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WOULDN'T IT BE NICE: SEARCHING FOR CLARITY IN INTERMITTENT STRIKE ADJUDICATION

Abstract: An employee's right to strike has been a fundamental piece of American labor law policy since its codification in the 1935 National Labor Relations Act. Recently, however, strike activity has undergone a dramatic transformation in response to rapidly declining rates of unionization. Instead of numerous union members striking for weeks on end, small numbers of employees have engaged in surprise one-day strikes in an attempt to maximize the potential effect on employers despite the strike's brief nature. Such strikes, often referred to as "intermittent strikes," fall into an area of legal ambiguity due to prior inconsistent adjudication. As the law currently stands, it is difficult to determine when these brief strikes warrant National Labor Relations Act protection or when an employee could be subject to discipline for engaging in the activity. In October 2016, the Office of the General Counsel for the National Labor Relations Board proposed a new framework to promote clarity in this area of labor law. In December 2017, after the administration change, the newly sworn-in General Counsel of the National Labor Relations Board rescinded that proposed framework, relegating intermittent strikes back to their previous state of legal uncertainty. This Note argues that while the clarity offered by the rescinded framework would have been a welcome addition to intermittent strike law, that framework still left some areas too ambiguous to provide a workable standard and may have been overly favorable to employees. With a few minor changes, the Office of the General Counsel could propose a new framework that employers and employees on both sides of the political spectrum find agreeable, while also providing much needed clarity.

INTRODUCTION

On November 2, 2012, the Walmart store in Richmond, California opened its doors, as it does every day of the week, at 6:00 a.m.¹ Shortly before its opening, however, a group of six temporary Walmart employees ceased working to engage in an in-store protest challenging the conduct of their project supervisor and Walmart's apparent lack of response thereto.² It was the second

¹ Wal-Mart Stores, Inc., 364 N.L.R.B. No. 118, 1 (Aug. 27, 2016).

² *Id.* Employees Raymond Bravo, Semetra Lee, Demario Hammond, Misty Tanner, Markeith Washington, and Timothy Whitney alleged in their unfair labor practice charge that their field project supervisor Art Van Riper had treated them unfairly, made racist and derogatory comments, and had threatened bodily harm. *Id.* at 1–2. Prior to the charge, the employees had sent a letter directly to Walmart recounting Van Riper's "racist remarks and threats of physical violence," and describing

work stoppage at the Richmond Walmart in less than a month.³ The six employees, wearing green shirts emblazoned with “OUR Walmart,” engaged in their work stoppage for less than an hour and a half in total.⁴ They were joined, at points, by non-employee protestors.⁵ The comingled groups stood in a customer service area, and eventually moved to an aisle by the entrance of the store.⁶ By 6:52 a.m., the six employees had handed in their daily timesheets and all protestors had exited the store.⁷ Similar scenes have been playing out at Walmart stores across the United States.⁸ In 2013, in Baker, Louisiana, a group of Walmart employees went on strike and drove to a Walmart shareholder meeting in Bentonville, Arkansas.⁹ Further, there have been numerous newsworthy strikes on Black Friday over the past few years.¹⁰

how Van Riper’s conduct created an overall untenable workplace environment. *Id.* at 2. The employees went so far as to ask for Van Riper’s termination. *Id.* Walmart, however, did not respond. *Id.*

³ *Id.* at 2. Employees Hammond, Tanner, and Washington previously went on strike on October 9th and 10th, protesting Walmart’s general mistreatment of its employees. *Id.* They were joined by other associates from the Richmond store. *Id.* The three employees submitted a letter offering to return to work on October 11th. *Id.* Upon offering to return, the employees’ supervisor allegedly said, “If it were up to me, I’d shoot the union.” *Id.*

⁴ *Id.* The OUR Walmart campaign (“Organization United for Respect at Walmart”) is a non-unionized nationwide group of Walmart employees whose goal is to achieve fairer pay, equitable benefits, and general respect for Walmart employees. See Steven Greenhouse, *Wal-Mart Workers Try the Nonunion Route*, N.Y. TIMES (June 14, 2011), <http://www.nytimes.com/2011/06/15/business/15walmart.html> [<https://perma.cc/8KVW-HW63>] (describing OUR Walmart’s efforts to organize Walmart employees outside of the traditional union structure).

⁵ *Wal-Mart Stores, Inc.*, 364 N.L.R.B. No. 118, at 2.

⁶ *Id.* at 2–3.

⁷ *Id.* at 3.

⁸ See, e.g., Dave Jamieson, *Walmart Workers Launch Black Friday Strike*, HUFFINGTON POST (Nov. 26, 2014), http://www.huffingtonpost.com/2014/11/26/walmart-workers-protest_n_6225034.html [<https://perma.cc/5FXX-4ZR5>] (noting three consecutive years of protests on Black Friday by Walmart workers across the United States); Ashlee Kieler, *Labor Board Orders Walmart to Rehire 16 Employees Fired for Striking*, CONSUMERIST (Jan. 22, 2016), <https://consumerist.com/2016/01/22/labor-board-orders-walmart-to-rehire-16-employees-fired-for-striking/> [<https://perma.cc/M2YM-UKLD>] (detailing strikes at various Walmart stores in Arkansas and California).

⁹ Dave Jamieson, *Labor Groups Are Taking on Walmart and McDonald’s. But Who Will Fund Their Fight?*, HUFFINGTON POST (June 2, 2016), http://www.huffingtonpost.com/entry/our-walmart-funding_us_574f4b70e4b0eb20fa0cac8b [<https://perma.cc/6MRM-TLYW>]. In a move orchestrated by OUR Walmart, Walmart worker Janet Sparks, at the time earning \$13.25 an hour after ten years of employment, took her plight to Walmart’s headquarters. *Id.* Walmart granted Sparks three minutes to address the shareholders, during which she noted the disparity between workers’ pay and Walmart executives’ bonuses. Josh Eidelson, *Whose Walmart?: Workers Crash Walmart’s Party*, NATION (June 17, 2013), <https://www.thenation.com/article/whose-walmart-workers-crash-walmarts-party/> [<https://perma.cc/X5VY-TX4Y>]. The Walmart chairman cut Sparks off at the three-minute mark, and the shareholder meeting trudged on. *Id.*

¹⁰ See Jamieson, *supra* note 8. Prior to Black Friday in 2014, for example, workers in California, Florida, Louisiana, Maryland, Virginia, and Wisconsin delivered notices to their employers of their intent to go on strike. *Id.* Jamieson’s article notes that Walmart workers have consistently used Black Friday to raise awareness regarding Walmart’s pay practices. *Id.*

Walmart employees are famously (or perhaps infamously, depending on which side of the debate one falls) non-unionized.¹¹ Non-union workers retain the right to strike, but due to the lack of union protection are more vulnerable to replacement than their unionized counterparts.¹² In recent years, however, a non-union group, the Organization United for Respect at Walmart (“OUR Walmart”), has attempted to fight for Walmart workers’ rights while avoiding traditional unionization.¹³ OUR Walmart, at one point backed by the United Food and Commercial Workers (“UFCW”) union, fights for more equitable treatment for Walmart employees.¹⁴ Unlike traditional unions, OUR Walmart

¹¹ See Susan Berfield, *How Walmart Keeps an Eye on Its Massive Workforce*, BLOOMBERG BUSINESSWEEK (Nov. 24, 2015), <https://www.bloomberg.com/features/2015-walmart-union-surveillance/> [<https://perma.cc/7SSD-LYAF>] (detailing Walmart’s extraordinary steps to keep tabs on the OUR Walmart Campaign); Julie Gutman Dickinson, *Walmart’s War Against Unions—and the U.S. Laws That Make It Possible*, HUFFINGTON POST (Aug. 5, 2013), http://www.huffingtonpost.com/julie-b-gutman/walmart-labor-laws_b_3390994.html [<https://perma.cc/S74U-PUHQ>] (noting Walmart’s success in preventing its workforce from organizing); Steven Greenhouse, *How Walmart Persuades Its Workers Not to Unionize*, ATLANTIC (June 8, 2015), <https://www.theatlantic.com/business/archive/2015/06/how-walmart-convinces-its-employees-not-to-unionize/395051/> [<https://perma.cc/R7G3-J68T>] (recounting stories from a former Walmart store manager whose store experienced anti-union efforts); Aimee Picchi, *Union: Walmart Shut 5 Stores Over Labor Activism*, CBS NEWS (Apr. 20, 2015), <http://www.cbsnews.com/news/union-walmart-shut-5-stores-over-labor-activism/> [<https://perma.cc/V8HB-RF29>] (noting United Food and Commercial Workers’ claim that Walmart closed five stores in retaliation to labor activism); Ann Zimmerman, *Pro-Union Butchers at Wal-Mart Win a Battle, but Lose the War*, WALL ST. J. (Apr. 11, 2000), <http://www.wsj.com/articles/SB955407680495911513> [<https://perma.cc/XW62-ZGQ6>] (describing Walmart’s apparent retaliation for unionization of butchers). Walmart workers have faced additional hurdles in their fight when attempting to redress grievances via class action procedures. See generally Joseph A. Seiner, *The Issue Class*, 56 B.C. L. REV. 121, 126–29 (2015) (detailing the requirements for class certification in light of the then-recent *Wal-Mart Stores, Inc. v. Dukes* decision, which struck down a proposed class of Walmart employees).

