Nos. 16-72963, 16-73186, 16-73279

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WAL-MART STORES, INC.
Petitioner/Cross-Respondent/Intervenor

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

THE ORGANIZATION UNITED FOR RESPECT AT WALMART
Intervenor/Petitioner

ON PETITIONS FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF CONTENTS

Headings-Cont'd **Page(s)**

TABLE OF CONTENTS

Headings-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

Statutes: **Page(s)**

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on petitions of Wal-Mart Stores, Inc. ("Walmart") and the Organization United for Respect at Walmart ("OUR Walmart") to review, and on the cross-application of the National Labor Relations Board to enforce, a Board order issued against Walmart on August 27, 2016, and reported at 364 NLRB No. 118. (ER.1-44.) The Board had jurisdiction under

Section 10(a) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(a). The Court has jurisdiction over this proceeding because the Board's Order is final under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). The petitions and application were timely; the Act provides no time limits for them. Venue is proper in this Circuit because the unfair labor practices occurred in California.

STATEMENT OF ISSUES

1. Is the Board entitled to summary enforcement of its uncontested findings that Walmart violated the Act by threatening employees with store closure, job loss, and physical violence for engaging in union activity; stating that Walmart will never be union; prohibiting employees from talking to strikers; maintaining a dress code that restricted employees' rights to wear union insignia; and disparately enforcing the dress code against an employee wearing OUR Walmart and union insignia?

2. Since the 1930s, the Board, with court approval, has held that the Act protects the right of employees to pressure their employer by remaining in their workplace for a reasonable period of time during a work stoppage. To determine whether an on-site work stoppage retained the Act's protection, the Board, again with court approval, consistently applies the factors set forth in *Quietflex Manufacturing Co.*, 344 NLRB 1055 (2005), to balance employees' statutory rights and employers' property rights, regardless of the industry in which the work

stoppage occurs. The Board determined long ago that the legal framework governing solicitation—an activity not at issue in this case—does not control in work stoppage cases, which involve fundamentally different considerations. Did the Board reasonably adhere to its longstanding precedent by applying *Quietflex*, and not solicitation caselaw, to the work stoppage here?

3. Are Walmart's other challenges to the Board's use of the *Quietflex* test without merit?

4. Does substantial evidence support the Board's application of the *Quietflex* test to the facts of this case?

5. The Board has broad discretion to craft remedies that effectuate the policies of the Act. Do the standard Board remedies ordered in this case fall within that discretion?

RELEVANT STATUTORY PROVISIONS

Relevant provisions are set forth in the attached addendum.

STATEMENT OF THE CASE

I. THE PROCEDURAL HISTORY

Acting on charges filed by OUR Walmart, the Board's General Counsel issued a consolidated complaint alleging that Walmart committed multiple unfair labor practices. (ER.20; FER.1-12.) After a hearing, an administrative law judge found that Walmart had committed many of the alleged violations. (ER.20-44.)

On August 27, 2016, the Board (then-Chairman Pearce and Member Hirozawa; now-Chairman Miscimarra, dissenting in part) issued a Decision and Order affirming the judge's findings. (ER.1-20.)

II. THE BOARD'S FINDINGS OF FACT

Walmart operates thousands of stores where it sells groceries and consumer goods. (ER.20.) OUR Walmart is a union-supported association through which Walmart employees advocate for improvements in their terms and conditions of employment. (ER.21; SER.46-47, 82-83, 119-20, 235, 751.)

Walmart's Richmond, California store is a large, multidepartment facility with two stories and multiple entrances, within a larger mall. (ER.1; SER.232.) The store is open daily from 6:00 a.m. to 12:00 a.m., but its customer-service desk opens at 7:00 a.m. (ER.2, 28 n.28, 38; SER.259-69, 315-17, 365, 446-47, 642, FER.13-21.)

A. Walmart Repeatedly Violates Employees' Rights

From 2010 to 2013, Walmart maintained a dress code for its California stores that unlawfully restricted employees from wearing union insignia at work. (ER.22, 32-33.) At the Richmond store, Walmart also applied its dress code in a discriminatory manner, singling out overnight maintenance employee Raymond Bravo for enforcement in August and September 2012 when he wore shirts bearing OUR Walmart and union logos. (ER.22-23, 34.) Walmart does not contest the

Board's finding that the dress code, as well as its application of the code to Bravo, violated the Act.

Walmart began remodeling the Richmond store in August 2012 and hired a crew of temporary employees for the project. (ER.1, 24.) One of Walmart's project supervisors, Art Van Riper, made statements that remodel employees considered abusive and racist. (ER.1, 25-26.) In particular, employees were troubled when Van Riper told an African-American employee working with a rope, "if it was up to me, I would put that rope around your neck." (ER.1, 25.) On October 11 and 12, Van Riper made multiple antiunion threats and coercive statements to remodel employees Demario Hammond, Misty Tanner, and Markeith Washington, overnight maintenance employee Raymond Bravo, and other employees. Specifically, Van Riper told employees, "[i]f it were up to me, I'd shoot the union"; threatened that Walmart would never be union; directed employees not to speak to other employees returning from a strike; and threatened that returning strikers would "be looking for new jobs." (ER.1, 25-26.) The Board found, and Walmart no longer disputes, that those statements violated the Act.[1]

[1] The Board also found, and Walmart does not dispute, that an assistant manager at Walmart's Placerville store violated the Act by suggesting to an employee that Walmart would close the store if OUR Walmart got too big. (ER.1 n.4, 21, 31-32.)

B. Employees Stop Work To Protest Supervisory Abuse and Request Permanent Jobs and a Group Meeting

On October 17, six employees—Hammond, Tanner, Washington, Bravo, and remodel employees Semetra Lee and Timothy Whitney (collectively, "the Employees")—submitted a letter to Walmart complaining about Van Riper's "racist remarks and threats of physical violence" and requesting that Walmart remove him. (ER.2, 26; SER.357, 394, 403, 410, FER.25.) The letter also requested that Walmart offer permanent jobs to remodel employees, whose employment was to end in early November, and meet with OUR Walmart members. (ER.2, 26; SER.231, FER.25.) Walmart did not reply. (ER.2, 26, 38.) To make their case more forcefully, the Employees worked with OUR Walmart to plan a work stoppage for November 2, the day Walmart had set for a "grand reopening" to mark the conclusion of its remodel project. (ER.2, 26-27; SER.243-45, 306.)

On the night of November 1, remodel employee Tanner notified assistant manager Tennille Tune that employees planned to engage in a work stoppage the next morning. (ER.2, 27; SER.629-31.) Tanner offered to call it off in exchange for a promise of permanent jobs for the remodel employees after the project concluded. (ER.2, 27; SER.629-30.) Tune notified Walmart's labor relations department of the work-stoppage plans. (ER.2, 27; FER.53.) Walmart dispatched Human Resource Manager Janet Lilly and Market Asset Protection Manager Paul

Jankowski to the store on the morning of November 2. (ER.2, 27; SER.525, 686-87.)

The Employees stopped working at about 5:24 a.m., after completing most of their assigned 10:00 p.m. to 7:00 a.m. shifts. (ER.2, 25; SER.127, 246-47, 252, 266-67, 354, 486.) They first approached Assistant Manager Tune and read her the same letter they had submitted on October 17. (SER.626, 632, FER.29, Joint Exhibit 26(b)(clip 2 at 5:23:40-5:24:30).) They then gathered in the then-closed customer-service area of the store, off to one side from the first-floor entrance. (ER.2; Joint Exhibit 26(b)(clip 2 at 5:23:40-5:24:30).)

Several minutes later, at 5:29 a.m., Lilly and Jankowski approached the Employees and offered to meet with them individually to discuss their concerns. (ER.2, 27; SER.255-56, 301-03, 539.) The Employees explained why they were protesting and requested to meet as a group, but Lilly refused. (ER.2; SER.255-56, 301-03, 359, 361, 391, 539-40, Joint Exhibit 26(a)(clip 3 at 5:30:20-5:30:41).) Lilly asked the Employees to return to work, but they refused. (ER.2; SER.303.)

Shortly after the store opened at 6:00 a.m., four non-employees entered carrying an OUR Walmart banner and joined the Employees in the customer-service area. (ER.2, 27; Joint Exhibit 26(b)(clip 2 at 6:03:35-6:03:45).) Lilly again approached the group and asked the Employees to meet with her individually and return to work. (ER.27; SER.542.) They continued to seek a group meeting,

and declined to return to work. (ER.27; SER.361, 542.) Jankowski asked the nonemployee protesters to leave the store. (ER.2, 28; Walmart Br.13, SER.916 ¶6.) After 6:15 a.m., several more nonemployees joined the protest, which at its largest included 9-13 nonemployees. (ER.2; Joint Exhibit.26(a)(clip 3 at 6:32:45-6:38:00).)

At 6:29 a.m., the Employees, accompanied by two nonemployee protesters, briefly left the customer-service area and moved to the aisle leading from the first-floor store entrance. (ER.3, 28; SER.263-65.) Soon after they arrived, Lilly asked them to return to the customer-service area or leave the store. (SER.263-65.)[2] They promptly complied by returning to the customer-service area at 6:32 a.m. (ER.3, 28; SER.265.) At no time did Walmart management tell the Employees they would be disciplined if they did not leave the store. (ER.28; SER.268, 364.)

At 6:37 a.m., two police officers entered the store and spoke with Lilly, Jankowski, and a representative of the protesters. (ER.3, 28; Joint Exhibit 26(b)(clip 2 at 6:37:25).) The Employees complied with a request to leave, departing the customer-service area to clock out at 6:38 a.m. (ER.3; SER.266-67,

[2] That request was consistent with Walmart's labor-relations guidance, which noted that "the NLRA likely protects [employees'] peaceful participation" in a sit-in, and advised managers, during a sit-in on the sales floor, to "[d]esignate an area where [employees] can sit so that customers/members and other [employees] will not have to walk through." (FER.59. *Cf.* SER.916 ¶3 (Jankowski's declaration that when work stoppage began, he "directed the [employees] to sit in the corner near Customer Service").)

