

FEAR AND LOATHING IN THE AMERICAN WORKPLACE: PAVING THE BOG OF LOGOMACHY

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INTRODUCTION.....	879
I. ADMINISTRATIVE FRAMEWORK.....	886
A. <i>The NLRA and the Bog of Logomachy</i>	886
B. <i>The Make-Whole Remedy</i>	888
C. <i>Thryv, Inc. and the Board’s Power Moving Forward</i>	890
II. EXISTING GAPS IN PROTECTION.....	891
A. <i>Child Care Costs</i>	892
B. <i>Student Loan Penalties</i>	894
C. <i>Side or Second Jobs</i>	895
D. <i>Loss of Utilities</i>	896
III. RECOMMENDATIONS.....	898
A. <i>Guidance Documents</i>	900
B. <i>Adjudication</i>	900
C. <i>Foreseeability</i>	902
CONCLUSION.....	905

INTRODUCTION

“Let me explain it to you, let me run it down just briefly if I can. We’re looking for the American Dream, and we were told it was somewhere in this area.”¹ The so-called “American Dream” has been invoked in popular

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1. HUNTER S. THOMPSON, FEAR AND LOATHING IN LAS VEGAS 164 (Harper Perennial 2005) (1971).

discourse to represent the American ideal that one who is willing to work hard can achieve a better life than their parents.² It may not come as a surprise that this ideal has not come remotely close to realization for most.³ According to Federal Reserve data, millennials own significantly less of the nation's wealth than baby boomers and Generation X—millennials' parents—did at the same median age, and they likely will never catch up.⁴ In 2022, forty-five percent of all new income went to the top one percent of American society; “three multibillionaires own[ed] more wealth than the bottom half of [the] American [population].”⁵ Wages have largely remained stagnant,⁶ cost of living has consistently increased,⁷ and American workers’

2. See, e.g., Alissa Quart, *How the Horatio Alger Lie Helped Shape the Myth of American Upward Mobility*, ROLLING STONE (Mar. 14, 2023), <https://www.rollingstone.com/culture/culture-features/american-dream-myth-horatio-alger-lie-bootstrapped-excerpt-1234695926/>; Senator Barack Obama, Speech on the American Dream (Nov. 7, 2007).

3. See Michael Hobbes, *FML: Why Millennials Are Facing the Scariest Financial Future of Any Generation Since the Great Depression*, HUFFINGTON POST: HIGHLINE, <https://highline.huffingtonpost.com/articles/en/poor-millennials-print/> (last visited Nov. 11, 2023); Andrew Van Dam, *The Unluckiest Generation in U.S. History*, WASH. POST (June 5, 2020, 1:18 PM), <https://www.washingtonpost.com/business/2020/05/27/millennial-recession-covid/>; Tami Luhby, *Many Millennials Are Worse Off Than Their Parents – A First in American History*, CNN (Jan. 11, 2020, 7:05 AM), <https://www.cnn.com/2020/01/11/politics/millennials-income-stalled-upward-mobility-us/index.html>.

4. See *Distribution of Household Wealth in the U.S. Since 1989*, FED. RESRV., <https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/table/#quarter:119;series:Net%20worth;demographic:generation;population:all;units:shares> (Sept. 22, 2023); Christopher Ingraham, *The Staggering Millennial Wealth Deficit, In One Chart*, WASH. POST (Dec. 3, 2019, 9:45 AM), <https://www.washingtonpost.com/business/2019/12/03/precariousness-modern-young-adulthood-one-chart/>.

5. Bernie Sanders, *The US Has a Ruling Class – and Americans Must Stand Up to It*, THE GUARDIAN (Sept. 2, 2022, 6:15 AM) (emphasis added), <https://www.theguardian.com/commentisfree/2022/sep/02/the-us-has-a-ruling-class-and-americans-must-stand-up-to-it>.

6. See, e.g., *Economic News Release: Real Earnings Summary*, U.S. BUREAU OF LAB. STAT. (Aug. 10, 2023, 8:30 AM), <https://www.bls.gov/news.release/realer.nr0.htm>; Lawrence Mishel, Elise Gould & Josh Bivens, *Wage Stagnation in Nine Charts*, ECON. POL'Y INST. (Jan. 6, 2015), <https://www.epi.org/publication/charting-wage-stagnation/>.

7. See, e.g., Issue Brief, The White House, *The Cost of Living in America: Helping Families Move Ahead* (Aug. 11, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/08/11/the-cost-of-living-in-america-helping-families-move-ahead/>; Matt McConnell, *What Covid Teaches Us About the Cost-of-Living Crisis*, HUM. RTS. WATCH (Dec. 20, 2022, 8:26 AM), <https://www.hrw.org/news/2022/12/20/what-covid-teaches-us-about-cost-living-crisis>.

share of corporate income has continued to decrease,⁸ despite record-breaking corporate profits.⁹ Although each generation of Americans grew up on the promise that their hard work and determination alone would deliver them a better life than their parents, the hard truth is that the reality is to the contrary.

Americans—particularly young Americans—are looking for the American Dream. The second largest employer in the United States, Amazon, employs over one million Americans.¹⁰ On its hiring website and in the media, Amazon proudly boasts a competitive hourly wage, frequently citing its capitulation to the “Fight for 15” movement in 2018, raising its minimum hourly wage to \$15 per hour.¹¹ It is not surprising why such employment would be attractive to young Americans, where the federal minimum wage still sits at \$7.25 per hour.¹² Young Americans have come to Amazon and similar employers looking for the American Dream; they were told it was somewhere in the area.

In addition to its competitive wages, Amazon also touts its benefits, career advancement, and “[a] safe and inclusive work environment with team and management support.”¹³ However, career advancement rarely happens for Amazon workers.¹⁴ A former Amazon Vice President of Human Resources stated that, “Amazon intentionally limit[s] upward mobility for hourly workers.”¹⁵ Countless firsthand reports from Amazon workers have revealed

8. *Nominal Wage Tracker*, ECON. POL’Y INST., <https://www.epi.org/nominal-wage-tracker/> (last visited Nov. 11, 2023).

9. See Tobias Burns, *Corporate Profits Hit Record High in Third Quarter Amid 40-Year-High Inflation*, THE HILL (Nov. 30, 2022, 12:33 PM), <https://thehill.com/business/3756457-corporate-profits-hit-record-high-in-third-quarter-amid-40-year-high-inflation/>.

10. Todd Bishop, *Amazon Tops 1M U.S. Employees*, GEEKWIRE (Feb. 9, 2022, 8:36 AM), <https://www.geekwire.com/2022/amazon-tops-1m-u-s-employees/>.

11. *Our Impact: Economy*, AMAZON, <https://www.aboutamazon.com/impact/economy/15-minimum-wage> (last visited Nov. 11, 2023); Steven Greenhouse, *‘The Success is Inspirational’: The Fight for \$15 Movement 10 Years On*, THE GUARDIAN (Nov. 23, 2022), <https://www.theguardian.com/us-news/2022/nov/23/fight-for-15-movement-10-years-old>.

12. 29 U.S.C. § 206(a)(1)(C) (2018).

13. AMAZONJOBS, <https://hiring.amazon.com/#/> (last visited Nov. 11, 2023).

14. See Shirin Ghaffary, *Amazon Fired Chris Smalls. Now the New Union Leader is One of Its Biggest Problems*, VOX (June 7, 2022, 6:30 AM), <https://www.vox.com/recode/23145265/amazon-fired-chris-smalls-union-leader-alu-jeff-bezos-bernie-sanders-aoc-labor-movement-biden>.

15. Jodie Kantor, Karen Weise & Grace Ashford, *The Amazon That Customers Don’t See*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/interactive/2021/06/15/us/amazon-workers.html>.

harrowing working conditions.¹⁶ These conditions and the mistreatment of workers are not unique to Amazon.¹⁷ Where market capitalism is left unchecked by the government, owners can and will exploit the labor market to the highest degree possible in order to generate maximum profit.¹⁸ This dynamic is what makes unions and strong labor protections so essential: without them, Americans would not enjoy the weekend, the forty-hour work week, or child labor laws.¹⁹ Moreover, at-will employees would be entirely unable to negotiate their wages, benefits, and working conditions.²⁰ Yet, today, workers reasonably fear retaliation for labor organizing.²¹ That, along with a general weakening of labor law's worker protections, has led to a reality of fear and loathing in the workplace.²² As workers lose basic

16. See, e.g., Ken Klippenstein, *Documents Show Amazon is Aware Drivers Pee in Bottles and Even Defecate En Route, Despite Company Denial*, THE INTERCEPT (Mar. 25, 2021, 4:54 PM), <https://theintercept.com/2021/03/25/amazon-drivers-pee-bottles-union/>; Michael Sainato, *'Lack of Respect': Outcry over Amazon Employee's Death on Warehouse Floor*, THE GUARDIAN (Jan. 9, 2023, 3:00 AM), <https://www.theguardian.com/technology/2023/jan/09/amazon-employee-death-warehouse-floor-colorado>.