¹² *General Counsel Asks NLRB to Change Intermittent Strike Law*, WOLTERS KLUWER (Mar. 8, 2018), <http://www.employmentlawdaily.com/index.php/news/general-counsel-asks-nlrb-to-change-intermittent-strike-law/> [<https://perma.cc/NL2E-SBEK>].

¹³ Greenhouse, *supra* note 4; *OUR Declaration of Respect*, OUR WALMART (Mar. 8, 2018), http://www.united4respect.org/our_declaration_of_respect [<https://perma.cc/KY2F-KGX2>]. The OUR Walmart declaration promulgates the group’s goal of having Walmart publicly commit to obeying what the group believes is a more equitable set of labor standards and working conditions. *OUR Declaration of Respect*, *supra*. Among the standards sought are a fifteen-dollar minimum wage, full-time working schedules for employees that want them, more predictable schedules, affordable healthcare, consistent and transparent enforcement of company policies, and equal treatment. *Id.* OUR Walmart could perhaps be best categorized as a “worker center,” which is a term used to describe a collective operation, often operating with union support though not comprised of union members. See *What Are Worker Centers?*, WORKER CENTERS (Mar. 8, 2018), <http://workercenters.com/what-are-worker-centers/> [<https://perma.cc/E46F-S92A>] (defining worker centers in general terms). Worker centers often operate in sectors that have been traditionally hostile to formal unionization in an attempt to reap the benefits of NLRA protection without official union representation. *Id.* Worker centers have also been referred to as “alt-labor,” and the American Federation of Labor–Congress of International Organizations has endorsed their operation as a viable alternative to unionization. *Id.*

¹⁴ Peter Olney, *Where Did the OUR Walmart Campaign Go Wrong?*, IN THESE TIMES (Dec. 14, 2015), <http://inthesetimes.com/article/print/18692/our-walmart-union-ufcw-black-friday> [<https://perma.cc/3TU6-NEBH>]; *OUR Declaration of Respect*, *supra* note 13.

does not negotiate contracts with employers, but instead describes itself as a grassroots operation aimed at eventual organization.¹⁵ The OUR Walmart campaign has seen its share of peaks and valleys, with one particularly notable valley being the formidable UFCW's withdrawal of its funding in September 2015.¹⁶ At the height of its operating abilities, however, OUR Walmart members have carried out large-scale strikes, like the ones in California and Louisiana, and the Black Friday strikes that tend to grab media attention on the biggest shopping day of the year.¹⁷

Some media outlets have thus far doubted the sustainability of the OUR Walmart campaign.¹⁸ The UFCW's funding withdrawal lent credence to these reservations.¹⁹ But a more prevalent issue is the legal ambiguity underlying the strike tactics in which OUR Walmart members have engaged.²⁰ Walmart has thus far asserted that these strikes constitute unprotected "intermittent strikes," a form of strike whose legality has been so unpredictably adjudicated that the Office of the General Counsel for the National Labor Relations Board ("NLRB" or "Board") under President Obama issued a since-rescinded memo-

¹⁵ See Greenhouse, *supra* note 4 (noting that the difference between the OUR Walmart campaign and traditional unionization lies in the campaign's ultimate goal of aiding workers without the confines of traditional unionization); *OUR Declaration of Respect*, *supra* note 13 (promulgating the OUR Walmart declaration).

¹⁶ See Jamieson, *supra* note 9 (noting that the UFCW withdrew funding because OUR Walmart members were not official UFCW members, and the UFCW found it difficult to justify financially supporting workers who were not dues-paying members); Nathan Layne & Lisa Baertlein, *Wal-Mart Worker Group Splits in Two; Both Sides Vow to Continue Wage Fight*, REUTERS (Sept. 16, 2015), <http://www.reuters.com/article/us-walmart-union-idUSKCN0RH06O20150917> [<https://perma.cc/3PL2-WJS6>] (detailing the split between OUR Walmart and the UFCW).

¹⁷ See, e.g., Jamieson, *supra* note 8 (detailing Black Friday protests); Kieler, *supra* note 8 (detailing additional strikes).

¹⁸ See Olney, *supra* note 14 (noting that without union-backing, the campaign's prospects seem relatively dismal). In support, Olney dissects previous, similarly designed campaigns aimed at Walmart that failed terribly. *Id.* For example, the UFCW organized a single department within a Walmart store in Québec, and in response the store closed. *Id.* Similarly the meat department of a Texas Walmart organized its ten workers into a small union, only to see the department closed. *Id.* Olney's ultimate prediction is that small-scale organizations simply cannot overcome an economic giant like Walmart that can afford large court fees and even negative judgments. *Id.*

¹⁹ See *id.* (noting that a union's funding of a small campaign like OUR Walmart is financially unviable). Within a union, the decision to provide funding for activities outside the union itself is not an easy one to make or maintain. *Id.* Union leadership operates in a system where they must face reelection, and if union members give up on funding these sorts of campaigns, the union leaders must respond in kind. *Id.*

²⁰ See Robert M. Schwartz, *One-Day Strikes: A Word to the Wise*, LAB. NOTES (Oct. 2, 2013), <http://www.labornotes.org/2013/10/one-day-strikes-word-wise> [<https://perma.cc/YS24-QTNH>] (noting that the NLRB doctrine regarding intermittent strikes, like the ones OUR Walmart workers engage in, is misunderstood and discordantly applied). In 2013, Schwartz noted that workers may easily lose NLRA protection by engaging in such tactics, and provided a list of precautions to take such as leaving large gaps of time in between walkouts, and holding walkouts for different reasons, rather than the same reason each time, among others. *Id.*

random attempting to create a brighter line between protected and unprotected strike activity under the National Labor Relations Act (“NLRA”).²¹

A protected strike is one whose activity falls under the purview of the NLRA, which in turn governs what employers and employees can do during a strike.²² Most notably, employers cannot simply discharge employees for engaging in lawful strike activity.²³ Unprotected strikes fall outside the NLRA’s governance, and employers are accordingly free to respond to the strike as they see fit.²⁴ Broadly speaking, the difference between protected and unprotected strikes lies in the form of the strike.²⁵ The Board and the courts have generally

²¹ Natalie C. Young, *The NLRB’s General Counsel Rescinds, Revokes and Questions*, NAT’L L. REV. (Dec. 21, 2017), <https://www.natlawreview.com/article/nlrbs-general-counsel-rescinds-revokes-and-questions> [<https://perma.cc/A2L5-EBTW>] (noting the rescission of OM Memorandum 17-02, the model brief regarding intermittent strikes). As Young notes, the rescission of the memorandum opens up the issue of intermittent strikes for re-evaluation, but until that time, intermittent strikes will be adjudicated by the Board based on the case law and precedent already in place. *Id.*; Matthew Bultman, *NLRB Urged to Clarify Law on Intermittent Strikes*, LAW360 (Oct. 5, 2016), <http://www.law360.com/articles/848550/print?section=corporate> [<https://perma.cc/RR4A-YKDX>] (noting that intermittent strikes are presently an unsettled area of law); Michael J. Lotito, *NLRB General Counsel Wants More Clarity & Employee Protection for Intermittent Strikes*, LITTLER MENDELSON P.C. (Oct. 5, 2016), <https://www.littler.com/publication-press/publication/nlrbs-general-counsel-wants-more-clarity-and-employee-protection> [<https://perma.cc/V4XQ-2BD9>]; Steven Rosenfeld, *Walmart’s Ridiculous Response: “One Day Walkouts Are Not Legal Strikes,”* ALTERNET (Feb. 15, 2014), <http://www.alternet.org/print/labor/walmarts-ridiculous-response-one-day-walkouts-are-not-legal-strikes> [<https://perma.cc/H2XH-GN8F>] (detailing arguments on both sides of the debate); see *Farley Candy Co.*, 300 N.L.R.B. 849, 849 (1990) (noting that intermittent strikes involve a plan to strike, returning to work, and subsequently striking again).

