NO. 16-1370

In the
Supreme Court of the United States

MASTEC ADVANCED TECHNOLOGIES,
A DIVISION OF MASTEC, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER MASTEC ADVANCED TECHNOLOGIES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, Petitioner MasTec Advanced Technologies, a division of MasTec, Inc., provides, among other services, installation and maintenance services for satellite television equipment under contract with various satellite television providers, including DirecTV, Inc., which recently merged with AT&T. MasTec Advanced Technologies is a division of MasTec, Inc. MasTec, Inc. is a publicly-traded Florida corporation.

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SUPPLEMENTAL BRIEF FOR PETITIONER MASTEC ADVANCED TECHNOLOGIES

This supplemental brief, filed pursuant to Rule 15.8 of the Rules of this Court, brings to the Court's attention an opinion of the United States Court of Appeals for the Eighth Circuit in *MikLin Enterprises, Inc. v. NLRB*, No. 14-3099, 2017 WL 2835648 (8th Cir. July 3, 2017), which was issued after the filing of Petitioner MasTec Advanced Technologies' ("MasTec") petition for writ of certiorari.

As discussed below, *MikLin* further demonstrates that the Circuit Court for the District of Columbia's decision in this case is an impermissible modification of the proper standard for determining an employer's ability to discharge an employee for disloyalty or whether an employee remains protected by the Act. The D.C. Circuit sanctioned the Board's improper application of *NLRB v. Local Union No. 1229, IBEW*, 346 U.S. 464 (1953) ("*Jefferson Standard*"). The decision of the D.C. Circuit, therefore, warrants this Court's review. Likewise, *MikLin* also deepens the Circuit split that exists with respect to the standard for determining an employer's ability to discharge an employee for disloyalty.

A. *MikLin* Further Demonstrates A Circuit Split And Shows That The D.C. Circuit Improperly Applied *Jefferson Standard* To Determine Whether Employees Were Appropriately Terminated For Disloyal Actions

Section 8(a)(1) of the NLRA 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). Notwithstanding that prohibition, the Act expressly preserves the employer's right to "suspend[] or discharge[]" an employee "for cause," including disloyalty to the employer. *Jefferson Standard*, 346 U.S. at 472 (quoting 29 U.S.C. § 160(c)).

In *Jefferson Standard*, this Court stated it has "been clear" that the Act "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them." 346 U.S. at 474 (quoting *Labor Board v. Jones & Laughlin*, 301 U.S. 1, 45-46 (1937)). "The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough." *Id.* at 475. The Supreme Court expressly ruled in *Jefferson Standard* that the Board may not restrict "the right of discharge when that right is exercised for reasons other than intimidation and coercion." *Id.* Furthermore, this Court has also determined that it is "plain" that "disloyalty is adequate cause for

discharge." *Id.* at 475. Thus, this Court has determined that an employee's disloyalty can be sufficient reason for an employer to lawfully terminate the employee.

In *MikLin*, the Eighth Circuit Court of Appeals considered *Jefferson Standard* in the context of employees' publication of a dispute with their employer about sick pay. *MikLin*, No. 14-3099, 2017 WL 2835648, *2-*3. There, employees and Industrial Workers of the World ("IWW"), a union which was attempting to organize MikLin's employees, were engaged in a public relations campaign, which included the distribution of flyers. *Id.* The employees in *MikLin* first posted flyers:

> featuring two identical, side-by-side photographs of a sandwich … on community bulletin boards in the public area of several of MikLin's stores. Above the left sandwich was a label stating "Your Sandwich Made By A Healthy Jimmy John's Worker." Above the right sandwich was a label stating: "Your Sandwich Made By A Sick Jimmy John's Worker." Below the photographs, in larger white letters, the poster stated: "Can't Tell the Difference?" In smaller red letters, the poster stated: "That's Too Bad Because Jimmy John's Workers Don't Get Paid Sick Days. Shoot, We Can't Even Call

> In Sick." Below that, in even smaller white letters, the posters stated: "We Hope Your Immune System Is Ready Because You're About To Take the Sandwich Test." Below that, in white letters approximately the same size as the labels at the top of the posters, the posters asked readers to "Help Jimmy John's Workers Win Sick Days. Support Us Online At www.jimmy-johnsworkers.org."

Id.

Thereafter, after MikLin refused to concede to all of the employees' demands, the employees and the IWW issued a press release which distributed the flyer and then posted the flyer (which now included the owner's phone number) in various places within two blocks of each of MikLin's ten locations. *Id.* As a result of this activity, MikLin fired the employees responsible for the "Sandwich Posters" and issued final written warnings to other employees who assisted with the campaign. *Id.*

After the MikLin employees were discharged and disciplined, IWW filed three unfair labor practice charges. *Id.* at *3-*4. The Board's Acting General Counsel issued a consolidated complaint, and, following a hearing, the Administrative Law Judge ("ALJ") issued a decision recommending that MikLin

be found to have committed most of the violations alleged in the consolidated complaint. *Id.*

In relevant part, upon its own review, the Board found that MikLin violated Sections 8(a)(3) and (1) of the Act by discharging and issuing written final warnings to employees because of their participation in the Sandwich Poster campaign. *Id.* After a panel of the Eighth Circuit granted the Board's petition for enforcement, and denied MikLin's petition for review, the Eighth Circuit granted rehearing en banc and vacated the panel decision. *Id.* at *1.