17. See generally Julia Carrie Wong, *Tesla Factory Workers Reveal Pain, Injury and Stress: 'Everything Feels Like the Future But Us'*, THE GUARDIAN (May 18, 2017, 3:00 AM), <https://www.theguardian.com/technology/2017/may/18/tesla-workers-factory-conditions-elon-musk>; Michael Sainato, *'Lavatory Waste Comes on Us': New York Airport Workers Protest Unsanitary Conditions*, THE GUARDIAN (Feb. 23, 2023, 6:00 AM), <https://www.theguardian.com/world/2023/feb/23/swissport-usa-new-york-unsafe-unsanitary-conditions-unionize>; Errol Schweizer, *How Meat Processing Workers Are Fighting For Safer Working Conditions*, FORBES (May 3, 2022, 8:48 AM), <https://www.forbes.com/sites/errolschweizer/2022/05/03/how-meat-processing-workers-are-fighting-back/>.

18. See, e.g., KARL MARX, CAPITAL VOLUME I 405 (Ben Fowkes trans., Penguin Books 1990) (1976) ("And the most fundamental right under the law of capital is the equal exploitation of labour-power by all capitalists.").

19. *What Unions Have Done for You*, UFCW LOC. 1500, <https://m.ufcw1500.org/get-educated/what-unions-have-done-for-you> (last visited Nov. 11, 2023).

20. See *Unions Help Reduce Disparities and Strengthen Our Democracy*, ECON. POL'Y INST. (Apr. 23, 2021), <https://www.epi.org/publication/unions-help-reduce-disparities-and-strengthen-our-democracy/> (explaining that, while labor unions improve conditions for all workers, union members have better protections than that of non-members).

21. See, e.g., Gordon Lafer & Lola Loustaunau, *Fear at Work*, ECON. POL'Y INST. (July 23, 2020), <https://www.epi.org/publication/fear-at-work-how-employers-scare-workers-out-of-unionizing/> (finding that, while most American workers want a union in their workplace, very few have it because of both legal and illegal employer intimidation tactics).

22. See generally *Republic Steel Corp. v. Nat'l Lab. Rels. Bd.* (NLRB), 311 U.S. 7, 13 (1940) (creating the "punitive" prohibition); Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141–197 (2018) (restricting the activities and power of labor unions);

protections and feel an increasing threat of reprisal by their employers, union membership declines,²³ and as union membership declines, income inequality rises at a near-equal rate.²⁴ In order to cure these feelings of fear and loathing, workers must be afforded the robust protections that Congress has promised to provide.²⁵

The National Labor Relations Act (NLRA or the Act) was enacted in 1935 with the express purpose of “encouraging and protecting the collective-bargaining process.”²⁶ Section 10(c) of the Act authorizes the National Labor Relations Board (NLRB or the Board) to direct wrongdoers to “take such affirmative action . . . as will effectuate the policies of [the Act].”²⁷ Conceptually, the Act gives the Board “wide discretion” to determine the remedies that most appropriately effectuate the policies and spirit of the Act, and the particular means chosen are “for the Board not the courts to determine.”²⁸ However, courts have greatly limited the Board’s discretion in granting remedies to effectuate the policies of the Act, namely by declaring that NLRA remedies may not be “punitive” and instead must be “remedial.”²⁹ The result of the *Republic Steel Corp. v. NLRB*³⁰ ruling is that the Board may not premise a particular remedy on a deterrence rationale; it may only happen to deter unfair labor practices.³¹

In a later case, Justice Felix Frankfurter lamented the punitive-remedial

Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2460 (2018) (ruling that union security agreements in the public sector violate the First Amendment); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002) (denying backpay awards to undocumented immigrant workers).

23. See Heidi Shierholz, *Working People Have Been Thwarted in Their Efforts to Bargain for Better Wages by Attacks on Unions*, ECON. POL’Y INST. (Aug. 27, 2019), <https://www.epi.org/publication/labor-day-2019-collective-bargaining/> (explaining how the decline of collective-bargaining is the direct result of employers’ anti-union activities).

24. See *id.* (illustrating the negative correlation between union membership and income inequality).

25. See *id.* See generally National Labor Relations (Wagner) Act of 1935, 29 U.S.C. §§ 151–169 (showing the U.S. eliminated the causes of obstacles to the flow of commerce and is encouraging collective-bargaining by protecting the ability of workers to associate and organize).

26. *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 892 (1984); 29 U.S.C. § 151 (2018).

27. 29 U.S.C. § 160(c) (2018).

28. *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943).

29. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940) (citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 235–36 (1938)).

30. 311 U.S. 7 (1940).

31. Michael Weiner, Comment, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579, 1581 (2005).

distinction that came out of *Republic Steel*, criticizing the decision for entering the Court into what he called the “bog of logomachy.”³² Justice Frankfurter affirmed a common gripe among the legal community: that the law focuses too closely on minutiae and semantics, too often adhering to rigid understandings of words and absolute legal rules, instead of taking account of empirical evidence and real-world, material consequences.³³

Because the Board is limited to granting “remedial” measures, its traditional method of effectuating the policies of the Act in instances of an illegal discharge or demotion is the so-called “make-whole” remedy, in which the Board seeks to “restore the status quo ante and make the unit employees whole for any loss of earnings and benefits.”³⁴ Traditionally, the make-whole remedy includes reinstatement and backpay to the aggrieved worker.³⁵ Previous Board adjudications have waded deep into the bog of logomachy by labeling remedies for economic losses punitive, and therefore outside of the Board’s power.³⁶ However, reinstatement and backpay often do not go far enough to make the aggrieved worker “whole,” as life’s obstacles have the tendency to snowball.³⁷ Much like the story of Chris Gardner’s way out of

32. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953).

33. *See, e.g., Holland v. Florida*, 560 U.S. 631, 650 (2010) (“[C]ourts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.”); Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 120 (2009) (stating that “[t]extualism’s fundamental philosophy—its prime directive—is that the text is the law, and it is the text that must be observed”) (quoting Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (Amy Gutmann ed., 1997)); 5-4 Pod, *Textualism*, PROLOGUE PROJECTS (June 29, 2021) (downloaded using Patreon) (explaining that textualism is a method of legal interpretation that focuses exclusively on the text of the law, as opposed to the law’s purpose, its legislative history, and material implications).

34. *Voorhees Care & Rehab. Ctr.*, 371 N.L.R.B. No. 22, slip op. at 3 (Aug. 25, 2021).

35. *See, e.g., id.*, at 4 n.14 (calling on the National Labor Relations Board (NLRB or the Board) to consider adding consequential damages to its traditional make-whole remedy of reinstatement and backpay).

36. *See, e.g., M & M Affordable Plumbing*, No. 13-CA-121459, 2018 WL 1255489, at *10 (N.L.R.B. Div. of Judges Mar. 9, 2018) (“The Board . . . is not prepared to deviate from its current remedial practice and will not order reimbursement of consequential damages.”); *Laborers’ Int’l Union of N. Am., Loc. Union No. 91*, 365 N.L.R.B. No. 28, slip op. at 1 n.2 (Feb. 7, 2017) (refusing to deviate from the Board’s remedial practice by considering consequential damages).

37. *See discussion infra* Part Existing Gaps in Protection

poverty in the biographical drama film *The Pursuit of Happyness* (2006),³⁸ one unfortunate circumstance can, and often does, lead directly to even more unfortunate circumstances, thus trapping individuals in a vicious cycle of poverty.³⁹ As Isaiah Thomas, an Amazon worker and labor organizer, so aptly put it, “I live paycheck to paycheck. They fire me that ruins my life. They fire . . . anybody else, that could ruin their life.”⁴⁰

When an employee is discharged or demoted in violation of the Act, they too experience additional losses due to, and on top of, their loss of wages and benefits.⁴¹ For instance, they may experience interest charges or late fees on credit cards, additional health insurance and health care costs, or penalties from loan nonpayment, among many other things.⁴² In *Voorhees Care and Rehabilitation Center*,⁴³ the Board welcomed public input about whether to add consequential damages for economic losses to its traditional make-whole remedy suffered as a direct and foreseeable result of an employer’s unfair labor practice.⁴⁴ Less than a month later, NLRB General Counsel Jennifer A. Abruzzo issued a memorandum urging NLRB Regions to seek compensation for consequential damages where appropriate.⁴⁵ The General Counsel further articulated several specific consequential damages to be considered, including *inter alia* interest or late fees on credit cards, loss of home or care due to nonpayment, and health insurance or medical expenses.⁴⁶

In December 2022, the Board addressed General Counsel Abruzzo’s guidance in *Thryv, Inc.*⁴⁷ In that case, the Board recognized the inadequacy of its remedies where they do not cover direct and foreseeable pecuniary harms suffered as a result of an employer’s unfair labor practice, and ruled that all direct and foreseeable pecuniary harms suffered as a result of an

38. THE PURSUIT OF HAPPYNESS (Columbia Pictures 2006); *see also* discussion *infra* Part Existing Gaps in Protection

39. *See* THE PURSUIT OF HAPPYNESS (Columbia Pictures 2006); *see also* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 51 (Crown Publishers 2016); discussion *infra* Part Existing Gaps in Protection

40. Paula Pecorella & Meg Herschlein, *Amazon Fired a Pro-Union Worker. Workers Are Fighting Back*, MORE PERFECT UNION (May 6, 2022), <https://perfectunion.us/amazon-fired-a-pro-union-worker-workers-are-fighting-back/>.

