Case Nos. 16-2721, 16-2944

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

COOPER TIRE & RUBBER COMPANY,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

On Petition For Review From
The National Labor Relations Board
Case No. 08-CA-087155

BRIEF OF *AMICUS CURAE* NATIONAL ASSOCIATION OF MANUFACTURERS SUPPORTING PETITIONER/CROSS-RESPONDENT COOPER TIRE & RUBBER COMPANY AND SEEKING REVERSAL OF THE DECISION OF THE NATIONAL LABOR RELATIONS BOARD

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CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, the National Association of Manufacturers ("NAM") hereby certifies that it is a trade association and its general purpose is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth. The specific purpose of NAM in this brief is set forth below in the section of this brief entitled, "Identity and Interest of the Amicus Curiae."

NAM hereby certifies that it does not have any outstanding shares or debt securities in the hands of the public. NAM further certifies that it does not have any parent company, nor does any publicly held company have a 10% or greater ownership interest in it.

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

In this brief, the National Association of Manufacturers ("NAM") supports Appellant Cooper Tire's appeal of the Board's Decision (the "Decision") in this matter. The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes more than $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development. The NAM is a powerful voice for the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM and its members believe any form of discrimination or harassment, including that based upon race, has no place in the United States. NAM members, in furtherance of their interests in eliminating discrimination and in compliance with applicable laws, maintain and enforce non-discrimination and non-harassment policies to prohibit and remedy any discrimination and harassment in their workplaces. Finally, the NAM and its members are in need of certainty regarding their ability to effectuate their policies, and redress discriminatory and harassing behavior in their workplaces, regardless of whether the employees

engaged in discrimination and harassment are otherwise engaged in concerted, protected activity or of the location of the activity.

The NAM has reviewed and fully supports the Brief submitted by Cooper Tire and does not seek to repeat arguments made therein. The NAM is filing this short brief of its own in order to make three narrow but significant additional points: (a) the Board is required to harmonize the Act with other federal laws, including, but not limited to, anti-discrimination and anti-harassment laws, like Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981; (b) the ALJ Decision's protection of racist comments on a picket line unjustifiably interferes with Cooper Tire's, and other NAM members' obligation, to comply with federal law and policy by disciplining employees for making discriminatory or harassing comments; and (c) the "real world" experience of employers, including NAM's members, faced with the facts at issue here fully supports this Court reversing the Decision and determining that racist comments are not protected by the Act, even if uttered on a picket line.

The NAM and it members believe racism, discrimination, and harassment serve no legitimate purpose in the workplace and should not be protected by the Act, in any way. The NAM believes that the Decision protects racial harassment as Section 7 activity, simply because it occurred on a picket line.

Such a decision cannot be allowed to stand. The important purposes underlying federal anti-discrimination and anti-harassment statutes enacted by the United States Congress oblige employers—legally and morally—to protect employees' right to enjoy a discrimination- and harassment-free workplace. Further, this Court should affirm its stance against racial discrimination and harassment, harmonize its interpretation of the Act with the clear federal policies prohibiting racism, and determine employees do not have any statutory right to engage in discriminatory and harassing conduct. For these reasons, which are discussed more fully below, the Decision should be overturned, and this Court should determine racist statements have no protection under the Act.

Pursuant to Federal Rule of Appellate Procedure 29(b), the NAM has filed its Motion for Leave to File *Amicus Curiae* Brief on Behalf of National Association of Manufacturers in Support of Respondent Cooper Tire & Rubber Company.

STATEMENT OF INDEPENDENCE OF *AMICUS CURIAE*

The National Association of Manufacturers and the undersigned counsel are solely responsible for the content of this *amicus curiae* brief. No counsel for any party to this matter authored this brief, in whole or in part. No party or its counsel contributed money intended to fund the preparation or submission of this brief. Similarly, no person, other than the NAM and its members, contributed money intended to fund the preparation or submission of this brief.

ARGUMENT

I. INTRODUCTION

On January 7, 2012, Anthony Runion ("Runion"), a bargaining unit employee at Cooper Tire & Rubber's ("Cooper Tire") Findlay, Ohio facility, made racist, discriminatory statements to replacement workers while he was on a picket line. Specifically, Runion yelled "Hey, did you bring enough KFC for everyone?" and "Hey, anybody smell that? I smell fried chicken and watermelon" to African-American replacement workers who were arriving for work in the Findlay plant. As a result of his racist statements, Runion was fired by Cooper Tire on March 1, 2012. Runion filed a grievance relating to his discharge.