324, 358, 696.) By 6:52 a.m. all employee and nonemployee protesters had left the store. (ER.3; SER.266-67.)

Throughout the protest, there was little customer traffic into or out of the store. (ER.2; SER.362, Joint Exhibit 26(b)(clip 2 at 6:00:00-6:53:00.) Working employees and managers freely accessed the customer-service desk, and no customers were prevented from using it. (ER.2, 27, 29; SER.253-54, 539-40, Joint Exhibit 26(a)(clip 3 at 5:29:00-5:30:00, 5:56:56-5:57:27, 6:09:01-6:09:06, 6:47:20-6:47:40, 6:03:45-6:05:35, 6:11:33-6:12:51).) There was no shouting, property damage, or violence. (ER.4, 37; SER.130-31, 256-58, 269, 362.)

C. Walmart Disciplines Employees for the Work Stoppage

After the protest, Walmart issued a two-level disciplinary "coaching" to each of the Employees. (ER.3, 29-30; SER.270-71, 393, 746-49, FER.31-43.) Under Walmart's disciplinary policy, employees with three coaching levels are subject to discharge for further infractions. (ER.3, 29-30; FER.22-24.) The coachings stated that the reason for the discipline was "Unauthorized Use of Company Time, Inappropriate Conduct," and that the Employees had:

> Abandoned work immediately before Grand Opening event and refused to return to work after being told to do so. [T]hen engaged in a sit-in on the sales floor and physically occupied a central work area. [T]hen joined with a pre-coordinated flash mob during Grand Opening to further take over, occupy, and deny access to the main customer pathway through the front of the store. Refused to stop/leave when told to do so.

(ER.3 n.10, 30; FER31-43.) In meetings with each employee, Walmart stated that it was disciplining them for unauthorized use of company time. (ER.30; SER.271, 325, 569.)

On November 8, upon completion of the remodeling project, Walmart terminated Lee, Tanner, Hammond, Whitney, and Washington, along with other temporary remodel employees. (ER.30; SER.273, 282-83, 286, FER.44-47.)

III. THE BOARD'S CONCLUSIONS AND ORDER

The Board (then-Chairman Pearce and Member Hirozawa; now-Chairman Miscimarra, dissenting in part) found that Walmart coerced employees in violation of Section 8(a)(1), 29 U.S.C. § 8(a)(1), by stating that Walmart would never be union and that employees who participated in a strike would be looking for new jobs (ER.1 n.4, 34-36, 40); threatening employees that it would "shoot the union" (ER.1-2 n.6, 34-36, 40); prohibiting employees from talking to coworkers returning from a strike (ER.1 n.6, 34-36, 40); and suggesting that it would close a store if too many employees joined OUR Walmart (ER.1 n.4, 31-32, 39). The Board further found that Walmart violated Section 8(a)(1) by maintaining a dress code that unduly restricted employees' right to wear insignia protected by the Act and by disparately enforcing that dress code against an employee who wore union and OUR Walmart insignia. (ER.1 n.4, 32-34, 39-40.) Finally, the Board found that Walmart violated Section 8(a)(1) by disciplining employees for engaging in a

protected work stoppage.[3] (ER.1-7, 36-40.) Dissenting in part, Member Miscimarra would not have found violations based on Walmart's statements about closing a store and shooting the union, or based on its discipline of employees who participated in the work stoppage. (ER.8-17.)

The Board ordered Walmart to cease and desist from the unfair labor practices found and from, in any other manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. (ER.7-8.) Affirmatively, the Board ordered Walmart to rescind its unlawful dress code and either inform employees that it has done so or provide them with a new, lawful policy; rescind its unlawful discipline against the Employees; post separate notices at its stores in Placerville, Richmond, and throughout California; and have a Walmart manager or Board agent read a notice to its Richmond employees. (ER.8, 18-20.)

[3] The Board severed and consolidated with another case the issue of the legality of a dress code that Walmart implemented in 2013. (ER.1 n.1.)

SUMMARY OF ARGUMENT

1. Walmart does not challenge a number of the Board's unfair-labor-practice findings, and the Board is therefore entitled to summary enforcement of the uncontested portions of its Order.

2. The Board reasonably analyzed the Employees' November 2 protest within the framework of *Quietflex Manufacturing Co.*, 344 NLRB 1055 (2005). In contesting the Board's application of settled law, Walmart relies on cases addressing employee solicitation, which is not at issue in this case. As Walmart itself acknowledges (Br.27), the Board may accommodate employer and employee interests "at differing points along the spectrum depending on the nature and strength of the respective [Section] 7 rights and private property rights asserted in any given context." *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976). Those interests are different when employees solicit one another to sign union authorization cards and when they stop work to demand their employer's attention, and the Board reasonably decided long ago that the same standards do not govern in both circumstances.

3. Walmart's various other challenges to the Board's application of *Quietflex* are meritless. The Employees did not seize Walmart's property, and Walmart's hypothetical constitutional theory—which it concedes would only apply if a seizure had occurred—is speculative at best and otherwise mistaken. There is also

no merit to Walmart's claim that *Quietflex* does not apply because the Employees wanted to meet as a group or because they sought media coverage for their protest.

4. Applying *Quietflex*, the Board reasonably found that the Act protected the Employees' small, peaceful, early-morning protest in support of their pressing, statutorily protected demands. Substantial evidence supports the Board's finding that employees who stopped work on November 2 did not forfeit the protection of the Act by remaining in the store for a brief period to protest supervisory abuse and demand permanent jobs and a group meeting with management.

5. The Board's remedial Order is within its broad discretion. As to Walmart's concededly unlawful dress code, the Board ordered its standard remedy, requiring a notice posting to inform employees of their rights and assure them that Walmart will not commit the same violations again. That remedy remains necessary because, although the policy is no longer in effect, Walmart has never repudiated it. Regarding OUR Walmart's arguments that the Board should have ordered additional remedies, the Board acted within its discretion by summarily rejecting OUR Walmart's waived and otherwise unsupported arguments.

STANDARD OF REVIEW

"The National Labor Relations Board 'has the primary responsibility for developing and applying national labor policy,' and its rules are accorded 'considerable deference.'" *NLRB v. Calkins*, 187 F.3d 1080, 1085 (9th Cir. 1999) (quoting *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786, 110 (1990)). In particular, it is the Board's responsibility "to resolve conflicts between Section 7 rights and private property rights." *Hudgens*, 424 U.S. at 521. The Board's factual findings are "conclusive" if supported by substantial evidence, 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951), and its remedies are reviewed for "clear abuse of discretion," *USW v. NLRB*, 482 F.3d 1112, 1116 (9th Cir. 2007). In sum, "[t]he judicial role is narrow: The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT AS TO ITS UNCONTESTED FINDINGS

Walmart does not dispute the Board's findings that it violated the Act by repeatedly threatening and otherwise coercing employees in the weeks before the work stoppage, and by maintaining an unlawful dress code and discriminatorily enforcing it against one of the Employees. Thus, "those unfair labor practice[] violations must be taken as established," and the Board is entitled to summary enforcement of those portions of its Order pertaining to them. *NLRB v. Advanced Stretchforming Int'l, Inc.*, 233 F.3d 1176, 1180 (9th Cir. 2000) (quotation marks and citation omitted); *NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1126 (9th Cir. 2011).

Those violations, however, do not disappear from the case simply because Walmart has not challenged them. Rather, they "lend[] their aroma to the context in which the [remaining] issues are considered." *NLRB v. Clark Manor Nursing Home*, 671 F.2d 657, 660 (1st Cir. 1982); *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993). In particular, Walmart's multiple violations of its Richmond employees' rights provide context for those employees' decision to stop work on the morning of November 2 in protest.

II. THE BOARD REASONABLY APPLIED ITS SETTLED LAW GOVERNING ON-SITE WORK STOPPAGES

A. The Act Protects Employees Who Stop Work and Protest on Their Employer's Property for a Reasonable Period

Section 7 of the Act guarantees the right of employees to engage in "concerted activities" for the purpose of "mutual aid or protection." 29 U.S.C. § 157. Under Section 8(a)(1) of the Act, it is an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. 29 U.S.C. § 158(a)(1).

The right of employees to strike is at the core of the Act. *Bus Emps. v. Mo.*, 374 U.S. 74, 82 (1963). It is among the concerted activities Section 7 protects. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). Further, under Section 13, the Act cannot be construed "to interfere with or impede or diminish in any way the right to strike," 29 U.S.C. § 163, while Section 2(3), 29 U.S.C. § 152(3), "preserves to strikers their unfilled positions and status as employees during the pendency of a strike." *Erie Resistor*, 373 U.S. at 233. Given Congress's "repeated solicitude for the right to strike" throughout the Act, that right "is to be given a generous interpretation." *Id.* at 234-35.

Protected strikes take many forms. The Act, for example, protects union-represented employees who withhold their labor and establish a traditional picket line in support of formal collective-bargaining demands. *See Hudgens*, 424 U.S. at

509; *Seattle-First Nat'l Bank v. NLRB*, 651 F.2d 1272, 1273 (1980). It likewise protects unrepresented employees who, without prior notice, concertedly protest their terms and conditions of employment by walking out or simply not coming to work. *See NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14-16 (1962); *NLRB v. Long Beach Youth Ctr., Inc.*, 591 F.2d 1276, 1278 (9th Cir. 1979).

The Act also protects employees who decide, intuitively enough, that the best place to stop work and demand better wages and working conditions is in the workplace itself. From the early years of the Act to the present day, the Board and the courts have consistently recognized that the Act protects the right of striking employees to protest within their workplace for a reasonable time. *See, e.g.*, *NLRB v. Am. Mfg. Co.*, 106 F.2d 61, 67-68 (2d Cir. 1939) (weavers remained in workplace to pressure employer to bargain with their union); *Cudahy Packing Co.*, 29 NLRB 837, 867-68 (1941) (meatpackers stayed on killing floor to protest workforce reduction); *HMY Roomstore, Inc.*, 344 NLRB 963, 963-64 (2005) (furniture distribution employees congregated in lunchroom to request meeting with employer regarding wage increase); *Amglo Kemlite Labs., Inc.*, 360 NLRB 319, 320-21 (2014) (production employees gathered in lamp assembly area to protest lack of wage increase), *enforced*, 833 F.3d 824 (7th Cir. 2016).