41. *See* discussion *infra* Part Existing Gaps in Protection

42. *See* discussion *infra* Part Existing Gaps in Protection

43. 371 N.L.R.B. No. 22 (Aug. 25, 2021).

44. *Id.* at 4 n.14.

45. Memorandum from the NLRB Gen. Couns. No. 21-06 on Seeking Full Remedies 1-2 (Sept. 8, 2021) [hereinafter GC 21-06].

46. Memorandum from the NLRB Gen. Couns. No. 21-07 on Full Remedies in Settlement Agreements 2-3 (Sept. 15, 2021) [hereinafter GC 21-07].

47. *See* 372 N.L.R.B. No. 22, slip op. at 6 (Dec. 13, 2022).

employer's unfair labor practice be included in the traditional make-whole remedy.⁴⁸ Although the General Counsel's memoranda and the Board's decision in *Thryv* substantially improved the Board's ability to effectuate the policies of the Act through appropriate remedies,⁴⁹ there are still several gaps in the Board's new conception of its make-whole relief.⁵⁰ Just as President Biden and Treasury Secretary Yellen recently took immediate and drastic steps to ensure that depositors of the failed Silicon Valley Bank—predominantly businesses in lucrative industries⁵¹—be made whole,⁵² so too should the NLRB take swift and substantial steps to ensure that the hard-working Americans who keep our society operational be made truly whole for all losses attributed to their employer's unfair labor practices.

This Comment will address the current holes in the Board's consequential damages guidance and will recommend several categories of economic losses that should be considered in order to effectuate the policies of the Act, and will offer a path forward for fully establishing and building upon the victory for workers that came out of the *Thryv* decision. Part I addresses the administrative framework of NLRB remedies, Part II outlines the current holes in NLRB protections, and Part III recommends that the Board and NLRB General Counsel issue memoranda and adjudicate unfair labor practice claims in a way that not only comports with *Thryv*, but endeavors to push and broaden the holding and rationale of that decision.

I. ADMINISTRATIVE FRAMEWORK

A. *The NLRA and the Bog of Logomachy*

In 1935, Congress passed the NLRA in response to the widespread employer denial of employees' right to organize and employer refusal to acquiesce to the procedure of collective-bargaining.⁵³ This phenomenon led to strikes, industrial strife, and unrest, which had "the intent or the necessary

48. *Id.*

49. See discussion *infra* Part I. *Thryv, Inc. and the Board's Power Moving Forward*

50. See discussion *infra* Part II.

51. See SVB Financial Grp., Annual Report (Form 10-K) 8 (Dec. 31, 2022). Silicon Valley Bank's customers mainly included businesses, entrepreneurs, and professionals in the technology, life science/health care, private equity/venture capital, and premium wine industries. See *id.*

52. Joint Press Release, Dep't of Treasury, Bd. of Governors of Fed. Rsrv. Sys., Fed. Deposit Ins. Corp., Joint Statement by Treasury, Fed. Rsrv., and FDIC (Mar. 12, 2023), <https://www.federalreserve.gov/newsevents/pressreleases/monetary20230312b.htm> ("All depositors of [Silicon Valley Bank and Signature Bank] will be made whole.")

53. 29 U.S.C. § 151 (2018).

effect of burdening or obstructing commerce.”⁵⁴ Congress further stated that,

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.⁵⁵

The express purpose of the Act is to “encourag[e] and protect[] the collective-bargaining process.”⁵⁶

Among the Act’s protections for organized labor and commerce in general, is an authorization for the NLRB to direct the perpetrators of unfair labor practices to “take such affirmative action . . . as will effectuate the policies of [the Act].”⁵⁷ Abstractly, the Board has “wide discretion” to determine the most appropriate remedies to execute the policies and spirit of the Act, and such remedies are “for the Board not the courts to determine.”⁵⁸ However, subsequent court opinions and political maneuvers have weakened this basic protection, and have further stymied the Act’s ability to conform its protections to the realities of the modern day.⁵⁹ For instance, in *Republic Steel*, the Court held that NLRA remedies may not be “punitive” in nature,⁶⁰ resulting in the Board’s inability to “premise a particular remedy on a deterrence rationale.”⁶¹

A decade after *Republic Steel*, the Court upheld the Board’s traditional method of computing backpay despite the method overcompensating

54. *Id.*

55. *Id.*

56. *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

57. 29 U.S.C. § 160(c) (2018).

58. *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–63 (1969) (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964)); *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943) (quoting *Int’l Ass’n of Machinists v. NLRB*, 311 U.S. 72, 82 (1940)).

59. *See generally Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940) (creating the “punitive” prohibition); *Labor Management Relations (Taft-Hartley) Act of 1947*, 29 U.S.C. §§ 141–197 (2018) (restricting the activities and power of labor unions); *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (ruling that union security agreements in the public sector violate the First Amendment); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (denying backpay awards to undocumented immigrant workers).

60. *Republic Steel*, 311 U.S. at 11–12; *Weiner*, *supra* note 31.

61. *Weiner*, *supra* note 31.

unlawfully discharged employees.⁶² Writing for the majority, Justice Frankfurter explained that it is the business of the Board, not the Court, “to give coordinated effect to the policies of the Act,” further saying,

We prefer to deal with these realities and to avoid entering into the *bog of logomachy*, as we are invited to, by debate about what is “remedial” and what is “punitive.” It seems more profitable to stick closely to the direction of the Act by considering what order does . . . and what order does not, bear appropriate relation to the policies of the Act.⁶³

Despite Justice Frankfurter’s eloquent words and sound reasoning in *NLRB v. Seven-Up*,⁶⁴ reviewing courts, and the Board itself, have consistently waded into the “bog of logomachy,” asking “whether [the] proposed remedy is aimed at punishment or deterrence rather than effectuating the policies of the Act.”⁶⁵

B. *The Make-Whole Remedy*

The Board’s traditional method of effectuating the policies of the Act in instances of an illegal discharge or demotion is the so-called “make-whole” remedy, in which the Board seeks to “restore the status quo ante and make the unit employees whole for any loss of earnings [or] benefits.”⁶⁶ The idea behind the make-whole remedy is to put the aggrieved worker back into the same material position they were in before their unlawful discharge or demotion, ideally rendering the unfair labor practice materially null.⁶⁷ Traditionally, the make-whole remedy includes reinstatement and backpay to the aggrieved worker.⁶⁸ However, it should come as no surprise that mere reinstatement and backpay do not always make unlawfully discharged or demoted workers “whole” with respect to their losses associated with the unfair labor practice.⁶⁹

A glaring hole in the traditional make-whole remedy, which the Board has recently sought to fill, is economic losses.⁷⁰ Economic losses are those apart from loss of pay or benefits, like damage to an employee’s credit rating.⁷¹ In

62. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346–48 (1953).

63. *Id.* (emphasis added).

64. 344 U.S. 344 (1953).

65. *See Weiner*, *supra* note 31, at 1582.

66. *Voorhees Care & Rehab. Ctr.*, 371 N.L.R.B. No. 22, slip op. at 3, 4 n.14 (Aug. 25, 2021).

67. *See id.*; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (stating that the aim of the Board order is the “restoration of the situation, as nearly as possible, to that which would have obtained but for” the employer’s unfair labor practice).

68. *See Voorhees Care & Rehab. Ctr.*, 371 N.L.R.B. No. 22, slip op. at 3 (Aug. 25, 2021).

69. *See id.* at 4 n.14.

70. *See id.*; *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 14, 21 (Dec. 13, 2022).

71. GC 21-06, *supra* note 45; GC 21-07, *supra* note 46.

2021, the issue of economic losses came before the Board in a case where an employer terminated its employees' bargained-for health insurance plans without notice and unilaterally implemented an inferior plan, leading to employees incurring significant health care costs.⁷² In addition to standard cease and desist, backpay, and reinstatement orders, the Board ordered the employer to make unit employees whole for other costs attributable to the unlawful conduct, such as granting employees "all interest, emoluments, rights, and privileges in the health insurance plan provided for in the collective-bargaining agreement . . . that would have accrued to them but for the unlawful conduct," and including all outstanding medical costs incurred as a result of the employer's failure to pay the employees' medical insurance, as well as any court judgments rendered against employees for failure to pay their medical bills.⁷³

In coming to this conclusion, Board Chairman McFerran noted that the *Voorhees* case

should prompt the Board to seek public input about whether to add a new, make-whole remedy to those [it] traditionally order[s]: an award of consequential damages to make employees whole for economic losses (apart from the loss of pay or benefits) suffered as a direct and foreseeable result of an employer's unfair labor practice.⁷⁴

The Board specifically expressed that "where the employer's egregious violations so harm employees that they may not be fully remedied by the Board's traditional make-whole awards" it is necessary to consider consequential damages.⁷⁵ Although NLRB General Counsel Abruzzo likely did not ask for consequential damages in *Voorhees* because the Board has never authorized such damages,⁷⁶ she quickly accepted the Board's new invitation.⁷⁷

In two September 2021 memoranda, less than a month after the *Voorhees* decision, General Counsel Abruzzo urged NLRB Regions to seek compensation for "consequential damages to make employees whole for economic losses . . . suffered as a direct and foreseeable result of an

72. *Voorhees Care & Rehab. Ctr.*, 371 N.L.R.B. No. 22, slip op. at 1, 3 (Aug. 25, 2021).

