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STIFLING NASCENT CONCERTED ACTIVITY: THE NLRB AND THE *ALSTATE* DECISION

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INTRODUCTION

The National Labor Relations Board (NLRB) made a number of significant changes to the interpretation and enforcement of the National Labor Relations Act (NLRA or the Act) under the Trump administration. The collective impact of these changes may make it more difficult for workers to bring successful unfair labor practice charges against their employers. Although NLRB case decisions and rulemaking affect a large proportion of American workers, the significance of these policy changes is often not widely recognized.¹ This Note will examine one such change—the Board’s 2019 *Alstate Maintenance* decision that overturned its 2011 decision in *WorldMark by Wyndham*.²

Alstate Maintenance revisited the issue of what constitutes protected concerted activities.³ Under Section 7 of the NLRA, employees

1. See, e.g., Jennifer Holly, *Employee Email and Social Media: What Is Protected Concerted Activity under the Law?*, A.B.A. (Dec. 3, 2018), <https://www.americanbar.org/groups/litigation/committees/employment-labor-relations/articles/2018/fall2018-employee-email-and-social-media-what-is-protected-concerted-activity-under-the-law> [<https://perma.cc/T6JU-NPK3>] (discussing lack of recognition of the coverage of nonunion employers under the NLRA).

2. *Alstate Maintenance, LLC and Trevor Greenridge*, 367 N.L.R.B. No. 68, 1 (2019); *WorldMark by Wyndham and Gerald Foley*, 356 N.L.R.B. 765, 765 (2011).

3. *Alstate Maintenance*, 367 N.L.R.B. at 1.

are protected from unfair labor practices when they engage in protected concerted activity: “Employees shall have the right to self-organiz[e], to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁴

Protected concerted activity includes discussion of wages or any other term or condition of employment between two or more employees; when an individual employee raises concerns about terms or conditions of employment on behalf of other employees; and when an individual employee seeks to “initiate or [] induce” group action on the part of other employees.⁵ Both employees who are members of a union and employees who are not members of a union, including at nonunionized workplaces, are covered under the Act.⁶ As the rate of union membership has dramatically declined, from 20.1 percent in 1983 to 10.5 percent in 2018,⁷ and thus the percentage of employees who can rely on the terms of employment and protections found within collective bargaining agreements decreases, the protections of the NLRA for employees in nonunionized workplaces remains vital.⁸

The boundaries of what constitutes “concerted activity” have changed over time, and in 2011 the NLRB in *WorldMark by Wyndham* expanded the notion of “concerted” to encompass when an employee raises concerns about working conditions in a group setting, even if the employee is not raising concerns on behalf of two or more employees.⁹ In 2019 the Board overturned *WorldMark* in *Alstate*, in which

4. 29 U.S.C. § 157.

5. *Meyers Industries, Inc. and Kenneth P. Prill*, 281 N.L.R.B. 882, 887 (1986).

6. See Brian Christensen & David Knight, *Section 7 and the Non-union Employer*, 60 J. MO. B. 312, 312 (2004). The Board has jurisdiction over private-sector employers who engage in interstate commerce. *Jurisdictional Standards*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/rights-we-protect/law/jurisdictional-standards> [https://perma.cc/7EZ3-TWCR].

7. *Union Membership Rate 10.5 percent in 2018, down from 20.1 percent in 1983*, U.S. DEPT OF LAB., BUREAU OF LAB. STATS., THE ECON. DAILY (Jan. 25, 2019), <https://www.bls.gov/opub/ted/2019/union-membership-rate-10-point-5-percent-in-2018-down-from-20-point-1-percent-in-1983.htm> [https://perma.cc/8Z9Z-J5J8]. The NLRA applies to private-sector employers and the U.S. Postal Service. In 2018, 6.4% of employees in the private sector belonged to a union. *Id.*

8. If a workplace is unionized, all employees in the bargaining unit are covered under the collective bargaining agreement. In the 27 “right to work” states, where employees are not required to join or pay dues even if their work unit is unionized, employees who do not join the union are still covered under the collective bargaining agreement negotiated between the employer and the union. *Employer/Union Rights and Obligations*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/rights-we-protect/rights/employer-union-rights-and-obligations> [https://perma.cc/2C4J-NFDL].

9. *Wyndham Resort Dev. Corp. and Gerald Foley*, 356 N.L.R.B. 765, 765 (2011) [hereinafter *WorldMark by Wyndham*].

the Board held that in order for an employee's activity to be protected, there must be evidence that the employee intends to "initiate or induce" action among others in the group.¹⁰ The Board held that a single employee raising an individual workplace complaint in a group setting is not a concerted action, and therefore that act does not enjoy protection under the NLRA.¹¹ This decision represents a significant narrowing of the definition of protected concerted activity, and as such potentially undermines the rights of workers to raise workplace concerns without fear of discipline, retaliation, or termination.

I. CURTAILING THE PROTECTIONS OF THE NLRA: OVERVIEW OF SELECTED RECENT AND PROPOSED CHANGES

In 2019, the Board issued several important decisions and announced rulemaking that rolled back employee rights, constrained unions, and situated the Board's agenda firmly within the "employer-friendly" realm.¹² Some of the most notable decisions addressed the classification of employees and independent contractors, a reversal of the public-space exception for unions, liberalizing employers' capacity to make unilateral changes to working conditions under a comprehensive bargaining agreement, and the employment status of graduate students and their ability to unionize.¹³

In the contemporary "gig economy," an increasing number of workers have taken jobs such as driving for Uber or Lyft, delivering groceries, and dog walking, wherein workers are connected to job assignments through smartphone applications and workers generally set their own hours.¹⁴ Clashes have arisen among employers, regulators, unions, and workers' advocacy groups about whether such workers should be classified as employees or independent contractors.¹⁵

10. *Alstate Maintenance*, 367 N.L.R.B. at 4.

11. *Id.*

12. See Braden Campbell, *NLRB Wraps Up Busy Summer with a Flurry of Rulings*, LAW360 (Sept. 13, 2019, 4:58 PM), <https://www.law360.com/articles/1196278/nlr-wrap-up-busy-summer-with-a-flurry-of-rulings> [https://perma.cc/2HAS-F77W].

13. *Id.*; *NLRB Proposes Rulemaking Concerning Students*, NAT'L LAB. RELS. BD. (Sept. 20, 2019), <https://www.nlr.gov/news-outreach/news-story/nlr-proposes-rulemaking-concerning-students> [https://perma.cc/42XM-WT5X].

14. See, e.g., Duncan Strauss, *Your dog is big business, and Uber-like apps want it*, WASH. POST (Sept. 27, 2017, 8:00 AM), <https://www.washingtonpost.com/news/animalia/wp/2017/09/27/your-dog-is-big-business-and-uber-like-apps-want-it> [https://perma.cc/R7HE-L2HF].

15. See, e.g., John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L.J. 1, 13 (2018) (discussing the increasing problem of employers' misclassification of employees as independent contractors); Scott M. Prange, *Managing the Workforce in the Gig Economy*, HAWAII B.J., June 2016, at 4–5 (discussing the increase

Additionally, some companies have shifted their workforce from employee to independent contractor status as a cost-saving measure to avoid paying for costs such as Social Security and unemployment insurance in addition to common benefits such as health insurance and paid vacation.¹⁶ The distinction between employee and independent contractor status is critical as most of the protections of U.S. employment law do not extend to independent contractors.¹⁷ Further, independent contractors are not covered under the NLRA and cannot unionize.¹⁸

In January 2019, the Board reverted to the traditional common-law factor test and held that airport shuttle bus drivers are independent contractors, overruling its decision to revise the test in *FedEx Home Delivery*, a 2014 case.¹⁹ An airport shuttle service converted its fleet of drivers from employees into independent contractors by adopting a franchise model.²⁰ Rejecting the reasoning of *FedEx Home Delivery*, wherein the Board “minimized the importance of entrepreneurial opportunity,” the Board affirmed the decision of the Regional Director in applying the common-law factor test.²¹ Although the Board merely affirmed the decision of the Regional Director, it took the opportunity presented by the petition for review to overturn the Obama-era Board decision.²²

The Board also sought to limit the right to unionize through its rulemaking process regarding the classification of graduate students.²³ Graduate students, who are often employed at universities in teaching and research assistant roles, have organized to form unions at private universities following the Board decision in 2016 that recognized the right of both graduate and undergraduate teaching and

of employers “shedding their roles as direct employers”); Alana Semuels, *What Happens When Gig-Economy Workers Become Employees*, THE ATLANTIC (Sept. 14, 2018), <https://www.theatlantic.com/technology/archive/2018/09/gig-economy-independent-contractors/570307> [<https://perma.cc/KHH7-QPSJ>] (discussing California’s recent legislation that will reclassify some “gig-economy” workers as employees and the divergent preferences of workers and employers).

