Sunbelt Rentals, Inc. *and* International Union of Operating Engineers, Local 139, AFL–CIO. Cases 18–CA–236643, 18–CA–238989, and 18–CA–247528

December 15, 2022

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, RING, WILCOX, AND PROUTY

On May 13, 2020, Administrative Law Judge Michael A. Rosas issued a decision finding, among other violations, that the Respondent violated Section 8(a)(1) of the Act by interrogating two employees while preparing its defense to unfair labor practice allegations without fully complying with the required safeguards set forth in *Johnnie's Poultry*.[1]

On March 29, 2021, the National Labor Relations Board issued a decision largely affirming the judge's findings and conclusions, except for the *Johnnie's Poultry* violations, which the Board severed and retained.[2] Previously, on March 1, 2021, the Board had issued a Notice and Invitation to File Briefs (NIFB) in this matter,[3] which asked the parties and interested amici to address the following questions:

1. Should the Board adhere to or overrule *Johnnie's Poultry*?

2. If the Board overrules *Johnnie's Poultry*, what standard should the Board adopt in its stead? What factors should it apply in determining whether an employer has violated the Act when questioning an employee in the course of preparing a defense to an unfair labor practice allegation? Should the Board apply a "totality of the circumstances" standard? Even if some of the *Johnnie's Poultry* safeguards should be dispensed with, are there any that, if breached, should continue to render such questioning unlawful per se?

The primary issue presented in this case is thus whether the Board should adhere to the bright-line, per se standard set forth in *Johnnie's Poultry* for evaluating whether employer interrogations of employees in preparation for Board proceedings are lawful.

For more than 58 years, the Board has consistently recognized the "inherent danger of coercion" in employer questioning of employees in preparation for Board proceedings, while also acknowledging that employers have a countervailing "legitimate cause to inquire" to prepare their defense to unfair labor practice allegations.[4] Balancing these competing interests, as well as taking the Board's institutional interest in ensuring the integrity of its processes into account,[5] the Board has permitted such questioning only where the employer abides by certain safeguards.[6] Where an employer has failed to strictly observe these safeguards, the Board has found the interrogation per se unlawful.[7]

Reviewing courts have generally agreed that questioning employees about their Section 7 activity in preparation for a Board proceeding can be coercive and that an employer's compliance with the *Johnnie's Poultry* safe-

[1] 146 NLRB 770, 775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965).

[2] *Sunbelt Rentals, Inc.*, 370 NLRB No. 102, slip op. at 1 fn. 4 (2021). The Board found that the Respondent violated Sec. 8(a)(1) by threatening employees that it would be futile to support the Union and by interrogating employees about union activities related to a decertification petition; Sec. 8(a)(3) and (1) by reorganizing its Franksville facility and laying off the two remaining unit employees in response to the employees' vote to unionize; and Sec. 8(a)(5) and (1) by failing to meet at reasonable times for negotiations, refusing to bargain over wages from February to June 2019, engaging in surface bargaining, and failing to bargain over its decision to eliminate the bargaining unit. The Board also imposed special remedies for the Respondent's "pattern of serious misconduct," including a 12-month extension of the certification year, a bargaining-schedule remedy, a broad cease-and-desist order, and a public reading of the remedial notice, which the Union is permitted to record. Id., slip op. at 1, 5-6.

[3] *Sunbelt Rentals, Inc.*, 370 NLRB No. 94, slip op. at 1-2 (2021). In response, the then-Acting General Counsel, the Respondent, and the Charging Party filed briefs, and amicus briefs were filed by American Federation of Labor and Congress of Industrial Organizations (AFL–CIO); American Federation of State, County and Municipal Employees (AFSCME); American Federation of Teachers (AFT); Communications Workers of America, AFL-CIO (CWA); International Brotherhood of Electrical Workers (IBEW), Local Union 304; International Union of Operating Engineers (IUOE); National Nurses United (NNU); Service Employees International Union (SEIU); and Weinberg, Roger & Rosenfeld.

[4] *Johnnie's Poultry*, 146 NLRB at 774-775.

[5] Id. at 775 ("[I]nterrogation concerning employee activities directed toward enforcement of Sec[.] 7 rights also interferes with the Board's processes in carrying out the statutory mandate to protect such rights.").

[6] The *Johnnie's Poultry* safeguards are as follows:

> [T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

Id. See *Bill Scott Oldsmobile,* 282 NLRB 1073, 1075 (1987) (applying *Johnnie's Poultry*).

[7] Id.

guards is a relevant consideration in determining whether the questioning violated the Act. However, some courts have disagreed with the Board's per se approach[8] and have instead applied a totality of the circumstances test.[9]

Today, having carefully considered the matter and contrary to our dissenting colleagues, we reaffirm *Johnnie's Poultry* and the Board's bright-line approach to employer interrogations of employees in preparation for Board proceedings. As we will explain, Congress has given the Board the authority in the first instance to decide how the Act applies to employer questioning, and, based on our institutional experience, we believe that the *Johnnie's Poultry* standard is not only rational and consistent with the Act, but that it also appropriately balances the competing employee and employer interests at stake and best promotes the Board's institutional interest in effectively enforcing the Act. Contrary to the criticism from some courts, such interrogations are not protected by Section 8(c) of the Act, and, as applied to employer questioning of employees in preparation for Board proceedings, the totality of the circumstances test advanced by these courts has significant shortcomings compared to the Board's per se approach. Finally, applying *Johnnie's Poultry*, we affirm the judge's finding that the Respondent violated Section 8(a)(1) by interrogating two employees without providing the required assurances.

Background[10]

A. Facts

In 2018, the Charging Party Union prevailed in an election to represent a bargaining unit of drivers who transport and mechanics who maintain the Respondent's large construction equipment at its Franksville, Wisconsin equipment-rental facility. Subsequently, the General Counsel filed a complaint alleging that the Respondent committed numerous unfair labor practices in 2018 and 2019, including while negotiating for an initial collective-bargaining agreement with the Union.

On February 10, 2020, in preparation for the hearing in this case, the Respondent's attorney, Patricia Hill, met with two employees the Respondent planned to call as witnesses, Mariano Rivera and Christopher Pender. In her meeting with Rivera, Hill explained why she was speaking with him, assured him that he did not have to speak with her, and told him that he was entitled to hire an attorney to represent him, which he declined. She did not, however, tell Rivera that his answers to her questions would not affect his job. In her meeting with Pender, Hill explained the purpose of the questioning and told him that his answers would not affect his job, but she did not tell him his participation was voluntary.

As stated above, the judge, following well-settled principles, found that the Respondent violated Section 8(a)(1) by interrogating Rivera and Pender without fully complying with the *Johnnie's Poultry* safeguards. Specifically, the judge found that Hill failed to tell Rivera that his testimony would not affect his job and failed to tell Pender that his participation was voluntary. Thereafter, the Board issued the NIFB described above, asking whether it should adhere to or overrule *Johnnie's Poultry*, and if it overrules *Johnnie's Poultry*, what standard the Board should adopt in its stead.

B. Responses to the NIFB

The then-Acting General Counsel,[11] the Charging Party, and the amicus labor organizations primarily argue that the Board should adhere to the *Johnnie's Poultry* per se standard because employer interrogations of employees in preparation for Board proceedings are uniquely coercive and may jeopardize the Board's ability to enforce the Act. They also argue that the simplicity and clarity of the per se standard promotes compliance by employers, understanding by unions and employees, and enforcement by the Board. They assert that circuit court criticism of *Johnnie's Poultry* does not justify departing from the standard because the criticism is not universal across all circuits and because the Board can respond to such criticism by offering a more thorough explanation of why the per se standard is necessary. They also argue that replacing the per se standard with an after-the-fact totality of the circumstances analysis would introduce

[8] *Tschiggfrie Properties, Ltd. v. NLRB*, 896 F.3d 880, 888 (8th Cir. 2018) (declining to adopt *Johnnie's Poultry* and citing cases in which the Second, Fifth, and Seventh Circuits have done likewise); *ITT Automotive v. NLRB*, 188 F.3d 375, 389 fn. 9 (6th Cir. 1999) (explaining that although employers must give *Johnnie's Poultry* warnings, failure to do so will not result in per se liability); *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1256 (5th Cir. 1992) (rejecting application of *Johnnie's Poultry* and applying totality of the circumstances analysis based on *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964)); *A & R Transport, Inc. v. NLRB*, 601 F.2d 311, 313 (7th Cir. 1979) ("The interrogation standards set forth in *Johnnie's Poultry* are relevant in determining whether an interview was coercive . . . . We join with other circuits, however, in declining to approve a per se rule and instead will look to the totality of the circumstances . . . . "); *NLRB v. Lorben Corp.*, 345 F.2d 346, 348 (2d Cir. 1965) (recognizing relevance of *Johnnie's Poultry* safeguards but rejecting per se application in favor of totality of the circumstances analysis).

[9] See *Rossmore House*, 269 NLRB 1176 (1984) (setting forth totality of circumstances test), enfd. sub nom. *Hotel & Restaurant Employees, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[10] The facts are fully set forth in *Sunbelt Rentals, Inc.*, 370 NLRB No. 102 (2021).

[11] Hereafter, we will refer to the arguments of the "General Counsel."

complexity and potential redundancies for all parties and sacrifice the clarity and efficiency of the extant standard.

The Respondent urges us to overrule *Johnnie's Poultry* and replace it with the totality of the circumstances test set forth in *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). It argues that questioning employee witnesses in preparation for Board proceedings is no more inherently coercive than other interrogations, so the Board should apply the same standard to all interrogations. The Respondent also argues that circuit court precedent supports overruling *Johnnie's Poultry* because many circuits have rejected it, and even those courts that have not rejected *Johnnie's Poultry* apply a totality of the circumstances standard in other circumstances to determine whether an interrogation is unlawfully coercive, so adopting that standard will make the law uniform and consistent.

For the reasons set forth below, and having considered the responses to the questions asked in the NIFB, we have decided to adhere to the bright-line per se standard set forth in *Johnnie's Poultry*.[12]

DISCUSSION

A. The Board's Authority to Interpret and Apply the Act

We begin our consideration of the issue presented with the well-established premise that Congress gave the Board, and not the courts, the primary authority to interpret and apply the Act. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978). As the Supreme Court has repeatedly explained, "the NLRB has the primary responsibility for developing and applying national labor law policy . . . . [and t]his Court therefore has accorded Board rules considerable deference." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). "If the Board adopts a rule that is rational and consistent with the Act, then the rule is entitled to deference from the courts." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) (citations omitted). And where "the Board's application of such a rational rule is supported by substantial evidence on the record, courts should enforce the Board's order." Id. See also *Beth Israel Hospital v. NLRB*, 437 U.S. at 501 (explaining that "[t]he judicial role is narrow").

The *Johnnie's Poultry* standard is well within the area in which Congress has given the Board primary authority to decide how to apply the Act. As the Supreme Court has observed, "'[t]he ultimate problem is the balancing of the conflicting legitimate interests.'" Id. (quoting *NLRB v. Truck Drivers*, 353 U.S. 87, 96 (1957)). Specifically, in this context, the Board must balance an employer's "legitimate cause to inquire" in preparation for an unfair labor practice hearing against the "inherent danger of coercion" in such questioning. *Johnnie's Poultry*, 146 NLRB at 774. As the Court has explained, "'striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.'" *Beth Israel Hospital v. NLRB*, 437 U.S. at 501 (quoting *NLRB v. Truck Drivers*, 353 U.S. at 96). As we will discuss, the Board's policy, even predating the issuance of *Johnnie's Poultry* in 1964, has been that pretrial questioning of employees is uniquely coercive and that safeguards are necessary to ensure that the interrogation does not interfere with employees' Section 7 rights. While courts have not always agreed, none has persuasively explained how the *Johnnie's Poultry* standard is not rational and consistent with the Act. In order to fully explain why the standard is rational and consistent with the Act, we will first take a step back to describe the origins of *Johnnie's Poultry* and its development over time.

B. History of the Johnnie's Poultry Standard

1. Interrogations in General and in Preparation for Board Proceedings

The Board has long held that an employer violates Section 8(a)(1) of the Act when it coercively questions employees about their Section 7 activities. For several years early in the Board's history, the Board held that all interrogations were per se unlawful. See *Standard-Coosa-Thatcher Co.*, 85 NLRB 1358, 1359–1363 (1949). As the Board explained, "attempts to elicit information [regarding Section 7 activities] . . . necessarily would intimidate, restrain, and coerce [employees] in the exercise of their rights to organize. Such interrogation constitutes a threat that the employer's economic power and superior position may be used to the disadvantage of the individual employees disclosed to be members of or active in the union." Id. at 1362 (internal quotations omitted). Further, an interrogation "create[s] immediate, personal fear of loss of employment in present and prospective members of the Union, and it obviously constitutes, therefore, flagrant and unlawful interference, restraint, and coercion of employees." Id.

Following judicial criticism, however, the Board subsequently adopted a totality of the circumstances test for analyzing most allegations of coercive employer questioning. See *Blue Flash Express, Inc.*, 109 NLRB 591, 593 (1954); *Rossmore House*, above. This inquiry examines "whether under all the circumstances the question-

[12] In light of this conclusion, we need not address the NIFB's second question, asking what standard should replace *Johnnie's Poultry*.

ing at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Westwood Health Care Center*, 330 NLRB 935, 940 (2000). The Board considers, among other things, (1) whether there is a history of employer hostility to or discrimination against protected activity; (2) the nature of the information sought; (3) the identity of the questioner; (4) the place and method of interrogation; (5) the truthfulness of the employee's reply; and, when relevant, (6) the nature of the relationship between the questioner and the employee. *Intertape Polymer Corp.*, 360 NLRB 957, 957 (2014), enfd. in relevant part 801 F.3d 224 (4th Cir. 2015).

For more than 58 years, though, the Board has applied a different standard when an employer questions employees for the purpose of investigating facts relevant to an unfair labor practice complaint "where such interrogation is necessary in preparing the employer's defense for trial of the case." *Johnnie's Poultry Co.*, 146 NLRB at 775. The Board has recognized that there is an "inherent danger of coercion" in such questioning. Id. at 774. On the other hand, employers have a countervailing "legitimate cause to inquire" to prepare to defend themselves at the unfair labor practice hearing. Id. Balancing these competing interests, the Board has permitted employers to question employees on matters that involve Section 7 activity in limited circumstances without incurring liability if the employer observes "specific safeguards designed to minimize the coercive impact of such employer interrogation." Id. at 775.

> Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

Id. Failure to strictly observe these safeguards will result in a finding that the interrogation was per se unlawful. Id. ("When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege" to engage in questioning that would be unlawful absent the privilege); see also *Freeman Decorating Co.*, 336 NLRB 1, 14 (2001) (stating that the Board takes a "bright-line approach" in enforcing the *Johnnie's Poultry* safeguards), enf. denied on other grounds sub nom. *Stage Employees IATSE v. NLRB*, 334 F.3d 27 (D.C. Cir. 2003).[13]

2. Policies Underlying *Johnnie's Poultry*

As the Board has explained, the *Johnnie's Poultry* standard is anchored in its recognition that, although "an employer has a legitimate cause to inquire," interrogations of employees in preparation for unfair labor practice hearings present "an inherent danger of coercion." 146 NLRB at 774.[14] The D.C. Circuit has agreed, explaining that "because of the conflicting interests involved, a delicate balance must be achieved between the employer's need to prepare adequately for pending unfair labor practice cases and the inherently coercive nature (in violation of an employee's Section 7 rights) of employer interrogation of employees during a labor dispute." *UAW v. NLRB*, 392 F.2d 801, 809 (D.C. Cir. 1967), cert. denied 392 U.S. 906 (1968). See also *Standard-Coosa-Thatcher Carpet Yarn Div., Inc. v. NLRB*, 691 F.2d 1133, 1141 (4th Cir. 1982) ("The Board's per se rule simply recognizes that a significant risk of coerciveness arises when an employer questions employees about a union without informing them that they may, with impunity, decline to respond."), cert. denied 460 U.S. 1083 (1983).

The *Johnnie's Poultry* safeguards are thus designed "to temper the coerciveness of such interviews while permitting employers considerable latitude to question employees in preparation for trial." *Bill Scott Oldsmobile,* 282

[13] Although a few Board decisions may have suggested the possibility of an exception to the per se standard in certain circumstances, such statements were either dicta or arose in distinguishable circumstances. In *Le Bus*, 324 NLRB 588, 588 (1997), the Board suggested "that unusual settings and special circumstances may excuse or mitigate an employer's failure to give the required assurances." However, the Board did not find the purported exception met and thus its statement was merely dicta. In support, the Board cited only *Honda Hayward*, 307 NLRB 340, 350 (1992), but that case arose in distinguishable circumstances. Specifically, *Honda Hayward* involved job applicants, rather than employees, and the employer merely assured them that there was no need to lie in court. Also distinguishable is *Albertson's, LLC,* 359 NLRB 1341 (2013), affd. 361 NLRB 761 (2014). There, the Board considered whether it was sufficient that the employer had previously given assurances to the employees, which is not the typical *Johnnie's Poultry* scenario. However, the Board ultimately reversed the judge and found the violation, and any suggestion that partial assurances may have been sufficient if less time had elapsed was not an accurate statement of the law. Thus, to the extent that these cases include language arguably suggesting an exception to the per se standard, we specifically disavow and reject any such suggestion.

[14] As the D.C. Circuit has explained in other contexts, "the Board possesses an unmatched expertise in distilling and identifying the effects of unlawful employer conduct. We believe that the Board may rely on that expertise, and on the cumulative experience of past cases, to presume that certain employer conduct will inevitably produce certain effects on employees." *United Steelworkers of America v. NLRB*, 646 F.2d 616, 639 (D.C. Cir. 1981).

NLRB at 1075. Without the *Johnnie's Poultry* safeguards, employees may be nervous and tempted to lie for fear of potential retaliation, undercutting employers' ability to effectively prepare their defenses to unfair labor practice allegations. See, e.g., *Plains Cooperative Oil Mill*, 154 NLRB 1003, 1029 (1965) (noting that an employer "is more likely to get truthful answers if he tells the employees that they have nothing to fear no matter how they answer his questions").[15]

The simplicity and predictability of the *Johnnie's Poultry* standard also encourages employer compliance and ensures stronger protection of employees' Section 7 rights. Sample assurances are widely available. See, e.g., *Sheraton Anchorage*, 363 NLRB 53, 65 (2015) (employer handed printed assurances to employees prior to questioning); see also Westlaw.com, "Employee Interview Statement for an Unfair Labor Practice Investigation (Johnnie's Poultry Statement)," in Practical Law Standard Documents file, last accessed December 13, 2022. Providing these assurances imposes only a minimal burden on employers. See *Bill Scott Oldsmobile*, 282 NLRB at 1075 (recognizing that "[t]he safeguards are not unduly onerous or hampering and provide employers with clear guidance on how to avoid unfair labor practice liability . . . . [T]his clarity outweighs any inconvenience to the employer, especially in view of the significant Section 7 rights the Board is seeking to protect."). Further, because *Johnnie's Poultry* violations often come to light during hearings, the simplicity of the standard is critical, as it allows the General Counsel to quickly elicit key facts without sidetracking the hearing.

Additionally, the bright-line nature of the *Johnnie's Poultry* standard offers both stability and clarity in the law. As the Board and courts have recognized, "[w]hile bright-line rules . . . may run the risk of being over or under-inclusive in their coverage, it is generally recognized that the certainty and stability such a rule affords outweighs any harm done when the rule is applied evenly." *Williams Energy Services*, 336 NLRB 160, 160 (2001) (quoting *NLRB v. Maryland Ambulance Services*, 192 F.3d 430, 434 (4th Cir. 1999)). The *Johnnie's Poultry* standard is longstanding, having received the Board's bipartisan support since 1964. See *Encino Motor Cars, LLC v. Navarro*, 579 U.S. 211, 221–222 (2016) (explaining that although "[a]gencies are free to change their existing policies," when "explaining its changed position, an agency must be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'") (quoting *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009)).

3. Reception by the Courts

As several amici note, reviewing courts have generally agreed that employer interrogations of employees regarding their Section 7 activity in preparation for a Board proceeding can be coercive and that an employer's compliance with the *Johnnie's Poultry* safeguards is a relevant consideration in determining whether the questioning violated the Act. For example, the Fifth Circuit has acknowledged that there is "a delicate balance between the legitimate interest of the employer in preparing its case for trial, and the interest of the employee in being free from unwarranted interrogation . . . for . . . any interrogation by the employer relating to union matters presents an ever-present danger of coercing employees in violation of their [Section] 7 rights." *NLRB v. Neuhoff Bros., Packers, Inc.*, 375 F.2d 372, 377 (5th Cir. 1967) (internal quotations omitted). And, as the Fourth Circuit has explained, *Johnnie's Poultry*—and particularly its per se rule—"simply recognizes that a significant risk of coerciveness arises when an employer questions employees about a union without informing them that they may, with impunity, decline to respond" and that the safeguards "are reasonably calculated to limit that risk." *Standard-Coosa-Thatcher v. NLRB*, 691 F.2d at 1141. See also *UAW v. NLRB*, 392 F.2d at 809 (*Johnnie's Poultry* "established specific safeguards designed to minimize the coercive impact" of interrogations in preparation for litigation) (internal quotations omitted).

However, as the Respondent and our dissenting colleagues argue, some courts have rejected the Board's per se approach. See, e.g., *Tschiggfrie Properties, Ltd. v. NLRB*, 896 F.3d 880, 888 (8th Cir. 2018) (declining to adopt *Johnnie's Poultry* rule and citing cases in which the Second, Fifth, and Seventh Circuits have done likewise).[16] Those courts favor instead a totality of the circumstances test, like the one set forth in *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), in which an employer's failure to comply with all the *Johnnie's Poultry* safeguards is considered along with other factors to determine whether its questioning was coercive under the circumstances of the case.

On the other hand, and as the General Counsel points out, the D.C. Circuit, which has plenary jurisdiction over

[15] *Rossmore House*, above, also recognizes that coercive questioning is more likely to lead to untruthful answers. For the reasons we explain in detail, however, the high likelihood of coerciveness in employers' litigation-defense questioning makes using untruthfulness as evidence of coercion, as the totality of the circumstances test does, superfluous, and undermining to the legitimate purposes of the questioning—in other words, the context warrants strong prophylactic efforts to prevent coercion that may result in untruthful answers.

[16] See footnote 8, above.

all Board decisions, has not rejected the Board's per se approach. See *UAW v. NLRB*, 392 F.2d at 809 (affirming Board's finding of an unlawful interrogation under *Johnnie's Poultry*). Further, although five circuit courts have declined to apply the *Johnnie's Poultry* standard, almost half of the Circuits have not yet expressed a view on *Johnnie's Poultry*.

Significantly, the courts that have declined to apply the Board's *Johnnie's Poultry* standard have done so without addressing the Board's primary authority in interpreting and applying the Act in this context, and, with one exception,[17] discussed below, they have not specifically held that *Johnnie's Poultry* is not rational and consistent with the Act. See, e.g., *NLRB v. Lorben Corp.*, 345 F.2d at 350 (Judge Friendly, dissenting) ("Although my brothers condemn the Board's requirements, they do not explain why these rules are inappropriate or, more relevantly, why the Board may not reasonably think them so.") See also, e.g., *NLRB v. Complas Industries, Inc.*, 714 F.2d 729, 735-736 (7th Cir. 1983) (per curiam). In *Complas Industries*, the Seventh Circuit stated summarily that the court has "refused to defer to the Board's attempts to require employers to give the *Johnnie's Poultry* warnings regardless of context." But the court failed to acknowledge, let alone give appropriate weight to, the deference generally due the Board when interpreting the Act. And the court did not specifically find that the *Johnnie's Poultry* standard is irrational and inconsistent with the Act. Instead, courts like the Seventh Circuit have simply applied their preferred approaches without first considering whether the Act precludes the Board's *Johnnie's Poultry* per se standard.[18]

C. The Rationale in Support of Johnnie's Poultry

Although the *Johnnie's Poultry* standard has served the Board and parties well since its adoption over 50 years ago, we acknowledge that our prior decisions may not have sufficiently explained why interrogations in preparation for Board hearings should be treated as especially likely to be coercive. See, e.g., *Tschiggfrie Properties, Ltd. v. NLRB,* 896 F.3d at 888 (finding that the Board had not sufficiently explained the need for a per se rule). Therefore, we take this opportunity today to clarify the rationale for maintaining the *Johnnie's Poultry* standard.

1. Interrogations in Preparation for Board Proceedings Pose a High Potential for Coercion While Employers Also Have a Legitimate Need for Such Questioning

As the Board and courts have long recognized, and as we have discussed above, employer interrogations of employees in preparation for Board proceedings have a high potential to be coercive.[19] Such interrogations are highly likely to be coercive because they are conducted by an employer that is accused of unlawfully interfering with employees' Section 7 rights and is seeking information to vindicate itself. During such questioning, the employer is asking employees to assist the employer with preparing its defense to allegations that it unlawfully interfered with their coworkers' rights—or even the questioned employees' own rights. These interrogations are often conducted by a high-level company official or a company attorney and often occur in an unfamiliar office in anticipation of an always adversarial and often unfamiliar event: an unfair labor practice hearing. Particularly when a complaint has issued (which means the General Counsel has reviewed the case and found reason to believe that employee rights have been violated and is proceeding to prosecute that alleged violation), the interrogation takes place in a context of utter seriousness to the employer: its legal rights, as well as the legal rights of employees and/or a union are at stake, so this questioning, almost by definition and necessity, is never casual.

Further, unlike in most legal proceedings, where a party is not in a position to exert direct pressure on potential witnesses, *Johnnie's Poultry* interrogations involve legal proceedings where employee potential witnesses are economically dependent on their employers. The Supreme Court has found that because of "the economic dependence of the employees on their employers," there is a "necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing, Co.*, 395 U.S. 575, 617 (1969). Employer interrogations in preparation for Board litigation are thus especially likely to be coercive because "the employer has the power to discharge, withhold promotions, or otherwise penalize potential or actual witnesses for the General Counsel." *Plains Coopera-*

[17] See *Tschiggfrie Properties, Ltd. v. NLRB*, above.

[18] Nor have those courts given the Board the opportunity to provide further explanation in support of the *Johnnie's Poultry* per se approach through a remand.

As we will explain below, there is no merit to the dissent's broad assertion that "the Board lacks the authority to hold that noncompliance with Board-created safeguards or standards [i.e. the *Johnnie's Poultry* safeguards] is a per se violation of the Act when those standards go beyond the prohibitions established by the Act itself," a position the courts have not adopted.

[19] See, e.g., *Johnnie's Poultry*, 146 NLRB at 774 (basing decision on the "inherent danger of coercion" in such interrogations); *UAW v. NLRB*, 392 F.2d at 809 (recognizing the "inherently coercive nature (in violation of an employee's Sec[.] 7 rights) of employer interrogation of employees during a labor dispute").

tive Oil Mill, 154 NLRB at 1028. The likelihood of coercion in such circumstances is structural; it emanates from the context in which the interrogation occurs.

Both employees and employers may be harmed by the high risk of coercion present during interrogations in preparation for Board proceedings. As the Board has previously recognized, without the required assurances, employees may feel coerced, and thus compelled to tell employers what they think the employer wants to hear, even if their statements are evasive or untruthful. See, e.g., *Complas Industries*, *Inc.*, 255 NLRB 1416, 1416 (1981) (without assurances, employee was "evasive" during employer interrogation and "denied having knowledge of the union activity of which he was well aware"), enf. denied 714 F.2d 729 (7th Cir. 1983). And although giving the required assurances does impose a minimal burden on employers, employers will be even more burdened if their defenses ultimately rest on inaccurate information that was provided because of the coercive circumstances in which it was procured. See, e.g., *Plains Cooperative Oil Mill*, 154 NLRB at 1029 (explaining that an employer "is more likely to get truthful answers if he tells the employees that they have nothing to fear no matter how they answer his questions").

Because the potential for coercion in these circumstances is inextricably linked to the employee dependence on the employer, *Johnnie's Poultry* assurances are needed even where an employee appears to be aligned with the employer and where an interrogation is conducted by a presumably friendly supervisor. For, even in these circumstances, the employee might still fear retaliation by the employer as it, by necessity, conducts questioning in preparation for defending against allegations that it interfered with Section 7 rights. See *UAW v. NLRB*, 392 F.2d at 809 (rejecting employer's argument that, for these reasons, it was not required to give assurances to employees who had previously spoken with an attorney representing antiunion employees). Given the context of these pre-hearing interrogations, where the employee's vulnerability to potential employer coercion is at its zenith, any suggested alignment of interests between the employee and management does not excuse the need for providing assurances.

And even if the coercive circumstances described above may not be identifiable in every case, "[t]he Board and the courts have recognized the value of bright-line rules, which promote certainty, predictability, and administrative efficiency, even if their application in a particular case may seem unjust or unwise." *Williams Energy Services*, 336 NLRB at 160; see also *NLRB v. Maryland Ambulance Services*, 192 F.3d at 434 ("While bright-line rules . . . may run the risk of being over or under-inclusive in their coverage, it is generally recognized that the certainty and stability such a rule affords outweighs any harm done when the rule is applied evenly."); *Cleveland Indians Baseball Co.*, 333 NLRB 579, 580 (2001) (same, noting "[o]ften the tradeoff is worthwhile") (quoting *American Hospital Assn. v. NLRB*, 899 F.2d 651, 659 (7th Cir. 1990), affd. 499 U.S. 606 (1991)). The benefits, then, of a bright-line rule are clear, and it is equally clear that there is minimal potential for harm in the few cases where the circumstances may arguably appear less coercive than usual.