²² Craig Becker, “*Better Than a Strike*”: *Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351, 376 (1994). Becker notes that determining the form of a strike is key in deciding whether or not to extend NLRA protection. *Id.* The NLRA and subsequent case law has shaped each side’s rights during strikes. *Id.* at 353–54. Becker’s article provides an excellent overview of the history of intermittent strike law and the many court decisions that underlie the murky doctrine. See generally *id.*

²³ 29 U.S.C. §§ 157, 163 (2012) (codifying employees’ rights to participate in lawful strikes without employer retaliation); *Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132, 152–53 (1976) (noting that even when activities are afforded Section 7 protection, employers are free to lock out their employees or hire replacement workers); *Jasper Seating Co.*, 285 N.L.R.B. 550, 550–51 (1987) (noting an employer’s right to resort to hiring temporary replacement workers to maintain operations, specifically instead of outright discharge); *Solo Cup Co.*, 114 N.L.R.B. 121, 133–34 (1955) (noting an employer’s right to dock pay during a strike).

²⁴ See Becker, *supra* note 22, at 362–63 (describing some avenues of recourse for employers during a strike, such as a lockout or the hiring of replacement workers).

²⁵ See *id.* at 354–55 (noting the different forms of strikes and which forms are presently afforded NLRA protection). Generally speaking, traditional strikes are characterized by a complete cessation of work, often until a resolution of the dispute in question is reached or is near. See Mark A. Hutcheson et al., *Intermittent Strikes: Lawful or Not? Current Law and Emerging Issues*, A.B.A. SECTION LABOR & EMP. L 1–2 (Nov. 8–11, 2017), https://www.americanbar.org/content/dam/aba/events/labor_law/2017/11/conference/papers/Jeff_pamela_Intermittent%20Strikes_%20Lawful%20or%20Not_.authcheckdam.pdf [<https://perma.cc/XGZ2-GUHM>]. Intermittent strikes, on the other hand, involve a

held that work slowdowns (as opposed to full-on stoppages), sit-ins, partial strikes, and intermittent strikes are unprotected.²⁶ These forms of strikes are often referred to as “non-traditional” strikes.²⁷ Despite this attempt at categorization, however, the Board and courts have offered little guidance on how to assign these classifications, particularly in instances that might toe the line between traditional and non-traditional strikes.²⁸

On October 3, 2016, the NLRB Office of the General Counsel (“OGC”) circulated a memorandum to NLRB Regional Directors noting the uptick in intermittent and partial strikes as a negotiation tactic and arguing that the NLRB’s current test for determining whether such activities are protected is “difficult to apply.”²⁹ The most widely used definition of “intermittent strikes,” found in Board decisions, generally states that intermittent strikes involve a “plan or pattern” of conduct, particularly where the plan is to strike, return to work, and strike again.³⁰ In order to resolve the issues created by applying this ambiguous definition, the OGC attached a model brief to their memorandum, which proposed a new framework for intermittent strike adjudication which it

predesigned pattern to strike, return to work, and strike again, often times irrespective of progress in the underlying dispute. *Id.*

²⁶ See *Roseville Dodge, Inc. v. N.L.R.B.*, 882 F.2d 1355, 1359–60 (8th Cir. 1989) (declining to extend protection to intermittent work stoppages where the intent was to harass an employer); *Sawyer of Napa, Inc.*, 300 N.L.R.B. 131, 137 (1990) (declining to extend protection to workers’ refusal to work mandatory overtime); *Audubon Health Care Ctr.*, 268 N.L.R.B. 135, 136 (1983) (declining to extend protection to employees’ willingness to perform some, but not all, required tasks); *Pac. Tel. & Tel. Co.*, 107 N.L.R.B. 1547, 1549–50 (1954) (declining to extend protection to work slowdowns).

²⁷ See Becker, *supra* note 22, at 381 (referring to strikes that do not amount to a full work stoppage as “non-traditional” strikes); see also *Hutcheson et al.*, *supra* note 25, at 1–2 (noting general differences between traditional and intermittent strikes).

²⁸ *Int’l Union, Local 232 v. Wisc. Emp’t Relations Bd.*, 336 U.S. 245, 264–65 (1949) (*Briggs & Stratton*) (holding that a union’s “recurrent or intermittent unannounced stoppage of work to win unstated ends” is not entitled to NLRA protection nor does the Act prohibit the activity); Becker, *supra* note 22, at 376 (noting that NLRB and court decisions have only served to leave this area of jurisprudence in an ambiguous state).

²⁹ Memorandum from Beth Tursell, Acting Assoc. to the Gen. Counsel, to NLRB Reg’l Dirs., Officers-in-Charge, and Resident Officers (Oct. 3, 2016), <http://files.constantcontact.com/f5aff548201/f18a6c51-e3cd-4c6f-b7e6-604b84e15dbc.pdf> [<https://perma.cc/LK97-4WAH>] (noting that intermittent strikes are becoming a more frequently used tactic in the workplace and that the present test for adjudicating such tactics is hard to apply and potentially opens up some workers to discipline for what should be protected concerted activity). The memorandum goes on to refer to an attached model brief to be used in situations where these types of issues might be brought before the NLRB. *Id.*

³⁰ See *Farley Candy Co.*, 300 N.L.R.B. at 849 (noting that intermittent strikes involve a plan to strike, return to work, and strike again); *Polytech, Inc.*, 195 N.L.R.B. 695, 696 (1972) (noting that the presumption of protected strike activity is rebutted when there is evidence of planned intermittent stoppages). More recently, the Board has characterized some strike behavior as “hit-and-run” and has deemed that behavior unprotected. *Molon Motor & Coil Corp.*, 302 N.L.R.B. 138, 142 (1991). Intermittent strikes are also considered to be a course of action distinct from partial strikes, which involve employees performing some parts of their job while refusing to do others, resulting in the “partial” nomenclature. Richard Mittenthal, *Partial Strikes and National Labor Policy*, 54 MICH. L. REV. 71, 71–72 (1955) (noting that a partial strike is one where work activity and strike activity coincide).

argued that the Board should adopt for the sake of clarity and predictability in future cases.³¹

An attorney from the OGC's office arguing an intermittent strike case could have utilized the analysis and framework provided by the model brief to argue his or her case, and the NLRB accordingly could have easily adopted in full the proposed framework.³² The OGC, through the model brief, ultimately attempted to: (1) differentiate intermittent and partial strikes and (2) extend NLRA protection to instances involving multiple strikes.³³ The OGC further suggested criteria for determining whether multiple strikes fall under NLRA protection, namely, if the strikes "(1) [] involve a complete cessation of work, and are not so brief and frequent that they are tantamount to work slowdowns; (2) they are not designed to impose permanent conditions of work, but rather are designed to exert economic pressure; and (3) the employer is made aware of the employees' purpose in striking."³⁴

Prior to the rescission of the model brief, adoption of the OGC's framework would have cleared up a historically unsettled area of labor law, but it could have also presented new challenges for employers and employees alike.³⁵ This Note argues that while the OGC's test would have been an important step in clarifying this area of law, it may not have gone far enough toward protecting both employers and employees.³⁶ Part I details the history of strike protection and intermittent strikes in U.S. labor law, focusing on both employee and employer rights.³⁷ Part II analyzes the OGC's model brief, discussing how it attempts to clarify the current intermittent and partial strike jurisprudence.³⁸ Part III discusses the advantages and disadvantages of the OGC's test, focusing on the harms employers would face, and the areas of ambiguity that remain which could have prevented the standard from being useful for employees involved in campaigns like OUR Walmart.³⁹ Part III goes on to argue that the current or future OGC

³¹ OFFICE OF THE GEN. COUNSEL OF THE NAT'L LABOR RELATIONS BD., BRIEF INSERT: INTERMITTENT STRIKES (Oct. 3, 2016) [hereinafter OGC Model Brief], <http://hr.cch.com/ELD/IntermittentStrikesInsert.pdf> [<https://perma.cc/JAT9-CUDQ>].

³² *See id.* at 1 (presenting the model brief as an alternative option for the Board to consider in deciding on the legality of a given intermittent strike); Lotito, *supra* note 21 (noting the OGC's suggestion of using the model brief as an alternative argument in intermittent strike adjudications).

³³ *See* OGC Model Brief, *supra* note 31, at 2–3 (outlining the asserted goals of the model brief); Bultman, *supra* note 21 (noting the OGC's goals in putting forward the model brief).

³⁴ OGC Model Brief, *supra* note 31, at 13.

³⁵ *See supra* notes 29–34 and accompanying text. As discussed below, the framework, had it been adopted as written, could have left areas of ambiguity that both sides still would have had to navigate, presenting new challenges. *See infra* notes 223–231 and accompanying text.

³⁶ *See infra* notes 41–267 and accompanying text.

³⁷ *See infra* notes 41–118 and accompanying text.

³⁸ *See infra* notes 119–196 and accompanying text.