73. *Id.* at 3.

74. *Id.* at 4 n.14.

75. *Id.*

76. *See id.* ("The General Counsel did not ask for consequential damages here, presumably because the Board has never authorized such damages and has rebuffed the General Counsel before, without reaching the merits of the issue."); *Lou's Transp., Inc.*, 366 N.L.R.B. No. 140, slip op. at 8 (July 24, 2018) ("As the General Counsel concedes, the Board's order in this matter does not require Respondent to reimburse [the complainant] for consequential damages. As the Board has recognized, current Board precedent does not authorize it to award consequential damages.").

77. *See* GC 21-06, *supra* note 45.

employer's unfair labor practice."⁷⁸ Specifically, the General Counsel articulated several consequential damages to be considered by the Board in these situations: (1) interest or late fees on credit cards, (2) penalties for prewithdrawal of retirement accounts, (3) loss of home or car due to loan nonpayment, (4) damages to credit rating, (5) losses from liquidating savings or investment accounts, (6) expenses for professional licenses, (7) cost of health insurance or cost of medical expenses, (8) moving expenses, and (9) legal expenses.⁷⁹ The NLRB quickly took her invitation.⁸⁰

C. *Thryv, Inc. and the Board's Power Moving Forward*

Following *Voorhees* and General Counsel Abruzzo's September 2021 memoranda, the Board considered granting consequential damages in *Thryv, Inc.*⁸¹ in December 2022.⁸² In that case, the Board clarified that,

[I]n all cases in which [the Board's] standard remedy would include an order for make-whole relief, [the Board] *shall expressly order* that the respondent compensate affected employees for *all direct or foreseeable pecuniary harms suffered as a result of the respondent's unfair labor practice*. [It] will apply this policy retroactively . . . in "all pending cases in whatever stage" given the absence of any "manifest injustice" in doing so.⁸³

The Board expressly avoided using the term "consequential damages," explaining that it is a "legal term of art more suited for the common law of torts and contracts."⁸⁴ Instead, the Board ruled that "*all direct or foreseeable pecuniary harms* suffered as a result of [an employer's] unfair labor practice" be included in the traditional make-whole remedy.⁸⁵ In addition to expressly including direct and foreseeable pecuniary harms as a result of an employer's unfair labor practice within the traditional make-whole remedy, the *Thryv* Board declined to enumerate all the pecuniary harms that may fall into this category.⁸⁶ In doing so, it stated that future Board decisions regarding such damages will be guided by the Board's own caselaw.⁸⁷

The Board's review of its caselaw in *Thryv* revealed wide latitude to grant damages for direct and foreseeable pecuniary harms resulting from an

78. See GC 21-06, *supra* note 45; GC 21-07, *supra* note 46.

79. GC 21-07, *supra* note 46.

80. See *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 19–21 (Dec. 13, 2022) (showing how the NLRB was quick to act on the General Counsel's articulated consequential damages).

81. 372 N.L.R.B. No. 22 (Dec. 13, 2022).

82. *Id.* at 19–21.

83. *Id.* at 13 (emphasis added).

84. *Id.* at 9.

85. *Id.* at 6.

86. *Id.* at 12.

87. *Id.* at 13.

employer's unfair labor practice.⁸⁸ Importantly, the Board has "wide discretion" to effectuate the policies of the Act and is not limited to reinstatement with or without backpay.⁸⁹ The Supreme Court has interpreted the Board's power to order "reinstatement of employees with or without back pay" as not to limit the general grant of power to award affirmative relief, but to merely illustrate such power.⁹⁰ Additionally, the Board has historically updated and revised its remedial policies in order to ensure that victims of unlawful conduct are truly made whole.⁹¹ Relying on these authorities, the Board in *Thryv* clearly articulated its power to grant such damages, and further made clear that such remedies are, by their very nature, remedial and not punitive.⁹² This articulation averts *Republic Steel's* prohibition of punitive damages⁹³ and avoiding becoming yet another mummified body in the bog of logomachy.⁹⁴ Moving forward, the Board, relying on *Thryv*, may now issue remedies above and beyond mere reinstatement and backpay without being hamstrung to the archaic and wrongly decided holding in *Republic Steel*.⁹⁵

II. EXISTING GAPS IN PROTECTION

Although the categories expressed by General Counsel Abruzzo and the Board's subsequent decision in *Thryv* certainly allow the Board to more

88. See *id.* (describing several precedents, rules, and standards that have been established through the Board's caselaw regarding employers' unfair labor practices).

89. See *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943).

90. See *Radio Officers' Union of Com. Tel. Union, A.F.L. v. NLRB*, 347 U.S. 17, 54 (1954).

91. See, e.g., *Don Chavas, LLC*, 361 N.L.R.B. 10, 102, 104–05 (2014) (affirming requirement for employers to compensate employees for excess tax liability resulting from lump-sum backpay).

92. See *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 11 (Dec. 13, 2022); see also *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 293 (1960) ("[T]he public remedy is not thereby rendered punitive, where the measure of reimbursement is compensatory only.").

93. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940) (stating that the NLRB does not have unlimited discretion to devise punitive measures).

94. See *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953) ("We prefer to deal with these realities and to avoid entering the bog of logomachy, as we are invited to, by debate about what is 'remedial' and what is 'punitive.'").

95. See *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 13 (Dec. 13, 2022) ("[I]n all cases in which [the Board's] standard remedy would include an order for make-whole relief, [the Board] shall expressly order that the respondent compensate affected employees for all direct or foreseeable pecuniary harms suffered as a result of the respondent's unfair labor practice.").

forcefully effectuate the policies of the Act,⁹⁶ expressly defining these direct and foreseeable pecuniary harms is crucial because the Board is simultaneously wading into uncharted waters and eluding the fruitless descent into the bog of logomachy. Several holes remain in the General Counsel's guidance, all of which leave countless workers made only partially whole, often having a significant impact on those workers' lives.

A. *Child Care Costs*

One category of economic losses not covered by General Counsel Abruzzo's memoranda is economic losses from new child care costs resulting from an unlawful discharge or demotion. In a January 2023 report issued by the Department of Labor, the Women's Bureau found that child care consumed a significant amount of median family income across all care types, age groups, and local population sizes.⁹⁷ Specifically, the report found that child care is unaffordable in almost every county across the United States, with single parents and those below the poverty line most significantly impacted.⁹⁸ Child care costs outpaced inflation during the pandemic.⁹⁹ At minimum, families are putting eight percent of their income toward child care costs.¹⁰⁰ On the higher end, child care expenses account for thirty-five percent of low-income families' earnings,¹⁰¹ with the cost expected to continue to increase each year.¹⁰²

96. See GC 21-07, *supra* note 46; Thryv, Inc., 372 N.L.R.B. No. 22, slip op. at 6 (Dec. 13, 2022).

97. See Liana C. Landivar, Nikki L. Graf & Giorleny Altamirano Rayo, *Issue Brief: Childcare Prices in Local Areas*, U.S. DEP'T OF LAB. 2 (Jan. 2023), https://www.dol.gov/sites/dolgov/files/WB/NDCP/WB_IssueBrief-NDCP-final.pdf.

98. *Id.* at 3, 8; Juliana Kaplan, Jason Lalljee & Madison Hoff, *Childcare is Unaffordable Almost Everywhere Across the Country—and Where It's Even Pricier, Fewer Women are Employed*, BUSINESS INSIDER (Jan. 30, 2023, 10:13 AM), <https://www.businessinsider.com/childcare-is-unaffordable-almost-everywhere-in-america-2023-1>.

99. See *Price of Care: 2021 Child Care Affordability Analysis*, CHILD CARE AWARE OF AMERICA, <https://info.childcareaware.org/hubfs/Child%20Care%20Affordability%20Analysis%202021.pdf> (last visited Nov. 11, 2023) (illustrating the average annual prices, and affordability, of child care in every state in 2021); *Catalyzing Growth: Using Data to Change Child Care*, CHILD CARE AWARE OF AMERICA, <https://www.childcareaware.org/catalyzing-growth-using-data-to-change-child-care/#ChildCareAffordability> (last visited Nov. 11, 2023).