Notwithstanding the risks of coercion to employees, the Board and courts have recognized employers' legitimate need to prepare a legal defense. See, e.g., *Johnnie's Poultry*, 146 NLRB at 774 (acknowledging that employers have a "legitimate cause to inquire"); *Surprenant Mfg. Co. v. NLRB*, 341 F.2d 756, 763 (6th Cir. 1965) ("The cases recognize that the rule calls for a delicate balance between the legitimate interest of the employer in preparing its case for trial, and the interest of the employee in being free from unwarranted interrogation."). Where an employer has been charged with engaging in unlawful conduct, it clearly has a right to prepare its defense, including by investigating the facts underlying the allegations. Because employees are typically among the potential witnesses to allegedly unlawful conduct, that preparation may include questioning employees who may possess relevant information. In this context of preparation to defend against unfair labor practices charges, an employer's need to question employees is greater than, and different in purpose from, an employer's interest in questioning employees in other contexts.

We must, and do, recognize the importance of the employer's rights, as a charged party in Board proceedings, as well as the employees' inviolable Section 7 rights. We also recognize the tension, if not outright conflict, between the parties' rights and interests in these situations. Accommodating these competing considerations requires a "delicate balance." *Surprenant Mfg. Co. v. NLRB*, 341 F.2d at 763. The confluence of employers' need to question employees in order to defend themselves against unfair labor practice allegations, on one hand, and the predictably heightened risk of coercion entailed in this litigation-preparation process, on the other hand, makes it appropriate to treat interrogations in preparation for Board proceedings differently from other kinds of employer interrogations. And the Board's longstanding approach to interrogations in these situations effectively meets the needs of both parties. *Bill Scott Oldsmobile*, 282 NLRB at 1075 ("[T]he *Johnnie's Poultry* requirements have proved effective as a prophylactic measure to temper the coerciveness of such inter-

views while permitting employers considerable latitude to question employees in preparation for trial.").

2. Without Safeguards, Interrogations in Preparation for Board Proceedings May Jeopardize the Board's Ability to Effectively Enforce the Act and May Undermine the Integrity of Board Processes

An employer's questioning of an employee in preparation for Board proceedings has the potential—uniquely among the circumstances in which an employer may interrogate an employee—to jeopardize the Board's ability to enforce the Act and to undermine the integrity of Board processes. This provides another independent reason for treating interrogations in preparation for Board hearings differently from other interrogations—and requiring that they be conducted with the *Johnnie's Poultry* safeguards.

Section 7 of the Act guarantees employees "the right to utilize the Board's processes." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983). Section 10(a) empowers the Board to prevent unfair labor practices. However, pursuant to Section 10(b), the Board may issue a complaint only "[w]henever it is charged that any person has engaged in or is engaging in any . . . unfair labor practice." Thus, as the Supreme Court has explained, "[i]mplementation of the Act is dependent upon the initiative of individual persons who must . . . invoke its sanctions through filing an unfair labor practice charge." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). Although anyone may file a charge, employees are typically first, and most likely, to become aware of potentially unlawful conduct warranting the filing of a charge. The Board's ability to enforce the Act, therefore, depends upon and requires employees' honest participation in Board processes, initially as charging parties. And, after charges have been filed, "[t]he Board's ability to secure vindication of rights protected by the Act depends in large measure upon the ability of its agents to investigate charges fully and to obtain relevant information and supporting statements from individuals." *Certain-Teed Products Corp.*, 147 NLRB 1517, 1520 (1964). Employees' willingness to file charges and honestly participate in the ensuing Board investigations is of paramount, critical importance.

Indeed, the Board and the courts have also long recognized that there is a "special danger" of witness intimidation in Board proceedings. *Interstate Management Co. LLC*, 369 NLRB No. 84, slip op. at 2–3 (2020) (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-242 (1978)). This danger is "particularly acute with respect to current employees . . . over whom the employer, by virtue of the employment relationship, may exercise intense leverage." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 240. Employee witnesses are "especially likely to be inhibited by fear" because of employers' "capacity for reprisal and harassment." *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80, 83 (3d Cir. 1976).

Requiring *Johnnie's Poultry* assurances is thus consistent with the Board's strong, statutory interest in accurately determining the facts in order to identify, resolve, and prevent unfair labor practices. In *Bill Scott Oldsmobile*, 282 NLRB at 1075, the Board explained that "an employer's interviewing of employees in preparation for litigation has a pronounced inhibitory effect on the exercise of Section 7 rights, which includes protection in seeking vindication of those rights from employer interference, restraint, or coercion." Further, as the Fifth Circuit has recognized, "the process of investigation through interrogation of employees must be a carefully conducted one lest that very activity—or the prospect of it—inhibit employees from invoking, assisting or participating in Board procedures which depend so directly upon information supplied by or through employees." *NLRB v. Neuhoff Bros., Packers, Inc.*, 375 F.2d at 377. The *Johnnie's Poultry* assurances mitigate the risk that employer interrogations related to alleged unfair labor practices will inhibit employee participation in the Board's processes.

In addition, the *Johnnie's Poultry* assurances both complement and strengthen the Board's ability to effectively enforce Section 8(a)(4) of the Act. Congress enacted Section 8(a)(4), which makes it an unfair labor practice to discharge or otherwise discriminate against employees who file unfair labor practice charges or give testimony in Board proceedings, to ensure employees' unfettered access to the Board and thereby the integrity of the Board's processes. As the Supreme Court has explained, through the adoption of Section 8(a)(4), "Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board." *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972). Nor does Section 8(a)(4) lessen the need for preemptive safeguards, since "the possibility of deterrence arising from *post hoc* disciplinary action is no substitute for a prophylactic rule that prevents the harm to a pending enforcement proceeding which flows from a witness' having been intimidated." *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. at 239-240 (emphasis in original). The *Johnnie's Poultry* assurances help to ensure that employee participation in the employer's preparation for Board proceedings, and ultimately, the employee's participation in Board proceedings, is uncoerced.

In sum, because employer interrogations of employees in preparation for Board proceedings are uniquely likely

to be coercive, strict safeguards are necessary to ensure that the interrogations will not dissuade employees from exercising their protected right to utilize the Board's processes. Employer assurances against retaliation allow employees, who are economically dependent on their employers, to speak honestly about their activities and critical facts regarding the alleged unfair labor practices. Employees who receive the required reassurances will also be able to provide truthful evidence more freely to Board agents during the investigation and at the hearing. And by ensuring that employer questioning is noncoercive, the *Johnnie's Poultry* standard also safeguards employees' future access to the Board and its processes.

3. Johnnie's Poultry Effectively Accommodates Employees' Section 7 Rights, Employers' Legitimate Need to Question Employees, and the Board's Institutional Interest

As the above discussion demonstrates, questioning employees in preparation for unfair labor practice hearings is fundamentally different from other types of workplace interrogations because of the high risk of coercion, the need to accommodate an employer's legitimate right to prepare its defense, and the Board's institutional interest in ensuring the integrity of its processes. Thus,

> The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board subject to limited judicial review.

NLRB v. Truck Drivers, 353 U.S. at 96 (citing cases). See also *UAW v. NLRB*, 392 F.2d at 809 (noting that "because of the conflicting interests involved, a delicate balance must be achieved between the employer's need to prepare adequately for pending unfair labor practice cases and the inherently coercive nature (in violation of an employee's Section 7 rights) of employer interrogation of employees during a labor dispute").[20]

We reaffirm today that the *Johnnie's Poultry* safeguards aid in achieving a careful balance of all the interests at stake. First, as we have explained, they are necessary to dispel the "inherent danger of coercion" when an employer questions employees in preparation for a Board proceeding. 146 NLRB at 774. The preliminaries of such questioning—the explanation of its purpose and the assurances that participation is entirely voluntary and that no reprisal will take place—create a more reassuring atmosphere for the questioning to follow.[21] And the guardrails *Johnnie's Poultry* erects around the questioning itself—a context free from employer hostility to union organization, limiting the questions to the employer's legitimate purpose, refraining from inquiring into the employee's subjective state of mind or from otherwise interfering with the employee's statutory rights—provide a timely reminder to the employer itself not to interfere with, restrain, or coerce the questioned employee by pursuing lines of inquiry that exceed the employer's legitimate need for information.

At the same time, the safeguards accommodate an employer's legitimate need to question employees for the purpose of preparing their defenses to unfair labor practice allegations. Id. at 774-775. The *Johnnie's Poultry* "safeguards are not unduly onerous or hampering and provide employers with clear guidance on how to avoid unfair labor practice liability," and "this clarity outweighs any inconvenience to the employer, especially in view of the significant Section 7 rights the Board is seeking to protect." *Bill Scott Oldsmobile*, 282 NLRB at 1075.

In addition, the *Johnnie's Poultry* standard also protects the integrity of the Board's processes by ensuring that employees are able to speak truthfully without fear of reprisal. When an employer prefaces its questioning with these assurances, the Board is in a better position to effectuate its statutory duty of detecting, remedying, and preventing unfair labor practices. Indeed, preparing a witness with the *Johnnie's Poultry* safeguards may benefit employers, because the safeguards lessen the concern that the testimony elicited is a product of coerced participation in witness preparation.

In essence, the Board's per se, bright-line *Johnnie's Poultry* standard builds a sturdy barrier against a type of interrogation that is particularly likely to be coercive, while providing a well-defined and easily accessed gate through which the employer can pass to engage in this necessary but sensitive questioning. By so doing, we find, the standard effectively and appropriately balances the heightened risk of coercion to employees, the legitimate employer need to question employees to prepare its defense, and the Board's institutional interest, by permit-

[20] Balancing these interests, we rely on the Agency's cumulative experience, where for over 58 years it has steadfastly applied a per se rule. Notably, the Board here sought and received the views of interested persons and no amici—only the Respondent—urged the Board abandon the per se rule in favor of the totality of circumstances test.

[21] The fact that the *Johnnie's Poultry* assurances are given to employees *by their employer* (or by the employer's legal representative) is significant: like the employer commitments in the Board's remedial notices ("We will. . . ." and "We will not. . . .") not to repeat the employer's prior violations of employees' Sec. 7 rights, the assurances that an employer provides in this context also give employees reason to believe in the employer's commitment to respect their Sec. 7 rights.

ting such interrogations, but only where the employer abides by all the required safeguards.

4. Other Proposed Approaches are Inferior to the *Johnnie's Poultry* Assurances[22]

The Respondent and some courts have suggested that the Board should reverse its longstanding approach and begin applying a different standard for coerciveness in the questioning at issue. We have already explained the strengths of the per se *Johnnie's Poultry* assurances. In contrast, the totality of the circumstances test and other proposed approaches have significant weaknesses, many of which directly undercut strengths of the Board's established approach.

First, the totality of the circumstances test favored by some courts and the Respondent runs the risk of giving insufficient weight to the heightened risk of coercion that is present when an employer questions employees before a Board hearing. Under that test, the extent of an employer's compliance with the *Johnnie's Poultry* safeguards is considered along with other factors in determining whether an employer's questioning is coercive. Other factors that those courts would consider include:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of 'unnatural formality'?
>
> (5) Truthfulness of the reply.

Bourne v. NLRB, 332 F.2d at 48.

The totality of the circumstances approach would treat this heightened risk of coercion as just one among numerous factors, with no guidance as to how much weight any individual factor carries.[23] The unique risks of coercion associated with pre-hearing questioning that we have identified could be treated as essentially equal to other considerations that may have only limited significance, if any, in the specific context of employer questioning to defend against unfair labor practice charges. At the same time, some factors—such as the rank of the questioner and the formality of the questioning—that may merit an open-ended assessment in other types of interrogations are virtually certain to weigh in favor of coercion in this context, and litigating their significance is wasteful for the parties and the Board alike. By contrast, the *Johnnie's Poultry* per se standard is tailored to focus on the most material circumstances, namely the "inherent danger of coercion" in questioning of employees in preparation for a Board hearing. 146 NLRB at 774.

In addition, the multiple fact-intensive factors that could be raised under a totality of the circumstances test could lead to litigation that relies on protected Section 7 information (e.g., whether the interrogated employee was a union supporter) and that requires more extensive examination into potentially sensitive issues.[24] Such litigation would create significant administrative inefficiency and would likely lead to hearings being sidetracked by issues ancillary to the primary allegations. By contrast, the simplicity of the *Johnnie's Poultry* assurances makes them easy for employers to abide by and keeps the litigation focused on the violations already alleged.

There are several additional reasons why we disfavor the totality of the circumstances test. Unlike the *Johnnie's Poultry* standard, which attempts to prophylactically mitigate the potential for coercion in these interrogations, the totality of the circumstances test would not affirmatively prevent unlawful coercion because it relies on an after-the-fact analysis to determine whether the questioning was coercive. Even if the interrogation is ultimately found unlawful under the totality of the cir-

[22] Although the Fourth Circuit has approved *Johnnie's Poultry,* it has suggested that "[a]rguably, the statute would be better served by raising a rebuttable presumption of coerciveness in such cases." *Standard-Coosa-Thatcher v. NLRB*, 691 F.2d at 1141. Our dissenting colleagues argue that the Board should adopt that approach here, though no party or amicus has advocated doing so. As we will explain below, adopting an entirely new rebuttable presumption standard would be disruptive, and such a standard would share many of the shortcomings of the totality of the circumstances test.

A few amici argue that the Board should categorically ban all employee questioning in preparation for Board proceedings. As we have explained, the Board and courts have long recognized that employers have a legitimate cause to question employees when preparing their defense to unfair labor practice allegations. We therefore decline to adopt a blanket ban on all such interrogations because doing so could raise due process concerns.

[23] Flexibility to accommodate consideration of wide-ranging circumstances may, in some contexts, be valuable. But the virtually standardless discretion of a totality of the circumstances approach denies the parties the guidance and clarity of bright-line rules, and here, as we have explained, its open-endedness also lacks the coercion-preventing effects of the *Johnnie's Poultry* assurances.

[24] As explained above, an employee's perceived alignment with management or friendliness with the questioner does not negate the benefits of affirmative assurances or of bright-line rules; however, the per se rule to provide assurances does negate any need to litigate the employee's union sympathies or the employee's desire to be a witness for or provide information to the employer.

cumstances test, employees' Section 7 rights would still have been harmed, and the damage to the Board's institutional interests would have already occurred.[25] Moreover, the totality of the circumstances test does not assist employees in understanding and defending their rights. Indeed, this approach makes it far more difficult for even informed employees to understand what their rights are during such an interrogation, much less how to enforce them. An "employee whose rights must be culled from a complex body of uncertain facts and arcane decision law may have no rights that he can enforce effectively, the NLRA's Section 7 notwithstanding." *Cook Paint & Varnish Co v. NLRB*, 648 F.2d 712, 733 (D.C. Cir. 1981) (Judge Skelly Wright, dissenting). By contrast, requiring *Johnnie's Poultry* assurances as a prophylactic measure helps ensure that employee questioning is free from coercion from the start, ensures that employees are fully informed of the circumstances and boundaries of the interrogation, and better protects the Board's interest in detecting and remedying unfair labor practices.

Adopting the totality of the circumstances test would also diminish employers' incentive to comply with the *Johnnie's Poultry* assurances. Where all circumstances are considered, employers will always have myriad factors to cite when claiming that an interrogation was lawful even in the absence of the safeguards. If the rule is no longer applied on a per se basis, employers might perceive less need to be careful and scrupulous in their prehearing interrogations. Retaining a per se approach, by contrast, provides greater certainty, affords a prophylactic against coercive questioning, and creates a clear incentive for compliance.