³⁹ *See infra* notes 197–267 and accompanying text.

should re-propose this framework with slight alterations that would make it truly beneficial for all parties.⁴⁰

I. HISTORIC TREATMENT OF INTERMITTENT AND OTHER “NON-TRADITIONAL” STRIKES

In enacting the National Labor Relations Act (“NLRA”) in 1935, Congress endeavored to protect employees’ freedom to organize, and in turn their right to strike.⁴¹ Employee organization under the NLRA was, and remains, crucial to maintaining a level playing field between employers’ and employees’ disparate bargaining power.⁴² Broadly stated, without freedom of organization, employees would likely be disregarded by their economically dominant employers when attempting to negotiate for better wages, hours, or working conditions.⁴³ For this reason, the right to strike or the ability to threaten a strike have been referred to as “indispensable parts of a national labor policy.”⁴⁴ A strike, or threat of, is the most powerful and sometimes the only piece of leverage employees can bring to the bargaining table.⁴⁵

The NLRA also provides employers with their own set of rights.⁴⁶ For example, labor organizations cannot refuse to bargain with employers.⁴⁷ Employ-

⁴⁰ See *infra* notes 197–267 and accompanying text.

⁴¹ 29 U.S.C. § 151 (2012) (detailing the NLRA’s goal of promoting labor harmony, collective bargaining, and the balance of bargaining power); *Id.* § 163 (preserving the right to strike); Becker, *supra* note 22, at 352 (detailing the history of the National Labor Relations Act, specifically Congress’s intent to create a fair system of collective bargaining based around the right to strike).

⁴² 29 U.S.C. § 151; ROBERT A. GORMAN ET AL., COX AND BOK’S LABOR LAW CASES AND MATERIALS 47 (Robert C. Clark et al. eds., 16th ed. 2016).

⁴³ See Becker, *supra* note 22, at 352 (noting that the right to strike is crucial to furthering the Act’s intent of promoting negotiation between employers and employees). Becker also notes that the “specter” of the right to strike could be enough to force employers to the bargaining table. *Id.*; see also *id.* at 352–53 (detailing the history behind the NLRA’s enactment, specifically noting the unequal bargaining power between employers and employees at that time).

⁴⁴ GORMAN ET AL., *supra* note 42, at 47; see also *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233–34 (1963) (detailing how labor policy dictates that the right to strike must be preserved in order to further collective bargaining). In *Erie Resistor*, the Supreme Court noted that despite congressional changes to national labor policy, the right to strike has always been an area whose integrity has been preserved, underscoring congressional intent to preserve the right to strike. *Erie Resistor Corp.*, 373 U.S. at 234–35.

⁴⁵ See Becker, *supra* note 22, at 352 (noting the historic power of the strike in the bargaining context).

⁴⁶ See *Lodge 76*, 427 U.S. at 152–53 (noting that even when activities are afforded Section 7 protection, employers have the option to either implement a lockout of employees or hire temporary replacement workers); *Jasper Seating Co.*, 285 N.L.R.B. at 550–51 (noting an employer’s right to engage temporary replacement workers to maintain operations, without resolving to outright discharge of striking employees); *Solo Cup Co.*, 114 N.L.R.B. at 133–34 (noting an employer’s right to dock pay during a strike).

⁴⁷ 29 U.S.C. § 158.

ers are permitted to temporarily withhold or deny employment via a lockout.⁴⁸ Employers can hire temporary or permanent replacement workers for striking employees, and in some instances can do the same for employees that the employer itself locked out.⁴⁹ During unprotected strikes, which currently can include partial and intermittent strikes, employers can discharge employees.⁵⁰

Despite the NLRA's explicit preservation of the right to strike, there has been a significant amount of change over time in both the mechanics of permissible strikes and how employers are able to respond.⁵¹ NLRB decisions and court decisions constantly attempt to maintain balance between employer and employee rights.⁵² Section A discusses the roots of employees' right to strike and the differences between "traditional" and "non-traditional" strikes.⁵³ Section B details how the intermittent strike tactic has been inconsistently adjudicated, resulting in the confusing doctrine in place today.⁵⁴

A. The Right to Strike and the NLRA: Concerted Activities as Negotiation Tactics

The NLRA was created to balance the level of disparate bargaining power inherent in the employer-employee relationship, with the goal of minimizing disruptions to commerce.⁵⁵ Prior to the NLRA, groups of employees working

⁴⁸ See *Discriminating Against Employees Because of Their Union Activities or Sympathies* (Section 8(a)(3)), N.L.R.B. (Mar. 8, 2018), <https://www.nlr.gov/rights-we-protect/whats-law/employers/discriminating-against-employees-because-their-union> [<https://perma.cc/UWR5-FHR5>] (noting that employers may lockout employees defensively in response to unprotected activity or offensively to exert economic pressure for bargaining purposes); *Work Stoppages Frequently Asked Questions*, BUREAU LAB. STAT. (Apr. 28, 2017), <https://www.bls.gov/wsp/wspfaq.htm> [<https://perma.cc/CV34-WVWD>].

⁴⁹ See *Discriminating Against Employees Because of Their Union Activities or Sympathies*, *supra* note 48 (noting that employers may hire temporary replacements during strikes or lawful lockouts and may hire permanent replacements during economic strikes).

⁵⁰ See *id.* (noting employers' right to continue business operations).

⁵¹ See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 21–23 (2016) (detailing strike law's progression over time and how it was shaped by changing labor policies).

⁵² See *id.* at 21 (noting unions' loss of economic power and subsequent attempts to balance employer and employee rights).

⁵³ See *infra* notes 55–74 and accompanying text.

⁵⁴ See *infra* notes 75–118 and accompanying text.

⁵⁵ See 29 U.S.C. § 151 (discussing policy goals of the NLRA). When Senator Robert Wagner first introduced the bill that would become the NLRA in the Senate, it was titled the "Labor Disputes Act" and began by stating its express purpose "to equalize the bargaining power of employers and employees [and] encourage the amicable settlement of disputes . . ." Labor Disputes Act, S. 2926, 73d Cong. (1934). The Act went on to note that labor strife causes unwelcome obstructions to commerce, and that balancing bargaining power could aid this malady. *Id.* Senator Wagner echoed this sentiment in his testimony before the Committee on Labor of the House of Representatives. *Labor Disputes Act: Hearings on H.R. 6288 Before the H. Comm. on Labor*, 74th Cong. 8–25 (1935) (statement of Sen. Robert F. Wagner of New York). Senator Wagner notably argued, to applause, that the Act would "apply the healing balm of an upright, impartial, and peaceful forum to industry and labor, and thus will benefit employers, workers, and the country at large." *Id.* at 25.

together to pursue better terms or conditions of employment could be prosecuted for criminal conspiracy or for anti-trust violations.⁵⁶ This left employers with wide latitude to unilaterally promulgate terms and conditions that, in many instances, employees found unfavorable.⁵⁷ The NLRA corrected this issue by protecting employees' rights to work together to achieve more beneficial terms of employment.⁵⁸ Section 7 of the NLRA affords employees the right to engage in "concerted activities" for purposes of collective bargaining or other mutual aid or protection.⁵⁹ Under Section 8 of the NLRA, which gives teeth to Section 7, any action taken by an employer that interferes with this right constitutes an unfair labor practice and is subject to an injunction.⁶⁰ Strikes have long been recognized as a protected concerted activity.⁶¹ Moreover, employees' rights to strike are specifically protected by Section 13 of the NLRA.⁶²

The term strike, as defined in the Labor-Management Relations Act, "includes any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees."⁶³ The right to strike itself has undergone decades of evolution, with case law, Congress, and the NLRB all playing roles in the economic tug of war between employers and employees.⁶⁴ Strikes were already an established bar-

⁵⁶ *Loewe v. Lawlor*, 208 U.S. 274, 293 (1908) (holding that the Sherman Anti-Trust Act prohibits any combination whatsoever that restricts the free flow of commerce between the states, including employees working in concert); *Vegeahn v. Guntner*, 167 Mass. 92, 97 (1896) (deciding the legality of an injunction preventing workers from picketing and referring to the two-man picket at issue as a conspiracy); Becker, *supra* note 22, at 358 (noting that prior to the NLRA engaging in a strike was criminal conspiracy).

⁵⁷ *Labor Disputes Act: Hearings on H.R. 6288 Before the H. Comm. on Labor*, 74th Cong. 8–25 (1935) (statement of Sen. Robert F. Wagner of New York) (detailing prior failed attempts to protect workers).

⁵⁸ See 29 U.S.C. § 157 (protecting workers' rights to engage in collective bargaining).

⁵⁹ *Id.* The mutual aid or protection clause of Section 7 generally covers any activity related to employees' terms and conditions of employment, regardless of whether employees are unionized. See *Asplundh Tree Expert Co. v. NLRB*, 365 F.3d 168, 172 n.3 (3d Cir. 2004) (citing *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962)).