16. Prange, *supra* note 15, at 4.

17. Seth C. Oranburg, *Unbundling Employment: Flexible Benefits for the Gig Economy*, 11 DREXEL L. REV. 1, 20 (2018).

18. *Employee Rights*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/rights-we-protect/rights/employee-rights> [<https://perma.cc/8VSB-WVLR>].

19. *SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338*, 367 N.L.R.B. No. 75, 1 (2019).

20. *Id.* at 12.

21. Gary Fealk, *Republican-led NLRB Rolling Back Previous Board Changes*, MICH. EMP. L. LETTER, July 2019, at 3.

22. *See SuperShuttle DFW, Inc.*, 367 N.L.R.B. at 1.

23. *Jurisdiction—Nonemployee Status of University and College Students Working in Connection With Their Studies*, 84 FED. REG. 184, 49691 (Sept. 23, 2019) (to be codified at 29 C.F.R. pt. 103).

research assistants to unionize.²⁴ However in September 2019, the Board published a Notice of Proposed Rulemaking that proposed rescinding that recognition.²⁵

In August 2019, in line with the Board's moves to restrict the right to seek union representation, the Board held that the misclassification of employees as independent contractors does not constitute a violation of the NLRA.²⁶ It is unlawful for an employer to interfere in an employee's Section 7 rights.²⁷ However, in a three to one decision, the Board reasoned that "[a]n employer's mere communication to its workers that they are classified as independent contractors does not expressly invoke the Act. It does not prohibit the workers from engaging in Section 7 activity. It does not threaten them with adverse consequences for doing so"²⁸ Even though misclassifying an employee as an independent contractor can interfere with an employee's ability to unionize, the Board held that only explicit threats or coercion on the part of the employer constitute unfair labor practices, while misclassification does not.²⁹

A recent Board decision demonstrated the Board majority's antagonism toward unions.³⁰ In September 2019, the Board again overruled a prior decision when it held that employers' unilateral action under collective bargaining agreements would be evaluated under a lower standard.³¹ Under the Act, an employer cannot take unilateral action to alter an aspect of their business operations that will substantively impact any element of a comprehensive bargaining agreement to which they are a party.³² The Board had previously evaluated an employer's unilateral action under a "clear and unmistakable waiver standard," meaning that the comprehensive bargaining agreement must clearly waive an issue before an employer may take unilateral action.³³ In the 2019 decision, however, the Board adopted the more lenient contract coverage standard, whereby an

24. See David Yaffe-Bellany, *Graduate Students, After Gains in Union Efforts, Face a Federal Setback*, N.Y. TIMES (Sept. 22, 2019), <https://www.nytimes.com/2019/09/20/business/economy/grad-students-labor.html> [<https://perma.cc/53XK-X6KB>].

25. Jurisdiction—Nonemployee Status of University and College Students Working in Connection With Their Studies, 84 FED. REG. 184, 49691 (Sept. 23, 2019) (to be codified at 29 C.F.R. pt. 103).

26. *Velox Express, Inc. and Jeannie Edge*, 368 N.L.R.B. No. 61, 9 (2019).

27. *Id.* at 6.

28. *Id.*

29. See Campbell, *supra* note 12.

30. *MV Transportation, Inc. and Amalgamated Transit Union Local #1637, AFL-CIO, CLC.*, 368 N.L.R.B. No. 66, 1 (2019).

31. *Id.*

32. *Id.* at 12–13.

33. *Id.* at 2–3.

employer can take unilateral action on topics that are generally “within the . . . scope of contractual language [that] grant[s] the employer the right to act unilaterally.”³⁴ Employers can now make decisions on business operations that impact issues covered in their comprehensive bargaining agreements without consulting the union even if the agreement does not specify the issue as an area on which the employer may do so.³⁵ As a result, the power of unions to negotiate with the employer about changes to business operations, in order to protect the interests of union members, is diminished.³⁶

The foregoing section discusses only a selection of the decisions that the Board under the Trump administration rendered that collectively contribute to a more “business-friendly” environment and one that diminishes the ability of workers to vindicate their rights under the NLRA. It is in this context that the Board revisited “protected concerted activity.”³⁷

II. EVOLVING STANDARDS OF “PROTECTED CONCERTED ACTIVITY”

The Board has dramatically shifted its interpretation of what constitutes protected concerted activity and the tests that it applies.³⁸ *Alleluia Cushion* was a turning point wherein the Board found that individual activity with no group action can constitute concerted activity when its purpose is to enforce statutory rights.³⁹ But nine years later, under the Reagan administration, the Board overruled *Alleluia Cushion* in the *Meyers* cases, requiring that there be evidence of some form of group action.⁴⁰ *WorldMark by Wyndham*, though not explicitly overruling *Meyers*, shifted the interpretation of protected concerted activity back to a more liberalized position.⁴¹

A. Before *Meyers*—A Broad Interpretation of Section 7

In 1975 in *Alleluia Cushion*, the Board expanded its interpretation of “concerted” when it found that an employer unlawfully terminated an employee who had complained to management about safety violations and filed a complaint with the state Occupational Safety

34. *Id.* at 2.

35. *Id.* at 1–2.

36. *MV Transportation, Inc.*, 368 N.L.R.B. at 1.

37. *Alleluia Cushion Co. and Jack G. Henley*, 221 N.L.R.B. 999, 999 (1975).

38. *Id.* at 999–1000.

39. *Id.*

40. *Meyers Industries, Inc. and Kenneth P. Prill*, 268 N.L.R.B. 493, 493 (1984).

41. *WorldMark by Wyndham*, 356 N.L.R.B. at 765–66.

and Health Administration.⁴² Although the employee did not discuss the safety violations with coworkers and he did not make the complaints as their representative, the Board found that “where an employee . . . seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees . . . we will find an implied consent thereto and deem such activity to be concerted.”⁴³ The Board reasoned that an individual’s efforts to enforce safety laws were inherently concerted because their enforcement is both in the public interest and the interest of all employees of the complainant’s employer.⁴⁴ The Board relied upon the Supreme Court’s reasoning in *Southern Steamship Company v. N.L.R.B.*, in which the Court noted that the Board should consider other Congressional objectives and “statutory scheme[s]” as it enforces the NLRA.⁴⁵ The Board concluded that the NLRA “cannot be administered in a vacuum.”⁴⁶ *Alleluia Cushion* was significant because it held individual employee action in furtherance of statutory rights to be protected, even without the knowledge or expressed support of coworkers, as the consent of coworkers can be implied.⁴⁷

B. Meyers I (1984)

In 1984 the *Meyers Industries* case (*Meyers I*) presented facts similar to *Alleluia Cushion*, but the Board forcefully rejected its prior reasoning and explicitly overruled *Alleluia Cushion*, ushering in an era of a more constrained interpretation of Section 7 as it applies to individual employee action.⁴⁸ In *Meyers I*, truck driver Kenneth Prill was discharged after he made safety complaints to management and reported his employer to the Tennessee Public Service Commission for operating an unsafe truck and trailer.⁴⁹ The Board reversed the decision of the administrative law judge, who had ruled that Prill’s action was protected under *Alleluia Cushion*.⁵⁰

The Board criticized the reasoning of *Alleluia Cushion* because it viewed the decision as having created a “per se” standard of concerted conduct and in doing so shifted the burden of proof from the employee that alleges the violation of the Act to the respondent

42. *Alleluia Cushion Co.*, 221 N.L.R.B. at 999–1000.

43. *Id.* at 1000.

44. *Id.*

45. *Id.* (citing *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942)).

46. *Id.*

47. *Id.*

48. *Meyers Industries, Inc. and Kenneth P. Prill*, 268 N.L.R.B. No. 73, 493, 496 (1984).

49. *Id.* at 497–98.