Finally, if the Board were to seek a type of middle ground by adopting a totality of the circumstances test while also retaining a safe harbor for employers that provide the assurances, many of the benefits of the *Johnnie's Poultry* per se standard would be lost. Under such an approach, the safe harbor would encourage employers to provide the assurances because doing so would automatically show that the questioning was not coercive, without further consideration of the totality of the circumstances. But, because most parties would litigate the totality of the circumstances as an alternative position, the clarity, simplicity, and administrative efficiency of the Board's bright-line standard would be lost. See *Williams Energy Services*, 336 NLRB at 160 (discussing benefits of bright-line rules).

[25] For this reason, the totality of the circumstances test is less effective regardless of whether, on one hand, a particular employer intended to follow the rules, but failed through ignorance or inadvertence, or, on the other, had no intention of trying to abide by its obligations under the Act. A per se rule requiring safeguards, in contrast, provides for all employers – whether they are acting in good faith or in bad faith – to follow a process that lessens the likelihood of coercion while allowing their legitimate inquiries.

D. Responding to Court Criticism

Having clarified and bolstered the Board's rationale in support of *Johnnie's Poultry,* we now address the criticisms from some reviewing courts that have disagreed with the Board's per se standard, to the extent that we have not already addressed the issues above. Insofar as court criticisms simply reflect the courts' preferences for a different standard (typically applied, as explained, without deference for the Board's expertise in this area) or their minimization of the high risk of coercion in employer questioning in preparation for Board litigation, we do not repeat in detail our explanations, above, of why the *Johnnie's Poultry* per se test is preferable to other standards.

1. *Johnnie's Poultry* Does Not Infringe on Employers' Free Speech Rights Under Section 8(c) or Otherwise Unduly Burden Employers

The Eighth Circuit has criticized the Board's *Johnnie's Poultry* standard for infringing on employers' free speech rights under Section 8(c), which provides that "[t]he expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." Specifically, the court has found that "[r]equiring the safeguards as a per se rule is contrary to [the] essential statutory principle that unless the [questioning] itself coerces an employee not to exercise his rights, it is protected by Section 8(c) and is not a violation of Section 8(a)(1)." *Tschiggfrie Properties, Ltd. v. NLRB*, 896 F.3d at 888 (internal quotations omitted).

Contrary to the Eighth Circuit's view, however, the required assurances do not limit or foreclose employer free speech in violation of Section 8(c). To the contrary, because the assurances mitigate employee concerns about potential retaliation, they permit the employer to engage in a broader range of questioning than the Board permits in other contexts. *Johnnie's Poultry* therefore provides employers with both "considerable latitude to question employees in preparation for trial" and "clear guidance on how to avoid unfair labor practice liability" while doing so. See *Bill Scott Oldsmobile*, 282 NLRB at 1075.

As the Board and the courts have long recognized, "an employer, in questioning his employees as to their union sympathies, is not expressing views, argument, or opinion within the meaning of Section 8(c) of the Act, as the purpose of an inquiry is not to express views but to ascertain those of the person questioned." *Struksnes Con-*

struction Co., 165 NLRB 1062, 1062 fn. 8 (1967) (citing *Martin Sprocket & Gear Co. v. NLRB*, 329 F.2d 417, 420 (5th Cir. 1964)); *NLRB v. Minnesota Mining & Mfg. Co.*, 179 F.2d 323, 326 (8th Cir. 1950)).[26] Employer interrogations of employees that do not express the employer's views, arguments, or opinions, by definition, fall outside the category of expression that Section 8(c) protects.[27]

Further, even if we were to treat employers' questioning of employees in preparation for Board proceedings as containing an implicit expression of views, arguments, or opinions, such questioning virtually always touches on Section 7 rights and often on Section 7 activities, which brings it very close to improper questioning about employees' union sympathies. As stated in *Struksnes Construction*, above, Section 8(c) does not protect questioning employees about their union sympathies. The *Johnnie's Poultry* safeguards focus the attention of employers preparing for Board litigation on the boundary between permissible and impermissible questions and thus help them avoid the substantial risk of slipping into questions about employees' union sympathies. In so doing, the safeguards assist employers in retaining their Section 8(c) protections, rather than infringing on them.

Critically, Section 8(c) does not protect employer speech that tends to cause fear of reprisals in employees, a category that normally includes employer interrogations in the course of preparing for litigation.[28] The Supreme Court has recognized that employees are, understandably, susceptible to employer coercion, even when the coercion is not explicit. *NLRB v. Gissel Packing Co.*, 395 U.S. at 617 ("the economic dependence of the employees on their employers," creates a "necessary tendency" of the employees "to pick up intended implications of the [employer] that might be more readily dismissed by a more disinterested ear"). See generally Michael M. Oswalt, *The Content of Coercion*, 52 U.C. DAVIS L. REV. 1585 (2019) (postulating, using the employment setting and labor law as an analytical context, that *fear* is the content and substance of coercion; that fear is measurable and thus an effective tool to assess coerciveness; and that control is an antidote to fear). Pursuant to this theory, the *Johnnie's Poultry* safeguards counteract the questioning's predictable coerciveness by reassuring employees and returning to them some sense of control.[29]

[26] In *NLRB v. Minnesota Mining & Mfg. Co.*, the Eighth Circuit concluded that the Board's finding of an 8(a)(1) violation was "amply supported by the evidence in the record tending to prove that the Superintendent of the plant . . . instead of confining himself to argument, advice, expression of view or opinions in his conversations with employees relative to unionization, interrogated them about their union affiliations and sympathies and those of their fellow workers. Such questioning of employees i[s] not protected by Sec. 8(c)." Id. at 326. The Eighth Circuit's decision in *Tschiggfrie Properties, Ltd. v. NLRB*, above, contains no reference to that earlier, contrary in-circuit precedent; instead, it relies on intervening circuit decisions that also failed to grapple with the court's earlier conclusion that Sec. 8(c) does not protect questioning employees about their union affiliations and sympathies.

[27] As a practical matter, an employer seeking truthful answers in its investigation would seem to have little to gain from expressing its own views, arguments, or opinions, regardless of Sec. 8(c)'s protections. The employer's legitimate self-interest is in a factual inquiry in order to prepare a defense. The investigatory purpose is typically better served by asking neutral questions than by making arguments or expressing opinions that prompt answers consistent with the employer's intended defenses.

[28] Contrary to the Eighth Circuit's implication in referring to an "essential statutory principle that unless the [questioning] itself coerces an employee not to exercise his rights, it is protected by Sec[.] 8(c) and is not a violation of Sec[.] 8(a)(1)," *Tschiggfrie Properties, Ltd. v. NLRB*, 896 F.3d at 888 (internal quotations omitted), the Act requires no showing that an employee subjectively felt coerced, let alone that an employee responded to that subjective coercion by deciding not to exercise his rights. It is firmly established that Sec. 8(a)(1)'s objective test prohibits expression that *reasonably tends to coerce* employees. See, e.g., *Affiliated Foods, Inc.*, 328 NLRB 1107, 1109 (1999) ("In evaluating whether a statement or act interferes with, restrains and coerces employees in violation of Section 8(a)(1) of the Act, the Board applies an objective test. An employer's motivation for the statement or the act is irrelevant. * * * Similarly, whether or not a particular employee was actually coerced or considered himself to be is not relevant.") (overruled on other grounds by *United Site Services of California, Inc.*, 369 NLRB No. 137 (2020)); cf. *NLRB v. Enterprise Leasing Co., Southeast, LLC*, 722 F.3d 609, 619 (4th Cir. 2013) (explaining, in representation case, that "[s]ubjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct. This is so because the test for coercion is an objective one.") (internal quotations omitted). Employer expression that reasonably tends to coerce employees in violation of Sec. 8(a)(1) is thus unprotected by Sec. 8(c).

[29] As AFSCME notes, any argument that *Johnnie's Poultry* infringes on employer speech interests, including Sec. 8(c) – which "implements the First Amendment," *NLRB v. Gissel Packing Co.*, 395 U.S. at 617 – is also significantly undermined by the fact that a number of state labor boards and other state-level agencies have adopted the *Johnnie's Poultry* approach, apparently without any constitutional challenge. The following state labor boards rely on *Johnnie's Poultry*: the Florida Public Employees Relations Commission, see Local 1158, Clearwater Firefighters Association v. East Lake Tarpon Special Fire Control Department, 33 FPER ¶ 315, 2008 WL 8576443; the Michigan Public Employee Relations Commission, see Ingham County Board of Commissioners, 11 MPER ¶ 29059 (1998); the New York State Public Employment Relations Board, see Greece Central School District, 19 PERB ¶ 4517 (1986); the New Jersey Public Employment Relations Commission, see Burlington County, 14 NJPER ¶ 19076 (NJ PERC 1988); the Illinois Educational Labor Relations Board, see Service Employees International Local 73, 22 PERI ¶ 129 (IL ELRB 2006); the Washington Public Employment Relations Commission and Washington state courts, see Vancouver Police Officers Guild v. City of Vancouver, 107 Wash. App. 694, Court of Appeals, Div. 2 (2001); City of Seattle v. Public Employment Relations Commission, 160 Wash. App. 382, Court of Appeals, Div. 1 (2011); and the California Agricultural Labor Relations Board, see Gallo Vineyards (United Farmworkers of America), 30 ALRB No. 2 (2004). Two state labor boards have even expanded the safeguards to apply when an employer questions an employee about grievances or in any adversarial hearing. See Fraternal

Nor does providing *Johnnie's Poultry* assurances when interrogating employees in preparation for Board proceedings materially burden employers' investigations in other ways.[30] As the Charging Party and IUOE argue, providing the *Johnnie's Poultry* safeguards before an employer questions an employee in preparation for a Board proceeding imposes no greater burden on employers than providing *Upjohn*[31] warnings when an attorney representing a corporate entity interviews the entity's employees and clarifies for the employee that the attorney represents the company and not the employee individually, and that the attorney-client privilege belongs to the company, not the employee.[32] As with *Johnnie's Poultry* assurances, sample *Upjohn* scripts are widely available.[33] Much like *Upjohn* warnings, *Johnnie's Poultry* assurances are straightforward, not burdensome on employers, and provide clear guidance to employers and employees.

For all these reasons, we respectfully disagree with the Eighth Circuit and instead find that *Johnnie's Poultry* does not infringe on employers' protections under Section 8(c) or otherwise burden employers' ability to investigate unfair labor practice charges.

2. We Respectfully Disagree with the Courts That Have Found the Totality of the Circumstances Test Preferable

As we have explained at length above, we do not find the totality of the circumstances test preferable to the current per se rule requiring assurances at the time of questioning, despite some courts' partiality for the more open-ended test. To reiterate, interrogations conducted in preparation to defend against unfair labor practices involve circumstances where the risk of coercion is at its apex, making a wide-ranging assessment of whether coercion exists in the totality of the circumstances largely superfluous and inefficient. And, for reasons that should be obvious, we find it problematic that the circumstances treated as relevant under a "totality" test—and thus investigated and litigated by the Board, as well as by other parties—would often include employees' union sympathies. Such sensitive information should not be put at issue absent utter necessity, and the *Johnnie's Poultry* approach negates such necessity. As we have also explained, assurances that reduce coercion during the questioning itself are more protective of employees' rights under the Act (at no cost to employers' rights); more able to prevent violations, rather than only making it possible to remedy them after the fact; and more likely to result in witness participation essential to the functioning and integrity of the Board's processes, as well as candid responses and trustworthy information for all parties to rely on in litigation.

The courts that have rejected the Board's per se *Johnnie's Poultry* standard generally perceive that a per se approach is too rigid.[34] But that is a common feature of bright-line rules, and it is often more than offset by the benefits of such rules. For all the reasons explained above, we find that the many and significant advantages of the bright-line per se rule amply offset its few disadvantages. In short, the *Johnnie's Poultry* standard serves the Act's policies, the Board's processes, and the parties' needs more effectively and efficiently than the totality of the circumstances test proposed by the Respondent and reviewing courts.

E. Response to the Dissent

Our dissenting colleagues disagree with our decision to adhere to the bright-line, per se *Johnnie's Poultry* standard. Their dissent essentially boils down to two arguments: (1) the *Johnnie's Poultry* per se standard is impermissible under the Act; and (2) the Board should instead adopt a rebuttable presumption standard. We find both arguments are without merit.

1. The Board Is Not Prohibited from Adopting Bright-Line, Per Se Standards.

As our colleagues observe, the Act does not explicitly state that it is unlawful for an employer to interrogate employees prior to an unfair labor practice hearing without providing them with certain assurances. What Section 8(a)(1) says is that it is unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of their rights to engage in protected, concerted activity. For nearly 60 years, the Board's interpretation of the Act has been that employers' pre-hearing interrogation of employees is inherently coercive and thus that employer assurances must be given to dispel the inherent coerciveness of the circumstances, which will otherwise interfere with employees' ability to exercise their rights. We reject our colleagues' argument that it is impermissible for the Board to require these assurances because the

Order of Police, Lodge 114, 2001 WL 37111079 (Okla. Pub. Emp. Rel. Bd. 2001); City of Santa Maria Firefighters' Association v. City of Santa Maria (2020) PERB Decision No. 2736-M.

[30] Under either a per se test or a totality of the circumstances analysis, or under the dissent's suggested rebuttable presumption, an employer could be subject to a Board finding that it violated the Act by engaging in coercive questioning. But the obligation to comply with the Act and avoid coercive questioning is not the kind of burden that warrants adopting a test that is less protective of employees' rights and the Board's processes.

[31] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

[32] See Westlaw.com, "Upjohn Warning," Practical Law Glossary Item 5-501-8808, last accessed December 13, 2022.

[33] See, e.g., id. (linking to "Standard Document, Internal Investigations: Examples of an Upjohn Warning").

[34] See cases cited above in footnote 8.

Board assertedly "lacks the authority to impose a per se standard that goes beyond the prohibitions Congress has established in the text of the Act itself."

As a general matter, as the Supreme Court has repeatedly recognized,

> A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. . . . Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review.

Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); see also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) (explaining that the Act "did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice" and that it is the Board's duty to "apply[] the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms"). The dissent's broad rejection of bright-line rules—and its misapplication of that principle to the present circumstances—would unnecessarily limit the Board's authority to interpret and administer the Act, contrary to the intent of Congress and decades of Supreme Court precedent.

Our dissenting colleagues also fail to fully appreciate that the Board, with court approval, has adopted several bright-line rules which are not specifically delineated in the text of the Act. Significantly, in *NLRB v. Katz*, 369 U.S. 736, 743 (1962), the Supreme Court held that the Board was well within its rights to find that unilateral changes circumvent bargaining obligations just as much as a refusal to bargain under Section 8(a)(5), even though the text of Section 8(a)(5) does not explicitly prohibit unilateral changes. As the Court explained,

> the Board *is* authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement. Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy.