Legitimate reasons for employees to stay on during a work stoppage include attempting to meet with their employer about their grievances, *Roseville Dodge*,

Inc. v. NLRB, 882 F.2d 1355, 1358-59 (8th Cir. 1989), pressuring the employer to resolve them, *Molon Motor & Coil Corp. v. NLRB*, 965 F.2d 523, 525 (7th Cir. 1992), or protesting its failure to do so, *NLRB v. Pepsi-Cola Bottling Co. of Miami*, 449 F.2d 824, 825 (5th Cir. 1971). Thus, it is firmly established that on-site work stoppages "can be a form of economic pressure protected under Section 7," *Quietflex*, 344 NLRB at 1056, and "a legitimate weapon to be used in the field of labor relations," *Pepsi-Cola*, 449 F.2d at 828.

The Act's protection for strikes is considerable, but it is not unlimited. The Act does not protect repeated, partial, or intermittent work stoppages. *See Shelly & Anderson Furniture Mfg. Co. v. NLRB*, 497 F.2d 1200, 1203 (9th Cir. 1974); *E.R. Carpenter Co.*, 252 NLRB 18, 21 (1980). Nor does it cover employee conduct during a strike that is "unlawful, violent or in breach of contract," or otherwise "indefensible." *Shelly & Anderson*, 497 F.2d at 1204 (quotation omitted); *Consol. Commc'ns, Inc. v. NLRB*, 837 F.3d 1, 8 (D.C. Cir. 2016). And the Board has recognized that while employees have the right to stop work and protest in the workplace, where they can get their employer's attention, "[a]t some point, an employer is entitled to assert its private property rights and demand its premises back." *Quietflex*, 344 NLRB at 1056. Employees who refuse to move their strike off employer premises after that point may forfeit the Act's protection and expose themselves to lawful discipline. *Id.* at 1058-59.

It is the primary responsibility of the Board to determine whether, or when, that point arrived in any given case by balancing "the employees' Section 7 right to engage in activity on the employer's property . . . against the employer's asserted private property rights." *Amglo Kemlite*, 360 NLRB at 322. The Board has declined to impose "hard-and-fast rules" to govern that inquiry. *Quietflex*, 344 NLRB at 1056. Instead, with court approval, the Board has weighed a number of factors "in determining which party's rights should prevail" in each case. *Id.* In *Quietflex*, 344 NLRB at 1056-57, the Board compiled those considerations into a multifactor test, which it applied in this case. (*See* below, pp.38-39.)

The Board "has applied the *Quietflex* factors to work stoppages occurring in a variety of settings," including where employees stopped work inside a hotel, on the premises of an oil refinery, or while driving their employer's taxicabs. (ER.3 (citing *L.A. Airport Hilton Hotel & Towers*, 360 NLRB 1080, 1083-87 (2014), *enforced sub nom. Fortuna Enters., LP v. NLRB*, 789 F.3d 154 (D.C. Cir. 2015)), *Atl. Scaffolding Co.*, 356 NLRB 835, 836-37 (2011); *Nellis Cab Co.*, 362 NLRB No. 185, 2015 WL 5081422, at *3-4 (2015)).) By the same token, the Board has declined to develop distinct tests for on-site work stoppages in specific industries. *See, e.g.*, *The Masonic Home*, 206 NLRB 789, 790 (1973) (applying "same standard of conduct" to on-site work stoppage in healthcare industry). As the Board noted (ER.7), the D.C. Circuit has upheld that judgment in the hotel context,

recognizing that "[t]he Board was not obligated to create special rules for the service industry." *Fortuna*, 789 F.3d at 161. Thus, the Board's application of *Quietflex* here—and its refusal to create a retail exception—is consistent with settled law. (See discussion of specific *Quietflex* factors and their application to the work stoppage in this case at pp.38-54, below.)

B. The Board Long Ago Rejected Walmart's Argument that Solicitation Principles Control in the Work Stoppage Context

1. The Board routinely finds Section 7 activity on the selling floor protected

The Supreme Court, as Walmart admits (Br.27), has recognized that the accommodation between employer and employee rights "may fall at differing points along the spectrum depending on the nature and strength of the respective [Section] 7 rights and private property rights asserted in any given context." *Hudgens*, 424 U.S. at 522. Over the years, the Board has fulfilled its "primary responsibility for making this accommodation" with regard to the many forms that Section 7 activity may take on the selling floor. *Id.* As to most such activity, the Board has declined to impose bright-line rules, and instead balances, on a case-by-case basis, the parties' competing interests. In doing so, it "takes account of the degree, if any, to which an employer was actually impeded in its ability to do business." (ER.5 n.17.)

An instructive example is *Goya Foods of Florida*, 347 NLRB 1118 (2006), *enforced*, 525 F.3d 1117 (11th Cir. 2008). There—contrary to Walmart's claim (Br.3)—the Board found, with court approval, that the Act protected a labor-related demonstration on the selling floor of a supermarket. The employer in *Goya Foods* argued that 3 employees lost the Act's protection when they participated in a union rally with 1000 protesters outside the store, which they entered with 7 nonemployee supporters. 525 F.3d at 1123-24. The group shouted inside the store, and a "commotion was caused not just by the ten protesters but by the police and media presence that surrounded them." *Id.* at 1123-24 n.5. The group left the store "upon being confronted by the police." *Id.* at 1127. On those facts, the Board found that the employees' activity was protected, noting that any actual disruption they created in the busy supermarket was minimal and "did not appreciably interfere with the activities of the store as customers continued to shop in the store aisles and cash registers continued to ring as they were checked out." 347 NLRB at 1134.

In many other cases, the Board has similarly found Section 7 activity inside retail establishments to be protected where the employer, like Walmart here, failed to demonstrate significant disruption of its business. *See, e.g.*, *Thalassa Rest.*, 356 NLRB 1000, 1000 n.3 (2011) (protest in restaurant did not disturb patrons, block

their movements, or interfere with working employees).[4] Conversely, the Board finds a loss of protection where egregious disruption occurred.[5] The *Quietflex* framework, which weighs the extent to which an on-site work stoppage interfered with the employer's business (pp.42-44, below), is consistent with the Board's broader precedent within the retail industry.

2. Solicitation is a term of art that describes a conduct not at issue here

Ignoring the broad range of Section 7 activities that unquestionably are protected in the retail setting, Walmart seeks to apply the Board's solicitation rules here. (Br.25-35.) Walmart's conflation of work stoppages and solicitation is contrary to longstanding Board law.

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[4] *See also Mardi Gras Casino & Hollywood Concessions, Inc.*, 359 NLRB 895, 912-13 (2013) (employee and union delegation entered casino and demanded meeting at reception desk), *incorporated by reference*, 361 NLRB No. 59 (2014); *Sheraton Anchorage*, 359 NLRB 803, 853 (2013) (employees presented management with petition in hotel lobby, "where the guests gathered and hotel business was conducted"); *Crowne Plaza LaGuardia*, 357 NLRB 1097, 1099, 1101 (2011) (employees confronted manager "in a public area of the hotel, in view of the hotel's guests," but there was no "evidence that the noise interfered with the [employer]'s service to any guest"), *enforced*, Docket Nos. 11-4608, 11-4833 (2d Cir. 2012); *Saddle West Rest.*, 269 NLRB 1027, 1041-42 (1984) (employee was not "sufficiently disruptive" even if she "stridently, vehemently, or boisterously" called for boycott "within the hearing of some restaurant customers"); *Gen. Nutrition Ctr.*, 221 NLRB 850 (1975) (retail walkout started with discussion with management on the selling floor in the presence of customers).

[5] *See Rest. Horikawa*, 260 NLRB 197, 198 (1982) (30 picketers invaded crowded restaurant, seriously disrupting business); *Honda of Mineola*, 218 NLRB 486, 486 n.3 (1975) (union representatives "block[ed] customer access" despite many requests to leave).

As defined by Board precedent, "solicitation" is a specific, circumscribed subset of union activity—not a shorthand for Section 7 activity in general. Solicitation describes a discrete step in union organizing: ordinarily, it "means asking someone to join the union by signing his name to an authorization card." *W.W. Grainger, Inc.*, 229 NLRB 161, 166 (1977), *enforced*, 582 F.2d 1118 (7th Cir. 1978). *Accord Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1097 (8th Cir. 2005). It does not encompass other activities employees may carry out with the Act's protection on the selling floor of a retail establishment, such as participating in a demonstration,[6] talking about unionization,[7] wearing a t-shirt urging union support,[8] or arguing with a supervisor about terms and conditions of employment.[9]

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[6] *See* pp.20-22.

[7] *See May Dep't Stores Co.*, 59 NLRB 976, 983 (1944) (employee who "merely pointed out the advantages of the Union" but "never, in so many words, asked [another employee] to join the Union" did not solicit); *Opryland Hotel*, 323 NLRB 723, 731 (1997) (asking employee to attend union meeting was not solicitation).

[8] *See Wal-Mart*, 400 F.3d 1093 (8th Cir. 2005) (wearing union t-shirt on selling floor reading, "Sign a card . . . Ask me how," was not solicitation).

[9] *See King Soopers, Inc. v. NLRB*, __F.3d __, 2017 WL 2485311, at *8-9 (D.C. Cir. June 9, 2017) ("heated discussion" about collectively bargained rights); *Walmart Stores, Inc.*, 341 NLRB 796, 799, 808 (2004) (employee's use of profanity during concerted activity "in the retail area of the store" was protected where "there is no evidence that any other employees or customers overheard the conversation"), *enforced*, 137 F. App'x 360 (D.C. Cir. 2005).