100. Landivar, Graf & Rayo, *supra* note 97, at 6.

101. See Rasheed Malik, *Working Families Are Spending Big Money on Child Care*, CTR FOR AM. PROGRESS (June 20, 2019), <https://www.americanprogress.org/article/working-families-spending-big-money-child-care/>.

102. Kaplan, Lalljee & Hoff, *supra* note 98.

Consider the story of displaced steelworker Shannon Mulcahy.¹⁰³ Shannon was a second-shift worker at the now-closed Rexnord Corporation steel factory in Indiana.¹⁰⁴ Like most Americans, her responsibilities did not end when she arrived home after a day's work at the factory.¹⁰⁵ Shannon is a single mother of two, and her son, Kent, depended on her to help support his disabled four-year-old daughter, Carmella.¹⁰⁶ When the factory closed, Shannon had to look for work, and this search included traveling to attend job fairs, participating in trainings, and conducting general networking.¹⁰⁷ For a worker in Shannon's position, this situation would pose a problem: who is going to care for Carmella now that Shannon is forced to look for work during those hours to keep a roof over her family's collective head? Unless a family member or friend is willing and able to provide such support—which is not always readily available in working-class communities—Shannon will likely have to pay to ensure her granddaughter receives the care that she would normally provide had she not lost her job.

Crucially, losing one's job often disrupts a worker's career path in lasting and predicable ways.¹⁰⁸ Laid-off workers, particularly low-wage workers, generally experience long stretches of unemployment,¹⁰⁹ and evidence shows that periods of unemployment make workers less employable.¹¹⁰ Job loss also produces significant and sustaining losses in earnings.¹¹¹ Where displaced workers find new jobs, they will on average earn seventeen percent less than they would have had they not lost their previous job.¹¹² Most discouraging is evidence demonstrating that earnings losses of laid-off workers persists for as long as twenty years.¹¹³ Considering this evidence, the average displaced worker will spend more time unemployed, earning less than with their

103. See Farah Stockman, *Becoming a Steelworker Liberated Her. Then Her Job Moved to Mexico*, N.Y. TIMES (Oct. 14, 2017), <https://www.nytimes.com/2017/10/14/us/union-jobs-mexico-rexnord.html>.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. See Cristobal Young, *Losing a Job: The Nonpecuniary Cost of Unemployment in the United States*, 91 SOC. FORCES 609, 614 (2012); Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity Among the Working Poor*, 63 SOC. PROBS. 46, 47 (2016).

109. See Desmond & Gershenson, *supra* note 108; Robert Gibbons & Lawrence Katz, *Layoffs and Lemons*, 9 J. LAB. ECON. 351, 375–78 (1991).

110. See Young, *supra* note 108.

111. See Desmond & Gershenson, *supra* note 108.

112. Henry S. Farber, *What Do We Know About Job Loss in the United States? Evidence from the Displaced Workers Survey, 1984–2004*, ECON. PERSPS., May 2005, at 25.

113. Desmond & Gershenson, *supra* note 108.

previous position, and will spend the next decade or two trying to catch back up to their pre-displacement earnings.¹¹⁴ Therefore, when a worker is unlawfully terminated, they will need to spend more time searching for work, and will ultimately need to take on more hours or additional jobs to cover what they lost from their displacement and maintain their family's quality of life. In this standard scenario, someone like Shannon would need to take on additional costs to cover Carmella's care, as the time she had previously budgeted to spend providing that care is now spent working additional hours that she would not have needed to take on but for her displacement.

B. Student Loan Penalties

While General Counsel Abruzzo's memoranda included economic damages resulting from loss of home or car due to loan nonpayment,¹¹⁵ another category of economic losses not covered by the memoranda are penalties for nonpayment of student loans. Where an employee is unlawfully discharged or demoted, their ability to make payments on their student loans will likely be negatively impacted, and any default on such loans will result in substantial penalties to the borrower.¹¹⁶

In the short-term, where a student loan borrower fails to make their monthly payments, the borrower can be saddled with late fees, have their tax refund withheld, or even have their wages garnished.¹¹⁷ The long-term consequences of nonpayment include default where the entire balance immediately comes due, loss of eligibility for future aid, a drop in credit score, and potential lawsuits.¹¹⁸ General Counsel Abruzzo's memoranda cover both damages to credit rating and legal expenses, protecting student loan borrowers from the latter two long-term consequences.¹¹⁹ However, the current guidance leaves a hole in its protection of unlawfully discharged or demoted workers who are hit with late fees, withheld tax returns, or wage garnishments as a result of their inability to make monthly payments.¹²⁰ Perhaps General Counsel Abruzzo omitted such consequential damages because at the time of her issuing the memoranda student loan payments

114. *Id.*

115. *See* GC 21-06, *supra* note 45, at 1; GC 21-07, *supra* note 46.

116. *Student Loan Delinquency and Default*, FED. STUDENT AID, <https://studentaid.gov/manage-loans/default> (last visited Nov. 11, 2023).

117. Dori Zinn, *What Happens if You Never Pay Your Student Loans?*, BANKRATE (Sept. 14, 2022), <https://www.bankrate.com/loans/student-loans/never-pay-student-loans/>.

118. *Id.*

119. *See* GC 21-07, *supra* note 46, at 2, 4. *See generally* GC 21-06, *supra* note 45.

120. *See generally* GC 21-07, *supra* note 46 (lacking mention of protection measures for student loan borrowers).

were paused across the country, but the pause has since lifted following the Supreme Court's decision in *Biden v. Nebraska*.¹²¹

Take the experience of Rick Tallini,¹²² for instance. Rick has a current outstanding student loan balance of \$350,000, which he feels he has no hope of ever recovering from.¹²³ After finishing law school, Rick was unable to land a higher-paying legal job and was laid off from the day job that got him through law school.¹²⁴ He applied for forbearance and deferments but was unsuccessful.¹²⁵ Although he went through Chapters 13 and 7 bankruptcy after going through a messy divorce and losing his law license due to his inability to make child support payments and entered into several income-based repayment (IBR) student loan repayment plans, his student loan debt obligation ballooned to \$350,000.¹²⁶ While there are certainly other factors that played a role in producing that remarkable sum of debt, the snowball effect began when he was laid off, and Rick's inescapable debt cycle thus took off.¹²⁷ Had Rick not been discharged from the job he was relying on to make his early student loan repayments, it is likely that his initial \$60,000 debt obligation would pale in comparison to his ultimate \$350,000 obligation.¹²⁸ Although it is difficult to calculate what portion of Rick's \$350,000 obligation was the direct result of his job displacement, an attempt at such a calculation is essential to ensure that the Board's remedies truly make aggrieved workers saddled with snowballing student loan debt truly whole.

C. *Side or Second Jobs*

In 2022, according to the Bureau of Labor Statistics (BLS), over 400,000 Americans worked two full-time jobs and over 7.7 million workers held two or more job positions.¹²⁹ Roughly forty-four percent of Americans work a

121. *COVID-19 Emergency Relief and Federal Student Aid*, FED. STUDENT AID, <https://studentaid.gov/announcements-events/covid-19> (last visited Nov. 11, 2023). See generally *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

122. Brian O'Connell, *Night of the Living Debt: Five Real Life Student Loan Horror Stories*, SAVING FOR COLLEGE (Mar. 4, 2021), <https://www.savingforcollege.com/article/night-of-the-living-debt-five-real-life-student-loan-horror-stories>.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. Michael Sainato, *'I'm Selling My Blood': Millions in US Can't Make Ends Meet with Two Jobs*, THE GUARDIAN (Nov. 5, 2022, 5:00 AM), <https://www.theguardian.com/us-news/2022/nov/05/multiple-jobs-census-data-inflation-us>.

side hustle to make ends meet,¹³⁰ and an increasing number of Americans are working part-time jobs.¹³¹ Millions of Americans rely on the income generated from second or side jobs, and where a union worker is unlawfully discharged or demoted, their ability to generate income from these alternate avenues may be damaged.

For instance, a union worker who is unlawfully demoted to a different shift may be unable to make their shift at their second job, resulting in additional loss of income. Similarly, an individual working on the side as an Uber driver who loses their full-time job may be unable to make their car payments and lose their car, thus rendering them unable to produce income from their side job of which they now entirely rely due to their job displacement.¹³²

Consider the story of Pam and Ned in Matthew Desmond's nonfiction, Pulitzer-Prize-winning *Evicted: Poverty and Profit in the American City*.¹³³ Pam and Ned were victims of entrenched cyclical poverty in Milwaukee; Ned worked as a construction worker and Pam got a job at a commercial printing plant forty minutes from home.¹³⁴ Although they were initially able to make ends meet under this arrangement, once winter came around, Ned's job shut down for the colder months, disabling Ned and Pam's ability to afford necessary repairs to the car Pam relied on to get to and from work.¹³⁵ As a result, Pam lost her job at the printing plant.¹³⁶ This scenario applies equally to a single individual working two jobs as it does to a couple with their own respective jobs, and it illustrates how one job displacement can lead to the loss of a second or side job.