Id. at 747 (emphasis in original). Like the *Katz* rule, the *Johnnie's Poultry* standard is permissible because it is consistent with the text of the Act. As we have explained, and in agreement with the D.C. Circuit, employer questioning in preparation for Board hearings involves "a delicate balance . . . between the employer's need to prepare adequately for pending unfair labor practice cases and the inherently coercive nature (in violation of an employee's Section 7 rights) of employer interrogation of employees during a labor dispute." *UAW v. NLRB*, 392 F.2d at 809. The *Johnnie's Poultry* safeguards are thus consistent with the congressional policy set forth in Section 8(a)(1) because they ensure that such employer questioning does not coerce employees in the exercise of their Section 7 rights. Id.

The per se *Johnnie's Poultry* standard is analogous to the Board's longstanding per se rule regarding employer requests that employees provide it with their statements to the Board. As the Board has explained, "interrogation of employees regarding statements or affidavits given to Board agents is 'inherently coercive." *U.S. Cosmetics Corp.*, 368 NLRB No. 21, slip op. at 29 (2019) (quoting *Acme Bus Corp.*, 357 NLRB 902 (2011)); id. at 1 (Board adopting judge's analysis). See also *Wire Products Mfg. Corp.*, 326 NLRB 627-628 (1998), enfd. sub nom. *NLRB v. R. T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000). The Board has applied, and several courts have enforced, this per se rule even though the Act contains no express language restricting the right of employers to request such statements because such requests "would naturally inhibit . . . employees' desire to cooperate with the Board's investigative efforts and deter others from so cooperating." *Martin A. Gleason, Inc.*, 215 NLRB 340, 340 (1974), enf. denied 534 F.2d 466 (2d Cir. 1976).[35] See also *Retail Clerks International Association v. NLRB*, 373 F.2d 655, 658 (D.C. Cir. 1967) (recognizing that such "interrogation may have a chilling effect on an employee's exercise of his [Sec.] 7 rights");[36] *NLRB v. Winn-Dixie Stores, Inc.,* 341 F.2d

[35] Although circuit courts have not universally agreed with the Board's per se standard regarding employer requests for employees' witness statements, the Board has continued to apply that standard and those decisions have often been enforced. See, e.g., *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 505 (2007), enfd. 312 Fed.Appx. 737, 747–748 (6th Cir. 2008); *Wire Products Manufacturing Corp.*, above, enfd. sub nom. *NLRB v. R.T. Blankenship & Assocs*., above; *Astro Printing*, 300 NLRB 1028, 1028–1029 & fn. 6 (1990); see also *Frascona Buick, Inc.*, 266 NLRB 636, 647–648 (1983) (citing cases). Further, to the extent that some court decisions have declined to enforce Board findings of violations in this context based on the courts' conclusion that the individual employee at issue did not subjectively feel coerced, that is not the correct test. As we have stated repeatedly, Sec. 8(a)(1) is violated by conduct that has a reasonable tendency to coerce, which is an objective test. See, e.g., *Hedison Mfg. Co.*, 260 NLRB 1037, 1037–1038 (1982) (citing cases).

[36] The D.C. Circuit also explained that "[t]hese limitations do not severely handicap the employer's preparation for a hearing, for at the hearing he may demand the statements of employees who testify and

750, 752–753 (6th Cir. 1965) (finding request for employee statements to the Board unlawful because they "necessarily reveal the employees' attitudes, activities, and sympathies in connection with the Union" and also "divulge the union sympathies and activities of other employees"), cert. denied 382 U.S. 830 (1965). Cf. *Texas Industries, Inc. v. NLRB*, 336 F.2d 128, 133 (5th Cir. 1964) (explaining that "[i]t would seem axiomatic that if an employee knows his statements to Board agents will be freely discoverable by his employer, he will be less candid in his disclosures" and finding that "[i]t is no answer to say that the employee is free to refuse to furnish his employer with a copy of his statement. A refusal under such circumstances would be tantamount to an admission that the statement contained matter which the employee wished to conceal from the employer"). Thus, "any less stringent rule presents too great a risk of interference with the Board's enforcement of the Act," *NLRB v. Maxwell*, 637 F.2d 698, 702 (9th Cir. 1981), just as would a less stringent rule regarding employer interrogations of employees in preparation for Board hearings. See *Bill Scott Oldsmobile*, 282 NLRB at 1075.[37]

Additionally, the three cases cited by the dissent do not broadly prohibit the Board from fashioning per se rules and are clearly distinguishable. First, the Supreme Court's invalidation of the Board's per se rule requiring that exclusive hiring hall agreements contain certain safeguards in *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961), was rooted in the Court's concern regarding the scope of the Taft-Hartley amendments. The Court's statement, quoted by the dissent, that "[w]here . . . Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme" specifically pertained to the issue of hiring hall regulation. Id. at 676. In the Court's view, because Taft-Hartley specifically outlawed the closed shop but did not expressly ban hiring halls or impose other requirements regarding the substance of hiring hall agreements, the Board's proposed safeguards, which required hiring halls to do more than provide assurances that they would not discriminate on the basis of union membership, risked usurping Congress's legislative function. Id. at 674. By contrast, in the *Johnnie's Poultry* context, Congress has not "adopted a selective system for dealing with" employers' interference with Section 7 activity. See id. at 676 (citing *NLRB v. Drivers, Chauffeurs, Helpers, Local 639*, 362 U.S. 274, 284–290 (1960) (Board's authority in applying Section 8(b)(1)(A) is limited by the fact that "Congress in the Taft-Hartley Act authorized the Board to regulate peaceful 'recognitional' picketing only when it is employed to accomplish objectives specified in [Section] 8(b)(4)")). Instead, Congress has delegated authority to the Board to interpret the broad language of Section 8(a)(1), which states generally that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. The per se *Johnnie's Poultry* standard is a permissible effort to give effect to this statutory prohibition. Unlike the hiring hall agreement safeguards the Court criticized in *Teamsters Local 357*, the safeguards the Board requires in the context of employer questioning do no more than assure employees that their statutory rights will be respected.

Second, the Supreme Court's decision in *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952), was also closely tied to the specific issue at hand, namely the Board's holding that an employer's insistence on a management rights provision was per se unlawful. Again, the Court made no broad pronouncement that the Board is generally prohibited from adopting per se standards. The dissent asserts that *NLRB v. American National Insurance* stands for the proposition that Section 8(a)(1) must be "enforced by application of the [statutory standard] to the facts of each case," see id. at 409, rather than by the *Johnnie's Poultry* per se rule. However, the Court's statement was much narrower, focusing on the "good faith bargaining standards of Section 8(d)" and concluding only that the Board could not "prohibit[] all employers in every industry from bargaining for management functions clauses altogether." Id. Thus, nothing in the Court's decisions support the dissent's view that the Board is barred from effectuating the Act by

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may, if circumstances warrant, obtain a continuance to meet surprise testimony." Id. (internal citation omitted).

[37] The Board applies bright-line rules in various other contexts as well. For example, the Board has long held that a threat of plant closure is a per se violation of Sec. 8(a)(1) even though no such prohibition is expressly set forth in the Act. See *Mid-South Drywall Co.*, 339 NLRB 480, 481 fn. 6 (2003). Just as an employer's threat of plant closure "is *per se* a violation," id., because it "reasonably tend[s] to coerce employees in the exercise of their rights," *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1317 (7th Cir. 1989), an employer's interrogation of an employee in preparation for an unfair labor practice hearing without the required assurances is per se unlawful because of its tendency to be coercive.. See *UAW v. NLRB*, 392 F.2d at 809.

It is also a per se violation of Sec. 8(a)(1) for an employer to encourage, solicit, or assist employees to withdraw their authorization cards. See *American Linen Supply*, 297 NLRB 137, 137 (1989), enfd. 945 F.2d 1428 (8th Cir. 1991). See also *Coca Cola Bottling Co.*, 95 NLRB 284, 307 & fn. 15 (1951) ("The Board has held that mere solicitation of an employee to withdraw from a union is coercive *per se*."), enfd. 195 F.2d 955 (8th Cir. 1952). And, as with unilateral changes, the Supreme Court has endorsed the Board's findings that direct dealing and insistence on a permissive subject are per se violations of Sec. 8(a)(5). See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 679 (1944); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

adopting bright-line rules, such as the *Johnnie's Poultry* standard, unless the Act expressly authorizes it to do so.

Third, in *Operating Engineers Local 513 v. NLRB*, 635 F.3d 1233 (D.C. Cir. 2011), the District of Columbia Circuit rejected only the Board's rule that it was per se unlawful for a union to discipline a union member who complied with an employer's safety rule. In doing so, the court explained that "[a]lthough we give wide deference to the Board's interpretation of the general language of the National Labor Relations Act, . . . the Board here does not even purport to rely on any interpretation of the Act's language." Id. at 1235 (internal citations omitted). By contrast, for almost 60 years, the Board has grounded its *Johnnie's Poultry* standard in its interpretation of the Act, namely that employer interrogations of employees in preparation for Board hearings presents an "inherent danger of coercion" and therefore such interrogations require strict safeguards to comply with Section 8(a)(1). 146 NLRB at 774. And as we have explained, the D.C. Circuit has enforced the Board's per se approach. See *UAW v. NLRB*, 392 F.2d at 809. Its later opinion in *Operating Engineers Local 513 v. NLRB* expresses no intent to overrule *UAW v. NLRB*.

There is thus no merit to our colleagues' assertion that "the Board lacks the authority to hold that noncompliance with Board-created safeguards or standards is a per se violation of the Act where those standards go beyond the prohibitions established by the Act itself." As discussed, the per se rule does not go beyond the Act's broadly worded prohibitions. Section 8(a)(1) of the Act makes it unlawful for employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." The Board has simply held that employer interrogation of employees before an unfair labor practice hearing without providing certain assurances constitutes unlawful interference, restraint, and coercion of employees in the exercise of their Section 7 rights. Further, such a narrow interpretation of the Board's authority would significantly undermine the role that Congress assigned the Board in interpreting and administering the Act. As the Supreme Court has repeatedly recognized, the Board has the "special function of applying the general provisions of the Act to the complexities of industrial life." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963); see also *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500–501 (1978) ("if [the Board] is to accomplish the task which Congress set for it [in Section 8(a)(1), the Board] necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions."). It is thus the Board's duty to engage in the "'difficult and delicate responsibility' of reconciling conflicting interests of labor and management," and it is well established that "the balance struck by the Board is 'subject to limited judicial review.'" *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (quoting *NLRB v. Truck Drivers*, 343 U.S. at 96).[38] Congress intended for the Board to employ its specialized knowledge and experience, as we have done here, to develop legal rules that are informed by the Board's experience in enforcing rights under the Act. Our decision today to retain the *Johnnie's Poultry* per se standard reflects our administrative expertise in balancing the conflicting legitimate interests at stake and is thus subject to limited judicial review, contrary to the suggestions of our dissenting colleagues.

2. The Rebuttable Presumption Standard Has Many of the Same Shortcomings as the Totality of the Circumstances Test.

The dissent argues that we should instead adopt a rebuttable presumption standard, asserting that such a standard "retains all the benefits of the per se standard" while "fully address[ing] the concerns articulated by the circuit courts." We disagree.

Our colleagues envision a standard under which an employer's failure to provide the *Johnnie's Poultry* safeguards would be presumed coercive, but the employer would then be provided an opportunity to rebut that presumption by showing, by a preponderance of the evidence, that the questioning was not coercive under the totality of the circumstances. Contrary to our colleagues' contention, a rebuttable presumption standard would not maintain the important prophylactic effect of the per se *Johnnie's Poultry* standard. Under a rebuttable presumption standard, any determination regarding the lawfulness of an employer's questioning is more complex, and its after-the-fact outcome is more uncertain. Because the employer cannot adequately assess the risk of an unfair labor practice finding until later, the rebuttable presumption would not ensure a comparable level of protection at the time the questioning takes place.[39] A rebuttable pre-

[38] Cf. *NLRB v. Lorben Corp.*, 345 F.2d at 349 (Judge Friendly, dissenting) (The NLRB "ought not be denied the right to establish standards, appropriate to the statutory purpose, that are readily understandable by employers, regional directors and trial examiners, and be forced to determine every instance of alleged unlawful interrogation by an inquiry covering an employer's entire union history and his behavior during the particular crisis and to render decisions having little or no precedential value . . . .").

[39] We disagree with our dissenting colleagues' contentions that a rebuttable presumption standard would still have a prophylactic effect for employees and that a rebuttable presumption standard will not incentivize rational employers to disregard the *Johnnie's Poultry* safeguards. A rebuttable presumption standard would encourage at least some employers to be less scrupulous in ensuring that they provide all the *Johnnie's Poultry* safeguards precisely because it provides employers who fail to provide the safeguards the opportunity to avoid liability by liti-

sumption standard would also invite the same problematic post hoc justifications and speculation into employees' Section 7 activities as the totality of the circumstances test. By failing to counteract the potential for coercion in this type of questioning at the start, the rebuttable presumption standard would undermine the very purpose of the *Johnnie's Poultry* safeguards.

Furthermore, our colleagues find that the stability of more than 58 years of unbroken Board precedent is of little consequence because there is a division among circuit courts and some have refused to enforce Board orders. To reiterate, we acknowledge that the Board has not previously provided a comprehensive explanation of its position, and we hope that the explanation provided here will satisfy courts that the Board's long-standing position is a reasonable interpretation of the Act.[40]

Our colleagues assert that under a rebuttable presumption standard employers will still have a strong incentive to provide the *Johnnie's Poultry* assurances to employees. But a rebuttable presumption opens the door for and incentivizes employers to craft after-the-fact defenses to explain why their questioning was not in fact coercive. Providing employers with a chance to rebut the presumption of coercion in these circumstances will lead to litigation that is both time-consuming and risky, insofar as employers' questioning may delve into employees' protected activities.

The dissent tries to downplay these concerns by focusing on its contention that the General Counsel's questioning at an unfair labor practice hearing will be the same under the rebuttable presumption standard as under the per se standard. But that is certainly not the case with regard to an employer's questioning, or the General Counsel's response to an employer's questioning, under the rebuttable presumption standard. The increased time that parties and the Board will expend on litigation of *Johnnie's Poultry* allegations—allegations that by their nature often arise as adjunctive allegations in an already scheduled unfair labor practice hearing—is a significant disadvantage of the rebuttable presumption standard that the dissent ignores. But even worse, the dissent fails to acknowledge the practical impacts on employee rights of permitting post hoc rebuttal of the presumption of coercion, about which we have grave concerns. Inevitably, employers that have allegedly failed to meet the *Johnnie's Poultry* safeguards—that is, employers engaged in unfair labor practice litigation where the allegation is raised—would have an incentive to cast about for any possible argument or evidence that may serve as rebuttal. As we have noted, some of the *Bourne* factors, which would presumably be relevant under the dissent's standard—such as the rank of the questioner and the formality of the questioning—are virtually certain to weigh in favor of coercion in this context. As a result, what remains—that is, the types of evidence that employers will put on and the types of questions that employers will ask to meet their burden of showing the absence of coercion—will, we anticipate, often pertain to employees' union sympathies. Thus, the rebuttable presumption approach may lead to publicly airing employees' private protected activity. This is particularly concerning insofar as the Board's processes may be implicated. Allowing employees' protected activities or sympathies to become critical evidence in the litigation of unfair labor practices, and making Board hearings the venue for questioning that delves into them, risks discouraging employee participation in Board processes. Due regard for employees'

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gating the presumption of coerciveness after the fact. A per se standard is a more effective deterrent because the employer cannot avoid providing the safeguards and hope to avoid liability by litigating the coerciveness of the questioning. Employees that those employers coercively question will experience coercion that a per se standard would have more effectively deterred. The dissent asserts that the Board's experience with rebuttable presumptions shows otherwise, but they cite only one example of a rebuttable presumption standard—rules prohibiting solicitation outside working time—which is clearly distinguishable. When an employer interrogates employees to prepare its defense in an unfair labor practice proceeding, it is especially important that the Board ensure that the employees have adequate information regarding the circumstances and boundaries of the interrogation so that they are fully protected against coercion at the time of the employer's questioning.

