Nos. 16-2721 & 16-2944

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

COOPER TIRE & RUBBER COMPANY,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
NLRB Case No. 08-CA-087155

BRIEF *AMICI CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER/CROSS-RESPONDENT'S PETITION FOR REHEARING *EN BANC*/PANEL REHEARING

Warren Postman
Janet Galeria
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the
United States of America

Rae T. Vann
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Center for Workplace Compliance

September 29, 2017

CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Rule 26.1 and Eighth Circuit Local Rule 26.1A, *Amici Curiae* Center for Workplace Compliance and Chamber of Commerce of the United States of America disclose the following:

1) For non-governmental corporate parties please list all parent corporations:

   None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

   None.

s/ Rae T. Vann

Warren Postman
Janet Galeria
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae* Chamber of Commerce of the United States of America

Rae T. Vann
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae* Center for Workplace Compliance

September 29, 2017

RULE 29(c)(5) STATEMENT

No counsel for a party authored this brief in whole or in part.

No counsel or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

Respectfully submitted,

s/ Rae T. Vann

Warren Postman
Janet Galeria
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the
United States of America

Rae T. Vann
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Center for Workplace Compliance

September 29, 2017

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The Center for Workplace Compliance and Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* contingent on the granting of the accompanying motion for leave. The brief urges the court to grant Petitioner/Cross-Respondent Cooper Tire and Rubber Company's Petition for Panel Rehearing/Rehearing *En Banc.*

INTEREST OF THE *AMICI CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and

professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

Amici are employers, or representatives of employers, subject to the National Labor Relations Act (NLRA or Act), 29 U.S.C. §§ 151 *et seq.*, as amended, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other laws and regulations governing the workplace. Because their members are potential defendants to claims of workplace harassment and discrimination, *amici* have a direct and ongoing interest in the issues presented in this appeal.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The divided panel's decision effectively requires employers to subordinate their EEO compliance responsibilities – and in particular their efforts to proactively prevent and promptly correct workplace harassment – to the NLRA whenever the subject of a misconduct investigation may implicate, however remotely, employee rights under the Act. It places companies in an untenable position of either enforcing their anti-harassment policies in cases like these and risking an NLRB charge, or treating the misconduct as NLRA-protected – and

risking an EEOC charge. In that regard, it contravenes federal workplace nondiscrimination laws and is inconsistent with rulings by the Third and Seventh Circuit Courts of Appeals that even single utterances of racial slurs can be sufficient to trigger Title VII harassment liability.

REASONS FOR GRANTING THE PETITION

I. THE PANEL MAJORITY'S DECISION CONFLICTS WITH THE PURPOSES AND AIMS OF FEDERAL WORKPLACE NONDISCRIMINATION LAWS

Largely disregarding the obvious tension between the Board's interpretation of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.*, as amended, and the risk of noncompliance with federal employment nondiscrimination laws, the panel majority erroneously concluded that harassing picket line language – which included racist references to chicken and watermelon – constituted NLRA-protected speech for which the perpetrator could not lawfully be disciplined by his employer. The decision severely undercuts employer efforts to comply in good faith with the important obligations that federal employment nondiscrimination laws – including but not limited to Title VII of the Civil Rights Act of 1964 (Title VII) – impose on them to proactively prevent, and promptly correct, harassing conduct. For that reason, this Court should grant the petition and vacate the panel decision.

A. Title VII Requires That Employers Act Promptly To Correct Suspected Harassing Conduct

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, makes it unlawful for an employer to discriminate "against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin ...." 42 U.S.C. § 2000e-2(a)(1). In 1986, the U.S. Supreme Court held in *Meritor Savings Bank, FSB v. Vinson* that hostile environment sexual harassment is actionable under Title VII. 477 U.S. 57 (1986). Since that time, hostile environment claims have been recognized in other contexts as well, including harassment on the basis of race. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (1991); *Dowd v. United Steelworkers of Am.*, 253 F.3d 1093 (8th Cir. 2001).

The Supreme Court also has imposed certain affirmative obligations on employers seeking to avoid liability for unlawful harassment. For instance, the Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), established an affirmative defense to liability for harassment perpetrated by supervisors, which requires among other things that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior." *Ellerth*, 524 U.S. at 765; *Faragher*,

524 U.S. at 807. The Court later described the defense as "a strong inducement [for employers] to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability." *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271, 278 (2009) (citation omitted). Where the alleged harassment is perpetrated by a non-supervisor, however, the employer will be held vicariously liable if it knew or reasonably should have been aware of the harassing behavior and "failed to take proper action." *Gordon v. Shafer Contracting Co.*, 469 F.3d 1191, 1195 (8th Cir. 2006).