On August 12, 2012, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO/CLC (the "Union") filed an unfair labor practice charge alleging, among other things, that Runion was discharged in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (the "Charge"). The Charge was deferred pending the resolution of Runion's grievance.

On May 14, 2014, an Arbitrator issued an opinion and award (the "Award"), finding that Runion made both the "KFC statement" and the "chicken and watermelon statement." The Arbitrator also determined that these comments violated Cooper Tire's harassment policy and that they were "more serious" given

that they occurred on a picket line "where there was a genuine possibility of violence." The Arbitrator denied the grievance and determined Runion was discharged for "just cause" under the collective bargaining agreement.

After the Arbitrator issued the Award, the Regional Director refused to defer to the Arbitrator's award upholding Runion's discharge and a complaint was issued. On June 5, 2015, Administrative Law Judge Thomas M. Randazzo issued a decision and refused to defer to the Award because he determined it was clearly repugnant to the National Labor Relations Act ("NLRA" or "Act"). That decision was appealed to the National Labor Relations Board (the "Board").

On May 17, 2016, the Board issued a Decision and Order (the "Decision") and determined that an arbitrator's award, which upheld the discharge of Runion on or about March 1, 2012 for the racist statements he made on a picket line, was clearly repugnant to the Act. The Decision, in large part, adopted Administrative Law Judge Thomas M. Randazzo's June 5, 2015 Decision that refused to defer to the arbitrator's award. However, the Board did not accept the ALJ's determination that the Arbitrator had failed to adequately consider the unfair labor practice issue.

The Decision framed the main issue of this case as whether Cooper Tire violated Section 8(a)(1) and 8(a)(3) of the Act by discharging Runion on or about March 1, 2012 for his racist statements made on a picket line.

The Decision determined that, even though Runion's "statements most certainly were racist, offensive, and reprehensible," they did not forfeit the protection of the Act. (Decision, p. 8). However, as will be discussed below, this Decision cannot stand because the Act cannot and should not protect racist comments, regardless of where or when these comments are made. The Board cannot force employers to violate other federal statutes through its protection of racist speech used on a picket line, and employers need to be able to rely on and apply their legitimate anti-discrimination and anti-harassment policies.

II. THE BOARD HAS AN OBLIGATION TO HARMONIZE AND RECONCILE THE ACT WITH OTHER FEDERAL LAWS, INCLUDING THE CIVIL RIGHTS LAWS

The Board is required to accommodate its enforcement of the NLRA in a way that is consistent with other federal laws. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 251 (1970); *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 144 (2002); *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."). Indeed, "statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Boys Markets, Inc.*, 398 U.S. at 250.

Given these clear directives from the Supreme Court, the Board cannot consider its cases and apply the Act in a vacuum. Rather, the Board must fully consider an employee's right to engage in protected concerted activity alongside other employees' right to work in a discrimination-free and harassment-free environment and an employer's duty to provide such a workplace. However, the Decision altogether failed to consider any other federal policies when it held that an employee who makes racist comments on a picket line is engaged in protected concerted activity because he did not coerce or intimidate employees or raise a reasonable likelihood of an imminent physical confrontation. (Decision, p. 11).

III. CLEAR CONGRESSIONAL STATUTES AND POLICIES MANDATE THAT EMPLOYERS PROTECT EMPLOYEES FROM DISCRIMINATORY AND HARASSING COMMENTS

In the instant matter, reinstating Runion is tantamount to requiring that Cooper Tire violate federal anti-discrimination and harassment laws, including Title VII and Section 1981, as well as numerous other similar state and local laws. Under Section 1981, "[a]ll persons within the jurisdiction of the United States shall have the same right ... to the full and equal benefit of all laws." 42 U.S.C. § 1981. Moreover, Title VII renders it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1). Title VII and

Section 1981 embody federal policies prohibiting discrimination and harassment on many bases, including race. *See, e.g.*, *McDonald v. Santa Fe Transportation*, 427 U.S. 273 (1976).