The Board's rules for solicitation are well established. In any industry, as the Supreme Court recognized in *Beth Israel*, the Board presumptively permits employer bans on solicitation during working time. 437 U.S. at 492-93. In addition, in retail, "the Board has held that solicitation and distribution may be prohibited on the selling floor at all times." *Id.* at 493.[10]

Beth Israel's acknowledgement of the Board's solicitation rules in retail, however, provides no support for Walmart's assertion (Br.26-29) that the Board must apply the same standard to work stoppages, a distinct Section 7 activity. On the contrary, *Beth Israel* reaffirmed that the Board may reach different accommodations in distinct contexts. 437 U.S. at 504. And the case *Beth Israel* cited for that proposition expressly authorized the Board to do precisely what it has done: to "strik[e] the proper balance" between Section 7 and property rights by distinguishing between "lawful economic strike activity" and "organizational activity," which includes solicitation. *Hudgens*, 424 U.S. at 522 & n.10. *Cf. Seattle-First*, 651 F.2d at 1276 ("We do not think the burden imposed on the union in organizational cases is invariably appropriate in economic strike activity cases.").

[10] Distribution of union literature is also distinct from solicitation; ordinarily, the Board permits employers in any industry to prohibit it both during working time and in working areas. *Beth Israel*, 437 NLRB at 492-93 & n.10. Like solicitation, distribution did not occur in Walmart's store in this case. (SER.183, 328.)

3. The Board's longstanding refusal to apply solicitation caselaw to on-site work stoppages is reasonable

The Board has long drawn a reasonable distinction between work stoppages and solicitation. It articulated that distinction in *Golay & Co.*, in which employees were discharged for protesting a coworker's discharge by punching in and going to their machines but refusing to work. 156 NLRB 1252, 1258-59 (1966), *enforced as modified*, 371 F.2d 259, 262 (7th Cir. 1966) (enforcing the Board's order to reinstate protesters but finding it unnecessary to pass on whether their on-site work stoppage remained protected). There, the Board rejected the employer's contention that their hours-long protest was "an illegal sitdown strike involving a plant seizure as in *Fansteel*." *Id.* at 1261-62. In finding the work stoppage protected, the Board rejected the argument Walmart makes here: "that engaging in a strike in a work area is comparable to distributing literature or soliciting during working hours, and that such conduct is unprotected during this period." *Id.* at 1262 (quotation omitted).

Thus, under *Golay*, an employer can prohibit employees from soliciting during working time or distributing in working areas, but it must generally permit them to stop work and protest for a reasonable period during the same time, in the same place. The Board has reached that same result time and again. *See, e.g.*, *KDI Precision Prods., Inc.*, 176 NLRB 135, 137 (1969) (collecting cases in which employees remained at their machines on the work floor during work stoppage to

protest working conditions), *enforced*, 436 F.2d 385 (6th Cir. 1971). And this Court has upheld that result as well. *See NLRB v. Phaostron Instrument & Elec. Co.*, 344 F.2d 855, 857-58 (9th Cir. 1965) (employer unlawfully discharged employees for walkout they initiated by proceeding through working areas, during working time, and persuading others to join them).

The different principles the Board applies to solicitation and work stoppages reflect its reasonable judgment that the employee and employer interests in the two contexts are different. Where solicitation is concerned, the Board has taken into account the employer interest in avoiding the cumulative disruption that could result from employees soliciting one another on the selling floor every day. And it has determined that permitting employers to ban selling-floor solicitation does not unduly trench on employees' Section 7 rights because they have adequate opportunities to solicit one another during their "luncheon and rest periods," *May Dep't Stores Co.*, 59 NLRB 976, 981 (1944), in "stockrooms, kitchens, and other nonpublic areas." *Beth Israel*, 437 U.S. at 506.

The Board has recognized, however, that the adequacy of employee "access [to employer premises] to organize their fellow employees" does not speak to employees' distinct Section 7 interest in "remain[ing] on the property to pressure their employer to meet with them." *Quietflex*, 344 NLRB at 1059. As to the latter interest, the Board has long recognized that employees have the right to confront

their employer on the work floor where they can effectively command its attention, instead of passively waiting outside or in a backroom for the employer to come to them. *See, e.g.*, *Am. Mfg.*, 106 F.2d at 67-68; *Cudahy Packing*, 29 NLRB at 867-68. That right would be abrogated for one in four working Americans (Amici Br.4-5) if the Board were to confine Section 7 activity to stockrooms and kitchens by extending solicitation rules in the retail setting as Walmart proposes.

Further, the Board's approach to on-site work stoppages is informed by the fact that those stoppages, unlike solicitation, are not everyday events. While they may result in some measure of short-term disruption, the frequency of on-site work stoppages is restricted by principles applicable to strikes generally (*see* p.18), as well as the practical realities that strikers may be replaced and they are not entitled to wages while a work stoppage persists. *See Vic Tanny Int'l, Inc. v. NLRB*, 622 F.2d 237, 241 (6th Cir. 1980); *First Nat. Bank of Omaha v. NLRB*, 413 F.2d 921, 925 (8th Cir. 1969); *E.R. Carpenter*, 252 NLRB at 22. And the duration of on-site work stoppages is limited by the Board's *Quietflex* framework, under which prolonged protests may lose the Act's protection. (*See* pp.49-50.)

There is, in conclusion, no categorical ban on Section 7 activity on the sales floor, and the Board has reasonably rejected Walmart's reliance on inapposite solicitation caselaw.

III. WALMART'S REMAINING CHALLENGES TO *QUIETFLEX* FAIL

Walmart's other objections to the Board's application of *Quietflex* are baseless. As shown below, its argument (Br.35-39) that employees seized its property is refuted by the Board's well-supported factual findings. Its hypothetical alternative claim that *Quietflex* could effect a Fifth-Amendment taking (Br.39-45) is concededly divorced from the facts of this case and otherwise of no moment. Finally, there is no merit to Walmart's claim (Br.45-48) that employees forfeited the protection of the Act because they communicated with the media during the protest and refused to split up and submit to 2-on-1 meetings with Walmart managers. The Employees were entitled to augment their protest by appealing to the media and to insist on meeting as a group.

A. Employees Did Not Seize Walmart's Property

The Board reasonably rejected (ER.6, 38-39) Walmart's claim that employees seized its property. "The words 'sit-down strike,' or 'plant seizure,' are words of art and have a unique meaning in the field of labor law." *KDI Precision*, 176 NLRB at 137. The starting place for analyzing whether an unprotected seizure occurred is *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). *See Quietflex*, 344 NLRB at 1057 n.12. In *Fansteel*, employees took over and held their employer's premises for nine days, resisting eviction in "pitched battle." 306 U.S. at 248-49. That conduct, the Supreme Court held, was "outside the protection

of the statute." *Id.* at 256. But in subsequent cases, the Board and the courts have recognized *Fansteel*'s limited scope. "[N]ot every strike in which strikers remain on the premises amounts to an unlawful deprivation of an employer's rights." *Roseville Dodge*, 882 F.2d at 1358. And "[t]he mere act of sitting down on the job," as the Employees did here, "can alone furnish no basis for a finding that the acts constituted a forcible seizure of the employer's property." *Pepsi-Cola*, 449 F.2d at 829.

Substantial evidence supports the Board's finding (ER.6, 38) that the Employees made no attempt to seize or deprive Walmart of access to its property. As the Board found (ER.4), the Employees remained almost exclusively at one end of a small, enclosed area that was ordinarily closed at the early-morning hour,[11] off to the side of an entrance. When they left the customer-service area and Walmart asked them to return, they complied. (ER.3.) *See Atl. Scaffolding*, 356 NLRB at 836-37 (employer property rights are not impaired when employees comply with orders to move).

[11] There is no evidence the Employees knew Walmart was opening its customer service desk early on November 2, at 6:00 a.m. instead of the usual 7:00 a.m. (ER.2, 28 n.28, 38.) Thus, the record does not support Walmart's speculation (Br.49) that protesters sought to maximize the work stoppage's impact on customers by gathering there. Indeed, Walmart itself directed them there. (*See* p.8 & n.2.) And even after all the protesters departed by 6:52 a.m., no customers attempted to access the service desk before 7:00 a.m. That "is not surprising since the customer service area generally does not open until 7 a.m. and only has limited traffic at that early hour." (ER.38; SER.268-69, 315-17.)

As the Board found, other employees and customers "enjoyed continuous access to the customer service desk throughout the work stoppage." (ER.6.) *See Am. Mfg.*, 106 F.2d at 68 (no seizure where employees "were not claiming to hold the premises in defiance of the right of possession of the owner"). Although at times the protesters formed a loose, inward-facing circle to address each other (*e.g.*, Joint Exhibit 26(a)(clip 3 at 6:08:10, 6:34:14)), they never blocked entry to the customer-service area, contrary to Walmart's exaggerations (Br.36-37). Indeed, other employees worked in that space and management officials repeatedly entered it to speak with the protesters. (*See* pp.7-9.) *See Golay*, 156 NLRB at 1262 (no seizure where employer "was not denied access to the property"); *Cudahy Packing*, 29 NLRB at 866-68 (no seizure where there was no "attempt to exclude officials of the [employer] from the killing floor"). And Walmart cites no evidence that any customer avoided the service desk simply because people were there. *See id.* at 1263-64 (no blocking where 35 to 40 pickets walked "very close together" at parking lot entrance but there was no "evidence that any employee desiring to gain admittance to the plant was prevented from doing so"); *Mardi Gras Casino*, 359 NLRB at 912-13 (no blocking where employees and union representatives inside casino "caused customers to either go around the group or work their way through" but "[a]ny impeding was incidental").

As the Board noted (ER.6 n.20), Walmart's contemporaneous response to the work stoppage does not suggest that it thought otherwise. Jankowski admitted directing employees to the customer-service area in the first place, and Lilly later gave them the option of returning to it. (*See* p.8 & n.2.) Meanwhile, Walmart declined to end the in-store protest by offering the Employees a group meeting. (ER.6 n.20.)