Thus, employers have every motivation not only to strive to prevent conduct that could give rise to actionable harassment but also to address incidents immediately upon learning about them. This is true regardless of where in the workplace the objectionable behavior occurs.

Here, however, the panel majority drew a qualitative distinction between conduct taking place on the picket line and that which may occur in other contexts, noting, "'One of the necessary conditions of picketing is a confrontation in some form between union members and employees.'" *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885, 889 (8th Cir. 2017) (citation omitted). Implicit in this finding is the misguided notion that uttering a racial slur may, in fact, be acceptable depending on where the language is used. *Id.* at 890-91. Specifically, the court found that it is categorically unlawful for an employer to discharge an

employee for such misconduct – if it takes place on the picket line – unless the misconduct "'may reasonably tend to coerce or intimidate employees'" in their exercise of NLRA rights. *Id.* at 889 (citation omitted).

In particular, the panel majority cited favorably to the Board's decision in *Airo Die Casting, Inc.*, 347 N.L.R.B. 810 (2006), which involved the termination of an employee for violating the company's anti-harassment policy while on the picket line. *Cooper Tire*, 866 F.3d at 891. There, the employee approached a group of replacement workers "with both middle fingers extended and screamed 'f*** you n*****.'" *Id.* (quoting *Airo* at 811). The Board found that the employer violated the NLRA by discharging the employee because the employee's actions were not coercive or accompanied by any threats of violence. *Id.*

In this case, union employee Anthony Runion attended a cookout for Cooper Tire striking employees and their families at the Union Hall located near the main gate of the company's Findlay, Ohio plant. After leaving the event and returning to the picket line, Runion hurled several racist taunts at a group of mostly African-American replacement workers. Among other things, he said, "Hey, did you bring enough KFC for everyone?", 866 F.3d at 895, prompting an unidentified worker to exclaim, "Go back to Africa, you bunch of fucking losers." *Id.* Runion leveled a second racist taunt a few minutes later, saying, "Hey, anybody smell that? I smell fried chicken and watermelon." *Id.* After investigating the incident and

confirming that Runion made the "KFC" and the "fried chicken and watermelon" statements, *id.*, Cooper fired Runion for gross misconduct in violation of its anti-harassment policy.

According to the panel majority, Runion's comments here, as in *Airo*, were non-coercive, not directed at any one particular person, and not physically threatening in nature. For those reasons, it found that Cooper Tire was prohibited from discharging him – despite the fact that it was the racist nature of his actions, and not his union support, that prompted the disciplinary action.

Even still, the panel majority itself seemed discomfited by the Board's generally aggressive protection of offensive picket-line conduct, regardless of its nature. In a footnote, it expressed agreement with Judge Millett's recent concurrence admonishing the Board "against assuming that the use of abusive language, vulgar expletives, and racial epithets between employees is part and parcel of the vigorous exchange that often accompanies labor relations…" *Cooper Tire*, 866 F.3d at 891 n.1 (quoting *Consol. Communs., Inc. v. NLRB*, 837 F.3d 1, 20-24 (D.C. Cir. 2016) (Millett, J., concurring) (internal citations and quotation marks omitted)). In particular:

> [T]he Board's decisions seem in too many cases ... oblivious to the dark history such words and actions have had in the workplace (and elsewhere). ... To be sure, employees' exercise of their statutory rights to oppose employer practices must be vigorously protected, and ample room must be left for powerful and passionate expressions of views in the heated context of a strike. But Board decisions' repeated

> forbearance of ... racially degrading conduct in service of that admirable goal goes too far.

Id.

Indeed, where such language occurs in a work setting, whether on a picket line at the front gate of a plant or on the manufacturing floor, its use should be considered presumptively unprotected – and thus fair game for appropriate disciplinary action pursuant to an employer's anti-harassment policy. As Judge Beam pointed out in dissent, "No employer in America is or can be required to employ a racial bigot." *Id.* at 894 (Beam, J., dissenting).

B. The Third And Seventh Circuits Have Held That Even A Single Utterance Of A Racial Slur Can Trigger Title VII Harassment Liability

In *Castleberry v. STI Group*, the Third Circuit held that one instance of racial discrimination, such use of the "n-word," can be enough to state a claim for workplace harassment sufficient to survive a motion to dismiss. 863 F.3d 259, 264 (3d Cir. 2017). Similarly, in *Alamo v. Bliss*, the Seventh Circuit found that the alleged use of two racially offensive slurs – "spic" and "f—king Puerto Rican" – was sufficiently severe, if not necessarily pervasive, to state a claim for unlawful harassment. 864 F.3d 541, 550 (7th Cir. 2017) (footnote omitted). It noted, "A 'severe episode' that occurs 'as rarely as once' and a 'relent-less [sic] pattern of lesser harassment' both may violate Title VII." *Id.* (citation omitted).