[40] Our dissenting colleagues assert that by adhering to the *Johnnie's Poultry* standard, we are "thumbing [our] noses at the courts of appeals," but their position is contrary to the Board's longstanding nonacquiescence policy. As we have explained, the *Johnnie's Poultry* standard better effectuates the policies of the Act than the alternative tests adopted by some courts of appeals. Where, as here, the Board views a contrary court ruling as inconsistent with the Act's policies, the Board "is not required, on either legal or pragmatic grounds, to automatically follow an adverse court decision." *D.L. Baker, Inc.*, 351 NLRB 515, 529 fn. 42 (2007). Application of the Board's nonacquiescence policy is particularly appropriate here because some courts, including the D.C. Circuit, which has plenary jurisdiction over the Board's decisions, have approved the *Johnnie's Poultry* standard. Indeed, the courts have recognized that the Board "is not obliged to accept [a circuit court's] interpretation" and may "refus[e] to knuckle under to the first court of appeals (or the second, or even the twelfth) to rule adversely to the Board," because only the Supreme Court is "the supreme arbiter of the meaning of the [Act]." *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066–1068 (7th Cir. 1988) (citing cases). Finally, our "nonacquiescence" is rooted in our disagreement with our dissenting colleagues' claim that our decisions "have no chance of being enforced." No court has yet had an opportunity to consider the *Johnnie's Poultry* standard in light of the rationale we provide today regarding why the standard is rational and consistent with the Act.

Section 7 rights therefore counsels strongly against applying a rebuttable presumption.[41]

In sum, we do not adopt the rebuttable presumption standard proposed by the dissent because that approach fails to ensure that employer questioning of employees in preparation for Board proceedings is noncoercive, it invites employers to provide post hoc rationalizations, and it opens the door for employers to probe into employees' union sympathies. Although the proposed rebuttable presumption standard starts out looking similar to the current per se standard, it ends up bearing all the flaws of the totality of the circumstances standard, which we have described at length above. Rather than adopt such a problematic standard, we have chosen to address the concerns of some courts by clarifying and bolstering the rationale in support of our longstanding per se *Johnnie's Poultry* standard. As we have explained, the *Johnnie's Poultry* standard carefully balances the competing interests at stake by dispelling the inherent danger of coercion that employees face, while also accommodating employers' legitimate need to question employees to prepare their defenses and ensuring the integrity of the Board's processes.[42]

F. Application of Johnnie's Poultry in this Matter

Having reaffirmed and determined that we will adhere to the Board's bright-line, per se *Johnnie's Poultry* standard, we now review the judge's application of the *Johnnie's Poultry* standard to the facts of the instant case. As set forth above in the background section, the judge found that the Respondent's attorney, Patricia Hill, met with employees Mariano Rivera and Christopher Pender in the course of preparing for the hearing in this case. At her meetings with each employee, Hill failed to provide one of the required *Johnnie's Poultry* assurances. Specifically, Hill failed to assure Rivera that his answers to her questions would not affect his job, and Hill failed to advise Pender that his participation was voluntary. Thus, the judge found that the Respondent violated Section 8(a)(1) by interrogating the two employees without providing all the required *Johnnie's Poultry* assurances.

The Respondent does not dispute the facts and instead argues that the *Johnnie's Poultry* complaint allegations are defective because they include errors that were prejudicial and prevented it from litigating the allegations fully. We find no merit to the Respondent's exceptions.[43] As the record fully supports the judge's findings that the Respondent failed to comply with all the required *Johnnie's Poultry* safeguards, we affirm the judge's conclusion that the Respondent violated Section 8(a)(1) by interrogating Rivera and Pender.[44]

[41] The dissent contends that under a rebuttable presumption standard, employers will not submit evidence or question employees regarding their union sympathies, because this has not been a problem with other types of interrogations which are litigated under the totality of the circumstances test. We disagree. *Johnnie's Poultry* interrogations are different than other interrogations because they arise in the context of an employer preparing its defense to unfair labor practice allegations. To rebut the presumption of unlawfulness, an employer would need to demonstrate that the questioning did not have a prohibited coercive tendency. The nature of the questioning at the hearing and the types of evidence employers will submit to satisfy that burden would thus be different and much more likely to touch on employees' protected activity. The dissent asserts that such concerns are unfounded because counsel for the General Counsel and the administrative law judge will not allow employees to be coercively interrogated regarding their union sympathies at the hearing. However, problematic inquiries regarding employees' union sympathies may be unavoidable under the dissent's proposed rebuttable presumption standard to the extent the standard treats them as relevant to the determination of whether such employer interrogations were coercive to the particular employees questioned.

[42] At various points throughout their dissent, our colleagues appear to criticize the *Johnny's Poultry* per se standard as impermissible on the grounds that its application could result in "finding a violation of the Act even in cases where . . . [the] questioning was not, in fact[,] coercive." To the extent the dissent is suggesting that the per se standard is impermissible because it could result in a finding of a violation in the absence of "actual" coercion of a particular employee, the argument fails from inception. As noted previously, proof that an interrogation actually coerced an employee is not the relevant test. See, e.g., *Multi-Ad Services, Inc.*, 331 NLRB 1226, 1227–1228 (2000) ("It is well settled . . . that the basic test for evaluating whether there has been a violation of Section 8(a)(1) is an objective test, i.e., whether the conduct in question would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and not a subjective test having to do with whether the employee in question *was actually intimidated*") (emphasis in original), enfd. 255 F.3d 363 (7th Cir. 2001).

[43] Contrary to the Respondent's contentions on exception, it is inconsequential that the complaint alleged the questioning occurred in February 2019 instead of February 2020 and included other minor factual discrepancies. The errors were not prejudicial to the Respondent and did not prevent the Respondent from fully and fairly litigating these allegations. See *Jennmar Corp.*, 301 NLRB 623, 623 (1991); see also *Williams Enterprises*, 301 NLRB 167, 168 (1991) (discrepancy between the date the violation occurred and the date the complaint alleged it occurred was immaterial because "the issue . . . was the same regardless of when the violation occurred" and the allegation was fully litigated), enfd. in relevant part 956 F.2d 1226 (D.C. Cir. 1992).

We also reject the Respondent's argument that the judge abused his discretion in overruling its objection that the discussions between attorney Hill and employee Pender were protected by attorney-client privilege. At no point did Hill file a notice of appearance on behalf of Pender, and, as reflected in *Upjohn v. United States*, above, a company's attorney typically does not represent the employees she questions in preparing for litigation involving the company that is her client. Further, the vague discussions on the record fail to establish that the communications were privileged. See *U.S. v. Teamsters*, 119 F.3d 210, 214 (2d Cir. 1997) ("The burden of establishing the existence of an attorney-client privilege, in all of its elements, rests with the party asserting it."); see also *Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981) (same).

[44] Even if we applied the totality of the circumstances test proposed by the Respondent and preferred by some reviewing courts, we would still find the violation here. Applying the *Bourne* factors, there is an extensive history of employer hostility and discrimination because the

CONCLUSION

In sum, we reaffirm and adhere to the bright-line, per se *Johnnie's Poultry* rule. Having carefully balanced the competing demands at issue, we find that continuing to require employers to provide the *Johnnie's Poultry* assurances in all cases will protect both employees' Section 7 rights and employers' legitimate right to question employees when preparing their defenses to unfair labor practice allegations. Further, it will also protect the Board's strong institutional interest in ensuring the integrity of its processes. Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(1) by interrogating two employees without providing the required *Johnnie's Poultry* assurances.

ORDER

The National Labor Relations Board orders that the Respondent, Sunbelt Rentals, Inc., Franksville, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about matters that are the subject of unfair labor practice proceedings.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Franksville, Wisconsin facility copies of the attached notice marked "Appendix."[45] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 10, 2020.

Dated, Washington, D.C. December 15, 2022

_____
Lauren McFerran, Chairman

_____
Gwynne A. Wilcox, Member

_____
David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS KAPLAN AND RING, dissenting.

Employers charged with unfair labor practices often need to question employees in order to prepare for the hearing at which the case will be adjudicated. We agree with our colleagues that such questioning poses an inherent danger of coercion, but that employers nevertheless have a legitimate need to ask those questions in order to prepare their defense. Under these circumstances, "[i]t is the responsibility of the Board to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its

Board found that the Respondent committed numerous unfair labor practices in *Sunbelt Rentals, Inc.*, 370 NLRB No. 102, slip op. at 1; see also fn. 2, above. Further, Hill sought information in order to prepare the Respondent's defense to these unfair labor practice allegations. The questioning took place at the employees' workplaces and the questioner was an attorney. It is unclear whether the employees provided truthful answers during their meetings with Hill.

Finally, we reject the Respondent's argument that the interrogations were not coercive because the employees were aligned with the Respondent. As we have explained, *Johnnie's Poultry* assurances are needed in all cases, even where an employee appears to be aligned with the employer. See, e.g., *NLRB v. UAW*, 392 F.2d at 809 (explaining that employee aligned with employer may still fear retaliation). Further, in this case, the potential for coercion was especially heightened given the Respondent's commission of numerous unfair labor practices. For the above reasons, we would find the violation even if we applied the dissent's rebuttable presumption standard.

[45] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

policy." *Caesar's Palace*, 336 NLRB 271, 272 fn. 6 (2001). In *Johnnie's Poultry Co.,* 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965), the Board attempted to balance these competing rights and interests by permitting employers to question employees about their Section 7 activities in preparation for an unfair labor practice hearing only if specific safeguards were observed. Any questioning that does not strictly observe all of those safeguards without exception is deemed per se unlawful under the *Johnnie's Poultry* standard.

As we will discuss below, however, several circuit courts of appeals have rejected the per se standard promulgated in *Johnnie's Poultry* and have denied enforcement of decisions applying that standard, including the court in *Johnnie's Poultry* itself. In the view of those courts, the Board lacks the statutory authority to hold that questioning is per se coercive unless it strictly complies with the *Johnnie's Poultry* safeguards, even when this results in disregarding circumstances indicating that the specific questioning at issue was *not* coercive. Accordingly, the Board issued a Notice and Invitation to File Briefs (NIFB) in this case on March 1, 2021, asking the parties and interested amici to address whether the Board should adhere to or overrule *Johnnie's Poultry.*[1] After considering the responses to the NIFB, our colleagues choose to adhere to *Johnnie's Poultry.* They contend that its per se standard is "well within" the Board's authority, to the exercise of which courts must, in their view, defer. They further contend that the per se standard is preferable to possible alternatives.

We respectfully disagree with both contentions.[2] Decades of Supreme Court precedent make clear that the Board lacks the authority to impose a per se standard that goes beyond the prohibitions Congress has established in the text of the Act itself. *Johnnie's Poultry* is such a standard, as circuit courts have repeatedly held. It is the Board that must defer to these authoritative determinations regarding the limits of its authority—not, as our colleagues would have it, the other way around. Nor can we agree that the only alternatives are the per se standard that courts have rejected and the "totality of the circumstances" standard that our colleagues denounce.

A third alternative is available: a rebuttable-presumption standard, under which unlawful coercion would be rebuttably presumed where an employer fails to comply with the *Johnnie's Poultry* safeguards when questioning employees in preparation for a Board proceeding. The employer would then have the burden of rebutting the presumption by showing that its questioning was not coercive under the totality of the circumstances. This standard respects judicial guidance about the limits of the Board's authority, preserves all the benefits of *Johnnie's Poultry,* and at the same time ensures that proper consideration is given to evidence that questioning was not coercive even though not all the *Johnnie's Poultry* safeguards were observed. For the reasons that follow, we believe that a rebuttable presumption, unlike the per se standard, strikes "the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *Caesar's Palace*, 336 NLRB at 272 fn. 6. Because our colleagues offer no persuasive justification for rejecting it, we respectfully dissent.[3]

DISCUSSION

A. Existing Standards

1. Totality of the Circumstances

The Board has long held that an employer violates Section 8(a)(1) of the Act when it coercively questions employees about their Section 7 activities. See *Blue Flash Express, Inc.*, 109 NLRB 591, 593 (1954) (recognizing rule); accord *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985) (same); *Rossmore House*, 269 NLRB 1176 (1984) (same), enfd. sub nom. *Hotel & Restaurant Employees, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). As the Board has explained, coercive interrogations "carry an implied threat of reprisal" or otherwise "interfere with, restrain, or coerce . . . employees in the exercise of the rights guaranteed in Section 7 of the Act." *Blue Flash Express*, 109 NLRB at 595. In determining whether an interrogation was coercive, the Board typically considers the totality of the circumstances. *Sunnyvale Medical Clinic*, 277 NLRB at 1217; *Rossmore House*,

[1] The NIFB asked:

> 1. Should the Board adhere to or overrule *Johnnie's Poultry*?
>
> 2. If the Board overrules *Johnnie's Poultry*, what standard should the Board adopt in its stead? What factors should it apply in determining whether an employer has violated the Act when questioning an employee in the course of preparing a defense to an unfair labor practice allegation? Should the Board apply a "totality of the circumstances" standard? Even if some of the *Johnnie's Poultry* safeguards should be dispensed with, are there any that, if breached, should continue to render such questioning unlawful per se?

Sunbelt Rentals, Inc., 370 NLRB No. 94, slip op. at 1-2 (2021).

[2] We noted our willingness to reconsider *Johnnie's Poultry* in a future appropriate case in *Kauai Veterans Express Co.*, 369 NLRB No. 56, slip op. at 1 fn. 4 (2020). This is that case.

[3] Despite the majority's rejection of the rebuttable-presumption approach, and perhaps in recognition of the infirmities inherent in the per se standard, Chairman McFerran identified the rebuttable-presumption standard as an option in her dissent to the NIFB, although not as her preferred choice. See *Sunbelt Rentals, Inc.*, 370 NLRB No. 94, slip op. at 4 fn. 16 (Chairman McFerran, dissenting). The AFL–CIO also takes this position in its amicus brief.

269 NLRB at 1177. Evidence relevant to this inquiry includes but is not limited to "(1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation." *Rossmore House*, 269 NLRB at 1178 fn. 20 (citing *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964)).