50. *Id.* at 493.

employer.⁵¹ The Board found that the *Alleluia Cushion* decision departed from the language of the Act and Board precedent because it did not require “observable evidence of group action,” and instead “determined the existence of an issue about which employees *ought* to have a group concern,” or a hypothetical showing of group concern.⁵² The Board introduced an objective standard requiring “observable evidence”⁵³ that an “individual engaged in his activity with other employees or on their authority.”⁵⁴ Only upon satisfying this first element—observable evidence of an employee acting with or on the authority of other employees—could an analysis move to the second element to determine if the action was for “mutual aid or protection.”⁵⁵ The Board ruled that an action could rise to the level of protected concerted activity only if it satisfied both elements.⁵⁶

C. Meyers II (1986)

Two months after the Board decided *Meyers I*, the Supreme Court issued its decision in *N.L.R.B. v. City Disposal Systems, Inc.*, upholding the Board’s longstanding *Interboro* doctrine.⁵⁷ In *City Disposal*, a garbage truck driver was terminated when he refused to drive an unsafe truck.⁵⁸ Under the *Interboro* doctrine, when an individual employee “assert[s] . . . right[s] grounded in a collective-bargaining agreement,” that action is considered “concerted” and thus protected by Section 7.⁵⁹ Because the right to refuse to drive an unsafe truck was grounded in the truck driver’s collective bargaining agreement, the Board found that his assertion of this right was concerted.⁶⁰ Significantly, in deferring to the Board’s interpretation of “concerted,”⁶¹ the Court held that the Board’s *Interboro* doctrine is both a reasonable interpretation of Section 7 and “entirely consistent with the purposes of the Act.”⁶² The Court noted that although “concerted”

51. *Id.* at 495–96. The burden of proof is on the General Counsel, who prosecutes the case against the employer in front of the Board. *Id.* In practical terms, however, the burden of proof is on the employee alleging the NLRA violation. *See id.*

52. *Meyers Industries, Inc.*, 268 N.L.R.B. at 495.

53. *Id.*

54. Barbara Fick, *Protecting Worker Complaints After Meyers Industries*, 31 ST. LOUIS U. L.J. 823, 825–26, 830 (1987).

55. *Meyers Industries, Inc.*, 268 N.L.R.B. at 494.

56. *Id.*

57. *N.L.R.B. v. City Disposal Systems, Inc.*, 465 U.S. 822, 841 (1984).

58. *Id.* at 824.

59. *Id.* at 825.

60. *Id.* at 825, 828.

61. The Board’s interpretation of the NLRA on “issue[s] that implicate[] its expertise in labor relations” is entitled to “considerable deference” by the courts. *Id.* at 829.

62. *Id.* at 825, 831, 833.

can be interpreted to mean “two or more employees . . . the language of § 7 does not confine itself to such a narrow meaning.”⁶³

It was under the Supreme Court’s ruling in *City Disposal* that the Court of Appeals for the D.C. Circuit considered Kenneth Prill’s appeal of *Meyers I* in *Prill v. N.L.R.B.*⁶⁴ Although the Board’s interpretation of the NLRA is afforded “considerable deference,” the Circuit Court remanded the case back to the Board because it held that the Board’s opinion in *Meyers I* was based “on a faulty legal premise.”⁶⁵

The Circuit Court was highly critical of *Meyers I* for two key reasons.⁶⁶ First, it held that the Board was not required by the language of the Act to adopt the narrowed definition of “concerted” that required that an employee’s action be “clearly joined in or endorsed by other employees.”⁶⁷ The Circuit Court found that the Board incorrectly regarded its *Meyers I* interpretation to be not *an* interpretation, but the “mandated” interpretation of the Act.⁶⁸ The Circuit Court relied on the Supreme Court’s *City Disposal* decision when it reasoned that the Board has “authority to interpret ‘concerted activities’ broadly to effectuate the purposes of section 7,” and therefore the Board erred by insisting that its narrow and “literal” construction of Section 7 is the only possible interpretation.⁶⁹

Second, the Circuit Court held that rather than reverting to a pre-*Alleluia* standard in *Meyers I*, the Board had instead imposed “a new and more restrictive standard” than previously applied by the Board and the courts.⁷⁰ In *Meyers I*, the Board departed from the longstanding position that an individual, even if not specifically authorized, engages in concerted activity when they bring a “group complaint” to management.⁷¹ Further, the Circuit Court was concerned about the implications of the *Meyers I* standard on the widely held position under *Mushroom Transportation* that when an individual acts in order to gain support from other employees for “common goals,” that individual is protected under Section 7.⁷² The Circuit Court noted that several Courts of Appeals had approached the interpretation of this standard differently, and that it did not intend to determine among these which the Board should adhere to.⁷³ Rather, the Circuit Court

63. N.L.R.B. v. City Disposal Systems, Inc., 465 U.S. at 831.

64. *Prill v. N.L.R.B.*, 755 F.2d 941, 942 (D.C. Cir. 1985).

65. *Id.* at 947–48.

66. *Id.* at 948.

67. *Id.*

68. *Id.*

69. *Id.* at 951–53.

70. *Prill*, 755 F.2d at 948.

71. *Id.* at 954.

72. *Id.* (citing *Mushroom Transportation Co. v. N.L.R.B.*, 330 F.2d 683 (3d Cir. 1964)).

73. *Id.* at 955–56.

opined that the *Meyers I* standard was “substantially narrower” than the standards applied by the Board in the past and by “most” appeals courts.⁷⁴ With these serious concerns, and warning that the Board “should [not] ignore the policy implications of its decisions,” the D.C. Circuit remanded the case.⁷⁵

When the Board revisited Prill’s case in *Meyers II*, it accepted the D.C. Circuit’s holding that the standard articulated in *Meyers I* was not the only possible interpretation of the Act; however, the Board rejected the D.C. Circuit’s concerns and affirmed the *Meyers I* standard that required objective evidence of group interaction for an individual’s action to be considered concerted.⁷⁶ The Board addressed the central concerns of the D.C. Circuit with a more comprehensive analysis of five key issues, which nonetheless led to the same conclusion.⁷⁷

First, the Board emphasized that the *Meyers I* standard that “requires some linkage to group action in order for conduct to be deemed ‘concerted’” was “[f]aithful to the [c]entral [p]urposes of the Act.”⁷⁸ The Board pointed to the Act’s “[f]indings and declarations of policy,” which discussed the importance of protecting workers’ ability to organize in order to negotiate from a position of enhanced equality with employers.⁷⁹

Second, the Board explained that *Meyers I* was consistent with the Supreme Court’s *City Disposal* decision, issued shortly after *Meyers I*.⁸⁰ In *City Disposal*, the Supreme Court noted the Board’s justification of the *Interboro* doctrine rested on the notion that an individual asserting a right contained within a collective bargaining agreement is “an extension of the concerted action that produced the agreement” and that asserting such a right impacts all employees working under the collective bargaining agreement.⁸¹ In *Meyers II* the Board reasoned, therefore, that group action is a necessary element of concerted action.⁸² Further, like the Board in *Meyers I*, the Supreme Court separated the elements of “concerted activities” and activities for “mutual aid or protection.”⁸³

Third, the Board clarified that *Meyers I* did not stand for the proposition that individual employee activity could never enjoy protected

74. *Id.* at 956.

75. *Id.* at 957.

76. *Meyers Industries, Inc. and Kenneth Prill*, 281 N.L.R.B. 882, 882, 889 (1986).

77. *Id.* at 883–88.

78. *Id.* at 883–84.

79. *Id.* at 883 (internal quotation marks omitted).

80. *Id.* at 884.

81. *Id.*

82. *Meyers Industries, Inc.*, 281 N.L.R.B. at 884.