⁶⁰ 29 U.S.C. §§ 158(a)(1), 160(j).

⁶¹ Becker, *supra* note 22, at 359 (noting congressional debates that make clear strikes were a type of protected concerted activity under the NLRA).

⁶² 29 U.S.C. § 163 (preserving employees' right to strike subject to enumerated exceptions).

⁶³ *Id.* § 142(2). This definition has been whittled down over the years to exclude certain intermittent and partial strikes. See *Wash. Aluminum Co.*, 370 U.S. at 14 (holding a walk-out to be unprotected under the Act); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256 (1939) (holding a sit-down strike to be unprotected under the Act); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 343 (1938) (examining whether workers who strike remain employees of the company); Wesley Kennedy, *Intermittent Strikes: An Overview from the Union Perspective*, 14 LAB. L. 117, 121–22 (1998) (noting that the Supreme Court has not explicitly defined the bounds of intermittent strike behavior, but acknowledging that some partial and intermittent strikes fall outside NLRA protection).

⁶⁴ See Michael H. LeRoy, *Creating Order Out of Chaos and Other Partial and Intermittent Strikes*, 95 NW. U. L. REV. 221, 225–28 (2000) (noting the key Supreme Court decisions, NLRB deci-

gaining tool, though one without statutory protection, by the time the NLRA was enacted in 1935.⁶⁵ Seen as an unwieldy tactic producing labor turmoil, NLRA architect Senator Robert Wagner designed the Act to control strikes, rather than outlaw them completely.⁶⁶ Senator Wagner recognized strikes' importance in collective bargaining for workers who otherwise could be left powerless in the employer-employee relationship.⁶⁷

Though disruptive, reserving the right to strike is often enough to bring employers to the bargaining table, fearing the social and economic consequences of a work stoppage.⁶⁸ The NLRA drafters preserved this right by codifying employees' right to be free from employer retaliation for participating in strikes and other concerted activities.⁶⁹ In order to maintain balance, however, decisions interpreting the NLRA have regulated what employees can and cannot do during a strike.⁷⁰ Additionally, the Board grants employers some rights, such as the option to lock out workers who refuse to bargain and the ability to hire temporary or permanent replacements for striking employees.⁷¹

As the Board, Congress and the court system attempted to balance employer and employee protections, intermittent strike law evolved into the murky doctrine it is today.⁷² Drawn-out traditional strikes, though protected, became economically unfeasible for employees, but the loss of the threat of a strike would have negative consequences for employees during bargaining.⁷³

sions, and congressional enactments regarding intermittent strike law). LeRoy's article details parts of the history of intermittent strike jurisprudence, noting how the amount of leverage oscillated between favoring employers and employees at various points. *See id.*

⁶⁵ *See id.* at 228 (noting that the NLRA explicitly reserved employees' right to strike); *see also* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 478 (1921) (holding a secondary boycott of an employer's goods to be illegal); *Vegelahn*, 167 Mass. at 97 (holding a two-man picket to be an illegal conspiracy).

⁶⁶ *See* LeRoy, *supra* note 64, at 228–29 (detailing the history leading up to the NLRA's enactment).

⁶⁷ *See id.* at 228 (noting Senator Wagner's reasons why he felt it was important to keep strikes as an available tactic for employees); *see also* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) (explaining that labor policy is grounded on employees' ability to organize, thereby strengthening their bargaining position).

⁶⁸ *See* Atl. Scaffolding Co., 356 N.L.R.B. 835, 837 (2011) (discussing the potential economic harm an employer might face during a strike action); Joseph R. Landry, Note, *Fair Responses to Unfair Labor Practices: Enforcing Federal Labor Law Through Nontraditional Forms of Labor Action*, 116 COLUM. L. REV. 147, 155 (2016) (noting that the threat of a strike is a powerful tool for unionized employees in collective bargaining talks with employers).

⁶⁹ 29 U.S.C. § 157; Kennedy, *supra* note 62, at 117 (noting the importance of the strike for employees).

⁷⁰ Becker, *supra* note 22, at 353–54 (noting successions of restrictions placed on strike activities).

⁷¹ *Discriminating Against Employees Because of Their Union Activities or Sympathies*, *supra* note 48.

⁷² *See* Landry, *supra* note 68, at 149 (noting the ambiguity in current law as to when a strike is deserving of Act protection).

⁷³ *See id.* (describing the typical prolonged strike action as one where work ceases completely, at times for months on end, and workers are left without paychecks and companies without production).

So despite the often-unclear issues of legality, employees have increasingly resorted to non-traditional strikes in labor disputes.⁷⁴

B. How Intermittent Strikes Fell into Ambiguity

While the right to strike is broadly granted in statutory text, intermittent strikes currently sit in a zone of legal ambiguity.⁷⁵ Case law and Board adjudication have generally marshaled strikes into one of three categories: (1) activity protected from employer retaliation under the NLRA, (2) unprotected activity, and (3) illegal activity.⁷⁶ The overarching issue arose because when a strike's form has been questioned—and thus, whether the strike is afforded NLRA protection—the NLRB has more often defined intermittent strikes in the negative rather than giving the term a clear and positive definition.⁷⁷ Accordingly, intermittent strikes can fall into any of the above-mentioned categories based on the unique facts at hand, the political makeup of the NLRB, or the particular Federal Appeals Court hearing the appeal.⁷⁸

The notion that the right to strike came with an underlying qualifier, that certain *forms* of strikes did not receive NLRA protection, was first raised not long after the NLRA's enactment, in the 1939 Supreme Court case *NLRB v.*

⁷⁴ See Bultman, *supra* note 21 (noting the increasing prevalence of short-term strikes).

⁷⁵ 29 U.S.C. § 163 (2012); Becker, *supra* note 22, at 356–57 (noting that it is accepted today that intermittent strikes are unprotected yet referring to two lines of cases that have conflicting holdings).

⁷⁶ See Becker, *supra* note 22, at 379–81, 383 (describing the various strike forms and their legal implications). Generally, an “illegal” strike is one that can be enjoined by the NLRB or a state labor board. *See id.* at 381. An “unprotected” strike is one that employees can lawfully undertake, but they are not safeguarded from employer retaliation such as a discharge. *See id.* at 383. A “protected” strike is one within the bounds and protections of Section 7 of the NLRA. 29 U.S.C. §§ 157, 163.

⁷⁷ See Kennedy, *supra* note 63, at 121–22 (noting that since intermittent strikes were generally held to be unprotected, only a few cases have actually found activities that fall into that category). Kennedy cites three notable instances where activities were considered unprotected intermittent strikes. *Id.* For example, repeated refusal to perform overtime work, repeated attendance of union meetings, and repeated gathering in one spot every day to protest a work policy all fell under the intermittent strike category. *Id.* More often, Kennedy notes, cases endeavor to define activities that are *not* intermittent strikes. *Id.* at 122.

⁷⁸ See Becker, *supra* note 22, at 382–83 (noting that the Supreme Court has yet to explicitly rule on the status of intermittent strikes, but has suggested conflicting classifications in dicta); Michael R. Feinberg & Henry M. Willis, *Whose Strike Is It Anyway? Intermittent Strikes: What They are, When They Are Protected and How they Are Being Used in the “Fight for 15,”* A.B.A. SECTION LAB. & EMP. L. 5 (Feb. 27, 2017), https://www.americanbar.org/content/dam/aba/events/labor_law/2017/02/dll/papers/whose%20strike%20is%20it%20anyway%20021717.authcheckdam.pdf [<https://perma.cc/8NNE-ZSVH>] (noting that politicization of the NLRB is a major hurdle to achieving protection of intermittent strikes). All five board members of the NLRB must participate in decisions that would reverse longstanding Board precedent. Feinberg & Willis, *supra*. Assuming President Trump appoints Republicans to Board vacancies, a majority Republican Board might be hesitant to extend protection to intermittent strikes. *Id.*

*Fansteel Metallurgical Corp.*⁷⁹ The *Fansteel* Court recognized that certain forms of strikes are not only outside of the Act's protection, but are even illegal.⁸⁰ In 1949, the Supreme Court expanded these restrictions to include other forms of strikes in *International Union, Local 232 v. Wisconsin Employment Relations Board* (referred to commonly and hereinafter as "*Briggs & Stratton*"), which allowed states to issue cease and desist orders in labor disputes.⁸¹ The Court backtracked slightly over the next few decades, and instead of declaring certain strikes to be illegal, the Court instead held non-traditional strikes to be unprotected, meaning employers could use self-help tactics in place of state action.⁸² The two major cases outlining this new doctrine are *NLRB v. Insurance Agents International Union* and *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*.⁸³ The outcome of these cases, and others of the same kind, however, turned on their unique facts.⁸⁴ Further, subsequent decisions relied on non-binding dicta to reach their holdings.⁸⁵ Since *Lodge 76*, non-traditional strikes have fell into the amorphous non-protected but not illegal zone where they still find themselves today.⁸⁶

On the heels of the passage of the NLRA in 1935, employees undoubtedly had a general right to strike, but the outer bounds of this right had yet to be

⁷⁹ See *Fansteel*, 306 U.S. at 256 (holding a sit-in strike to be illegal); Becker, *supra* note 22, at 368 (noting that *Fansteel* was one of the first cases to restrict strikes based on form); see also *infra* notes 87–92 and accompanying text (providing a detailed discussion of *Fansteel*).