An employer violates Section 1981 and Title VII by, among other things, requiring employees to work in a racially hostile environment. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65–67 (1986). A hostile environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (internal quotation marks omitted). The law is clear that employers, including Cooper Tire, can be held liable for failing to redress discriminatory and/or harassing behavior which creates a hostile work environment. Thus, under Title VII and Section 1981, an employer has a duty to redress racially motivated, discriminatory, and harassing behavior in its workplace, even if it occurred on a picket line. *See also Dowd v. United Steelworkers of Am.*, 253 F.3d 1093, 1102 (8th Cir. 2001) (finding hostile work environment based in part on racial abuse occurring on union picket line).

To prevail on a Title VII claim that a workplace is racially hostile, a plaintiff need only show that: (1) he or she belongs to a protected group; (2) he or she was subjected to unwelcome harassment; (3) the harassment was based on race; (4) the

harassment affected a term, condition, or privilege of her employment; and (5) the plaintiff's employer knew or should have known of the harassment and failed to take proper remedial action. *Tatum v. City of Berkeley*, 408 F.3d 543, 550 (8th Cir. 2005) *citing Pedroza v. Cintas Corp. No. 2*, 397 F.3d 1063, 1068 (8th Cir. 2005). Other Circuit Courts utilize similar tests. *See, e.g., Okoli v. City of Balt.*, 648 F.3d 216, 220 (4th Cir. 2011). The same test applies to a hostile work environment claim asserted under 42 U.S.C. § 1981. *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1050 (8th Cir. 2002).

Whether the environment is objectively hostile or abusive is "judged from the perspective of a reasonable person in the plaintiff's position." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81, (1998). Again, as noted above, it is well settled that the hostile environment under Title VII can be created by conduct taking place outside the workplace. *Dowd*, 253 F.3d at 1102; *see also* Comment, *High Tech Harassment*, 87 Wash. L. Rev. 249 ("The First, Second, Seventh, and Eighth Circuit Courts of Appeals have expressly indicated that harassment conducted outside the physical walls of the workplace is part of the totality of the circumstances for purposes of a hostile work environment claim.").

Under this established legal doctrine, an employee can seek damages against his or her employer if it fails to redress racist comments, like Runion's, regardless of whether it occurs on a picket line. Employers have previously been held liable

for conduct similar to that engaged in by Runion. In fact, as this Court noted, "[p]erhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." *Ellis v. Houston*, 742 F.3d 307, 325 (8th Cir. 2014) *citing Rodgers v. W.–S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (citation and internal quotation marks omitted). Likewise, the United States Court of Appeals for the Fourth Circuit recently held that an employer can be held liable for creating a racially hostile work environment when an employee was the subject of two racial slurs at work. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015). The *Boyer-Liberto* Court stated: "As we and several of our sister courts of appeals have recognized, perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet …." *Id. citing Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001); *accord Ayissi–Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013); *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 24 (2d Cir. 2012); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004).

Moreover, this Court and other federal courts have already determined that comments similar to Runion's two comments, "Hey, did you bring enough KFC

for everybody?" and "Hey, anybody smell that? I smell fried chicken and watermelon," can be used to support hostile work environment claims against an employer. *See, e.g., Ellis*, 742 F.3d at 320 (comments regarding "fried chicken and watermelon, generally stereotyping them on the basis of race" supported hostile work environment claim under Section 1981); *Reed v. Procter & Gamble Mfg. Co.*, 556 Fed. App'x 421, 433 (6th Cir. 2014) *cert. denied*, 135 S. Ct. 84 (2014) (white employees' comments about "eating 'watermelon and fried chicken'" helped show conduct which was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment); *Navarro v. U.S. Tsubaki, Inc.*, 577 F.Supp.2d 487, 510 (D. Mass. 2008) (co-worker's comment that employee "should be picking watermelons rather than working in a machine shop and describ[ing] him as a monkey" could show hostile work environment at trial). This Court has also determined that, even though Section 7 may protect "impulsive, exuberant behavior" which occurs in the course of otherwise protected activity, intentional misconduct, which is "calculated" and "flagrant", like that of Runion, is not protected by the Act. *Earle Indus. Inc. v. NLRB*, 75 F.3d 400, 407 (8th Cir. 1996).