83. *Id.* at 885.

status under Section 7, but rather that for individual activity to be “concerted,” there must be some evidence of genuine group awareness and concern.⁸⁴ It was not sufficient that the issue raised by an individual is *potentially* an issue of group concern.⁸⁵ The Board additionally emphasized that individual conduct intended “to initiate or to induce or to prepare for group action” fell within the scope of the *Meyers I* analysis, thus affirming *Mushroom Transportation*.⁸⁶

Fourth, in *Meyers II* the Board rejected the D.C. Circuit’s concern of a “chilling effect” on future employee concerted action due to the termination of an employee who sought to assert a statutory right on an individual basis.⁸⁷ The Board reasoned that other employees would not feel intimidated by Prill’s discharge because he had acted alone; however, it did not explain why the termination of an employee who acted alone to complain and draw attention to a serious safety issue is less chilling than the termination of an employee acting on behalf of others.⁸⁸ Nonetheless the Board held that even if there *was* a chilling effect, this would still not render the termination unlawful.⁸⁹

Finally, *Meyers II* addressed the D.C. Circuit’s concern that *Meyers I* created an analysis whereby a unionized employee covered by a collective bargaining agreement would be protected when making a complaint, whereas a nonunionized worker making the same complaint would not enjoy Section 7 protection.⁹⁰ *Meyers II* frames this situation in terms of “[c]ontract [r]ights [v]ersus [s]tatutory [r]ights,” but did not seek to resolve the tension.⁹¹ Instead, the Board skimmed over this anomaly when it asserted that focusing its resources on the former “best effectuate[s] the policies of the Act,” and, as it did in *Meyers I*, noted “[t]he Board was not intended to be a forum in which to rectify all the injustices of the workplace.”⁹²

Meyers II entrenched the Board’s position that individual employee action must be connected to group action, or at least group awareness of the individual action, in order to enjoy the protection of Section 7.⁹³ In so holding, the Board affirmed a two-prong test in which first an action must be found to be concerted before an inquiry

84. *Id.* at 886.

85. *Id.* (citing *Allied Erecting Co. v. N.L.R.B.*, 272 N.L.R.B. 176 (1984), in which no concerted action was found where an employee, unsupported by his colleagues, contacted a secondary employer to discuss their primary employer’s failure to pay union scale wages).

86. *Id.* at 887.

87. *Id.* at 888–89.

88. *Meyers Industries, Inc.*, 281 N.L.R.B. at 888–89.

89. *Id.*

90. *Prill v. N.L.R.B.*, 755 F.2d 941, 957 (D.C. Cir. 1985).

91. *Meyers Industries, Inc.*, 281 N.L.R.B. at 887.

92. *Id.* at 888.

93. *Id.* at 882–89.

into whether the action was for mutual aid or protection becomes relevant.⁹⁴ By making the standard for concerted activity more difficult to meet, *Meyers I* and *II* raised the barrier for nonunionized workers to assert their rights in the workplace without fear of termination or other adverse employment action.⁹⁵

D. WorldMark by Wyndham Broadens the Test for Concerted Activity

In a two-to-one⁹⁶ decision in *Wyndham Resort Development Corp.*, the Board reversed the finding of the administrative law judge and held that an employee who complained to a company executive about a new dress code policy in front of other employees was engaged in protected concerted activity.⁹⁷ Before a daily morning sales meeting an executive, Rodney Hill, approached three employees, including Gerald Foley and Charles Feathers.⁹⁸ Hill informed Foley, who had been away on vacation, about a new dress code that required salespersons to tuck in their shirts.⁹⁹ Foley had heard rumors that there would be a change to the dress code.¹⁰⁰ Foley asked if it was a company-wide policy and if the policy would be disseminated in writing.¹⁰¹ His colleague Feathers interjected several times with complaints about the new policy, and by this time additional employees had approached and watched the exchange.¹⁰² Hill asked Foley and Feathers to come to his office, where they discussed the matter, the employees apologized, and they were told to return to work.¹⁰³ Several days later, Hill issued a written warning to Foley about the incident, noting that it was his second warning.¹⁰⁴ The first warning was issued following Foley's questioning during a sales meeting about commission payments.¹⁰⁵ Feathers did not receive a warning.¹⁰⁶

The administrative law judge (ALJ) found that a dress code is part of the terms and conditions of employment, but that Foley's

94. *Id.* at 884.

95. *Id.* at 884–89.

96. Chairman Wilma Liebman and Member Craig Becker, both Democrats, were in the majority. Republican Member Brian E. Hayes dissented. See *Wyndham Resort Dev. Corp. and Gerald Foley*, 356 N.L.R.B. 765, 765, 768 (2011).

97. *Id.* at 765.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *WorldMark by Wyndham*, 356 N.L.R.B. at 765.

103. *Id.* at 765–66.

104. *Id.* at 766.

105. *Id.*

106. *Id.*

exchange with Hill was not concerted, “because he acted independently of Feathers, in his own self-interest, without a common goal.”¹⁰⁷ The ALJ’s decision was in accord with *Meyers I* and *II*, and noted the lack of evidence that Foley acted on behalf of other employees or had discussed the matter in advance with Feathers.¹⁰⁸

Upon appeal the Board reversed the decision of the ALJ, found that Foley’s statements were concerted, and noted that in *Meyers II* the Board had clarified that individual employee actions that “bring[] truly group complaints to the attention of management” were protected.¹⁰⁹ The Board reasoned that because Foley spoke out about the new policy at the first opportunity and in the presence of colleagues who were similarly affected, that Foley “intended to induce group action.”¹¹⁰ The Board pointed to Foley’s language—using “we” and “us”—as evidence that Foley was speaking of a group concern.¹¹¹ Further, the fact that Foley’s colleague joined in and voiced similar complaints demonstrated that Foley’s actions were “incontrovertibly concerted under *Meyers*” because “they were undertaken ‘with . . . other employees.’”¹¹²

The Board rejected the ALJ’s reasoning that because Foley and Feathers did not discuss or agree to complain about the dress code in advance of the exchange with Hill that Foley’s actions were not concerted, affirming that no advanced plan “to act in concert” is necessary to engage in concerted activity.¹¹³ The Board also rejected the ALJ’s finding that the concerns of Foley and Feathers were not shared because Foley’s comments centered on the process of implementing the new dress code while Feathers complained about the substance of the dress code, because ultimately they were both “oppos[ed] to implementation of the rule.”¹¹⁴ The Board underscored that the employer perceived Foley’s actions as concerted, as supported by the language of the written warning issued to Foley.¹¹⁵

Although the Board found that Foley acted with intent to induce group action, it noted that because the employer was motivated to discipline Foley because the employer perceived that he intended

107. *Id.*

108. *WorldMark by Wyndham*, 356 N.L.R.B. at 766.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* (citing *Meyers Industries, Inc. and Kenneth P. Prill*, 268 N.L.R.B. 493, 493 (1984)).

113. *Id.* at 767.

114. *WorldMark by Wyndham*, 356 N.L.R.B. at 767.

115. The written warning issued to Foley stated that Hill did not want to have the conversation at that time but that Foley “persisted in voicing his complaints publicly, ‘on the sales floor in front of the team,’” and accused Foley of “incit[ing] another Rep to join in.” *Id.*

to induce action from fellow employees, that alone was enough to find the discipline issued to Foley as unlawful.¹¹⁶

The dissenting member of the Board, Member Hayes, disagreed with the Board's reasoning, writing that the Board, "reduces to meaninglessness the *Meyers* distinction between unprotected individual activity and protected concerted activity."¹¹⁷ Hayes argued that the majority decision "impermissibly conflat[ed] the concepts of group setting and group complaints" when it held that Foley's comments were concerted.¹¹⁸ Hayes expressed alarm that the majority's decision implied that an employee who makes a complaint in a group setting is deemed to have engaged in concerted activity, even if the statements were not intended to induce group action or were not on behalf of the group.¹¹⁹

The Board majority, however, did not frame its decision as a departure from *Meyers I* or *II*.¹²⁰ *WorldMark by Wyndham* endorsed the group setting of an individual action as evidence of intent to induce group action.¹²¹ The Board pointed to its earlier post-*Meyers II* holding in *Whittaker Corp.* wherein it held that "[p]articularly in a group-meeting context, a concerted objective may be inferred from the circumstances."¹²² The Board thus affirmed the protection of an employee's spontaneous action that entailed no prior consultation, holding that the group setting and Foley's use of collective language sufficiently indicated intent to induce group action.¹²³ The Board also recognized the "commonality of [Foley and Feather's] action"—to voice concerns to management about the new dress code—although they may have "had different motives."¹²⁴

III. ARGUMENT: OPENING THE DOOR TO STIFLE NASCENT CONCERTED ACTIVITY

Eight years after *WorldMark by Wyndham*, the Board once again acted to overrule an expansive interpretation of "concerted"

116. *Id.*

117. *Id.* at 768.

118. *Id.*

119. *Id.*

120. *See WorldMark by Wyndham*, 356 N.L.R.B. at 767.

121. *Id.* at 766.

122. *Whittaker Corp. and Milton E. Johnston*, 289 N.L.R.B. 933, 934 (1988); *see also Chromalloy Gas Turbine Corp. and Diane Baldessari*, 331 N.L.R.B. 858, 863 (2000) (holding that the concerted nature of the employee's statements protesting a new break policy can be inferred from the group setting and were not "mere griping").