Here, however, the panel majority summarily rejected Cooper Tire's assertion that forcing it to reinstate Runion would interfere with the company's Title VII compliance obligations. The court dismissed the idea that Runion's remarks implicated Title VII at all, holding, "Runion's comments—even if they had been made in the workplace instead of on the picket line—did not create a hostile work environment." 866 F.3d at 892. Oddly, the court cited as authority several decisions that arrived at *different* conclusions regarding the import, from a Title VII perspective, of "fried-chicken-and-watermelon" comments like those made here. *Id.* This case presents the *en banc* Court with an especially timely opportunity to clarify that such comments may be enough to trigger an employer's Title VII compliance obligations.

II. THE PANEL DECISION WILL HAVE A SUBSTANTIAL NEGATIVE IMPACT ON EMPLOYERS AND EMPLOYEES IN THE EIGHTH CIRCUIT

A. Employers Ought Not Be Forced To Choose Between Potential Title VII Liability On The One Hand, And NLRB Enforcement On The Other

Amici respectfully submit that the panel decision will require employers to make an untenable choice: Either they will respond swiftly to workplace misconduct of the kind at issue in this case, thus trading a possible EEOC discrimination charge for Board action, or they will treat such behavior as NLRA-protected and virtually guarantee the filing of an EEOC charge. Because

employers are subject to potential Title VII liability for failing to affirmatively act when faced with actual or constructive notice of suspected harassment, employers understandably take this duty seriously. To the extent that the panel's decision unreasonably and unnecessarily impedes employer preventive and corrective efforts, it is contrary to federal employment nondiscrimination law and should be reversed.

B. Forcing Employers To Employ Picket Line Racial Harassers Would Cause Unwarranted Workplace Discord And Produce Deleterious Results

As Judge Beam observed, the panel majority completely ignores the ongoing impact conduct such as Runion's can have on the workplace once the labor dispute is resolved and "work resumes with a day-to-day labor force consisting of members of various races including at least some Runion-maligned African American citizens." *Cooper Tire*, 866 F.3d at 895 (Beam, J., dissenting). As did the panel majority, Judge Beam also embraced the apt concerns expressed by Judge Millett in *Consolidated Communications* regarding the Board's current approach to cases like these. Judge Millett explained:

> I write ... to convey my substantial concern with the too-often cavalier and enabling approach that the Board's decisions have taken toward the sexually and racially demeaning misconduct of some employees during strikes. Those decisions have repeatedly given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace. The sexually and racially disparaging conduct that Board decisions have winked away encapsulates the very types of demeaning and degrading

> messages that for too much of our history have trapped women and minorities in a second-class workplace status.
>
> While the law properly understands that rough words and strong feelings can arise in the tense and acrimonious world of workplace strikes, targeting others for sexual or racial degradation is categorically different. Conduct that is designed to humiliate and intimate another individual *because of and in terms of that person's gender or race* should be unacceptable in the work environment. Full stop.

Consol. Communs., Inc. v. NLRB, 837 F.3d 1, 20-21 (D.C. Cir. 2016) (Millett, J., concurring).

Amici share those concerns, and add that their members devote substantial time and resources to maintaining diverse and inclusive work environments in which all employees not only feel comfortable coming forward with complaints, but also have faith that their employers will respond appropriately. Interfering with employer efforts to promptly redress racist outbursts at work – especially where, as here, the language used is entirely gratuitous, in other words, has no relevance to any Section 7 rights being advocated – severely undermines the effectiveness of harassment prevention and complaint resolution efforts.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully submit that the petition for rehearing *en banc*/panel rehearing should be granted.

Respectfully submitted,

s/ Rae T. Vann

Warren Postman
Janet Galeria
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the
United States of America

Rae T. Vann
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Center for Workplace Compliance

September 29, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that the BRIEF *AMICI CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER/CROSS-RESPONDENT'S PETITION FOR REHEARING *EN BANC*/PANEL REHEARING complies with Fed. R. App. P. 29(b)(4). The brief contains 2,497 words, from the Interest of the *Amici Curiae* through the Conclusion, according to the word processing program Microsoft Word 2010.

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

s/ Rae T. Vann

Warren Postman
Janet Galeria
U.S. CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the
United States of America

Rae T. Vann
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Center for Workplace Compliance

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants are not CM/ECF users. I have mailed the foregoing document by First Class Mail, postage prepaid, to the following non-CM/ECF participants:

Mr. Allen Binstock
NATIONAL LABOR RELATIONS BOARD
Regional Director, Region 8
1695 AJC Federal Building
1240 E. 9th Street
Cleveland, OH 44199

This brief has been scanned for viruses and is virus-free.

s/ Rae T. Vann
Rae T. Vann