D. Loss of Utilities

Although General Counsel Abruzzo's memoranda cover the loss of home

130. Carmen Reinicke, *44% of Americans Work a Side Hustle to Make Ends Meet—But It May Not Be an Efficient Way to Earn More, Says Expert*, CNBC (June 27, 2022, 2:06 PM), <https://www.cnbc.com/2022/06/27/44percent-of-americans-work-a-side-hustle-to-make-ends-meet.html>.

131. *Economic News Release: The Employment Situation — June 2023*, U.S. BUREAU OF LAB. STAT. (July 7, 2023, 8:30 AM), https://www.bls.gov/news.release/archives/empisit_07072023.htm.

132. See DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 58–60 (Batoche Books, 3d ed. 2001) (explaining that the purpose of wages is to support the laborer's family, and as the market price for labor falls the conditions for laborers diminish).

133. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 51 (Crown Publishers 2016).

134. *Id.*

135. *Id.*

136. *Id.*

or car due to loan nonpayment,¹³⁷ a union worker whose unlawful discharge or demotion leads to their loss of utilities due to nonpayment remains uncovered. Utilities like electricity, gas, water, sewer, internet, telephone, cable, security systems, and trash collection, in most cases, require monthly payments to continue service.¹³⁸ Where a worker has been unlawfully discharged or demoted, their access to such services may be disrupted due to the change in their economic circumstances.

During the COVID-19 pandemic, utility debt increased from around \$12 billion pre-pandemic to an estimated \$32 billion at the end of 2020,¹³⁹ and between the beginning of 2020 and October 2022, utility companies have disconnected U.S. households more than 5.7 million times.¹⁴⁰ Stacy Mason's household became one of those 5.7 million after she was laid off from her auto plant job in Ohio during the COVID-19 pandemic.¹⁴¹ After getting laid off, Stacy's bills began to pile up, and despite Ohio's moratorium on utility shutoffs, the gas company cut off her service.¹⁴² Stacy then had to boil water on her stove for bathing and washing dishes, and her children were forced to endure without heat.¹⁴³ Although in Stacy's case, the gas company had a duty to continue her gas service, the utility shutoff moratorium was a temporary measure in response to the pandemic, and such moratoriums are rapidly coming to an end, if they have not already ceased.¹⁴⁴

137. See GC 21-07, *supra* note 46, at 2; see also GC 21-06, *supra* note 45, at 1.

138. See generally Christopher J. Brooks, *Americans Struggle to Pay Utilities as Energy Prices Surge*, CBS NEWS (Sept. 26, 2022, 11:09 AM), <https://www.cbsnews.com/news/bank-of-america-consumer-report-energy/> (illustrating rising utility prices specific to electricity and natural gas).

139. Michael Sainato, *I Have Never Felt So Hopeless: Millions in US Fear Utility Shutoffs as Debts Rise*, THE GUARDIAN (Oct. 13, 2021, 5:00 AM), <https://www.theguardian.com/us-news/2021/oct/13/us-utility-bills-shutoffs-debt-covid-coronavirus>.

140. Selah Goodson Bell, Jean Su, Matt Kasper, Shelby Green & Christopher Kuveke, *Powerless in the United States: How Utilities Drive Shutoffs and Energy Injustice*, CTR. FOR BIOLOGICAL DIVERSITY 4 (2023), https://www.biologicaldiversity.org/programs/energy-justice/pdfs/Powerless-in-the-US-2023_ExecutiveSummary.pdf.

141. Peter O'Dowd & Allison Hagan, *You Could Lose Everything In The Blink Of An Eye: Utility Shutoffs Resume For Overdue Bills*, WBUR (Aug. 24, 2020, 9:39 AM), <https://www.wbur.org/hereandnow/2020/08/24/utility-shutoffs-protections-end>.

142. *Id.*

143. *Id.*

144. See, e.g., Brenda Flanagan, *Nj Moratorium on Utility Shut-Offs Ends This Week*, NJ SPOTLIGHT NEWS (Mar. 13, 2023), <https://www.njspotlightnews.org/video/nj-moratorium-on-utility-shut-offs-ends-this-week/>; Joshua Irvine, *What You Need to Know as Utility Shutoff Moratorium Ends in Iowa, Illinois*, TEL. HERALD (Apr. 5, 2023), <https://www.telegraphherald.com>.

Stacy's story demonstrates it is easy to see how an unlawful discharge can lead to one's utilities being shut off due to the inability to make payments.¹⁴⁵ This type of economic loss is clearly foreseeable, as every American relies on basic utilities to survive.¹⁴⁶

III. RECOMMENDATIONS

To truly and faithfully bring the NLRB's remedy practice closer to effectuating the policies of the Act, General Counsel Abruzzo should enumerate several additional categories of direct and foreseeable pecuniary losses to be considered and leverage the Board's broad adjudicative authority to bring such cases before the Board to establish lasting precedent. The NLRB is authorized to carry out the policies of the NLRA through two primary avenues: Section 6 rulemaking¹⁴⁷ and Section 10(c) adjudication.¹⁴⁸ Section 10(c) of the NLRA authorizes the Board to direct the perpetrators of unfair labor practices to "take such affirmative action . . . as will effectuate the policies of [the Act]."¹⁴⁹ Although Section 6 of the NLRA authorizes the Board "from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of [the Act],"¹⁵⁰ the Board has, throughout its history and unlike any other major federal agency, relied nearly exclusively on its adjudicative authority.¹⁵¹

com/news/article_6fa72f10-d251-11ed-82b1-7befaa806868.html; Joe Schulz, *Wisconsin Utilities Urge Customers to Make a Plan for the End of the Shut Off Moratorium April 15*, WIS. PUB. RADIO (Apr. 4, 2023, 5:55 AM), <https://www.wpr.org/wisconsin-utilities-customers-plan-end-disconnection-moratorium-april-15>.

145. See O'Dowd & Hagan, *supra* note 141.

146. See, e.g., Matthew Haag, *New Jersey Woman on Oxygen Dies After Electric Company Shuts Off Her Power*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/nyregion/woman-dies-oxygen-tank-electricity.html>.

147. 29 U.S.C. § 156 (2018).

148. 29 U.S.C. § 160(c) (2018); see *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

149. 29 U.S.C. § 160(c) (2018).

150. 29 U.S.C. § 156 (2018).

151. See *National Labor Relations Board Rulemaking Archive*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/what-we-do/national-labor-relations-board-rulemaking-archive> (last visited Nov. 11, 2023). See generally Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN L. REV. 163 (1985) (arguing that the Board should focus on rulemaking for a more consistent approach to labor decisions); Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469 (2015) (noting the Board's reluctance toward its rulemaking authority); Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387 (1995)

Many scholars have convincingly argued that the Board should rely much more heavily on its rulemaking authority.¹⁵² However, concerns with respect to notice-and-comment rulemaking include a long and laborious administrative process, the likelihood of judicial intervention and overruling, highly charged politics, and ossification.¹⁵³ In a case, as here, where the Board has already adjudicated a quasi-legislative rule that serves to substantially improve the Board's ability to provide remedies,¹⁵⁴ the most efficient route to establishing and building upon this rule is for the General Counsel to bring cases involving direct and foreseeable pecuniary harms before the Board to establish a strong and comprehensive precedent moving forward.¹⁵⁵

Although the "bog of logomachy" articulated by Justice Frankfurter¹⁵⁶ continues to knee-cap the Board's ability to effectuate the policies of the Act, Michael Weiner correctly argues that any substantial change to this legal framework would require a reversal by the courts or action by Congress.¹⁵⁷ Presently, it would be naive to expect either the 6-3 conservative supermajority Court or the famously non-labor friendly Congress to take any action in this respect.¹⁵⁸ Therefore, the most effective avenue for strengthening the Board's ability to effectuate the policies of the Act through appropriate remedies is through the Board's adjudicative authority itself,¹⁵⁹

(stating how the Board establishes most of its policies through adjudication rather than rulemaking).

152. See generally Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems With its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013 (2009) (explaining how scholars have criticized the Board's inconsistent use of its rulemaking power); Emily Bayer, Comment, *Setting Labor Policy Prospectively: Rulemaking, Adjudicating, and What the NLRB Can Learn From the NMB's Representation Election Procedure Rule*, 63 ADMIN. L. REV. 853 (2011) (noting scholars' criticism of the Board's reliance on adjudication and its impact on public perception of political bias); Estreicher, *supra* note 151; Garden, *supra* note 151; Flynn, *supra* note 151.

153. Bayer, *supra* note 151, at 859–65.

154. See *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 14 (Dec. 13, 2022).

155. See Estreicher, *supra* note 151, at 177.

156. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953).

157. See Weiner, *supra* note 31, at 1625.

158. See, e.g., *id.*; Nina Totenberg, *The Supreme Court is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), <https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative>; Sam Becker, *Anti-Union Bills Bubble Up in Congress, Despite Growing Voter Support for Organized Labor*, FAST COMPANY (Aug. 2, 2022), <https://www.fastcompany.com/90775158/anti-union-bills-bubble-up-in-congress-despite-growing-voter-support-for-organized-labor>.