2. Johnnie's Poultry

The Board applies a different standard, however, when an employer questions employees for the purpose of investigating facts relevant to an unfair labor practice complaint "where such interrogation is necessary in preparing the employer's defense for trial of the case." *Johnnie's Poultry*, 146 NLRB at 775. In justifying this standard in *Johnnie's Poultry*, the Board recognized that there is an "inherent danger of coercion" in such questioning but also recognized that employers have a countervailing "legitimate cause to inquire" to prepare to defend themselves at the unfair labor practice hearing. Id. at 774. Balancing these competing interests, the Board decided to permit such questioning so long as the employer observes "specific safeguards designed to minimize the coercive impact of such employer interrogation." Id. at 775.

> Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

Id. Failure to strictly observe these safeguards will result in a finding that the interrogation was per se unlawful. Id.; see also *Freeman Decorating Co.*, 336 NLRB 1, 14 (2001) (stating that the Board takes a "bright-line approach" in enforcing the *Johnnie's Poultry* safeguards), enf. denied on other grounds sub nom. *Stage Employees IATSE v. NLRB*, 334 F.3d 27 (D.C. Cir. 2003).

B. Per Se Standard Exceeds the Board's Authority

The Supreme Court has not yet addressed the validity of the *Johnnie's Poultry* per se standard. But the Supreme Court has rejected similar per se standards developed by the Board with respect to other types of unfair labor practices. Other courts have reached the same result, including with respect to *Johnnie's Poultry* itself. As these cases make clear, the Board lacks the authority to hold that noncompliance with Board-created safeguards or standards is a per se violation of the Act when those standards go beyond the prohibitions established by the Act itself.

In *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961), for example, the Supreme Court invalidated a standard created by the Board under which exclusive hiring hall agreements were deemed inherently discriminatory and therefore unlawful per se unless they included safeguards specified by the Board to prevent discrimination in the operation of the hiring hall.[4] Those safeguards were strikingly similar to the safeguards set forth in *Johnnie's Poultry*.[5] The Supreme Court rejected the Board's holding that failure to comply with those safeguards was per se unlawful as contrary to the Act, which does not prohibit hiring halls and prohibits only discrimination to encourage or discourage union membership. The Court held that the Board had exceeded its authority by finding that a hiring hall was discriminatory and unlawful simply because the hiring hall agreement did not comply with the Board-created safeguards. "Where, as here, Congress has aimed its sanctions only at specific discriminatory practices," the Court stated, "the Board cannot go farther and establish a broader, more pervasive regulatory scheme." Id. at 676.

Similarly, in *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952), the Supreme Court rejected the Board's holding that an employer's insistence, in collective bargaining, on a management rights provision was a per se violation of the Act. "Any fears the Board may entertain," the Court explained,

> that use of management functions clauses will lead to evasion of an employer's duty to bargain collectively as to "rates of pay, wages, hours and conditions of employment" do not justify condemning all bargaining for

[4] See *Mountain Pacific Chapter*, 119 NLRB 883, 897 (1958) (finding exclusive hiring hall was "an inherent and unlawful encouragement of union membership"), enf. denied and remanded 270 F.2d 425 (9th Cir. 1959).

[5] Specifically, the Board held that hiring hall agreements were per se unlawful unless they explicitly provided that

> (1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis, and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.
>
> (2) The employer retains the right to reject any job applicant referred by the union.
>
> (3) The parties to the agreement post, in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.

Teamsters Local 357 v. NLRB, 365 U.S. at 672 (quoting *Mountain Pacific Chapter*, 119 NLRB at 897).

> management functions clauses covering any "condition of employment" as *per se violations of the Act*. The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether.

Id. at 409 (emphasis added). Here, as in *Teamsters Local 357*, the Court rejected the Board's attempt to create a "*per se* violation" standard broader than the Act itself.

In *Operating Engineers Local 513 v. NLRB*, 635 F.3d 1233 (D.C. Cir. 2011), the United States Court of Appeals for the District of Columbia Circuit also rejected a Board-adopted rule under which "it is a *per se* unfair labor practice in violation of [S]ection 8(b)(1)(A) . . . for a union to discipline a union member who complied with an employer's safety rules." Id. at 1233. Section 8(b)(1)(A) prohibits unions from restraining or coercing employees "in the exercise of the rights guaranteed in [S]ection 7," and the Court found that those statutory rights are not implicated unless concerted activity is shown. Accordingly, the court rejected the Board's view that a union per se violates Section 8(b)(1)(A) if it disciplines an employee member for reporting a safety violation that the employee has a duty to report, even if no concerted activity is shown. Id. at 1236.

Consistent with these decisions, the Board also lacks the authority to hold that questioning that does not observe the *Johnnie's Poultry* safeguards is per se coercive. No provision of the Act requires employers to observe the *Johnnie's Poultry* safeguards or prohibits questioning that does not comply with them. Rather, the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act. 29 U.S.C. § 158(a)(1). This prohibition is to be "enforced by application of the [statutory standard] to the facts of each case," rather than by condemning all interrogations that do not comply with the *Johnnie's Poultry* safeguards "as per se violations of the Act." *NLRB v. American National Insurance*, 343 U.S. at 409. By substituting Board-fashioned safeguards for a determination of whether questioning was or was not coercive based on the record as a whole, the Board has gone beyond the specific prohibition of interference, restraint and coercion established by Congress and created a "broader, more pervasive regulatory scheme" as it did in *Mountain Pacific Chapter*, which the Court rejected in *Teamsters Local 357*, 365 U.S. at 676. If questioning in preparation for an unfair labor practice case is "to be subjected to regulation that is less selective and more pervasive, Congress, not the Board, is the agency to do it." Id. at 677.

Indeed, most circuit courts that have considered *Johnnie's Poultry* have disagreed with the per se standard contained therein, precisely because it improperly disregards evidence bearing on whether the employer actually "interfere[d] with, restrain[ed], or coerce[d] employees in the exercise of the rights guaranteed in [S]ection 7," as Section 8(a)(1) requires. For example, in *Tschiggfrie Properties, Ltd. v. NLRB*,[6] the Eighth Circuit found that, although the safeguards set forth in *Johnnie's Poultry* were relevant, the Board's conclusion that there would be a per se violation if those conditions were not met was not supported by the Act. The Court concluded that "[r]equiring the safeguards as a per se rule is contrary to [the] essential statutory principle that unless the [questioning] itself coerces an employee not to exercise his rights, it is protected by Section 8(c) and is not a violation of Section 8(a)(1)."[7] Similarly, the Seventh Circuit expressly found that "[i]nterrogation of employees is not a *per se* violation of the Act" and rejected the Board's finding that the interrogation was coercive under *Johnnie's Poultry* because the "[a]bsence of warnings is significant only when the Board can show, not merely an employer's questioning of an employee, but also a context of coercive conduct." *NLRB v. Complas Industries, Inc.*, 714 F.2d 729, 735 (7th Cir. 1983). The Second Circuit rejected the per se rule and found no violation because the record "d[id] not contain substantial evidence sufficient to support the Board's conclusion that the interrogation was coercive." *NLRB v. Lorben Corp.*, 345 F.2d 346, 349 (2d Cir. 1965). The Sixth Circuit has refused to enforce Board decisions finding per se violations under *Johnnie's Poultry.* See *Anserphone, Inc. v. NLRB*, 632 F.2d 4, 6 (6th Cir. 1980) (rejecting Board's per se finding in the absence of "evidence to support the conclusion that the interviewing of a few employees . . . prior to an unfair labor practice hearing constituted coercive interrogation"); accord *Dayton Typographic Service, Inc. v. NLRB*, 778 F.3d 1188, 1193–1195 (6th Cir. 1985).[8] Finally, the Fifth Circuit has also rejected the Board's application of *Johnnie's Poultry*. *Cooper Tire &*

[6] 896 F.3d 880 (8th Cir. 2018).

[7] Id. at 888 (internal quotation marks omitted; alterations in original). Additionally, in its decision denying enforcement of the Board's order in *Johnnie's Poultry* itself, the Eighth Circuit explained its rejection of the Board's per se standard–based violation finding by stating, "[W]e are of the view that the Board's determination on this issue is not supported by substantial evidence." *NLRB v. Johnnie's Poultry Co.*, 344 F.2d 617, 619 (8th Cir. 1965).

[8] See also *ITT Automotive v. NLRB*, 188 F.3d 375, 389 fn. 9 (6th Cir. 1999) (citing with approval the rejection of the per se standard in *Anserphone* and *Dayton*).

Rubber Co. v. NLRB, 957 F.2d 1245, 1256 (5th Cir. 1992).[9]

We find the criticisms articulated by these courts persuasive, and we agree that the *Johnnie's Poultry* standard that all employee questioning in preparation for a hearing is to be considered per se unlawful unless certain conditions are met exceeds the Board's authority. Such a rule would only be consistent with the regulatory scheme set forth in the Act if an employer's failure to comply with all *Johnnie's Poultry* safeguards *necessarily and invariably* resulted in interference with, restraint, or coercion of employees in the exercise of their rights under Section 7 of the Act. However, neither *Johnnie's Poultry* itself nor any subsequent Board decision has explained why the potential coercive impact of employer questioning in preparation for a Board hearing can *only* be dispelled by providing the safeguards articulated there. Reason and common sense tell us that factors other than whether the *Johnnie's Poultry* safeguards were provided may bear, in appropriate circumstances, on whether a particular interrogation did or did not have the prohibited coercive tendency. Plainly, many circuit courts think so as well. By failing to permit consideration of such evidence, the per se standard leads to unjustified and unenforceable unfair labor practice findings.

In arguing that the *Johnnie's Poultry* per se standard is permissible under the Act, our colleagues unpersuasively attempt to distinguish *Teamsters Local 357 v. NLRB*, 365 U.S. at 676, and *NLRB v. American National Insurance Co.*, 343 U.S. at 395, on their facts, differentiating those cases from this one on the basis that they deal with hiring halls and management-rights clauses, while this case involves questioning in preparation for a hearing. In so doing, the majority fails to give proper weight to the principles on which those decisions are based. Our colleagues also attempt to distinguish *Operating Engineers Local 513 v. NLRB* by asserting that, unlike in *Johnnie's Poultry*, the Board in that case did not attempt to ground its per se standard in an interpretation of the Act. In doing so, our colleagues have missed the point of the case. As noted, those three decisions place clear limits on the Board's power to declare conduct to be a per se violation of the Act. The *Johnnie's Poultry* per se standard exceeds those limits for the reasons stated above.

Contrary to the majority, the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962), does not support their position. The Court there held that "an employer's unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal [to bargain]." Id. at 743. As the majority observes, the Act does not explicitly prohibit unilateral changes. But the Court's decision makes clear that its holding was premised on the fact that "[u]nilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must *of necessity* obstruct bargaining, contrary to the congressional policy." Id. at 747 (emphasis added). That is simply not the case with the questioning of employees in preparation for an unfair labor practice hearing. It is not the case that a failure to observe all of the *Johnnie's Poultry* safeguards "must of necessity" interfere with, restrain, or coerce the questioned employee in the exercise of his or her rights under Section 7 of the Act.

Our colleagues also note that the Board has held that the interrogation of employees regarding statements or affidavits given to Board agents is inherently coercive. See, e.g., *U.S. Cosmetics Corp.*, 368 NLRB No. 21, slip op. at 29 (2019); *Acme Bus Corp.*, 357 NLRB 902, 903 (2011). That precedent is distinguishable, however. Employers have a legitimate interest in questioning employees about factual matters in preparation for an unfair labor practice hearing, but they have no legitimate interest in learning the contents of statements or affidavits given to the Board. *Acme Bus Corp.*, 357 NLRB at 903. Moreover, judicial reception of the witness statement per se rule has been mixed at best. Echoing the criticisms leveled against the *Johnnie's Poultry* per se standard, multiple circuit courts have held that the witness statement per se rule is impermissible because "[t]he test to be applied with respect to determining coercion is whether the employer engaged in conduct which, it reasonably may be said, tends to interfere with the free exercise of employee rights" based on the facts of the particular case. *Robertshaw Controls Co., Lux Time Divi-*

[9] Our colleagues go to great lengths to downplay the fact that nearly half of the Federal courts of appeals *will not enforce* Board decisions that apply the per se *Johnnie's Poultry* standard. They note that "some courts have disagreed" with the decision. They assert that the courts that have disagreed have not explained, to their satisfaction, why the *Johnnie's Poultry* standard is not enforceable. Finally, even though five Federal courts of appeals have refused and will refuse to enforce these decisions, they defend their position by asserting that "almost half of the Circuits have not yet expressed a view on *Johnnie's Poultry*." It cannot be disputed, however, that of the circuit courts that *have* expressed a view on *Johnnie's Poultry*, the overwhelming majority have rejected the Board's per se approach. In our view, our colleagues today are not merely thumbing their noses at the courts of appeals that have resoundingly rejected the per se standard at issue, they are ignoring the real-life consequences of clinging to a standard that has been decisively rejected by multiple courts that hold the power to deny enforcement of our decisions. It is hard to see how it is in either the Agency's or our stakeholders' interests to continue to issue decisions that, if challenged in any one of five circuit courts, have no chance of being enforced.

sion v. NLRB, 483 F.2d 762, 770 (4th Cir. 1973).[10] In these circumstances, the Board's precedent regarding requests for witness statements simply cannot bear the weight our colleagues place on it. Our colleagues fare no better by pointing to cases in which the Board has found that "a threat of plant closure is a *per se* violation of Sec. 8(a)(1) even though no such prohibition is expressly set forth in the Act." As the Seventh Circuit cogently explained, "[u]nlike an interrogation, which is coercive only if reasonable employees would perceive it as such, a threat of plant closure is *per se* a violation of § 8(a)(1)" because "any threat of plant closure 'reasonably tends to coerce employees in the exercise of their rights'" and thus violates the prohibitions of Section 8(a)(1). *NLRB v. Champion Laboratories, Inc.*, 99 F.3d 223, 228 (7th Cir. 1996) (quoting *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1317 (7th Cir. 1989)).

The majority also appeals repeatedly to the Board's expertise in the administration of the Act as a basis for retaining the per se standard and argues that the courts should defer to that expertise. But the Board's expertise did not save the per se rules rejected in *Teamsters Local 357 v. NLRB*, *NLRB v. American National Insurance Co.*, or *Operating Engineers Local 513 v. NLRB.* That justification is insufficient to carry the day here as well. The majority also relies on the stability provided by the per se standard's longevity, but the longstanding nature of a per se rule cannot justify it if it is unsupported by the Act.[11] See *Operating Engineers Local 513 v. NLRB*, 635 F.3d at 1236 (rejecting longstanding per se rule and explaining that "consistency alone cannot save the Board").[12]

Our colleagues acknowledge that "coercive circumstances . . . may not be identifiable in every case" where *Johnnie's Poultry* safeguards are not followed, though they argue that the per se standard should be retained all the same due to its "clarity, simplicity, and administrative efficiency." But the benefits of bright-line rules do not justify continued adherence to a per se standard that is inconsistent with the Act, for all the reasons stated above. See *Blue Flash Express,* 109 NLRB at 594 (rejecting bright-line rule prohibiting all interrogations, even though new test would require the Board "to carefully weigh and evaluate the evidence in [each] case," because "that is what we believe the statute requires us to do"); see also *Rossmore House*, 269 NLRB at 1177 (rejecting per se rule prohibiting interrogations concerning union sympathies in favor of totality-of-the-circumstances test because "'[t]o fall within the ambit of § 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference'") (quoting *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980)).[13]

[10] Compare *NLRB v. Martin A. Gleason, Inc.*, 534 F.2d 466, 479 (2d Cir. 1976) (declining to adopt Board's per se rule prohibiting employer requests for employee statements given to Board absent evidence that the conduct "interfered with the exercise of rights guaranteed to the employees by Section 7 of the Act.") and *Texas Industries, Inc. v. NLRB*, 336 F.2d 128, 133 (5th Cir. 1964) (stating that "[i]t may be that under some circumstances a showing could be made that an employer would be justified in obtaining copies of employees' statements," but finding violation because "such circumstances are not presented here") with *Retail Clerks International Association v. NLRB*, 373 F.2d 655, 658 (D.C. Cir. 1967) (approving per se rule) and *NLRB v. Winn-Dixie Stores, Inc.*, 341 F.2d 750, 752–753 (6th Cir. 1965), cert. denied 382 U.S. 830 (1965) (same). The Ninth Circuit, in turn, has found that a request for witness statements is per se unlawful absent "assuring the employee that no reprisals will follow from refusal, and without showing that the requested statement is needed for trial preparation and that the request does not go beyond those needs." *NLRB v. Maxwell*, 637 F.2d 698, 702 (9th Cir. 1981).