The cases Walmart cites do not support its seizure argument. In the mine-blocking case Walmart references (Br.37), employees put a physical obstruction on train tracks for multiple days, preventing non-striking miners from entering. *NLRB v. Clinchfield Coal Corp.*, 145 F.2d 66, 71-72 (4th Cir. 1944). The Employees here who peacefully "loitered or wandered about" did nothing comparable. *Golay*, 156 NLRB at 1262. Walmart also cites (Br.39) *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006), a Fourth Amendment case addressing ongoing, destructive, daily use of a homeowner's property by the general public, which does not inform the question presented here, particularly given that, unlike a homeowner defending the quiet enjoyment of her yard, Walmart obviously allows its employees and the public into its store. Nothing the Employees did there constituted a "meaningful interference with [Walmart's] possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

Finally, as for Walmart's hypothetical claim that *Quietflex* could effect a Fifth-Amendment taking, not here, but in some subsequent case (Br.39-45), we note as a preliminary matter that Walmart did not hint at any such theory in the exceptions it filed with the Board, and its brief in support of those exceptions referenced constitutional themes only in an isolated footnote. (ER.76 n.6.) *See Sever v. NLRB*, 231 F.3d 1156, 1171 (9th Cir. 2000) (arguments not raised in exceptions are waived). *Cf. Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 270 (2d Cir. 2000) (reference to an argument in a footnote before the Board was insufficient to preserve it for court review).

In any event, any Fifth-Amendment takings argument would fail here because there was no seizure of property. And Walmart's specific argument—that the Court should refuse to enforce the Board's decision here because, if the Board were to find a seizure in a future, hypothetical case, *Quietflex* conceivably "could lead to a finding" that the seizure was protected (Br.40)—is hopelessly speculative and otherwise meritless. A party cannot invalidate a Board rule merely by speculating that it could be invalidly applied under different circumstances. *See Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 619 (1991) ("The fact that petitioner can point to a hypothetical case in which the rule might lead to an arbitrary result does not render the rule 'arbitrary or capricious.'"); *King Soopers*, __ F.3d __, 2017 WL 2485311, at *13 ("The possibility that the rule, in uncommon particular

applications, might exceed the agency's statutory authority does not warrant judicial condemnation of the rule in its entirety." (quotation and brackets omitted)).

Moreover, under the Act, a party lacks standing to challenge matters as to which it is not "aggrieved." 29 U.S.C. § 160(f). *See Am. Baptist Homes of the W. v. NLRB*, __ F.3d __, 2017 WL 2429380, at *2 (D.C. Cir. June 6, 2017) ("[A] party generally lacks standing to challenge adjudicatory rulings that have not been applied to it."). Walmart is not aggrieved by an analysis it imagines the Board could apply to a case that "may never materialize." *NLRB v. Intersweet, Inc.*, 125 F.3d 1064, 1070 (7th Cir. 1997). The Board reasonably found no evidence of a seizure here, and Walmart's "prospective suggestion about an analysis that [the Board] may apply if ultimately faced with such evidence does not present an issue currently ripe for review by this court." *Id. Accord Sheet Metal Workers Int'l Ass'n v. NLRB*, 561 F.3d 497, 501-02 (D.C. Cir. 2009) (challenge to evidentiary rule Board had not yet applied was unripe). *Cf. Pirlott v. NLRB*, 522 F.3d 423, 433 (D.C. Cir. 2008) ("It is not within the province of the judiciary to force an agency to adopt a rule on a subject that is within its compass of authority before the agency itself has acted on the issue.").[12]

[12] The fanciful scenarios Amici describe (Br.8) are similarly unrelated to the facts of this case. If, in a future case, employees picket diners or disrupt the nightly news, the Board will balance the relevant interests under *Quietflex*, "tak[ing] account of the degree, if any, to which an employer was actually impeded in its ability to do business." (ER.5 n.17.)

Furthermore, the doctrine of constitutional avoidance Walmart cites (Br.42-45) dictates that the Court should not address Walmart's constitutional argument unnecessarily. "The Supreme Court has neatly instructed that the jurisdiction of the federal courts to hear constitutional challenges should be exercised only when 'the underlying constitutional issues [are tendered] in clean-cut and concrete form.'" *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) (quoting *Rescue Army v. Mun. Ct. of L.A.*, 331 U.S. 549, 584 (1947)). Walmart concedes that its Fifth-Amendment argument is unmoored from the facts of this case: it contends the Court should reach that argument only if the Court upholds the Board's finding that no seizure occurred. (Br.39, 44.) As such, the issue is "woefully unfit for adjudication." *Id.*

Even if it were properly before the Court, Walmart's hypothetical Takings-Clause argument would have no basis in law. The Supreme Court recognized over 70 years ago that "[i]t is not every interference with property rights that is within the Fifth Amendment." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n.8 (1945) (quotation omitted)). Since then, the Court has expressly authorized the Board to require retail employers to tolerate "lawful economic strike activity" by employees on their premises. *Hudgens*, 424 U.S. at 522.[13] And it has squarely

[13] Walmart's discussion (Br.41 & n.23) of *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), which addressed nonemployee organizer access to employer property, is irrelevant. *Lechmere* recognized "a distinction of substance" between

rejected Walmart's argument that the Fifth Amendment is implicated by a temporary "government-imposed physical invasion" (Br.42) of a shopping center by individuals engaging in expressive activity, even though "there has literally been a 'taking'" of the owner's "right to exclude." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82-84 (1980) ("[T]he fact that [handbillers] may have 'physically invaded' appellants' property cannot be viewed as determinative.").

Further, *Quietflex* does not contemplate any "permanent physical occupation of property" (Br.42) or a "permanent and continuous right" to traverse it (Br.43). In finding a 12-hour work stoppage unprotected, *Quietflex* emphasized "the limited duration of work stoppages found protected by the Board." 344 NLRB at 1058. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 867 n.1 (1987) (explaining that in *PruneYard*, "the owner had already opened his property to the general public, and in addition permanent access was not required"). As the Board emphasized here, *Quietflex* does not "give employees carte blanch to do whatever they want, whenever they want," but rather "balance[s] the fundamental employee right to exert economic pressure with an employer's right to maintain the integrity of its property." (ER.7 n.24.)

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nonemployee and employee access rights. *Id.* at 537. Only employee rights are at issue here.

B. Nothing Employees Did Rendered *Quietflex* Inapplicable

Walmart next contends (Br.45-48) that the Board should not have applied *Quietflex* because the Employees declined to meet during the work stoppage without the mutual aid and protection of their coworkers, and because they amplified their protest by communicating with the media. Both arguments mistake the facts and the law.

As a factual matter, Walmart errs in claiming (Br.45) that the Employees did not want to talk to management. As the Board found (ER.2, 4-5), the Employees submitted two letters to Walmart complaining of supervisory abuse and demanding permanent jobs for soon-to-be-terminated employees. In the letters and in person on November 2, they repeatedly asked to discuss those grievances as a group. (ER.2, 4-5.)

Those requests were legitimate and protected. See *Crowne Plaza*, 357 NLRB at 1101 (during on-the-job protest, "neither [the leader of an employee delegation] nor any other employee was required to abandon his coworkers and meet one on one with [the employer's representative]"). Walmart was not required to grant a group meeting, but neither were the Employees required to abandon the solidarity of a group and meet alone with a pair of Walmart managers. *See Electromec Design & Dev. Co. v. NLRB*, 409 F.2d 631, 633 (9th Cir. 1969) (employer unlawfully discharged employee who participated in walkout and

"refused an invitation to come to the plant to discuss the matter by stating, 'I will see you tomorrow as a group'"); *San Diego Cty. Ass'n for the Retarded*, 259 NLRB 1044, 1049 (1982) (employees did not lose protection "by engaging in direct, economic action to achieve a satisfactory resolution of their grievances rather than resorting to the grievance procedure unilaterally established by the [employer]"), *enforced mem.*, 705 F.2d 467 (9th Cir. 1983). *Cf. Olin Indus., Inc.*, 86 NLRB 203, 206 (1949) ("While the [employer] was under no legal obligation to meet with the Union, there is nothing in the Act which removes from its protection concerted activity aimed at securing a meeting between the Employer and the Union to discuss grievances."), *enforced*, 191 F.2d 613 (5th Cir. 1951).

Nor does the Employees' desire to publicize their protest make it unprotected. As an initial matter, the Act fully "protect[s] employee rights to seek support from nonemployees." *N.Y.-N.Y., LLC v. NLRB*, 676 F.3d 193, 196-97 (D.C. Cir. 2012) (quotation omitted); *NCR Corp.*, 313 NLRB 574, 576 (1993). Further, the Board has rejected the proposition that "the central purpose of the latitude employees have under the Act to engage in an onsite work stoppage is to allow them to present their grievance to their employer." *L.A. Airport*, 360 NLRB at 1087 n.26 (quotation omitted)). Rather, as shown above (pp.17-18), *Quietflex* recognizes employees' additional legitimate interests in pressuring management to resolve grievances or protesting its failure to do so.

Here, as the Board recognized (ER.7 & n.23), the Employees made legitimate tactical decisions to increase the pressure they could exert. Publicizing the work stoppage was one such decision. *See Nellis Cab*, 2015 WL 5081422, at *2 (taxi drivers engaged in a protected work stoppage by "dr[iving] their taxicabs down Las Vegas Boulevard, honking their horns and flashing their hazard lights while refusing to pick up passengers"); *Allied Aviation Serv. Co.*, 248 NLRB 229, 231 (1980) ("[a]t what point the employees determine that third-party assistance will be of more benefit than private talks with their employer is a tactical decision" and "it is not the Board's function to appraise the potential effectiveness" of that tactic), *enforced*, 636 F.2d 1210 (3rd Cir. 1980).[14]

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S APPLICATION OF *QUIETFLEX* TO THE FACTS OF THIS CASE, AND WALMART VIOLATED SECTION 8(a)(1) BY DISCIPLINING EMPLOYEES FOR ENGAGING IN A PROTECTED ON-SITE WORK STOPPAGE

Once Walmart's meritless threshold objections to *Quietflex* are cleared away, there is little to its disagreements with the Board's application of its test. The factors the Board evaluates under *Quietflex* are:

[14] Amici further argue (Br.17-19) that the Board should not apply *Quietflex* in any industry because it provides insufficiently reliable guidance. That contention is beyond the scope of Walmart's arguments and thus is not properly before the Court. *See Cellnet Comm., Inc. v. FCC*, 149 F.3d 429, 443 (6th Cir. 1998). In any event, *Quietflex* promotes consistency by compiling, in the form of a multifactor test, the principles the Board and courts have considered in evaluating on-site work stoppages since the early days of the Act.