123. *WorldMark by Wyndham*, 356 N.L.R.B. at 767.

124. Rita Trivedi, *Restoring a Willingness to Act: Identifying and Remediating the Harm to Authorized Employees Ignored Under Hoffman Plastics*, 51 U. MICH. J.L. REFORM 357, 380, 381 n.123 (2018).

in favor of a stricter interpretation.¹²⁵ In so doing, the Board opened the door to overruling other decisions related to the speech of individual employees.

A. Alstate Maintenance

In January 2019 in *Alstate Maintenance*, the Board¹²⁶ rejected *WorldMark by Wyndham* as incompatible with the *Meyers I* and *II* cases and, in overruling *WorldMark by Wyndham*, announced the “process of restoring the *Meyers* standard.”¹²⁷ The Board held that an employee’s statements in front of other skycaps about not receiving a tip from a soccer team that they had assisted the year prior was not concerted and, therefore, not protected under Section 7.¹²⁸ Further, the Board held that even if the employee’s statements were concerted, they were not protected because they “did not have mutual aid or protection as [their] purpose.”¹²⁹ Thus, the discharge of the employee due to these statements was lawful.¹³⁰ The lone Democrat on the Board strenuously rejected the majority’s holding and reasoning.¹³¹ Although the majority distinguished *Alstate* from *WorldMark by Wyndham*, and thus did not need to overturn that case in order to hold the employee’s statement in *Alstate* unprotected, the Board used *Alstate Maintenance* as a vehicle to explicitly overrule *WorldMark by Wyndham* and narrow the scope of concerted activity.¹³²

Trevor Greenridge worked as a skycap, which required him to assist passengers with their luggage.¹³³ Tips comprised the majority of his compensation.¹³⁴ Greenridge and three other skycaps were standing together when their supervisor informed them that a partner airline had requested assistance with a soccer team’s equipment.¹³⁵ Greenridge commented that when they had helped a soccer

125. See *Alstate Maintenance and Trevor Greenridge*, 367 N.L.R.B. No. 68, 1 (2019).

126. The majority included Chairman John F. Ring, Member Marvin E. Kaplan, and Member William J. Emanuel; all are Republican. Dissenting Member Lauren McFerran is a Democrat. *Id.* at 1, 9.

127. *Id.* at 1–2.

128. *Id.*

129. *Id.* at 1.

130. *Alstate Maintenance*, 367 N.L.R.B. at 1.

131. *Id.* at 9–18.

132. *Id.* at 5–6. The ALJ found that Greenridge’s statements were not protected, and the Board agreed in full, with the exception of one minor (and not dispositive) element of the judge’s reasoning. The Board adopted the decision of the ALJ, but nonetheless used the case as an opportunity to overrule *WorldMark by Wyndham*. *Id.*

133. *Id.* at 2.

134. *Id.* at 1.

135. *Alstate Maintenance*, 367 N.L.R.B. at 2.

team a year earlier, they did not receive a tip.¹³⁶ When the team's luggage arrived, Greenridge and the three other skycaps did not assist with the luggage and walked away.¹³⁷ After a group of baggage handlers had almost completed the job, the skycaps came back and assisted.¹³⁸ The next day all four skycaps were terminated, and Greenridge's discharge notice specifically referenced that his statements were made in front of other employees.¹³⁹

The Board held that Greenridge's statements were not concerted because they did not meet the standards articulated in the *Meyers* cases.¹⁴⁰ Specifically, the Board pointed to two standards from *Meyers II*.¹⁴¹ The first is when an individual who is not a designated representative of a group brings a "truly group complaint" to management, that action is concerted.¹⁴² To qualify as a "truly group complaint," there must be evidence of "prior or contemporaneous discussion of the concern between or among [employees]."¹⁴³ If there is no evidence of group discussion, an individual complaint is merely "solely by and on behalf of him- or herself" regarding "a purely personal grievance."¹⁴⁴ The Board held that there was no evidence to indicate that the tipping practice of soccer teams was a truly group complaint because the record did not indicate that Greenridge had discussed it with his fellow skycaps in advance.¹⁴⁵

The second standard the Board applied regards when an individual acts to induce or initiate group action, which originated in *Mushroom Transportation* and was affirmed by *Meyers II*.¹⁴⁶ If the statements do not "look[] toward group action" they are "more than likely . . . mere 'griping'" and unprotected.¹⁴⁷ The Board held that

136. Greenridge replied to his supervisor that "[w]e did a similar job a year prior and we didn't receive a tip for it." *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 2.

140. *Id.* at 2–4.

141. *Alstate Maintenance*, 367 N.L.R.B. at 3.

142. *Id.* (citing *Meyers Industries, Inc. and Kenneth P. Prill*, 281 N.L.R.B. 882, 887 (1986)).

143. *Id.* at 3.

144. *Id.* The Board has long held that when an individual complains about "working conditions affecting him alone," these are "personal gripes," and are not protected under Section 7. See Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 UNIV. PA. L. REV. 286, 290 (1981).

145. *Alstate Maintenance*, 367 N.L.R.B. at 4.

146. *Id.* at 3; see *Mushroom Transportation Co. v. N.L.R.B.*, 330 F.2d 683, 684–85 (3d Cir. 1964).

147. *Alstate Maintenance*, 367 N.L.R.B. at 3 (citing *Mushroom Transportation*, 330 F.2d at 685) (emphasis added).

Greenridge's statement on its face did not indicate an intent to initiate or induce action from the other skycaps, and pointed to Greenridge's testimony that the statement was "just a comment" that was "not aimed at changing the Respondent's policies or practices."¹⁴⁸ Additionally, the Board rejected the General Counsel's argument that intent to induce action could be inferred from the group setting in which Greenridge made his statement.¹⁴⁹ The Board distinguished *Alstate* from the earlier decisions *Whittaker* and *Chromalloy*, noting that in both of these latter cases the Board inferred intent to initiate action based on the group setting *and* on an analysis of the totality of the circumstances.¹⁵⁰ Unlike in those cases, in *Alstate* there was no meeting convened by the employer for the purpose of announcing a change in the terms and conditions of employment and thus no complaint against such a change.¹⁵¹

The Board further found that Greenridge's statement failed the second prong emphasized in the *Meyers* cases, holding that it was not for the purpose of mutual aid or protection.¹⁵² The Board took an exceptionally narrow view when it held that tips—the subject of Greenridge's comment and the majority of his compensation—were not related to the terms and conditions of his employment because the amount skycaps received in tips was within the control of passengers and not the employer.¹⁵³

B. *Alstate* Overrules *WorldMark* by *Wyndham*

Beyond holding that Greenridge's statements were not protected under *Meyers*, the Board found that *WorldMark* by *Wyndham* was incompatible with the *Meyers* cases and therefore must be overruled for two main reasons.¹⁵⁴ First, the Board held that *WorldMark* by *Wyndham* impermissibly created what amounted to a *per se* rule whereby an individual employee that makes a complaint about the terms or conditions of employment in a group setting is automatically deemed to have "engaged in initiating group action."¹⁵⁵ The Board held that "individual griping" would not be elevated to concerted status just because it is made in a group setting.¹⁵⁶ Second, the Board

148. *Id.* at 4.

149. *Id.*

150. *Id.*

151. *Id.* at 5.

152. *Id.* at 8.

153. *Alstate Maintenance*, 367 N.L.R.B. at 8.

154. *Id.* at 1, 6–7.