⁸⁰ See *Fansteel*, 306 U.S. at 256–57 (affirming refusal to uphold an order to reinstate workers where the underlying strike, a sit-in on the employer's premises, was illegal); see also *infra* notes 87–92 and accompanying text (providing a detailed discussion of *Fansteel*).

⁸¹ See *Briggs & Stratton*, 336 U.S. at 256 (holding that the strikes at issue in the case were so egregious that they were "undefensible" under the Act). The Court relied on traditional notions of property law to distinguish the employees' actions here. *Id.* When the employees refused to work but stayed on the premises, they were trespassing, and the Court did not want to condone that conduct. *Id.* at 355–56. See also *infra* notes 93–101 and accompanying text (providing a detailed discussion of *Briggs & Stratton*).

⁸² Becker, *supra* note 22, at 379–83 (following the progression of intermittent strike law jurisprudence from the 1930s to 1970s).

⁸³ *Lodge 76*, 427 U.S. at 152; *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 490 (1960). See *infra* notes 102–114 and accompanying text (providing a detailed discussion of *Insurance Agents and Lodge 76*).

⁸⁴ See Becker, *supra* note 22, at 408 (alluding to the notion that the cases interpreting non-traditional strikes are often fact-specific inquiries).

⁸⁵ *Id.* at 413 (noting that aside from dicta, the Supreme Court has not come down one way or another on intermittent strikes' legality).

⁸⁶ *Id.* at 383 (noting that the NLRB has not clarified the ambiguous case law surrounding intermittent strikes). Becker notes that the Supreme Court cases suggest the presence of an "intermediate category" where intermittent strikes are not illegal and not protected. *Id.* That is to say, the strikes are free from any governmental interference, but employers may also retaliate against striking employees. *Id.*

defined.⁸⁷ Questions in need of answering included, among others, whether striking workers remained employees, what types of activities were “concerted,” and, notably for intermittent strike jurisprudence, what types of strike behavior were protected by the NLRA.⁸⁸ The 1939 *Fansteel* decision addressed the latter issue, and examined illegal strikes that were plainly outside the bounds of NLRA protection.⁸⁹ While recognizing that Congress and the Wagner Act expressly provided that nothing in the Act shall impede or diminish the right to strike, the Supreme Court read into the statute that Congress intended to address only *lawful* strikes.⁹⁰ In other words, the Act’s affordance of the right to strike does not grant employees *carte blanche* to pursue any means of striking they see fit.⁹¹ And while the plainly contemplated purpose of a strike is to exert economic pressure, that pressure must be exerted using legal means.⁹²

The Supreme Court recycled the *Fansteel* reasoning a decade later in the 1949 *Briggs & Stratton* decision, when the Court again addressed certain “non-traditional” strike tactics, this time a series of intermittent work stoppages.⁹³ In *Briggs & Stratton*, the Supreme Court held that the NLRA’s protection of strikes did not preempt a state labor board from ordering an end to a union’s practice of holding repeated unannounced meetings during normal business hours.⁹⁴ The problem with this holding, as pointed out in the dissent, was that the Court relied on an unstable legal foundation.⁹⁵ The Court simply equated

⁸⁷ See, e.g., *Mackay Radio & Tel. Co.*, 304 U.S. at 343 (examining whether workers who strike remain employees of the company); *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486, 491 (8th Cir. 1946) (examining the motives of an employee strike and whether the motives of a strike can affect its status under the Act).

⁸⁸ See, e.g., *Wash. Aluminum Co.*, 370 U.S. at 14 (examining whether a walk-out was protected under the Act); *Fansteel*, 306 U.S. at 247 (examining whether a sit-down strike was protected under the Act); *Mackay Radio & Tel. Co.*, 304 U.S. at 343 (examining whether workers who strike remain employees of the company).

⁸⁹ *Fansteel*, 306 U.S. at 244. The employees in this case conducted a sit-down or sit-in strike, wherein they ceased working but stayed at their positions, presumably with the goal of grinding the employer’s operations to a halt. *Id.* at 244–50. In holding that this was not protected behavior, the Supreme Court emphasized the illegality of the action. *Id.* at 263–64. The employees were trespassing, as they had been discharged once they began their strike. *Id.* For that reason, the Supreme Court ultimately refused to uphold an injunction ordering the company to rehire the workers and provide back pay. *Id.*

⁹⁰ See *id.* at 256 (affirming refusal to uphold an injunction where the underlying strike was illegal).

⁹¹ See *id.* (holding that an illegal act is not the “exercise of the ‘right to strike’ to which the [NLRA] refer[s]”).

⁹² See *id.* (holding that illegal actions cannot receive NLRA protection).

⁹³ See *Briggs & Stratton*, 336 U.S. at 264–65 (“[T]his Court . . . has said, . . . ‘[the] recognition of the ‘right to strike’ plainly contemplates a lawful strike—the exercise of the unquestioned right to quit work,’ and it did not operate to legalize the sit-down strike, which state law made illegal and state authorities punished.”).

⁹⁴ See *id.* (holding that a state labor board can act in areas where the Act and the law are silent).

⁹⁵ See *id.* at 269 (Murphy, J., dissenting) (arguing that the activities at issue here are the exact type of activities deserving of Section 7 protection); Becker, *supra* note 22, at 378 (noting that the

the intermittent strikes at hand to the sit-down strikes banned in *Fansteel*, and noted that *Fansteel* stands for the proposition that not all strike activity is allowable.⁹⁶ The *Fansteel* Court, however, did not allow the sit-in strikes because they found them to be illegal.⁹⁷ *Briggs & Stratton* went a step further by saying that, while this activity was not illegal, it is not a type of strike activity deserving of NLRA protection.⁹⁸ In creating this new ambiguous middle-ground category, however, without expounding on when, how, or why the behavior crossed the line, the Court unintentionally added a measure of subjective analysis to a strike's legality without providing guiding criteria.⁹⁹ It also gave employers grounds to lawfully dismiss employees for engaging in similar conduct.¹⁰⁰ Ultimately, the decision ended up standing for the general proposition that employers may be able to take self-help measures in response to an intermittent strike.¹⁰¹

Eleven years later, as some of the *Briggs & Stratton* dissenters' warnings came to fruition, the Court revisited intermittent strikes in *Insurance Agents*.¹⁰²

Court's decision in *Briggs & Stratton* was largely made without prior legal decisions on which to rely).

⁹⁶ See *Briggs & Stratton*, 336 U.S. at 256, 259 (holding that the strikes at issue in the case were so egregious that they were "indefensible" under the Act); Becker, *supra* note 22, at 378 (noting that the only rationale the Court offered was that the strike at issue was "indefensible"). The *Harnischfeger Corp.* NLRB decision gave rise to the "indefensible" line of reasoning when the Board asked: "The question before us is, we think, whether this particular [strike] activity was so indefensible, under the circumstances, as to warrant the respondent, under the Act, in discharging the stewards for this type of union activity." *Harnischfeger Corp.*, 9 N.L.R.B. 676, 686 (1938).

⁹⁷ See *Fansteel*, 306 U.S. at 256 (affirming refusal to uphold an injunction where the underlying strike was illegal because the striking employees were trespassing on the employer's property).

⁹⁸ See *Briggs & Stratton*, 336 U.S. at 264–65. The Court noted the dangers of allowing *any* form of strike activity. *Id.* at 264. The employees' interpretation of the law would have made "strike[s] an absolute right . . . the effect [of which] would be to legalize beyond the power of any state or federal authorities to control" any form of strike, a simply untenable result in the Court's opinion. *Id.* The Court compromised by suggesting that there is strike activity not explicitly authorized by legislation on the books, but also not illegal. *Id.* at 264–65.

⁹⁹ See Becker, *supra* note 22, at 377 (criticizing the Court's failure to explain why intermittent stoppages are to be treated comparably as the sit-in strikes in *Fansteel*). Becker notes that the decision has been wrongly cited for the proposition that employers can discharge intermittent strikers. *Id.* In fact, Becker writes, the Court explicitly noted the absence of employer retaliatory measures in the case, and therefore did not approve or disapprove of them. *Id.* at 377 & n.121.