159. 29 U.S.C. §§ 151–169.

which the Court has given “wide discretion.”¹⁶⁰

A. *Guidance Documents*

General Counsel Abruzzo has recently found a considerable degree of success in her issuance of memoranda calling on the Board and its Regions to consider consequential damages in its traditional make-whole remedy.¹⁶¹ While the categories expressed by the General Counsel in those memoranda certainly allow the Board to more effectively effectuate the policies of the Act, these categories still contain gaps that leave countless aggrieved workers uncompensated for economic losses that are directly and foreseeably related to their unlawful discharge or demotion.¹⁶² Given the nearly immediate positive effect of General Counsel Abruzzo’s memoranda in effectuating the crucial decision in *Thryv*,¹⁶³ she should aggressively continue this practice in providing guidance to the Board to define what categories of economic losses can be reasonably described as the direct and foreseeable result of the employer’s unfair labor practice.

The General Counsel’s recent success in effectuating change in this way is clear. General Counsel Abruzzo should continue her essential work in protecting workers’ rights under the NLRA by issuing guidance for the Board to include in its traditional make-whole remedy remedies for economic losses from (1) new child care costs resulting from their unlawful discharge or demotion; (2) penalties for nonpayment of student loans; (3) losses to previously establish side- or second jobs; and (4) loss of utilities due to nonpayment.

B. *Adjudication*

In addition to issuing comprehensive guidance documents on the issue of remedies for economic losses, General Counsel Abruzzo should also seek to bring cases before the Board where aggrieved workers have suffered pecuniary harms as a result of an employer’s unfair labor practice, particularly cases that test new categories of economic losses not previously enumerated or considered by the Board—such as those enumerated in this Comment¹⁶⁴—in order to establish a strong precedent.

Similarly, the members of the Board and its Regions should seek to apply

160. *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *NLRB v. J.H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 262–63 (1969).

161. *See* GC 21-07, *supra* note 46, at 1; *Thryv, Inc.*, 372 N.L.R.B. No. 22 (Dec. 13, 2022).

162. *See* discussion, *supra* Part Existing Gaps in Protection

163. *See* GC 21-07, *supra* note 46, at 1; *Thryv, Inc.*, 372 N.L.R.B. No. 22 (Dec. 13, 2022).

164. *See* discussion *supra* Part Existing Gaps in Protection

the Board's decision in *Thryv* as liberally as possible in subsequent cases.¹⁶⁵ Before *Thryv*, the Board was hamstrung to an archaic and illiterate reading of the word "punitive."¹⁶⁶ Now that the Board has stated in no uncertain terms that all direct and foreseeable pecuniary harms suffered as a result of an employer's unfair labor practice be included in its traditional make-whole remedy, it has clarified that making one "whole" after being subject to an unlawful discharge or demotion cannot in any logical sense be considered "punitive,"¹⁶⁷ as it instead merely restores the *status quo ante* that the Act seeks to provide.¹⁶⁸

Because the NLRA's express "purpose is encouraging and protecting the collective-bargaining process,"¹⁶⁹ the consideration of additional categories of covered economic losses should center on whether, if not consistently compensated for, such losses would undermine the purpose of the Act by substantially and negatively affecting union activities, supplementing the extra-statutory "direct and foreseeable" analysis.¹⁷⁰ Where workers are not confident that the Act will properly protect their engagement in union activities, the express goal of "encouraging and protecting the collective-bargaining process"¹⁷¹ is undermined, and the Act is, in many instances, rendered a material nullity. Of course, such pecuniary losses must still be the direct and foreseeable result of the employer's unfair labor practice,¹⁷² but by first seeking to identify economic losses that, if not remedied, would undermine the bargaining process and the Act, the Board will have a greater ability to identify such economic harms and develop case law around their inclusion in the traditional make-whole remedy.

When considering appropriate remedies for an aggrieved worker, the Board should grant such remedies not only for the enumerated categories in General Counsel Abruzzo's memoranda, but also for economic losses from (1) new child care costs resulting from their unlawful discharge or demotion; (2) penalties for nonpayment of student loans; (3) losses to previously establish side- or second jobs; and (4) loss of utilities due to nonpayment. Each of these categories of economic losses have not yet been articulated by the General

165. See generally *Thryv, Inc.*, 372 N.L.R.B. No. 22 (Dec. 13, 2022).

166. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10–12 (1940). See generally *Weiner*, *supra* note 31.

167. *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 11 (Dec. 13, 2022).

168. See *Voorhees Care & Rehab. Ctr.*, 371 N.L.R.B. No. 22, slip op. at 3 (Aug. 25, 2021).

169. *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

170. See *Weiner*, *supra* note 31, at 1619–24 (arguing that deterrence should be understood as the primary purpose of § 10(c) of the National Labor Relations Act (NLRA or the Act)).

171. *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

172. *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 1, 11 (Dec. 13, 2022).

Counsel or the Board, and they are all often directly and foreseeably related to an unlawful discharge or demotion due to their standard and essential nature.¹⁷³ If the Board does not consistently compensate aggrieved workers for these losses in addition to the economic losses the General Counsel has already articulated, workers nationwide will reasonably fear reprisal to such an extent that the collective-bargaining process will be undermined, and the policies of the Act will be rendered a nullity in many circumstances.¹⁷⁴

C. *Foreseeability*

To effectuate these changes and the policies of the Act, General Counsel Abruzzo and the Board should explicitly define and broaden the concept of foreseeability with respect to these pecuniary harms. The Board has noted that “[w]here the Board has found that its remedial structure fails to fulfill its make-whole objective, [it] has revised and updated its remedial policies . . . to ensure that victims of unlawful conduct are actually made whole.”¹⁷⁵ Similarly, the Court has stated that “[t]he Board has broad discretion to adapt its remedies to the needs of particular situations” to ensure that the victims of discrimination are treated fairly.¹⁷⁶

Although the Board substantially expanded its application of remedies for pecuniary harms, it remains true that such harms must be “direct or foreseeable.”¹⁷⁷ In order to effectuate the policies of the Act and ensure that aggrieved workers are truly made whole, the Board should make clear that such a determination is a low bar to pass.¹⁷⁸ It is true that an employer may not be personally aware of a given employee’s life situation that, when combined with their unlawful discharge, would give rise to these pecuniary harms. However, an employer need not be specifically aware of such circumstances for an employee’s direct pecuniary harms to be foreseeable.

In *Thryv*, the Board stated that “[aggrieved workers] may be forced to incur significant financial costs, such as out-of-pocket medical expenses, credit card debt, and other costs,” and held such harms to be direct and foreseeable.¹⁷⁹

173. See *infra* Part III.C

174. See *Weiner*, *supra* note 31, at 1619–24 (explaining that the NLRA cannot achieve its aim of protecting the collective-bargaining process where the Board cannot premise its order on a deterrence rationale).

175. *King Soopers, Inc.*, 364 N.L.R.B. No. 93, slip op. at 4 (Aug. 24, 2016) (quoting *Don Chavas, L.L.C.*, 361 N.L.R.B. No. 10, slip op. at 2–3 (Aug. 8, 2014)).

176. *Local 60, United Bhd. of Carpenters & Joiners of Am. v. NLRB*, 365 U.S. 651, 655 (1961).

177. *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 1, 6, 15 (Dec. 13, 2022).

178. See *id.* at 15.

179. *Id.* at 9–10 (emphasis added).

Employers are not generally made aware of an employee's medical history or conditions, and similarly would not ordinarily know whether an employee has a credit card or not. Despite this, the Board held that such pecuniary harms are direct and foreseeable, and thus covered by the Board's make-whole remedy.¹⁸⁰ Likewise, an employer would not ordinarily be personally aware of an employee's childcare situation, whether they have student loans, second jobs, or side jobs or are personally responsible for paying the utilities in their home or apartment.

However, such harms are directly and foreseeably related to an unlawful discharge under *Thryv*'s reasoning because they are foreseeable consequences of losing one's job generally,¹⁸¹ and such consequences are understood by all who operate within a market economy, whether they be workers or management.¹⁸² In the modern reality of persistent wage stagnation,¹⁸³ increasing cost-of-living,¹⁸⁴ ballooning student debt,¹⁸⁵ rising child care costs,¹⁸⁶ popular reliance on multiple streams of income,¹⁸⁷ and frequent

180. *Id.*

181. *Id.*

182. *See generally* MARK FISHER, *CAPITALIST REALISM: IS THERE NO ALTERNATIVE?* (Zero Books 2009) (explaining that market capitalism is so ingrained in the global psyche that "it is easier to imagine the end of the world than it is to imagine the end of capitalism").

183. *See, e.g.,* *Economic News Release: Real Earnings Summary*, U.S. BUREAU OF LAB. STAT. (Apr. 12, 2023, 8:30 AM), <https://www.bls.gov/news.release/realer.nr0.htm>; Mishel, Gould & Bivens, *supra* note 6.