In order to avoid vicarious liability for certain types of co-worker harassment, an employer must prove that it exercised reasonable care to prevent and promptly correct the harassment. *See Faragher v. City of Boca Raton*, 524

U.S. 775, 807 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765, (1998). According to the Equal Employment Opportunity Commission, "[r]emedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur." *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1288 (11th Cir. 2003) (quoting EEOC Notice 915.002, at § V.C.1.f. (June 18, 1999)). Again, federal law dictates that Cooper Tire was required to redress Runion's racist comments, and, if it failed to do so, Cooper Tire could have been held liable for claims of harassment and discrimination.

Given the foregoing, there is a clear federal policy prohibiting discrimination and harassment, which requires employers to take affirmative steps to protect employees from, and altogether eliminate, discrimination and harassment in the workplace. Employers, like Cooper Tire and NAM's members around the country, have an obligation to support these federal policies by enacting and applying policies prohibiting harassment and discrimination, like Cooper Tire has in the instant matter. It is clear that, if unchecked, racist comments on a picket line could lead to liability for an employer.

IV. THE BOARD'S DECISION FORCES EMPLOYERS TO VIOLATE ANTI-DISCRIMINATION STATUTES BY PROTECTING RACIST BEHAVIOR ON PICKET LINES

Despite the clear federal anti-discrimination and anti-harassment policies described above, the Board felt constrained to determine that "extant Board law establishes that Runion's statements, while racist and offensive, were not sufficient to remove the protection of the Act from his protected picketing activity, and that his discharge violated the Act." (Decision, p. 12). Rather than allowing the clear policies supported by Title VII to stand, the Board determined it was bound by its decision in *Clear Pine Moulding,* 268 NLRB 1044 (1984), and subsequent cases applying that decision. (Decision, pp. 7-10).

At the outset, it must be noted that *Clear Pine Moulding* did not address the special circumstances created by racial epithets on picket lines but dealt only with non-racial offensive picket line misconduct. In addition, *Clear Pine Moulding* was decided before the United States Supreme Court first recognized that an employee could bring a Title VII claim for hostile work environment in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and nearly a decade before the Court set forth the current test to determine whether a hostile work environment exists in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). The Board could not have been and was thus not aware in 1984 of the sea change that would occur in the law of discrimination and hostile work environment during the ensuing thirty years. In

fact, even the Board's General Counsel has realized this change in the legal environment and determined that the use of racist language and stereotypes can lose the protection of the Act. *See* General Counsel Advice Memo for Case No. 07-CA-06682, *Detroit Medical Center*, 2012 NLRB GCM Lexis 1, at *7 (Jan. 10, 2012) (using offensive racist stereotypes was so "opprobrious" as to forfeit employee's protection under the Act).

In addition, though the Decision cites a number of cases applying *Clear Pine Moulding* to purportedly similar types of picket line misconduct, only one single case cited actually dealt with racial epithets on the picket line. That cited case, *Airo Die Casting, Inc*., 347 NLRB 810 (2006), does not bear the weight that the Board would have it carry.

In *Airo Die Casting*, an employee was terminated for saying a racial epithet, not to co-workers crossing the picket line, but to a contract security guard. *Id.* at 811. The *Airo Die Casting* Board majority did not engage in any extensive analysis of the issues, and did not apparently consider the implications of Title VII jurisprudence, addressing the discharge decision in a footnote. *Id.* at 810, n.3. More importantly, a majority of the *Airo Die Casting* Board stated that "there may well be circumstances, absent here, in which a picketing employee's use of the [epithet] might cause the employee to lose the Act's protection." *Id.* But the majority found that the discharge violated Section 8(a)(3), apparently because the

employer had failed to similarly discipline other employees who had used the epithet. *Id.* at 812.

In the present case, there is no claim that Cooper Tire discriminated against Runion by tolerating similar workplace racist remarks. In addition, the Board treated *Air Die Casting* as compelling an unfair labor practice finding in this case, even though the Board majority in *Air Die Casting* expressly limited it to its facts. The Board declined to consider or address the conflicting policies of Title VII, and treated *Clear Pine Moulding* as determining the outcome here, even though that case never addressed the development of Title VII law to cover racist statements as creating hostile work environments. Thus, the gravamen of the Decision is that, as long as employees are otherwise engaged in protected concerted activity on a picket line, this strike activity "trumps" other employees' rights to be free from racist, harassing remarks. According to the Decision, Runion's right to shout racist comments during a strike outweighs federal policies prohibiting discrimination and harassment.