¹⁰⁰ *Id.* at 377.

¹⁰¹ *Id.* at 377, 380 (noting that the *Briggs & Stratton* decision is too often erroneously cited for the proposition that employers can fire intermittent strikers without legal consequence, and arguing that the *Briggs & Stratton* Court did not explicitly hold as such).

¹⁰² See *Ins. Agents*, 361 U.S. at 492–94, 500 (holding a strike injunction to be invalid due to NLRA's misplaced regulation of the activity). The Court in *Insurance Agents* examined whether the NLRB had the same authority as afforded to the state labor board in *Briggs & Stratton*, that is, whether the NLRB could issue an injunction of strike activity. *Id.* The Court ultimately held that the Board could not enjoin this strike behavior, and cited the rationale that the employer had their own self-help methods they could rely on. *Id.* The argument over which law governs these types of strikes, however, likely could have been well-settled had the dissent won the day in *Briggs & Stratton*. See *Briggs &*

The Court scaled back from its decision in *Briggs & Stratton* by holding that intermittent strikes are not illegal, and therefore, not ripe for cease and desist orders.¹⁰³ The Court also, however, suggested in dicta that employers could rightfully discharge intermittently striking employees.¹⁰⁴ This decision directly led to the current legally ambiguous status of intermittent strikes.¹⁰⁵ They are not illegal but they are not protected.¹⁰⁶ Moreover, in *Insurance Agents* and cases that followed, the Court did not endeavor to set the bounds of this category of strike.¹⁰⁷ Striking employees have little guidance on what types of activities are protected outside of a “full on” or “traditional” strike, which types of strikes are illegal, and which are neither subject to injunction nor fully protected.¹⁰⁸

In the most recent landmark case on the subject, *Lodge 76*, the Supreme Court confirmed the “legal no-man’s land” status of intermittent strikes.¹⁰⁹ First and foremost, *Lodge 76* overruled *Briggs & Stratton*’s holding that non-traditional strikes are illegal by holding that a strike, regardless of form, should be free from government intervention.¹¹⁰ Second, the Court approved of and

Stratton, 336 U.S. at 268 (Douglas, J., dissenting) (arguing that the activities in the case at hand fell within the ambit of Section 7 of the NLRA, and therefore should have been governed by federal law); *id.* at 270 (Murphy, J., dissenting) (arguing that the majority’s decision departs from the usual deference given to administrative agencies).

¹⁰³ See *Ins. Agents*, 361 U.S. at 493–94 (holding that partial strikes are unprotected under the NLRA, but not illegal, and therefore not subject to a cease and desist demand). The Court here also reasoned that Congress did not leave this question open for NLRB interpretation, and therefore the NLRB could not act in this area. *Id.* at 499–500. While the Board is free to regulate strikes that clearly fall under their purview, areas in which they do not have authority must be left alone. *Id.*

¹⁰⁴ *Id.* at 490; Becker, *supra* note 22, at 379–80. Key to the decision was the Court’s feeling that the Board did not have statutory authority to enjoin the strike. Becker, *supra* note 22, at 380. Indeed, the Court called the Board’s regulation of work stoppages an “intrusion into the substantive aspects of the bargaining process.” *Ins. Agents*, 361 U.S. at 490. Such intrusion would give the Board too much power to dictate what types of tactics may be used during collective bargaining. *Id.*

¹⁰⁵ See Becker, *supra* note 22, at 381 (noting that this line of cases led to the ambiguous middle ground at issue here).

¹⁰⁶ *Id.* Becker notes that through the *Insurance Agents* decision, the Supreme Court confirmed the existence of a “middle category of unprotected strikes” where the employees cannot be enjoined but they also do not enjoy NLRA protection. *Id.* This would seem antithetical to labor law policy in that it allows for a great deal of gray area. *Id.*

¹⁰⁷ *Ins. Agents*, 361 U.S. at 490 (recognizing hesitance to regulating specific areas of the collective bargaining process).

¹⁰⁸ Becker, *supra* note 22, at 383 (noting the absence of guidance on when a recurrent strike becomes an intermittent one, and what the legal implications of that distinction may ultimately be).

¹⁰⁹ See *Lodge 76*, 427 U.S. at 152–53 (distinguishing protected and unprotected activity); see also Becker, *supra* note 22, at 381 (arguing that the *Lodge 76* decision entrenched the status of intermittent strikes into a “legal no-man’s land between prohibition and protection”). *Lodge 76* overruled the *Briggs & Stratton* decision, meaning that state labor boards could not issue injunctions and enter into collective bargaining disputes when intermittent strikes were at issue. *Id.*

¹¹⁰ *Lodge 76*, 427 U.S. at 141. The Court noted that decisions since *Briggs & Stratton* have reexamined the overarching issue, and further noted that strike activities need not be explicitly authorized by Section 7 in order to be free from interference, but rather, some activities engaged in as part of the

reiterated the dicta from *Insurance Agents*, that in the case of non-traditional strikes, employers are free to resort to retaliatory measures.¹¹¹ For example, employers could hire replacements or lockout their intermittently striking employees without adverse legal consequences.¹¹² Taken together, these two propositions now stand to differentiate strikes by form, protecting “traditional” strikes while leaving partial and intermittent “non-traditional” strikes devoid of NLRA protection.¹¹³ Most problematic is that this body of case law has failed to expound *why* this distinction ought to exist, and failed to draw a clear line delineating the two categories.¹¹⁴

Adding to the uncertainty created by the Supreme Court’s adjudication of intermittent strike cases, the NLRB has also failed to outline specific definitional criteria, opting to outline activities that are *not* unprotected intermittent strikes, rather than to explicitly define what *are* unprotected intermittent strikes.¹¹⁵ This was the case in early 2016 when the Board ruled on one of the OUR Walmart protests, ruling that their activity was protected and that Walmart’s subsequent discipline of the workers was an unfair labor practice.¹¹⁶ Operating in such conditions simply creates uncertainty on both sides of the bargaining table.¹¹⁷ A group of employees cannot reliably predict “how far is too far” when planning a strike or series of strikes, and an employer has no way of knowing what sorts of activities it does not have to tolerate.¹¹⁸

collective bargaining process ought to simply fall outside of government regulation so long as they are conducive to collective bargaining. *Id.*

¹¹¹ *Id.* at 140.

¹¹² *Id.* at 152. Citing *Insurance Agents*, the Court noted that the employer was free to engage in retaliatory methods such as discharge or other action against striking employees. *Id.*

¹¹³ *Id.* The *Lodge 76* Court noted the difference between forms of strikes and cited the form as a reason why the employers were free to resort to self-help methods. *Id.*

¹¹⁴ Becker, *supra* note 22, at 383.

¹¹⁵ See Kennedy, *supra* note 63, at 121–22 (listing the few Board decisions since *Lodge 76* that have endeavored to affirmatively address what constitutes intermittent strike activities, and noting the Board more often merely defines the term in the negative).

¹¹⁶ Wal-Mart Stores, Inc., 364 N.L.R.B. No. 118, 1 (Aug. 27, 2016). The Board ultimately held that, because the protest was “small, brief, peaceful, and confined,” the employees did not lose protection. *Id.* at 7. The Board did not, however, analyze the strike so fully as to make it clear which factors would have led to an opposite outcome. See *supra* notes 1–7 and accompanying text (providing the factual details of the strike).

¹¹⁷ See Hutcheson, *supra* note 25, at 2–4 (noting how, in the *Wal-Mart Stores, Inc.* case before the NLRB, both Walmart and the employees noted the need for clarity in intermittent strike adjudication); Michael M. Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. 597, 603 (2016) (noting the legal uncertainty surrounding the rise of the new non-union labor movements).

¹¹⁸ See Hutcheson, *supra* note 25, at 1–4 (noting the unpredictability of intermittent strike adjudication and using *Wal-Mart Stores, Inc.* as a case study).

II. THE OFFICE OF THE GENERAL COUNSEL OF THE NLRB SEEKS NEEDED CLARITY IN INTERMITTENT STRIKE DOCTRINE

In an effort to end the inconsistent treatment intermittent strikes have received since *Lodge 76*, the OGC of the NLRB had sought clarification on the intermittent strike doctrine.¹¹⁹ This guidance is necessary for both employers and employees.¹²⁰ The current doctrine is plainly confusing and difficult to apply, and often results in contradictions or unjust results.¹²¹ As unionization rates and instances of traditional strikes decline across the United States, intermittent strikes, like the ones at Walmart, have increased in prevalence.¹²² Intermittent strikes are quickly becoming an important, and sometimes only, option in the aggrieved employee's bargaining toolkit.¹²³ Section A considers why intermittent strikes are significant in today's labor climate, specifically examining the impact of declining unionization.¹²⁴ Section B reviews the rise of non-union concerted activities such as OUR Walmart and Fight for 15, and explains why intermittent strike protection is necessary for any future successes these movements may have.¹²⁵ Section C examines recent instances of intermittent strike jurisprudence.¹²⁶ Section D introduces the OGC's now-rescinded framework for future adjudication of intermittent strikes and details how it could have clarified the doctrine and the impact it could have had on employers and employees.¹²⁷

¹¹⁹ *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisc. Emp't Relations Comm'n*, 427 U.S. 132 (1976); Young, *supra* note 21 (noting the rescission of OM Memorandum 17-02, the model brief regarding intermittent strikes); *General Counsel Asks NLRB to Change Intermittent Strike Law*, *supra* note 12.