155. *Id.*

156. *Id.* at 7.

held that such a per se rule that rendered all complaints in a group setting concerted departed from the *Meyers I* definition, which held that “to be concerted, [the] activity must ‘be engaged in[,] with or on the authority of other employees and not solely . . . on behalf of the employee himself.’”¹⁵⁷ The Board reasoned that complaints about the terms and conditions of employment that only affected the speaker should not be deemed concerted merely because they are made in a group setting.¹⁵⁸

In sum, the Board, drawing from *Meyers II*, held that to be distinguished from “individual griping,” an individual’s statement to a manager or supervisor in front of other employees is concerted only if it falls into one of two sets of circumstances.¹⁵⁹ First, “an individual employee’s statement to a supervisor or manager must . . . bring a truly group complaint regarding a workplace issue to management’s attention.”¹⁶⁰ As discussed above, to qualify as a truly group complaint, there must be evidence that the employee either previously discussed the issue with one or more coworkers or that there is “contemporaneous” discussion.¹⁶¹ If there is no such evidence, a statement may still be found to be concerted if “the totality of the circumstances . . . support a reasonable inference that in making the statement, the employee was seeking to initiate, induce, or prepare for group action.”¹⁶² The Board articulated five nonexclusive factors that “would tend to support drawing such an inference”:

- (1) the statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment;
- (2) the decision affects multiple employees attending the meeting;
- (3) the employee who speaks up in response to the announcement did so to protest or complain about the decision, not merely (as in *WorldMark*) to ask questions about how the decision has been or will be implemented;
- (4) the speaker protested or complained about the decision’s effect on the work force generally or some portion of the work force, not solely about its effect on the speaker [. . .]; and
- (5) the meeting presented the first opportunity employees had to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand.¹⁶³

157. *Id.* (quoting *Meyers I*, 268 N.L.R.B. 493, 497 (1984)).

158. *Id.* at 7.

159. *Alstate Maintenance*, 367 N.L.R.B. at 7.

160. *Id.*

161. *See supra* note 144 and accompanying text.

162. *Alstate Maintenance*, 367 N.L.R.B. at 7.

163. *Id.*

In so holding, the Board established a higher evidentiary threshold to demonstrate that an individual complaint in a group setting is made to initiate or induce group action.¹⁶⁴ The Board also mandated the increased scrutiny of individual complaints in group settings to ensure that they do not reflect the concerns of only the speaking employee, rather than group concerns.¹⁶⁵

In her dissent, Member McFerran argued that the majority took “language out of context” and that *WorldMark by Wyndham* did not create a per se rule.¹⁶⁶ Instead, like in *Whittaker* and *Chromalloy*, the Board in *WorldMark by Wyndham* examined the totality of the evidence including the first person plural language used by the employee, the subject of the statements that was “common to all employees,” the fact that the statements were made at the employee’s first opportunity to address the dress code with management, the employee’s familiarity with the preferences of other employees and thus their likely concern about the new policy, and the fact that a co-worker joined him in expressing concern about the dress code.¹⁶⁷ The consideration of these factors together, McFerran argues, aligned *WorldMark by Wyndham* with *Whittaker*, *Chromalloy*, and the *Meyers* cases when it applied the “longstanding consideration: a complaint made in front of a group, in combination with other circumstances, may support an inference of an inducement of group action.”¹⁶⁸

The cases before the NLRB¹⁶⁹ that cite *WorldMark by Wyndham* before *Alstate* tend not to rely on the “per se” rule that it supposedly established.¹⁷⁰ Rather, the cases cite a variety of representative positions. In *Case Farms Processing*, for example, the ALJ cited *WorldMark by Wyndham* for the proposition that an employee “spontaneously” joining an individual employee in a complaint lends weight to a finding of concerted activity.¹⁷¹ In *Lou’s Transport, Inc.*, the administrative judge cited *WorldMark by Wyndham* as support

164. *See id.*

165. *See id.* at 4.

166. *Id.* at 13.

167. *Id.*

168. *Alstate Maintenance*, 367 N.L.R.B. at 13.

169. Here, “before the NLRB” references cases before administrative law judges while references to “the Board” references cases appealed to and decided on by a panel of National Labor Relations Board Members.

170. At the time of writing, 30 cases cited *WorldMark by Wyndham*, excluding *Alstate*. *Shepard Report for WorldMark by Wyndham*, 2011 NLRB LEXIS 63, LEXIS, <https://plus.lexis.com//shepards/?pdmfid=1530671&crd=6c705d06-fc91-4e96-9069-7ba0eb5b8730&pdaactivityid=c5ab3e75-c681-4c89-8a22-70845564c622&pdtargetclientid=-None-&ecomp=nnsk>.

171. *Case Farms Processing, Inc. and Utd. Food & Commercial Workers, Local No. 880*, 2011 N.L.R.B. LEXIS 533, at *63.

for the rule that an employee need not be “specifically authorized” to speak on behalf of other employees in order for the employee’s statements to be protected.¹⁷²

Administrative law judges have not widely relied on *WorldMark by Wyndham* to find that any employee who makes a complaint in a group setting has *per se* engaged in protected concerted activity. For this reason, the *Alstate* decision suggests that the Board was concerned with preemptively making it more difficult for employees to prove that their employers took adverse employment action based on protected concerted speech, rather than responding to a trend in NLRB case law initiated by *WorldMark by Wyndham*.¹⁷³ This interpretation of the Board’s motives in *WorldMark by Wyndham* is bolstered by the Board’s explicit invitation to bring cases before it so that it may reverse precedents related to “inherently concerted” speech.¹⁷⁴

C. Walking Through the Door Opened by Alstate Maintenance: The Risk of Future Diminishment of Section 7 Rights

The Board strategically used the *Alstate* case to open the door to future Board decisions that could continue to narrow Section 7 protections and diminish the rights of employees throughout the country.¹⁷⁵

The affected rights include the long-standing notion of “inherently concerted” speech.¹⁷⁶ The ability of employees to raise and speak freely about workplace concerns would be constrained, likely resulting in a chilling effect as employees can be subject to discipline and termination for previously protected actions.¹⁷⁷

In *Alstate*, the Board regarded *WorldMark by Wyndham* as having introduced a “per se” standard that elevated mere “griping” about individual complaints to the level of protected concerted activity.¹⁷⁸ In *Alstate* the Board identified its next targets when it invited cases

172. *Lou’s Transp., Inc. and Michael Hershey*, 361 N.L.R.B. 1446, 1456 (2014).

173. *See Alstate Maintenance*, 367 N.L.R.B. at 1.

174. *Id.* at 1 n.2 (“Although we do not reach them here, other cases that arguably conflict with *Meyers* include those in which the Board has deemed statements about certain subjects ‘inherently’ concerted *We would be interested in reconsidering this line of precedent in a future appropriate case.*” (emphasis added)).

175. *See id.* at 2, 18.

176. *See id.* at 1 n.2.

177. *See, e.g.*, Bernard J. Bobber & Kayla A. McCann, *NLRB Narrows the Scope of NLRA Section 7 Protection for Employee Complaints*, OGLETTREE DEAKINS (Jan. 22, 2019), <https://oglettree.com/insights/nlr-narrows-the-scope-of-nlra-section-7-protection-for-employee-complaints> [<https://perma.cc/S57V-Z327>] (“As a result of *Alstate Maintenance*, employers generally have more leeway to use discipline to regulate an individual employee’s statement Unions and individuals alike may find it more difficult to assert that an individual employee’s statement is concerted activity that is protected by Section 7”).

178. *See Alstate Maintenance*, 367 N.L.R.B. at 7.

that would allow the Board to revisit topics that have been held to be concerted due to their substance, regardless of the setting: discussions about wages, work schedules, and job security.¹⁷⁹ These topics reflect some of the core concerns of employees across all industries and the NLRB mandates that they be included in collective bargaining agreements.¹⁸⁰

Under the *Interboro* doctrine, employee actions related to rights addressed by their collective bargaining agreement (or that the employee believes to be found within their collective bargaining agreement) are protected concerted activities, even when undertaken alone and without the intent to initiate group action.¹⁸¹ Therefore union members will still be able to discuss wages, schedules, and job security while enjoying NLRA protection.¹⁸² However, if the Board rolls back protections related to discussion of these topics, the impact will be on nonunion members,¹⁸³ who constitute the vast majority of employees. This would result in precisely the situation predicted by the D.C. Court of Appeals in *Prill* when it opined that “*Meyers* produces the anomaly that a unionized worker who complains about . . . matters covered by a collective bargaining agreement will be held protected under *Interboro* and *City Disposal*, while an unorganized employee will be denied protection for engaging in identical conduct.”¹⁸⁴ The liberalized approach to protected concerted speech as seen in *WorldMark by Wyndham* has long been applied to employee speech about wages, job schedules, and job security.¹⁸⁵ *Alstate Maintenance* provides insight into how the Board under the Trump administration planned to approach these topics anew, subsequent to its invitation for cases in order to reconsider them under a stricter *Meyers* standard.¹⁸⁶

In *Trayco*, the Board adopted without comment the administrative law judge’s rulings, findings and conclusions regarding an employee’s discussion of wages.¹⁸⁷ The employee, Katie Marlowe, had discussed with other employees her concerns that new hires were earning higher wages than employees with seniority.¹⁸⁸ Marlowe also

179. *See id.* at 1 n.2.