184. *See, e.g.,* Issue Brief, The White House, *The Cost of Living in America: Helping Families Move Ahead* (Aug. 11, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/08/11/the-cost-of-living-in-america-helping-families-move-ahead/>; McConnell, *supra* note 7.

185. *See, e.g.,* Melanie Hanson, *Student Loan Debt Statistics*, EDUC. DATA INITIATIVE <https://educationdata.org/student-loan-debt-statistics> (Aug. 20, 2023); Alicia Hahn, *2023 Student Loan Debt Statistics: Average Student Loan Debt*, FORBES <https://www.forbes.com/advisor/student-loans/average-student-loan-statistics/> (July 16, 2023, 5:43 PM).

186. *See, e.g.,* Ella Ceron, *Most Parents Spend Over 20% of Their Income on Child Care*, BLOOMBERG (June 17, 2022, 11:51 AM), <https://www.bloomberg.com/news/articles/2022-06-15/average-childcare-costs-increase-with-most-parents-spending-20-of-income?>; Terry Gross, *As Child Care Costs Soar, Providers Are Barely Getting By. Is There Any Fix?*, NPR (Dec. 16, 2021), <https://www.npr.org/2021/12/16/1064794349/child-care-costs-biden-plan>.

187. *See, e.g.,* Megan Cerullo, *More American Workers Are Taking on Second Jobs as Inflation Rages*, CBS NEWS (July 21, 2022, 11:43 AM), <https://www.cbsnews.com/news/inflation-american-workers-are-taking-on-second-jobs/>; Brian O'Connell, *Night of the Living Debt: Five Real Life Student Loan Horror Stories*, SAVING FOR COLLEGE (Mar. 4, 2021), <https://www.savingforcollege.com/article/night-of-the-living-debt-five-real-life-student-loan-horror-stories>; Reinicke, *supra* note 130.

utility shutoffs,¹⁸⁸ the foreseeable consequences of job displacement for any working-class person includes the categories of economic losses recommended in this Comment and likely more. Knowing these realities, increased child care costs, student loan penalties, negatively affected second or side-jobs, and utility shutoffs resulting from an unlawful discharge or demotion would surprise only the most naive, or ignorant, employer.

By unequivocally stating that it will include *all* direct and foreseeable pecuniary harms suffered because of an employer's unfair labor practice be included in its traditional make-whole remedy,¹⁸⁹ the Board has entered a new era of more robust protections for aggrieved workers. Following the spirit of the *Thryv* decision, the Board should continue to aggressively and unapologetically seek new and creative ways of effectuating the policies of the Act that have been so drastically undermined by previous Court decisions and politics.¹⁹⁰ Although the additional categories enumerated in this Comment will go a long way toward truly making aggrieved workers "whole," the Board should continue to boldly identify areas that remain uncovered by Board decisions and should continue to seek comment from interested parties—particularly workers themselves—into the sometimes nonobvious economic harms that are inflicted by unlawful discharges or demotions. As technology continues to alter our way of life,¹⁹¹ wealth continues to be concentrated in the hands of the few,¹⁹² wages remain

188. See, e.g., Tom Perkins, *US Utilities Shut Off Power to Millions Amid Record Corporate Profits*, THE GUARDIAN (Jan. 30, 2023, 0:01 AM), <https://www.theguardian.com/us-news/2023/jan/29/us-utilities-shut-off-power-to-millions-amid-record-profits>; Will Wade & Mark Chediak, *A 'Tsunami of Shutoffs': 20 Million US Homes Are Behind on Energy Bills*, BLOOMBERG (Aug. 23, 2022, 8:05 PM), <https://www.bloomberg.com/news/articles/2022-08-23/can-t-pay-utility-bills-20-million-us-homes-behind-on-payments-facing-shutoffs?>

189. *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 1 (Dec. 13, 2022).

190. See generally *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940) (creating the "punitive" prohibition); *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (ruling that union security agreements in the public sector violate the First Amendment); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149–51 (2002) (denying backpay awards to undocumented immigrant workers); Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141–197 (restricting the activities and power of labor unions).

191. See, e.g., Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254, 325–26 (2018) ("Through fissuring and automation, firms are increasingly finding ways to escape their end of the socially constructed deal embodied in the standard employment relationship.").

192. See Sanders, *supra* note 5.

stagnant and cost-of-living continues to rise,¹⁹³ and employers continue to find new ways to exploit the labor their employees provide,¹⁹⁴ the Board should likewise use its adjudicative authority to evolve its caselaw and application of the Act to the times. Such action would work to truly effectuate the policies of the Act and help bring working Americans closer to the “American Dream.”

CONCLUSION

The NLRA empowers the Board to direct wrongdoers to “take such affirmative action . . . as will effectuate the policies of [the Act].”¹⁹⁵ The Board is given “wide discretion” to determine the remedies that most appropriately effectuate the purpose of the Act, and the Board—not the courts—has the power to choose the means best suited to accomplish that end.¹⁹⁶ However, the courts have greatly limited the Board’s discretion to grant remedies that effectuate the policies of the Act, namely, by declaring that NLRA remedies may not be “punitive,” and instead must be “remedial,”¹⁹⁷ what Justice Frankfurter coined “the bog of logomachy.”¹⁹⁸ The Board has since devised a way to both work within the bog of logomachy created by the *Republic Steel* Court and provide appropriate remedies “for all direct or foreseeable pecuniary harms suffered as a result of the [employer]’s unfair labor practice.”¹⁹⁹ However, the Board has not yet had the opportunity to develop comprehensive caselaw around the *Thryv* decision and the categories enumerated by the Board and General Counsel Abruzzo still contain holes that leave countless aggrieved workers uncompensated for

193. See, e.g., *Economic News Release: Real Earnings Summary*, U.S. BUREAU OF LAB. STAT. (Apr. 12, 2023, 8:30 AM), <https://www.bls.gov/news.release/realer.nr0.htm>; Mishel, *supra* note 6; Issue Brief, The White House, *The Cost of Living in America: Helping Families Move Ahead* (Aug. 11, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/08/11/the-cost-of-living-in-america-helping-families-move-ahead/>; McConnell, *supra* note 7.

194. See, e.g., Jennifer Sherer & Nina Mast, *Child Labor Laws Are Under Attack in States Across the Country*, ECON. POLY INST. (Mar. 14, 2023), <https://www.epi.org/publication/child-labor-laws-under-attack/>; Boone Ashworth, *Amazon Watches Its Workers and Waits for Them to Fail*, WIRED (June 4, 2022, 9:00 AM), <https://www.wired.com/story/amazon-worker-tracking-details-revealed/>.

195. 29 U.S.C. § 160(c) (2018); *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969) (quoting *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964)).

196. *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943) (first quoting *Int’l Assn. of Machinists v. NLRB*, 311 U.S. 72, 82 (1940); then quoting *NLRB v. Link-Belt Co.*, 311 U.S. 584, 600 (1941)).

197. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940).

198. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953).

199. *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 6 (Dec. 13, 2022).

these direct and foreseeable pecuniary harms.²⁰⁰ The problem is not that the current Board and General Counsel Abruzzo have failed to properly effectuate the policies of the Act through appropriate remedies—they have made several substantial and praiseworthy steps.²⁰¹ The problem is instead that the Board’s prior caselaw, historical practice of illiterate adherence to *Republic Steel*, and prior unwillingness to find creative methods of affording appropriate remedies²⁰² have failed countless aggrieved workers, and the labor movement as a whole, by leaving them with a profound fear of reprisal and intense loathing toward their working reality.²⁰³

By General Counsel Abruzzo first issuing guidance for the Board to include remedies for economic losses from new child care costs resulting from their unlawful discharge or demotion, penalties for nonpayment of student loans, losses to previously established side- or second jobs, and loss of utilities due to nonpayment, she will build on the successes of her prior memoranda leading to the crucial *Thryv* decision.²⁰⁴ By then bringing cases with aggrieved workers who have suffered new and unique pecuniary harms resulting from an employer’s unfair labor practice not yet considered under the new *Thryv* decision, she will put the Board in the position to establish a lasting and comprehensive precedent for these newly covered economic losses. By the Board making a conscious and aggressive effort to then extend the application of the *Thryv* decision to as many categories of economic losses that must be consistently covered in order to properly protect the collective-bargaining process, not only will the Board move itself closer to a true and faithful effectuation of the policies of the Act, it will help to usher in a new era of labor protection that is more responsive to the realities of the modern day and more conducive to the American Dream.

200. See GC 21-07, *supra* note 46.

201. See GC 21-07, *supra* note 46; *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 6, 9, 11, 13 (Dec. 13, 2022).

202. See generally *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940) (creating the “punitive” prohibition); Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141–197 (restricting the activities and power of labor unions); *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (ruling that union security agreements in the public sector violate the First Amendment); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (denying backpay awards to undocumented immigrant workers).

203. See discussions *supra* Parts I & II.

204. See GC 21-06, *supra* note 45; GC 21-07, *supra* note 46; *Thryv, Inc.*, 372 N.L.R.B. No. 22, slip op. at 9, 18 (Dec. 13, 2022).