Following the rehearing en banc, the full Eighth Circuit concluded "that the means the disciplined employees used in their poster attack [against MikLin] were so disloyal as to exceed their right to engage in concerted activities protected by the NLRA, as construed in a controlling Supreme Court precedent" in *Jefferson Standard*. *Id*. More specifically, the Eighth Circuit noted that Board precedent has changed after "initially recognize[ing] that employers may protect their businesses from detrimental product disparagement whether or not an employee attack referenced a labor dispute." *Id.,* at *5, citing *Patterson-Sargent Co.*, 115 NLRB. 1627, 1630 (1956); *Coca Cola Bottling Works, Inc.*, 186 NLRB 1050, 1063-64 (1970).

The Eighth Circuit noted that, more recently and despite no change in this Court's *Jefferson*

Standard disloyalty principle, "the Board has migrated to a severely constrained interpretation of that decision. 'To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence a malicious motive.'" *Id.*, citing *MikLin Enters., Inc.*, 361 NLRB No. 27, at *5 (2014).

Then the Eighth Circuit noted the Board has "fundamentally misconstrued *Jefferson Standard* in two ways." *Id.*

> First, while an employee's subjective intent is of course relevant to the disloyalty inquiry -- "sharp, public, disparaging attack" suggests an intent to harm -- the *Jefferson Standard* principle includes an objective component that focuses, not on the employee's purpose, but on the means used -- whether the disparaging attack was "reasonably calculated to harm the company's reputation and reduce its income," 346 U.S. at 471, to such an extent that it was harmful, indefensible disparagement of the employer or its product, *id.* at 477. By holding that no act of employee disparagement is unprotected disloyalty unless it is "maliciously motivated to harm the employer," the Board has not

interpreted *Jefferson Standard* -- it has overruled it.

Second, the Board's definition of "malicious motive" for these purposes excludes from *Jefferson Standard*'s interpretation of Section 10(c) all employee disparagement that is part of or directly related to an ongoing labor dispute. While the employees "may have anticipated that some members of the public might choose not to patronize [MikLin's] restaurants after reading the posters or press release," the Board ruled, their public communications were protected activity because "there is no evidence that [their] purpose was to inflict harm on [MikLin]." Rather, "they were motivated by a sincere desire to improve their terms and conditions of employment." *MikLin*, 361 NLRB No. 27, at *6. In other words, the Board refuses to treat as "disloyal" any public communication intended to advance employees' aims in a labor dispute, regardless of the manner in which, and the extent to which, it harms the employer. As the Court held in *Jefferson Standard* that its disloyalty principle would apply even if the employees had explicitly related their public disparagement to

> their ongoing labor dispute, once again the Board has not interpreted *Jefferson Standard* -- it has overruled it.

Id. at *5-*6.

As applicable to MasTec's petition, the Eighth Circuit has determined that the appropriate test following *Jefferson Standard* includes an objective component. This determination is contrary to the D.C. Circuit's panel opinion in the instant matter, which permitted the use of a subjective test and sanctioned the Board's "overruling" of *Jefferson Standard*. Furthermore, the Eighth Circuit found, pursuant to *Jefferson Standard*, an employee's public actions, even if related to a labor dispute, can be sufficient to remove employees from the protections of the Act, ***regardless of whether they would otherwise be considered protected by Section 7***.

There is no distinction between the actions of employees in *MikLin* and those actions taken by MasTec's Technicians in the instant matter. In both circumstances, employees made "materially false and misleading" public claims that were "reasonably calculated to harm the company's reputation and reduce its income." *Id.,* at *9 citing *St. Luke's Episcopal-Presbyterian Hosp. v. NLRB*, 268 F.3d 575, 581 (8th Cir. 2001). In *MikLin*, employees made false public claims of health code violations. *MikLin*, No. 14-3099, 2017 WL 2835648, *9. Here, MasTec Technicians filmed on-camera interviews in an effort

to smear and "slam" MasTec's largest customer, DirecTV, and to gain traction in its dispute with MasTec. Moreover, ***MasTec's Technicians acknowledged the broadcast contained false information***, including that customers are charged for services "they may never use" and that Technicians were told to lie to customers. This information was broadcasted on television three separate times.

> From the array of possible tactics, the employees selected public communications that were sure "to harm [MikLin's] reputation and reduce its income." *Jefferson Standard*, 346 U.S. at 471. This was a "continuing attack ... upon the very interests which the attackers were being paid to conserve and develop." 346 U.S. at 476. The Act does not protect such calculated, devastating attacks upon an employer's reputation and pro-ducts. *See Endicott Interconnect Techs., Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006). Although applying *Jefferson Standard*'s dis-loyalty principle is often difficult, the employees' third-party communications demonstrated "such detrimental disloyalty as to provide 'cause'" for MikLin to discharge and discipline those responsible for the campaign. 346 U.S. at 472.

MikLin, No. 14-3099, 2017 WL 2835648, *9-*10. Just as in *MikLin*, there is little or no question that the actions of MasTec's Technicians—by publicly smearing MasTec's largest customer—were so disloyal as to lose the protection of the Act.

Despite this disloyalty, as previously noted in MasTec's Petition for Certiorari, the D.C. Circuit impermissibly allowed these actions to stand by adopting the Board's improper, modified standard for determining whether an employee remains protected by the Act. In doing so, the D.C. Circuit sanctioned the Board's improper application of *Jefferson Standard*. The decision of the Circuit Court for the District of Columbia, therefore, warrants this Court's review.

This is made plain by *MikLin*, which, in addition to detailing the proper standard that was not applied by the D.C. Circuit, further highlights the Circuit split which MasTec requests that this Court resolve.

CONCLUSION

This Court should grant MasTec's Petition for Writ of Certiorari.

Respectfully submitted,

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