180. *See* ANNE MARIE LOFASO, NATIONAL LABOR RELATIONS ACT: LAW AND PRACTICE, Ch. No. 13, § 13.03 (Matthew Bender, 2d ed. 2021).

181. *See Prill v. N.L.R.B.*, 755 F.2d 941, 945 (D.C. Cir. 1985).

182. *N.L.R.B. v. City Disposal Sys.*, 564 U.S. 822, 831–32 (1984).

183. Specifically, employees in nonunionized workplaces.

184. *See Prill*, 755 F.2d at 957.

185. *See Alstate Maintenance and Trevor Greenridge*, 367 N.L.R.B. No. 68, 1 n.2, 7 (2019).

186. *See id.* at 1 n.2.

187. *Trayco of S.C., Inc. and Gen. Drivers, Warehousemen and Helpers Union No. 509*, 297 N.L.R.B. 630, 630, 635 (1990).

188. *Id.* at 631.

took these concerns to management and had asked for a raise.¹⁸⁹ She subsequently received a written warning.¹⁹⁰ The president of the company then questioned Marlowe about her discussions and complaints about wages and told her that “[y]ou’ve talk[ed] enough to my employees,” and then fired her.¹⁹¹

The administrative law judge found that Marlowe’s discussions with other employees about wages was a protected concerted activity, and because her employer’s motivation to fire her was based on this activity, the termination was unlawful.¹⁹² The administrative judge noted that although the *Meyers* cases require that the activity is “not solely by and on behalf of the employee himself,” they also call for a fact-specific inquiry and that the Board has upheld an individual’s statements about wages as concerted.¹⁹³ Further, the administrative judge reasoned that Marlowe’s discussion of wages was concerted in nature because even though she was not expressly seeking to initiate group action, “[d]issatisfaction due to low wages is the grist on which concerted activity feeds.”¹⁹⁴ Without stating so explicitly, the administrative judge seemingly found that statements regarding wages are inherently protected concerted activity because it can be inferred that they are an incipient step toward initiation of group action.¹⁹⁵ In a more recent case from 2014 involving the termination of an employee for discussing his wages, the Board noted that “employee wage discussions are ‘inherently concerted’” because “wages are a ‘vital term and condition of employment’.”¹⁹⁶

Post *Alstate Maintenance*, a Republican-dominated the Board may apply the narrower interpretation of concerted activity and find that discussion of wages is no longer “inherently concerted.”¹⁹⁷ Thus if *Trayco* were before the same Board that decided *Alstate Maintenance*, it would likely be decided differently.¹⁹⁸ Marlowe spoke to her colleagues about wages, but under *Alstate* this may not suffice to demonstrate that when she spoke to her supervisor she was bringing

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 634–35.

193. *Trayco*, 297 N.L.R.B. at 634.

194. *Id.* (quoting *Jeannette Corp. v. N.L.R.B.*, 532 F.2d 916, 919 (3d Cir. 1976)).

195. *See id.*

196. *Alt. Energy Applications, Inc.*, 361 N.L.R.B. 1203, 1206 n.10 (2014).

197. *See Alstate Maintenance and Trevor Greenridge*, 367 N.L.R.B. No. 68, 1 n.2 (2019).

198. At the time of writing, the Board consisted of Chairman John F. Ring (Republican), Marvin E. Kaplan (Republican), William J. Emanuel (Republican), and Lauren M. McFerran (Democrat). The fifth Board position was vacant. *Members of the NLRB Since 1935*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/who-we-are/the-board/members-of-the-nlr-b-since-1935> [<https://perma.cc/KL4X-YHXV>].

a “truly group complaint” to his attention.¹⁹⁹ In *Alstate* there was no record that the employee had previously discussed the soccer team’s failure to tip before he complained to a supervisor in front of others.²⁰⁰ But the Board also focused its analysis on the conclusion that he did not speak with the intention to induce group action among the sky-caps, specifically rejecting the counsel for the General Counsel’s argument—derived from *WorldMark by Wyndham*—that such intent can be inferred from the group setting.²⁰¹ The *Trayco* record suggests that Marlowe discussed the earnings of newer employees with her coworkers to ascertain if they were being paid more than more senior staff.²⁰² She also asked for a raise for herself, but not for a change in the wider compensation structure that would affect other employees.²⁰³ From these circumstances, the *Alstate* Board, demonstrably eager to eliminate or significantly limit the scope of inherently concerted speech, could conclude that Marlowe was merely engaged in personal griping, which was neither concerted nor for mutual aid or protection.²⁰⁴

Like wages, the work schedule is a fundamental term of employment.²⁰⁵ In *Aroostook County*, the Board drew on *Trayco* when it held that employees who had complained to each other about a change in their work schedule were engaged in protected concerted activity and their subsequent termination on the basis of these complaints was unlawful.²⁰⁶ In this case, several employees of a healthcare facility were fired when their supervisor learned that they had complained amongst each other at several different points about their work schedule.²⁰⁷ Relying on *Meyers I* and *II*, the administrative law judge found that the employees had not engaged in protected concerted activity because “where the employee activity at issue consists only of talk,” to be protected “it must appear that it was engaged in with the object of initiating group action.”²⁰⁸ Though acknowledging that employee discussions have been found to be protected even “without evidence of any intent to engage in

199. See *Alstate Maintenance*, 367 N.L.R.B. at 7.

200. *Id.* at 4.

201. *Id.*

202. *Trayco of S.C., Inc. and Gen. Drivers, Warehousemen and Helpers Union No. 509*, 297 N.L.R.B. 630, 631 (1990).

203. *Id.* at 632.

204. See *Alstate Maintenance*, 367 N.L.R.B. at 1.

205. See *Aroostook Cnty. Reg'l Ophthalmology Ctr. and Sheila Lamoreau*, 317 N.L.R.B. No. 32, 218, 220 (1995).

206. *Id.*

207. *Id.* at 219.

208. *Id.* at 228.

concerted action,” the administrative law judge distinguished those cases because they had been about wages.²⁰⁹

The Board reversed the administrative law judge’s decision and held that employees’ discussion of work schedules was protected concerted activity.²¹⁰ In contrast to the judge below, the Board adopted the reasoning of *Trayco*, holding that discussion about work schedules, like discussion of wages, constituted protected concerted activity because “work schedules . . . are directly linked to hours and conditions of work—both vital elements of employment—and are as likely to spawn collective action as the discussion of wages.”²¹¹

Like *Trayco*, if *Aroostook* was in front of the Board that decided *Alstate Maintenance*, it would likely overrule the decision in favor of a narrower vision of protected concerted activity. Similarly to *Trayco*, employees spoke to each other about a fundamental condition of their employment.²¹² Also like in *Trayco*, there is no specific evidence in the record to suggest that they did so with the intent to initiate or induce group action.²¹³ Thus, their statements could be reduced to personal griping, as the Board did in *Alstate*.²¹⁴

Even though, at the time of writing, the Board had not yet reversed prior decisions regarding employee speech related to wages, work schedules, or job security, the invitation issued in *Alstate* to bring cases that present such an opportunity may have chilled employees’ efforts to vindicate their rights.²¹⁵ The Board’s forceful rejection of *WorldMark by Wyndham*, coupled with the explicit intent to revisit the right to discuss fundamental employment conditions, has likely discouraged employees from filing charges related to these issues. Strategic labor lawyers will avoid filing cases that may become the vehicle for the Board to overturn precedent and dramatically diminish the scope of the protections afforded by Section 7.

CONCLUSION

In *Alstate*, the Board claims to “begin[] the process of restoring the *Meyers* standard by overruling conflicting precedent that erroneously shields individual action and thereby undermines congressional intent to limit the protection afforded under the Act to *concerted*

209. *Id.*

210. *Id.* at 220.

211. *Aroostook Cnty.*, 317 N.L.R.B. at 220.

212. *See id.*

213. *See id.*

214. *See Alstate Maintenance and Trevor Greenridge*, 367 N.L.R.B. No. 68, 7 (2019); *Aroostook Cnty.*, 317 N.L.R.B. at 219.