In so holding, the Board has eviscerated employers' ability to enforce their legitimate anti-discrimination, anti-harassment policies on a picket line. Under the Decision, Runion's racist utterances cannot be redressed and the employees who heard these comments have no recourse regarding these comments or any other racist behavior on a picket line, all in apparent violation of civil rights laws. To the

contrary, employees and members of the public should not have to be subjected to racist comments, and there is no legitimate reason for such comments to be protected by the Act. As a result, employers must be allowed to apply their non-discrimination, non-harassment policies, even to behavior on a picket line.

Nothing in the NLRA requires that the Board allow racist remarks on a picket line. Indeed, the Board has previously held that even if an employee is engaging in protected activity, the employee can lose the protection of the Act if he also engages in unprotected offensive, vulgar, and/or racist statements during the course of his protected activity. *See Atlantic Steel Co.*, 245 NLRB 814, 816 (1979); *see also*, *Media Gen. Operations, Inc. v. NLRB*, 560 F.3d 181, 189 (4th Cir. 2009) (referring to a supervisor as a "fucking idiot" sufficient to lose protection of the Act); *Felix Industries, Inc. v. NLRB*, 251 F.3d 1051 (D.C. Cir. 2001) (calling a supervisor a "fucking kid" weighed against protection by the Act);[1] *Sewell Mfg. Co.*, 138 NLRB 66, 71 (1962) (recognizing that appeals to racial prejudice have no place in NLRB electoral campaigns). Like *Sewell*, racial comments on a picket line "inject an element which is destructive of the very

[1] In the present case, the Board improperly distinguished the *Atlantic Steel* doctrine on the ground that different standards apply within the four walls of a workplace than apply outside on a picket line. (Decision, pp. 9-10). The Board again ignored settled law under Title VII finding that a hostile work environment can be created outside the physical walls of the workplace. *See Dowd*, 253 F.3d at 1102.

purpose of the [strike and] … which have no purpose except to inflame racial feelings." *Id.*

This Court has already made clear that the ultimate question in this matter is whether protecting Runion's conduct serves the purposes of the Act. *Earle Industries*, 75 F.3d at 405. However, there is no legitimate purpose for protecting racist comments and harassment. One need only look to the current state of society to see the impact of racism and understand that racist epithets should not be protected by the Act. Indeed, the Black Lives Matter campaign; recent events and protests in Milwaukee, Wisconsin, St. Paul, Minnesota, Baton Rouge, Louisiana, Dallas, Texas, and Ferguson, Missouri; the massacre at the Emanuel African Methodist Episcopal Church in Charleston; and the decision of leading corporate citizens, including Walmart, eBay, Sears (which owns and operates Kmart stores), Target, and Amazon, to end the sales of merchandise with the Confederate flag all demonstrate our current societal values, as well as the impact and divisiveness that racism and racist comments have.

It is long past the time for the Board to modernize its outdated jurisprudence to reflect the realities of federal law and social values which hold that racial discrimination and harassment have no place in our society. Yet, the Board steadfastly refuses to do so and, instead, has determined that the NLRA protects racism, so long as such racism arises in the context of a picket line. Given this

outdated, myopic focus on the NLRA, this Court must now distinguish between racist statements and other non-racist invectives on a picket line and clarify that, under *Clear Pine Moulding* and its progeny, discriminatory and harassing comments or actions are not protected by the Act. This Court should clearly hold that there is no protection for racism, discrimination, or harassment under the National Labor Relations Act.

CONCLUSION

For the reasons stated herein, and in the brief of Cooper Tire & Rubber Company, NAM respectfully requests that this Court refuse to refuse to enforce the Board's Order in this matter, reinstating Runion and awarding him backpay and to, instead, defer to the Arbitrator's Award that just cause existed for Runion's discharge.

Respectfully submitted,

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Dated: September 6, 2016

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with the Type-Volume Limitation, the Typeface Requirements, and the Type Style Requirements of Fed. R. App. P. 32(a) and with the Technical Requirements of 8th Cir. R. 28A(h).

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,115 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

3. The digital version of this brief filed herewith has been scanned for viruses and to the best of my knowledge, is virus-free.

Respectfully submitted,

/s/ Maurice Baskin

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CERTIFICATE OF SERVICE FOR DOCUMENTS FILED USING CM/ECF

I hereby certify that on September 6, 2016, I electronically filed the foregoing *Brief of Amicus Curiae National Association of Manufacturers* with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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