(1) the reason the employees stopped working;

(2) whether the work stoppage was peaceful;

(3) whether the work stoppage interfered with production or deprived the employer of access to its property;

(4) whether employees had an adequate opportunity to present their grievances to management;

(5) whether employees were given any warning that they must leave or face discipline;

(6) the duration of the work stoppage;

(7) whether employees were represented or had an established grievance procedure;

(8) whether the employees remained on the premises beyond their shift;

(9) whether the employees attempted to seize the employer's property; and

(10) the reason for which the employees were ultimately disciplined.

344 NLRB at 1056-57.

Here, the Board reasonably found (ER.3-7) that 9 of the 10 factors favored protection, while 1 was neutral. Balancing Walmart's rights against those of its employees under all the circumstances, the Board determined that the work stoppage remained protected. Substantial evidence supports the Board's application of each of the *Quietflex* factors, as well as its overall conclusion.

A. Employees Stopped Work for Protected, Pressing Reasons

As the Board found (ER.4, 37, 39), the first *Quietflex* factor favors protection because the concerns that motivated the Employees to stop work on November 2 were protected. *See Atl. Scaffolding*, 356 NLRB at 837 (first factor supported protection where employees' "reason for the work stoppage, a protest over wages, clearly is protected by Section 7"). As the Employees made clear in the letter they submitted on October 17 and presented to Walmart again on November 2, they stopped work to demand a meeting with management to discuss two requests: that Walmart remove a supervisor who had mistreated employees and offer permanent jobs to employees whose positions were about to end. (ER.2, 4, 26, 37; SER.245, 356-57, 394, 410, 632, FER.29, 31.) Indeed, employee Tanner notified Walmart ahead of time that the work stoppage could be averted if Walmart met one of those requests. (*See* p.6.)[15] Throughout the protest, employees continued to seek a group meeting to discuss their concerns. (*See* pp.7-8.)

Employees' mistreatment by a supervisor, *Atl.-Pac. Const. Co. v. NLRB*, 52 F.3d 260, 262 (9th Cir. 1995); *Arrow Elec. Co. v. NLRB*, 155 F.3d 762, 766 (6th

[15] Walmart asserts (Br.11, 14), without record support, that Tanner was a paid organizer. Whether she was or not is irrelevant because she was undisputedly a Walmart employee. (FER.48-52.) *See Tualatin Elec., Inc. v. NLRB*, 84 F.3d 1202, 1204 n.3 (9th Cir. 1996) (noting that the Supreme Court has rejected the "argument that a company worker being paid to help a union organize the company is not an 'employee' under the [Act]" (citing *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995))).

Cir. 1998), and the imminent termination of their jobs, *Robert F. Kennedy Med. Ctr.*, 332 NLRB 1536, 1539 (2000), were quintessentially protected concerns. Their right to protest their own terms and conditions at their own workplace "is at the core of section 7." *Seattle-First*, 651 F.2d at 1276. Thus, Walmart's discussion of area-standards picketing by nonemployees (Br.50) has nothing to do with this case. *See id.*

Furthermore, as the Board found (ER.4), the Employees had a pressing need to draw Walmart's attention to their concerns. The completion of the renovation project in early November was to mark the likely end of five of the Employees' jobs. (ER.4.) Any economic pressure they could exert by withholding their labor was thus time limited. It does not weigh against protection that the day of the work stoppage was an important one for Walmart—"[t]he protected nature of the work stoppage in this case was not vitiated by the effectiveness of its timing." *Atl. Scaffolding*, 356 NLRB at 837.

Finally, Walmart complains (Br.48-50) that OUR Walmart supported the work stoppage in various ways. But that fact is fully consistent with the Board's well-supported finding that the Employees themselves had protected reasons for participating in it. *See Masonic Home*, 206 NLRB at 790 (employees legitimately stopped work to protest workplace issues, regardless of union's motivations).

B. The Work Stoppage Was Peaceful

The second factor likewise favors protection because, as the Board found (ER.4, 37, 39), the work stoppage was entirely peaceful. "There is no evidence that the protest was in any way violent, unruly, or even confrontational." (ER.4.) *See Golay*, 156 NLRB at 1262. Indeed, the Employees acted respectfully toward Walmart management throughout the protest. (*See* pp.7-9.) The Employees wanted to hold a "peaceful protest" (SER.258), and that is what they did.

Walmart's claim that the work stoppage carried "the seeds of violence" fails. (Br.50.) "Without more than the mere act of sitting down during a labor dispute, there is no more incitement or probability of violence than is necessarily incidental to any other act." *Pepsi-Cola*, 449 F.2d at 829. *See Goya Foods*, 525 F.3d at 1123 n.5 (protest that caused commotion inside store was "peaceful").

C. The Work Stoppage Did Not Interfere with Walmart's Ability To Serve Customers or Access Its Property

The Board reasonably found that the work stoppage "neither interfered with the provision of services to customers nor prevented [Walmart] from accessing its property." (ER.4.) As shown (pp.28-31), ample evidence supports the Board's finding that the Employees never blocked customers, employees, or managers from accessing any part of the "large, multidepartment store with multiple entrances and exits." (ER.4.) Nearly half of the work stoppage took place before the store opened for business at 6:00 a.m. (ER.4, 37-39.) And after that, the Board

correctly observed that there is no evidence that the trickle of customers who entered were impacted by the protest in any way, if they noticed it at all. (ER.4-5.) *See Thalassa Rest.*, 356 NLRB at 1000 n.3 (protest inside restaurant remained protected where employer provided no evidence that it "disturbed the handful of patrons present, blocked the ingress or egress of any individual, was violent or caused damage, or prevented any employee from performing his work"); *Goya Foods*, 347 NLRB at 1134.

Walmart incorrectly argues (Br.51) that the protest prevented an employee from doing her job. One employee testified that she avoided the customer-service area during the protest because people there were "kind of talking loud." (SER.433.) As the Board found (ER.4-5, 28-29), however, other employees freely accessed the desk throughout the protest. The Board reasonably found that one employee's preference to work elsewhere did not rise to the level of interference under *Quietflex*.[16]

Walmart also makes much of the Employees' fleeting presence in front of a product display. (Br.51.) But as the Board found (ER.4-5, 28, 38), they spent only three minutes there. (Joint Exhibit 26(b)(clip 2 at 6:29:00-6:32:20).) Just a few

[16] That employee testified that the customer service desk phone rang during the protest. (Br.12.) But she admitted that the calls were transferred to her in another part of the store. (SER.438-39.) And even if some calls were missed, "this does not mean that they were not eventually serviced." *Benesight, Inc.*, 337 NLRB 282, 287 (2001) (work stoppage by customer-service representatives was protected even though 56 calls went unanswered).

customers entered the store during that time, and as the Board found, there is no evidence that any of them "was in any way impeded in their ability to shop in the store." (ER.5; Joint Exhibit 26(b)(clip 2 at 6:29:00-6:32:20).) The full photograph (FER.27) that Walmart carefully crops in its brief (Br.3) shows open access to the display behind the protesters and ample aisle space around them. Moreover, as noted above (pp.8, 29), the Employees promptly complied when Walmart asked them to leave that area.

Walmart claims (Br.51-52) it cannot quantify the number of customers driven away by the Employees' small, peaceful protest. But it cites no impact whatsoever on even one customer. As shown (pp.20-22), precedent supports the Board's focus on the total lack of evidence of disruption. *See, e.g.*, *Fortuna*, 789 F.3d at 161 ("[T]he Board reasonably determined that [the employer] did not present the testimony of a single employee that the work stoppage interfered with their ability to use the cafeteria." (quotation omitted)). That analysis is no less applicable because, as Walmart notes (Br.51-52), protesters had signs and t-shirts. *See Wal-Mart*, 400 F.3d at 1098 (anyone "was free to ignore" employee wearing pro-union shirt on sales floor; "Walmart failed to demonstrate how the t-shirt interfered in any manner with the operation of the store"); *Chrysler Corp.*, 228 NLRB 486, 488 (1977) (in-plant march through work areas with signs was protected).

D. Employees' Ability To Present Their Grievances Was Limited

The Board reasonably determined that the fourth factor—whether the Employees had an adequate opportunity to present their grievances to management—was "arguably neutral," but entitled to little weight. (ER.5.) As the Board noted (ER.5), after failing to respond to the Employees' October 17 letter for over two weeks, Walmart offered to meet with the Employees immediately before and during the work stoppage. To that extent, the Board recognized (ER.5), the Employees had an opportunity to be heard.[17] To take advantage of that opportunity, however, Walmart required the Employees to forego the support of their coworkers and present their grievances individually before a pair of high-level management officials. (*See* SER.301-02 ("We wanted a group meeting, because if you go in there individually, there will be two managers against one person."), 388, 391, 569, 686-87.) As explained below (pp.50-52), the Board reasonably recognized (ER.5) that the conditions Walmart placed on employees' ability to present their grievances diminished the weight due this factor.

During the protest, Walmart never provided a substantive response to employee demands regarding Van Riper and permanent jobs. Nor did Walmart

[17] It makes no difference if, as Walmart argues (Br.52), the letter dated October 17 was not submitted until October 31. The Employees were not required to provide any notice of their grievances before stopping work, much less two-week written notice. *See Electromec*, 409 F.2d at 634 ("The fact that the employees here failed to present a specific demand at the time they walked out does not cause their walkout to lose its protected status.").

offer employees a setting in which they could act collectively regarding those grievances, either as a group or through a representative. *Cf. Quietflex*, 344 NLRB at 1059 (no protection where employer "offered to meet with representatives from the group [of protesters] or with all of them by shift," and "made a reasonable effort to respond to the issues raised," but employees "made it clear that they would not leave the premises until all of their demands were met").