215. *See Alstate Maintenance*, 367 N.L.R.B. at 1 n.2.

activity for the purpose of mutual aid or protection.”²¹⁶ The Board cautioned against the “impermissibl[e] conflating [of] the concepts of group setting and group complaints,” insisting on a more literal meaning of concerted.²¹⁷ Additionally, the Board invited the opportunity to revisit the holdings of *Trayco* and *Aroostook* under *WorldMark by Wyndham*.²¹⁸

Trayco and *Aroostook* were decided four and nine years after *Meyers II*; they were decided twenty-one and sixteen years before *WorldMark by Wyndham*, respectively.²¹⁹ The brief five-year interval between *Meyers II*—wherein *Alleluia Cushion* was overruled and a requirement imposed that only activity in which group action is underway or intended to be initiated is protected under Section 7—and *Trayco*—wherein “concerted” is broadly construed to cover non-group action on fundamental terms and conditions of employment—suggests that the *Meyers* standard was not particularly well-entrenched in Board jurisprudence.²²⁰ At a minimum, the *Meyers* cases did not prevent the Board from departing from a “narrowly literal interpretation of ‘concerted activities’” in *Trayco*, *Aroostook*, and others.²²¹

The shifts between an expansive and narrow understanding of concerted activity appears to more closely reflect the partisan nature of the Board rather than trends of a changing economy and the evolving character of the employer-employee relationship. Under the Trump administration the Board sought to remake the NLRB’s jurisprudence through both incremental and sweeping changes to numerous areas of labor law.²²² Collectively these decisions and rulemaking may increase the difficulty for employees to prove unfair labor practice violations, give broader latitude to employers to discipline and terminate employees who speak up about workplace concerns, and create a more challenging environment for unions to operate within.

It is not disputed that Section 7 protects workers when they seek to organize for better terms and conditions of work.²²³ But particularly in nonunionized workplaces, it is precisely the so-called “mere griping,” i.e., the exchange of information about working conditions and levels of dissatisfaction, which are the nascent stirrings of organized

216. *Id.* at 1.

217. *Id.* at 7 n.45.

218. *Id.* at 1 n.2.

219. *See id.*

220. *See Trayco of S.C., Inc. and Gen. Drivers, Warehousemen and Helpers Union No. 509*, 297 N.L.R.B. 630, 634 (1990); *Meyers Industries, Inc. and Kenneth P. Prill*, 281 N.L.R.B. 882, 882, 884 (1986).

221. *Prill v. N.L.R.B.*, 755 F.2d 941, 951 (D.C. Cir. 1985).

222. *See supra* Part III.

223. *See Alstate Maintenance*, 367 N.L.R.B. at 2.

group action.²²⁴ As the Board earlier held in *Trayco* and in *Aroostook*, employee concerns regarding wages and work schedules are the kinds of dissatisfaction that motivate employees to engage in concerted activity.²²⁵ Under *Alstate Maintenance*, the Board requires that there is some evidence of group action that goes beyond an employee's individual complaints.²²⁶ It is unlikely, however, that employees will advance to the point wherein they seek to initiate group action if they cannot speak freely to identify shared concerns.

In *Alstate*, the Board erred when it so heavily weighed the frame of mind of the complaining employee but not that of the employer.²²⁷ In the written termination notice, the employer specifically identified the group setting as a motivating factor.²²⁸ Likewise in *WorldMark by Wyndham*, the written warning issued by the employer cited the setting in front of other employees.²²⁹ In both cases, the employer was clearly motivated—at least in part—by the group setting of the employees' complaints.²³⁰ In *WorldMark by Wyndham* the Board noted that “even if we were to find that [the employee's] protest was not concerted, we would still find the warning unlawful because it was based on Wyndham's perception that [the employee] was engaged in concerted activity by inciting coworkers to join his protest.”²³¹ The Board's *Alstate* decision allows employers to stifle the earliest forms of concerted activity—the airing of individual workplace concerns—before employees ever have the opportunity to identify shared issues of concern and formulate the intention to engage in group action.²³²

If workers can be disciplined or even terminated for speaking up about their working conditions, the less likely it is that they will ever be able come together to achieve better outcomes. A compounding factor is the increasing precariousness of job security as more workers are classified as independent contractors through relaxed standards and more people participate in the gig economy.²³³ By leaving

224. *See id.* at 3.

225. *Aroostook Cnty. Reg'l Ophthalmology Ctr. and Sheila Lamoreau*, 317 N.L.R.B. No. 32, 218, 220 (1995); *Trayco*, 297 N.L.R.B. at 634 (citing *Jeannette Corp. v. N.L.R.B.*, 532 F.2d 916, 918 (3d Cir. 1976)).

226. *See Alstate Maintenance*, 367 N.L.R.B. at 3.

227. *Id.* at 7.

228. *Id.* at 2.

229. *WorldMark by Wyndham*, 356 N.L.R.B. at 766.

230. *See Alstate Maintenance*, 367 N.L.R.B. at 2; *WorldMark by Wyndham*, 356 N.L.R.B. at 766.

231. *WorldMark by Wyndham*, 356 N.L.R.B. at 767.

232. *See Alstate Maintenance*, 367 N.L.R.B. at 7.

233. *See Elaine Pofeldt, Survey: Nearly 30% of Americans are Self-Employed*, FORBES (May 30, 2020, 10:49 PM), <https://www.forbes.com/sites/elainepofeldt/2020/05/30/survey-nearly-30-of-americans-are-self-employed/?sh=142736392d21> [https://perma.cc/C8BG-86TE].

the fifth seat on the Board vacant, a seat that would traditionally be filled by a Democrat, the Trump administration ensured that the rotating three-member Board panel that issued decisions would always have a Republican—and generally speaking employer-friendly majority.²³⁴ The incoming Biden administration can immediately address this imbalance by filling the vacancy with an experienced labor law practitioner who will uphold an interpretation of protected concerted activity that recognizes that before one can run, one must walk—i.e., before employees can unite to improve their working conditions, they must be able to speak freely to each other without fear of reprisal.²³⁵

An Advice Memo from the Office of the General Counsel from July 2020 illustrates the serious implications of the *Alstate* decision on workers' health and safety.²³⁶ The memo advised the Regional Director to dismiss charges against an employer who terminated two employees for discussing their dissatisfaction with the employer's practice of requiring nurses to share medical gowns while caring for patients at a nursing home during the early period of the COVID-19 pandemic.²³⁷ The memo relied heavily on *Alstate*, reasoning that even though the charging parties spoke to each other (and possibly others) about this serious safety issue—and therefore were not even engaged in individual action—their action was not protected because there was not sufficient evidence that the intent of their exchange was to initiate or induce group action.²³⁸ *Alstate* coupled with this Advice Memo seem to suggest that if an employer terminates a worker early enough, then discussions that may develop into group action on the terms and conditions of employments will not materialize and the employer will face no consequences.

As the proportion of unionized workers continues to fall, the more critical Section 7 protection becomes in the workplace.²³⁹ In this context *Alstate* represents less of a restoration and more of a backsliding to *Meyers*. In upholding the *Interboro* doctrine in *City Disposal*, the Supreme Court noted that *Interboro* is based on an understanding of the relationship of inequality between the employee and employer

234. See Joshua Fox, Steven Porzio & Samantha Shear, *Senate Confirms Pair of Appointees to National Labor Relations Board*, JDSUPRA (July 30, 2020), <https://www.jdsupra.com/legalnews/senate-confirms-pair-of-appointees-to-51798> [<https://perma.cc/CRE4-2ZEA>].

235. Board members must also be confirmed by the Senate. See *id.*

236. Memorandum from the N.L.R.B.'s General Counsel to Paul Murphy (July 31, 2020), <https://www.nlr.gov/sites/default/files/attachments/pages/node-6409/adv-hornell-gardens-03-ca-258740-final.pdf> [<https://perma.cc/2E7L-AF5Z>].

237. See *id.*

238. *Id.*

239. Christensen & Knight, *supra* note 6, at 312.

even after the signing of a collective bargaining agreement.²⁴⁰ This inequality is more pronounced in the absence of a union and collective bargaining agreement. In recognition of this dynamic, employees deserve the opportunity, without the threat of discipline or termination, to speak about and question their terms and conditions of employment. As it has done before in *Alleluia Cushion*, *Trayco*, and *WorldMark by Wyndham*, the Board should swing the pendulum back in the direction of an expansive interpretation of protected concerted action in order to afford the greatest possible protection to workers under the NLRA.

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240. See *N.L.R.B. v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984).

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