[11] Our colleagues make much of the fact that the Board has applied *Johnnie's Poultry* "[f]or more than 58 years." What our colleagues fail to mention, however, is that for that same 58 years, courts have *refused to enforce* decisions in which the Board applied the *Johnnie's Poultry* standard. See, e.g., *NLRB v. Johnnie's Poultry*, 344 F.2d 617, 618-619 (8th Cir. 1965); see also *NLRB v. Lorben Corp.*, 345 F.2d 346, 349 (2d Cir. 1965).

[12] We share our colleagues' commitment to effectuating the Congressional policy of ensuring that all persons with information about unfair labor practices are "completely free from coercion against reporting them to the Board." *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972). But this commitment provides no justification for a per se rule under which questioning may be held violative of Sec. 8(a)(1) even if it does not tend to interfere with, restrain, or coerce the questioned employee in the exercise of his or her Sec. 7 rights.

The majority's reliance on *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 216 (1978), is also misplaced. The Court there upheld the Board's rule prohibiting the prehearing disclosure of witness statements against a challenge that the rule violated the Freedom of Information Act (FOIA). The Court's interpretation of the FOIA as permitting the Board's "prophylactic rule" for the purpose of preventing witness intimidation says nothing about the Board's authority, under the Act, to invoke a "prophylactic rule" for the purpose of determining that an employer or union has committed an unfair labor practice. *Teamsters Local 357* and *NLRB v. American National Insurance* do speak to that issue, and the holdings of those cases are fatal to the majority's position for all the reasons stated above.

[13] Bright-line rules are beneficial in appropriate circumstances because they provide parties with clear guidance regarding their obligations under the Act. But they cannot be used to create a per se unfair labor practice for conduct that otherwise does not violate the Act for the reasons stated above. The examples of bright-line rules cited by the majority are not to the contrary. See *NLRB v. Maryland Ambulance Services*, 192 F.3d 430, 433–434 (4th Cir. 1999) (applying Board's "actual work" bright-line rule to determine voter eligibility in Board elections); *Williams Energy Services*, 336 NLRB 160, 160 (2001) (*Williams Energy Services I*) (adhering to and applying bright-line successor-bar rule); *Cleveland Indians Baseball Co.*, 333 NLRB 579, 579-580 (2001) (applying regulatory definition of "working day" as a bright-line definition pertaining to the posting requirements for notices of elections as stated in Sec. 103.20 of the Board's Rules and Regulations).

Finally, our colleagues posit that the per se standard better effectuates the policies of the Act than a standard that considers whether questioning was coercive under the totality of the circumstances in each case. Indeed, the majority spills much ink explaining why a totality of the circumstances standard would be problematic. Although we agree with some of those criticisms, we disagree that the choice is limited to an either/or between totality of the circumstances and the *Johnnie's Poultry* per se standard. The Board could also replace the current per se standard—an impermissible standard, as we have shown—with a rebuttable presumption standard. As explained below, that standard offers all the advantages of the per se standard while also affording a workable means by which all relevant facts may be considered and fully addresses the concerns articulated by the circuit courts.

C. The Rebuttable Presumption Standard

While the Board lacks the authority to impose the *Johnnie's Poultry* safeguards as a per se standard, its authority to establish *rebuttable* presumptions is well established. For example, the Board has long held that rules prohibiting solicitation outside of working time "must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." *Peyton Packing Co.*, 49 NLRB 828, 843–844 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944). That presumption was upheld by the Supreme Court in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). The Court explained that the presumption's validity "depends upon the rationality between what is proved and what is inferred," and held that it was sufficiently justified by "the Board's appraisal of normal conditions about industrial establishments." Id. at 804–805. In doing so, the Court recognized that the presumption was rebuttable and noted approvingly that the Board had "succinctly expressed the requirements of proof which it considered appropriate to outweigh or overcome the presumption as to rules against solicitation." Id. at 803.[14]

Consistent with these principles, we would replace the *Johnnie's Poultry* per se standard with a rebuttable presumption that an employer's questioning of employees in preparation for a Board proceeding is coercive if the employer fails to provide one or more of the *Johnnie's Poultry* safeguards. This presumption is amply justified by the Board's experience in the administration of the Act as reflected in *Johnnie's Poultry* and its progeny, as reviewing courts have repeatedly acknowledged.[15] The employer would then have an opportunity to rebut that presumption by showing, by a preponderance of the evidence, that the questioning was not coercive under the totality of the circumstances standard discussed above.[16]

This rebuttable presumption standard retains all the benefits of the per se standard cited by our colleagues. It would address their concerns about sacrificing the stability and clarity of the *Johnnie's Poultry* standard because the safeguards themselves would not change; employers could still use the widely available model assurances our colleagues cite. The rebuttable presumption standard would also maintain the "prophylactic" effect that *Johnnie's Poultry* was designed to promote because employers could only be assured beforehand that their questioning will be found lawful if all of the *Johnnie's Poultry* safeguards are observed. See *Bill Scott Oldsmobile*, 282 NLRB 1073, 1075 (1987) (discussing "prophylactic" effect of *Johnnie's Poultry* safeguards). Employers

Further, we disagree with the successor-bar doctrine cited by our colleagues because it is contrary to Supreme Court precedent and imposes an unwarranted restriction on employees' Sec. 7 rights. See *Hospital Menonita de Guayama, Inc.*, 371 NLRB No. 108, slip op. at 10 (2022) (Member Ring, dissenting); *Bay at North Ridge Health and Rehabilitation Center, LLC*, Case 18–RD–208565 (Feb. 14, 2018) (not reported in Board volumes) (Member Kaplan, concurring). We also note that the Board vacated *Williams Energy Services I*, on which the majority relies, in *Williams Energy Services*, 340 NLRB 764, 764-765 (2003) (*William Energy Services II*), and applied the previous doctrine that provided only a rebuttable presumption of majority support to an incumbent union in a successorship situation.

[14] A Board majority recently extended *Republic Aviation* to hold that employer dress codes that restrict the wearing of union insignia in any way are presumptively unlawful. See *Tesla, Inc*., 371 NLRB No. 131, slip op. at 1, 5–8 (2022). We dissented from this unjustified extension of *Republic Aviation* for the reasons stated in our joint dissent. Id., slip op. at 20–31. But nothing in our dissent calls into question the Board's authority to establish the rebuttable presumption that was at issue in *Republic Aviation* or the one we outline here.

[15] See, e.g., *NLRB v. Neuhoff Bros. Packers, Inc.*, 375 F.2d 372, 377 (5th Cir. 1967) (finding that "the process of investigation through interrogation of employees must be a carefully conducted one lest that very activity—or the prospect of it—inhibit employees from invoking, assisting or participating in Board procedures which depend so directly upon information supplied by or through employees"); see also *ITT Automotive v. NLRB*, 188 F.3d at 389 fn. 9 (noting that the circuit's case-by-case approach was not a rejection of the concerns addressed in *Johnnie's Poultry* and explaining that "an employer must give *Johnnie's Poultry* warnings" even if failure to do so does not incur per se liability).

[16] Placing the rebuttal burden on the employer is appropriate because it has direct access to the interrogator, the specifics of the interrogation, and other relevant facts and is therefore in the best position both to know what evidence should be entered into the record and to obtain such evidence promptly. Cf. *St. George Warehouse*, 351 NLRB 961, 964 (2007) (finding that the burden of going forward with evidence is properly placed on party having knowledge of the relevant facts), enfd. 645 F.3d 666 (3d Cir. 2011).

therefore will still have strong incentives to provide the *Johnnie's Poultry* safeguards in order to benefit from the safe harbor they afford. The fact that an employer would have the opportunity to rebut the presumption of coercion would not incentivize employer noncompliance with the safeguards any more than an employer's ability to prove special circumstances incentivizes restrictions on solicitation outside of working time. Under a rebuttable presumption standard, as under *Republic Aviation*, the employer bears the burden of proof on the issue. Few employers will choose to take that chance, as the Board's experience with the special circumstances standard amply demonstrates.

Our colleagues argue that a rebuttable presumption standard would not maintain the prophylactic effect of the per se *Johnnie's Poultry* standard, asserting that "[b]ecause the employer cannot adequately assess the risk of an unfair labor practice finding until later, the rebuttable presumption would not ensure a comparable level of protection at the time the questioning takes place." The majority offers no persuasive justification for their position that an employer's inability to predict in advance whether it will be found to have committed an unfair labor practice will incentivize, rather than deter, disregard of the *Johnnie's Poultry* safeguards. As applied to rational, risk-averse employers, that assumption is simply counterintuitive—and employers that are heedless of unfair labor practice liability would not be deterred by a per se standard, either.[17] In any event, the majority's prediction contradicts the Board's longstanding experience with rebuttable presumptions discussed above.

There is also no merit to the majority's prediction that "the types of evidence that employers will put on and the types of questions that employers will ask to meet their burden of showing the absence of coercion" under a rebuttable presumption standard would lead to improper intrusions into employees' union sympathies. Our colleagues point to no evidence that this has been a problem when other types of interrogations are litigated under the totality of the circumstances standard specified in *Sunnyvale Medical Clinic*, 277 NLRB at 1217, and *Rossmore House*, 269 NLRB at 1177. It bears emphasis that any questions asked by an employer to prove absence of coercion would be posed at the hearing, in the presence of the administrative law judge and counsel for the General Counsel. We reject the notion that the judge would permit employees to be coercively interrogated regarding their union sympathies, or that counsel for the General Counsel would permit such questions to go unchallenged.

A rebuttable presumption standard also will not needlessly complicate the litigation of *Johnnie's Poultry* allegations. Under a rebuttable presumption standard, the General Counsel must prove only that an employee was interrogated in preparation for a Board proceeding and that one or more of the *Johnnie's Poultry* safeguards were not provided, just as under the current per se approach. Accordingly, as heretofore, a succinct line of questioning to ascertain whether the employer provided the *Johnnie's Poultry* safeguards will suffice to enable the General Counsel to meet her burden. Once this is shown, unlawful coercion is presumed and the employer has the burden of rebutting it.

The rebuttable presumption standard will also effectively address the criticisms of the circuit courts that have rejected the *Johnnie's Poultry* per se standard. Indeed, the Fourth Circuit has already endorsed a rebuttable presumption standard, recognizing that the Act "would be better served by raising a rebuttable presumption of coerciveness" than by the per se standard of *Johnnie's Poultry* itself. *Standard-Coosa-Thatcher Carpet Yarn Division, Inc. v. NLRB*, 691 F.2d at 1141. We are not aware of any circuit court decision holding that a rebuttable presumption standard would be impermissible in this context. While some courts rejecting the *Johnnie's Poultry* standard have instead applied a totality of the circumstances test,[18] our rebuttable presumption standard is also consistent with their rationale because it considers the totality of the circumstances. While the rebuttable presumption standard does so in the form of a rebuttal burden, adopting that framework is well within the Board's authority for all the reasons stated above.

Finally, we note that the rebuttable presumption standard will excuse an employer's noncompliance with the *Johnnie's Poultry* safeguards only in cases where the

[17] Our colleagues posit that some employers will disregard the *Johnnie's Poultry* safeguards all the same if they are aware that they will have the opportunity to litigate the presumption of coerciveness after the fact. But a rational, risk-averse employer would not choose to take that chance, especially on an issue as to which it bears the burden of proof.

[18] *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d at 1256 (rejecting application of *Johnnie's Poultry* and applying totality of the circumstances analysis based on *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964)); *A & R Transport, Inc. v. NLRB*, 601 F.2d 311, 313 (7th Cir. 1979) ("The interrogation standards set forth in Johnnie's Poultry are relevant in determining whether an interview was coercive . . . . We join with other circuits, however, in declining to approve a Per se rule and instead will look to the totality of the circumstances. . . ."); *NLRB v. Lorben Corp.*, 345 F.2d at 348 (recognizing relevance of *Johnnie's Poultry* safeguards but rejecting per se application in favor of totality of the circumstances analysis based on *Bourne v. NLRB*, supra); see also *ITT Automotive v. NLRB*, 188 F.3d at 389 fn. 10 (listing factors from *Bourne v. NLRB* as illustrative of the considerations relevant to the totality of the circumstances analysis).

Board itself would find that the employer has proven, by a preponderance of the evidence, that the questioning did not reasonably tend to interfere with, restrain, or coerce employees under the totality of the circumstances of that case. In rejecting this standard, then, our colleagues are effectively insisting on finding a violation of the Act even in cases where they would agree that the employer has proven that questioning was not, in fact coercive. With all due respect to our colleagues, that is not a permissible interpretation of the Act.

CONCLUSION

The Board's per se application of the *Johnnie's Poultry* standard and blanket refusal to consider other relevant circumstances surrounding an employer's interrogation of an employee in preparation for a Board proceeding before finding a violation is at odds with Supreme Court and circuit court precedent, and with the Act itself. It is also unenforceable in many of the Federal courts of appeals. We have advanced an alternative that resolves the problems identified by those courts while retaining all the benefits of the current *Johnnie's Poultry* standard. Our colleagues offer no persuasive justification for refusing to adopt the alternative standard we have proposed. Instead, they double down on the same standard the courts have overwhelmingly rejected. Accordingly, we respectfully dissent.[19]

Dated, Washington, D.C. December 15, 2022

Marvin E. Kaplan, Member

John F. Ring, Member

[19] We would apply the rebuttable presumption standard retroactively as the Board has done in prior decisions adopting or changing the standard applicable to employer interrogations. See *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); *Rossmore House*, 269 NLRB at 1178. Accordingly, in the instant case, we would remand the issue to the judge to apply the modified *Johnnie's Poultry* standard and to provide the parties an opportunity to introduce additional evidence relevant to the coerciveness of the questioning under the rebuttable presumption standard.

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about matters that are the subject of unfair labor practice proceedings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

SUNBELT RENTALS, INC.

The Board's decision can be found at www.nlrb.gov/case/18-CA-236643 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.