Cone Mills Corp. v. NLRB, 413 F.2d 445 (4th Cir. 1969), upon which Walmart relies (Br.53), is distinguishable. Disagreeing with the Board, the Fourth Circuit concluded there that an on-site protest lost the Act's protection in part because employees had fully voiced their demand, and the employer had fully responded that it would not meet the demand at that time, but rather would handle it with the employees' union steward through the parties' established, collectively bargained grievance procedure. *Id.* at 450-54. Here, the Employees had no comparable ability to pursue their grievances collectively through a representative. Because Walmart offered the Employees only a limited opportunity to state their concerns, and never provided a substantive response indicating that further protest at that time would be pointless, the Board reasonably considered this factor neutral, and unworthy of significant weight.

E. Walmart Never Warned Employees that They Would Be Disciplined if They Failed To Leave the Store

As to the fifth factor, the Board correctly found (ER.5-6, 38) that Walmart's failure to warn the Employees of any discipline for remaining in the store weighed in favor of protection. Although Walmart repeatedly asked the Employees to return to work, it is well established that they could not lawfully be disciplined for declining that request. *See Atl. Scaffolding*, 356 NLRB at 838. *Compare Molon Motor & Coil Corp.*, 302 NLRB 138, 138 (1991) (discharges "motivated by the employees' refusal to work," rather than their refusal to leave employer premises, were unlawful), *enforced*, 965 F.2d 523 (7th Cir. 1992), *with Quietflex*, 344 NLRB at 1059 (employees lawfully "were discharged for their refusal to leave the property after 12 hours of protest," not "for engaging in protected activity on the [employer's] premises").

Further, as the Board found (ER.5), to the extent Walmart asked the Employees to leave, it sent equivocal, mixed messages. According to manager Jankowski, Walmart directed the Employees to conduct their work stoppage in the customer-service area in the first place. (*See* p.8 n.2.) And for the most part, management only asked them to return to work—not to leave the store. (ER.6 n.20; Walmart Br.13.) When the Employees briefly moved into an aisle, Lilly gave them the option of returning to the customer-service area. Thus, as the Board observed (ER.5 n.18), the Employees could have thought Walmart condoned their

presence there. *See Amglo Kemlite*, 360 NLRB at 323 (Board did not need to determine whether work stoppage remained protected because employer condoned it). When police finally gave the Employees unequivocal instructions to leave, they immediately complied by going to clock out and then vacating the building. (ER.3.) *See Pepsi-Cola*, 449 F.2d at 827-30 (on-the-job work stoppage was protected where employees refused an employer request to leave but "left immediately when requested to do so by the police").

It is undisputed that Walmart never warned the Employees that they would be disciplined for not leaving the store. Nor did it provide any deadline by which they could leave to avoid incurring discipline. *Cf. Quietflex*, 344 NLRB at 1059 & n.16 ("employees understood that the [employer] was demanding control of its premises by the 7 p.m. deadline"). Walmart's failure to apprise the Employees of the consequences of persisting in their protest weighs against allowing Walmart to discipline them after the fact.

Walmart's argument that the Employees' "day-to-day refusal to follow instructions" constituted discipline-worthy insubordination (Br.53-54) is wrong. "[A]ll strikes involve refusals to work and an employer's insistence that such refusals to 'follow orders' constitute insubordination is contrary to basic Section 7 rights." *E.R. Carpenter*, 252 NLRB at 21. *See HMY Roomstore*, 344 NLRB at 966 (employer unlawfully disciplined employees for "[g]ross insubordination" after

they refused three orders to return to work). Amici's argument (Br.13) that work stoppages are uniformly unprotected when employees refuse a single order to leave is similarly contrary to law. *See, e.g.*, *Pepsi-Cola*, 449 F.2d at 829 (employer cannot deprive employees of protection merely by ordering them to leave); *Am. Mfg.*, 106 F.2d at 67-68 (employees retained protection despite refusing order to leave); *Golay*, 156 NLRB at 1262.[18]

F. The Work Stoppage Was Short

As the Board found (ER.6, 38-39), the short duration of the work stoppage also favors protection. The entire in-store protest took under an hour and a half, of which the store was open for only 52 minutes. (ER.6, 38.) And it was only at the end that Walmart, through the police, unequivocally ordered the Employees to leave. (ER.5.) Work stoppages that lose the Act's protection are typically much longer, with more prolonged refusals to obey orders to leave. *See*, *e.g.*, *Quietflex*

[18] Relatedly, contrary to Walmart's throwaway argument (Br.10-11 n.7), the Employees had no duty to clock out before the work stoppage. *See Phaostron*, 344 F.2d at 858 (walking out without punching out was protected); *Liberty Nat. Prods., Inc.*, 314 NLRB 630, 637-38 (1994) (on-site, on-the-clock work stoppage protected), *enforced mem.*, 73 F.3d 369 (9th Cir. 1995); *NLRB v. S. Silk Mills*, 210 F.2d 824, 825 (6th Cir. 1954) (per curiam); *Go-Lightly Footwear, Inc.*, 251 NLRB 42, 44 (1980). As noted above (p.27), Walmart had no obligation to pay them while they were unequivocally striking. *S. Silk Mills*, 210 F.2d at 825; *Case, J.I., Co.*, 95 NLRB 47, 57 n.16 (1951), *enforced in pertinent part*, 198 F.2d 919 (8th Cir. 1952). Walmart quotes out-of-context language from a case addressing disloyal employee conduct (Br.10-11 n.7), but the "peaceful, temporary work stoppage in protest against working conditions" here "is not of the same character." *S. Silk Mills*, 210 F.2d at 825.

(employees who remained on employer's property for over 8 hours after being asked to leave lost the protection); *Waco, Inc.*, 273 NLRB 746, 746 (1984) (employees remained for 3-1/2 hours after order to work or leave). The protest here was well within the range the Board has considered reasonable. *See Roseville Dodge*, 882 F.2d at 1359 (2-3 hours); *Am. Mfg.*, 106 F.2d at 68 (2 hours); *Golay*, 156 NLRB at 1259 (1-1/2 to 3-hours). As the Board noted (ER.7), *Restaurant Horikawa*, upon which Walmart relies (Br.54), did not involve an on-site work stoppage, and in context, the disruption of a small, crowded restaurant in that case was nothing like the limited protest in a large retail store at issue here. 260 NLRB at 197-98.

G. Employees Lacked Representation or a Group Grievance Procedure

The seventh *Quietflex* factor asks whether employees had an established mechanism for resolving workplace issues on a collective basis, either through a collective-bargaining representative or a grievance procedure. (ER.6.) The Supreme Court has recognized that for employees with "no bargaining representative and no established procedure by which they c[an] take full advantage of their unanimity of opinion in negotiations with the company," a work stoppage may be the "most direct course" for communicating with an employer. *Wash. Aluminum*, 370 U.S. at 15. Employees in those circumstances have greater leeway to "speak for themselves as best they c[an]." *Id.* at 14.

It is undisputed that the Employees lacked union representation and that Walmart refused to hear their grievances on a collective basis, either through a representative or as a group. The Board has consistently found those facts to weigh in favor of protection, even where, as here, the employer was willing to meet with individual employees. *Compare HMY Roomstore*, 344 NLRB at 964 (on-site work stoppage protected where employer "told [employees] that he would not meet with them in groups but only one-on-one"), *and Firestone Steel Prod. Co.*, 248 NLRB 549, 550, 553 (1980) (employees "had no union representation, and no meaningful, enforceable grievance procedure to present their complaint to management," notwithstanding policy that "the door to the plant manager's office is open to your problem") *with Cambro Mfg. Co.*, 312 NLRB 634, 634, 636 (1993) (employer's open door policy allowed for group meetings to collectively address grievances), *and Waco*, 273 NLRB at 751 (employer declined group meeting but offered to meet "with one or more [employee] spokespersons").

That precedent is consistent with the purposes of the Act. Congress intended the Act "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 835 (1984). *Accord* 29 U.S.C. § 151; *Erie Resistor*, 373 U.S. at 234 n.13. Thus, as the Court has recognized, "[c]oncerted activity—the

right of employees to act *together*—is the essential, substantive right established by the [Act]." *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 980 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017). As noted above, the Act did not require Walmart to hear grievances on a collective basis. But its refusal to do so weighed in favor of allowing employees to express themselves collectively through an on-site protest. *See Wash. Aluminum*, 370 US at 15 (employees need not restrict themselves to "individual pleas, unsupported by any threat of concerted protest"); *Superior Travel Serv., Inc.*, 342 NLRB 570, 574 (2004) ("employees are not required to limit themselves to those means of protest specifically approved by their employer").

H. Employees Did Not Stay Past the End of Their Shifts

Walmart does not dispute that the Employees vacated the store before 7:00 a.m., when the remodel employees' shifts ended, and well before 8:00, when Bravo's shift was to end. The eighth factor therefore favors protection. *See Pepsi-Cola*, 449 F.2d at 829 (work stoppage that "did [not] threaten to carry over into the next shift" was protected). It is immaterial that, as Walmart notes (Br.54), a demonstration continued outside the store in an area Walmart never asked protesters to vacate (SER.324, 699-700). *See Calkins*, 187 F.3d at 1083 (upholding Board's finding that under California law, nonemployee union representatives had

right to protest on private property outside grocery store); *Atl. Scaffolding*, 356 NLRB at 837 (cited above, p.29).

I. Employees Did Not Seize Walmart's Property

As shown above (pp.28-31), the Board reasonably found "no evidence that employees seized or in any way impeded access to the store during the work stoppage." (ER.6.) Accordingly, the ninth factor favors protection.

J. Walmart Proffered Unlawful or Baseless Justifications for Disciplining the Employees

The Board reasonably found (ER.6, 39) that the final factor—the reasons for the Employees' discipline—also supports protection. An employer may be entitled to use discipline to enforce its property rights against employees engaged in a prolonged on-site work stoppage. See *Quietflex*, 344 NLRB at 1059. As noted above, however (p.47), an employer cannot lawfully discipline employees merely for concertedly disobeying commands to return to work. *See, e.g.*, *Molon Motor*, 302 NLRB at 138.

Here, as the Board noted (ER.6), Walmart disciplined the Employees for activities that were unquestionably protected.[19] Specifically, Walmart punished them for unauthorized use of company time, as well as for abandoning work and

[19] Amici's references (Br.7, 14, 20) to the level of discipline Walmart administered are irrelevant. If anything, discipline short of suspension or discharge suggests that Walmart itself did not see the Employees' conduct as the all-out assault on its store that it seeks to portray after the fact.

refusing to return to work—all legitimate aspects of a work stoppage. (ER.6, 30; pp.9-10.) The Board reasonably discredited (ER.6) Walmart's remaining justifications for the discipline. As shown above (pp.28-31, 42-44), employees did not, as Walmart claimed, take over or deny access to Walmart's property.

In sum, substantial evidence supports the Board's finding that the November 2 work stoppage was protected. The Employees were entitled to stop work and demand a group meeting with Walmart at a time when they thought they could effectively command its attention. Walmart, in response, was entitled to ask the Employees to leave. Within a reasonable time, they did so. Under those circumstances, the work stoppage "simply d[id] not rise to the level of the disregard of property rights and defiance of law associated with an unprotected sitdown strike." *City Dodge Ctr., Inc.*, 289 NLRB 194, 194 n.2 (1988), *enforced sub nom. Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989). Accordingly, the Board reasonably found that Walmart violated the Act by disciplining the Employees.

V. THE BOARD'S REMEDIAL ORDER IS WELL WITHIN ITS DISCRETION

Section 10(c) of the Act empowers the Board, upon finding unfair labor practices, to issue remedial orders requiring "affirmative action" that "will effectuate the policies of th[e Act]." 29 U.S.C. § 160(c). Thus, the Board has "primary responsibility and broad discretion to devise remedies," subject to

"limited judicial review." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). Board remedies will not be overturned unless they constitute "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir. 1997) (quotation omitted). A party attacking a Board remedy as insufficient "must show that the remedy is clearly inadequate in light of the Board's findings." *Fresh Fruit & Vegetable Workers Local 1096 v. NLRB*, 539 F.3d 1089, 1102 (9th Cir. 2008) (quotation omitted).

A. The Board Acted Within Its Discretion in Requiring Walmart To Remedy Its Unlawful Dress Code

Walmart no longer disputes the Board's finding that it maintained an unlawful dress code from 2010 to 2013 at each and every one of its California stores. To remedy that violation, the Board ordered Walmart to post a notice informing employees who were subject to that policy of their rights under the Act, notifying them that the Board found Walmart violated those rights, and assuring them that Walmart will neither maintain a dress code that "unduly restricts [employees'] right to wear union insignia," nor "in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the [Act]." (ER.19.) Walmart's sole remedial argument (Br.55-58) is that it should be excused from posting that notice because the 2010 policy is no longer in effect. That argument fails under well-settled law.

The requirement that violators of the Act post a notice like the one at issue here "has been an essential element of the Board's remedies for unfair labor practices since the earliest cases under the Act." *J. Picini Flooring*, 356 NLRB 11, 12 (2010) (citing *Penn. Greyhound Lines, Inc.*, 1 NLRB 1, 52 (1935)). Such notices' remedial purposes are well established. "They help to counteract the effect of unfair labor practices on employees by informing them of their rights under the Act and the Board's role in protecting the free exercise of those rights." *Id.* "They inform employees of steps to be taken by the [employer] to remedy its violations of the Act and provide assurances that future violations will not occur." *Id.* Finally, "[t]hey also serve to deter future violations." *Id.* *See Presto Casting Co. v. NLRB*, 708 F.2d 495, 499 (9th Cir. 1983) ("[I]t is not an abuse of discretion to make an order to deter future misconduct despite a claim of compliance.").

A violator need not post a notice if it has already repudiated its unfair labor practices, *Boch Imports, Inc. v. NLRB*, 826 F.3d 558, 565-66 (1st Cir. 2016), but Walmart did not do so here. Effective repudiation requires an employer to "signal unambiguously to the employees that the employer recognizes that it has acted wrongfully, that it respects their Section 7 rights, and that it will not interfere with those rights again." *Id.* (quotation and brackets omitted). Like the notice posting it permits an employer to avoid, the Board's repudiation standard serves the "fundamental remedial purpose" of "protect[ing] employees from the potential

lingering effects of an unfair labor practice, even though that practice has been halted." *Id.* at 565 (internal quotation marks omitted). It applies with full force where an unlawful work rule is at issue, "even if the employer has since discontinued that policy or revised it in a manner that makes it compliant with the [Act]." *Id.*

As to the 2010 dress code, Walmart has "neither notified its employees of its unfair labor practices nor provided them assurances that it would not interfere with their Sec. 7 rights in the future." *Boch Imports, Inc.*, 362 NLRB No. 83, 2015 WL 1956199, at *1 n.3 (2015), *enforced*, 826 F.3d 558 (1st Cir. 2016). Thus, the need for the "standard—and venerable—Board remedy" of a notice posting remains. *Id.* *See Lily Transp.*, 362 NLRB No. 54, 2015 WL 1439930, at *1, *3 (2015) (repudiation ineffective where employer failed to tell employees reason for issuing revised handbook, or to offer assurances against future interference with Section 7 rights); *Casino San Pablo*, 361 NLRB No. 148, 2014 WL 7330998, at *6 (2014).

Self-evidently, to remedy Walmart's violation of employees' rights at every store where the unlawful policy was in effect, Walmart must post a notice at all of its California locations. *See Lily Transp.*, 2015 WL 1439930, at *1 n.4; *Fresh & Easy Neighborhood Mkt.*, 356 NLRB No. 145, 2011 WL 1615652, at *1-2 (2011), *enforced*, 468 F. App'x 1 (D.C. Cir. 2012). The different standard Walmart cites (Br.56-57) for requiring notice postings at facilities beyond those where unfair

labor practices occurred is not at issue here. And because the relevant legal standard is objective, there was no need for evidence that the 2010 dress code subjectively deterred employees at other stores from engaging in protected activity. *See, e.g.*, *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007) ("The Board is merely required to determine whether employees *would reasonably* construe the disputed language to prohibit Section 7 activity, and not whether employees *have* thus construed the rule." (quotation and brackets omitted)).

B. The Board Acted Within Its Discretion in Rejecting OUR Walmart's Waived and Unsupported Remedial Requests

OUR Walmart's remedial challenge also falls far short of establishing an abuse of the Board's discretion. OUR Walmart's sole contention (Br.7-15) is that the Board inadequately explained why it did not require Walmart to post the notice regarding its Richmond store at all of its California locations, and to describe its violations of the Act in greater detail in that notice. But OUR Walmart waived any argument for those remedial measures by not requesting them from the administrative law judge in the first instance. "[A] contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived." *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989), *enforced*, 922 F.2d 832 (3d Cir. 1990).

In any event, OUR Walmart's arguments are meritless. The Board followed its usual practice of "order[ing] a notice to be posted at the location where the

unfair labor practices took place." *Terminix-Int'l Co., L.P.*, 315 NLRB 1283, 1289 (1995). Although the Board may require a broader posting if employees at other facilities knew about the unfair labor practices, *Consol. Edison Co. of N.Y., Inc.*, 323 NLRB 910, 911-12 (1997), OUR Walmart offers nothing more than speculation to support its claim (Br.7-9) that the discipline of six employees at one store in Richmond sent a coercive message to employees across the state.

The Board also adhered to its usual notice-posting format in requiring Walmart to inform employees that the Board has found it violated federal labor law and that it would not engage in specifically enumerated unlawful actions going forward. (ER.18-20.) *See J. Picini Flooring*, 356 NLRB at 12. OUR Walmart would prefer a more detailed explanation of the Board's findings, but as OUR Walmart notes (Br.13), the notice directs employees to the Board's decision, which sets them forth in full. It was within the Board's discretion to determine that more concise notice language "most effectively apprise[s] employees of their rights, and of [Walmart's] unlawful acts." *Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 176 (2001), *enforced*, 354 F.3d 534 (6th Cir. 2004).

Because OUR Walmart's arguments are waived as well as unsupported, the Board appropriately rejected them in summary fashion. (ER.1 n.2.) *See Am. President Lines v. NLRB*, 340 F.2d 490, 492 (9th Cir.1965); *NLRB v. State Ctr. Warehouse & Cold Storage Co.*, 193 F.2d 156, 158 (9th Cir. 1951).

CONCLUSION

The Board respectfully requests that the Court deny Walmart's and OUR Walmart's petitions for review and enforce the Board's Order in full.

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National Labor Relations Board

July 2017

STATEMENT OF RELATED CASES

Counsel for the Board is not aware of any related cases pending before this Court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WAL-MART STORES, INC.	)	
	)	
Petitioner/Cross-Respondent/Intervenor	)	
	)	Nos. 16-72963, 16-73186,
v.	)	16-73279
	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos.
	)	32-CA-090116 et al.
Respondent/Cross-Petitioner	)	
	)	
THE ORGANIZATION UNITED FOR RESPECT AT WALMART	)	
	)	
Intervenor/Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 13,892 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 13th day of July 2017

UNITED STATES COURT OF APPEALS
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Respondent/Cross-Petitioner	)	
	)	
THE ORGANIZATION UNITED FOR RESPECT AT WALMART	)	
	)	
Intervenor/Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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this 13th day of July 2017

STATUTORY ADDENDUM

TABLE OF CONTENTS

National Labor Relations Act ("the Act"), 29 U.S.C. § 151, et seq.

THE NATIONAL LABOR RELATIONS ACT

Section 1 of the Act (29 U.S.C. § 151):

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting 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.

Section 2 of the Act (29 U.S.C. § 152) provides in relevant part:

When used in this Act--

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

Section 7 of the Act (29 U.S.C. § 157):

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, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and

enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Section 13 of the Act (29 U.S.C. § 160) provides in relevant part:

Sec. 13. [§ 163. Right to strike preserved] Nothing in this Act [subchapter], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.