¹²⁰ OGC Model Brief, *supra* note 31, at 3 (arguing that ambiguity in this area is a negative for both employers and employees); *General Counsel Asks NLRB to Change Intermittent Strike Law*, *supra* note 12 (noting that employees are subject to employer discharge for activities they may have otherwise thought were protected activities).

¹²¹ See OGC Model Brief, *supra* note 31, at 3 (noting inconsistent results); Becker, *supra* note 22, at 376.

¹²² See OGC Model Brief, *supra* note 31, at 2 (noting the increase in intermittent strike activity); Oswald, *supra* note 117, at 603 (noting how campaigns like OUR Walmart are changing worker organization strategies); *infra* notes 135–141 and accompanying text (detailing figures from the Bureau of Labor Statistics outlining declining unionization rates in the United States).

¹²³ OGC Model Brief, *supra* note 31, at 3 (noting the increase in intermittent strikes and their importance as a viable labor tactic).

¹²⁴ See *infra* notes 128–141 and accompanying text.

¹²⁵ See *infra* notes 142–166 and accompanying text.

¹²⁶ See *infra* notes 167–180 and accompanying text.

¹²⁷ See *infra* notes 181–196 and accompanying text.

*A. The Shift from Traditional to Non-Traditional Strikes
and Why Intermittent Strikes Are Necessary*

The OGC cited two main reasons why non-traditional worker movements must rely on intermittent strikes.¹²⁸ First, non-union workers often lack the proper mechanisms or grievance procedures to deal with problems in the workplace and are turning to short-term strikes to put maximum pressure on employers.¹²⁹ Second, given diminishing union affiliation, such workers do not have access to the same financial backing union members would, and therefore simply cannot afford drawn out strike efforts.¹³⁰ In an increasingly non-unionized labor market, employees cannot garner the same strength in numbers on which they used to rely.¹³¹ Striking employees are less impactful without large numbers.¹³² Employees must instead increasingly rely on factors like timing and media coverage to exert the same type of pressure that, for example, a month long strike would exert.¹³³ In attempting to clarify intermittent strike doctrine, the OGC attempted to reintroduce the strike back into the employee's bargaining arsenal and equalize the employer-employee relationship the way recognition of concerted activities once did.¹³⁴

In 1983 the Bureau of Labor Statistics (“BLS”) reported 17.7 million U.S. workers were unionized—or 20.1% of wage and salaried workers.¹³⁵ In 2017 that figure was down to 14.8 million members, or 10.7%.¹³⁶ Unionized work-

¹²⁸ OGC Model Brief, *supra* note 31, at 14.

¹²⁹ *Id.*; Shelly Banjo & Melanie Trotman, *Wal-Mart Challenges Labor Board's Complaint*, WALL ST. J. (Feb. 2, 2014), <https://www.wsj.com/articles/walmart-challenges-labor-board8217s-complaint-1391389153> [<https://perma.cc/F6QJ-2EHH>] (noting that short-term strikes are changing the labor landscape in the absence of traditional labor unions); Victor Luckerson, *The One Day Strike: The New Labor Weapon of Last Resort*, TIME (Dec. 7, 2013), <http://nation.time.com/2013/12/07/the-one-day-strike-the-new-labor-weapon-of-last-resort> [<https://perma.cc/FN59-THLU>] (discussing strikes in over 100 cities and noting that the strikes involved a series of intermittent one-day protests). Luckerson also notes that the falling unionization rates have coincided with a decrease in “traditional” strikes, and argues that one-day strikes may be the only viable option remaining. Luckerson, *supra*.

¹³⁰ OGC Model Brief, *supra* note 31, at 14; *see infra* notes 135–141 and accompanying text (detailing figures from the Bureau of Labor Statistics outlining declining unionization rates in the United States).

¹³¹ OGC Model Brief, *supra* note 31, at 3 (noting the increase in intermittent strikes and their importance as a viable labor tactic); Oswald, *supra* note 117, at 599.

¹³² *See* OGC Model Brief, *supra* note 31, at 3 (noting the increase in intermittent strikes and their importance as a viable labor tactic); Oswald, *supra* note 117, at 599 (noting the decreasing importance of the strike as a bargaining tactic, in part due to declining unionization figures).

¹³³ *See* Andrias, *supra* note 51, at 50 (noting the importance of social media in raising awareness for worker movements); Jamieson, *supra* note 8 (detailing Black Friday protests).

¹³⁴ OGC Model Brief, *supra* note 31, at 12–15.

¹³⁵ *Union Members—2017: Union Membership (Annual) News Release*, DEP'T LAB., BUREAU LAB. STAT. (Jan. 19, 2018), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/QZV3-GEX6>].

¹³⁶ *Id.*

ers earned an average of about \$212 more per week than non-union workers.¹³⁷ Work stoppage figures have seen an even more drastic drop in frequency.¹³⁸ The BLS defines a “work stoppage” as a strike including 1,000 or more workers lasting at least one full shift.¹³⁹ In 2017 there were only seven such work stoppages.¹⁴⁰ This represents a 90% drop in work stoppages over the previous four decades.¹⁴¹

B. OUR Walmart and Fight for 15 Currently Rely on Intermittent Strikes in the Absence of Unionization

Despite pronounced recognition in some academic circles that re-empowering unionization would have a net beneficial effect on workers, the economy, and income inequality, many workers cannot afford to wait for a union renaissance that may or may not be on the horizon.¹⁴² This has led workers to bargain outside of a traditional union structure.¹⁴³ Two such examples are OUR Walmart and Fight for 15.¹⁴⁴

¹³⁷ *Id.* The reader should note, however, that the Bureau of Labor Statistics warns that earnings comparisons may not account for potentially important factors that would explain the differences between the figures. *Id.*

¹³⁸ *Work Stoppages Summary*, DEP’T LAB., BUREAU LAB. STAT. (Feb. 9, 2018), <https://www.bls.gov/news.release/wkstp.nr01.htm> [<https://perma.cc/T2W2-F8RF>].

¹³⁹ *Work Stoppages: Frequently Asked Questions*, DEP’T LAB., BUREAU LAB. STAT. (Apr. 27, 2016), <https://www.bls.gov/wsp/wspfaq.htm#> [<https://perma.cc/PNG5-SM4G>].

¹⁴⁰ *Work Stoppages Summary*, *supra* note 138.

¹⁴¹ *Id.* From 1947 to 1956, for example, the United States saw 3,438 work stoppages. *Id.* Six decades later, from 2007 to 2016, that figure was 143. *Id.* The parallel sharp declines in union membership and work stoppages are no coincidence. See Andrias, *supra* note 51, at 21–23 (arguing that without union membership, strike actions are an increasingly daunting proposition for smaller groups of employees). Case law expanding employer rights gave employers both the ability to avoid unionization of their workers and also make strikes economically unviable for workers. *Id.* Employers, for example, can close a unionized plant and hire subcontractors. *Id.* at 22. Declining membership leaves unions less powerful and corporations therefore are less hesitant about finding replacements and “strike breakers.” Mike Collins, *The Decline of Unions Is a Middle Class Problem*, FORBES (Mar. 19, 2015), <https://www.forbes.com/sites/mikecollins/2015/03/19/the-decline-of-unions-is-a-middle-class-problem/> [<https://perma.cc/PB2E-DQQ3>].

¹⁴² See Andrias, *supra* note 51, at 44 (detailing attempts to revive unionization in the United States); Oswalt, *supra* note 117, at 603 (arguing that the union-movement’s energy needs to be redirected); Dayne Lee, Note, *Bundling “Alt-Labor”: How Policy Reform Can Facilitate Political Organization in Emerging Worker Movements*, 51 HARV. C.R.-C.R. L. REV. 509, 516 (2016) (noting the rise of alternative forms of organization in response to declining unionization); Collins, *supra* note 141 (noting the historic importance of unions and economic problems stemming from their declining rates).

¹⁴³ See Lee, *supra* note 142, at 516 (describing “alt-labor” movements as groups outside traditional bargaining units that are self-organized but nonetheless funded by large worker organizations).

¹⁴⁴ Andrias, *supra* note 51, at 50–51 (noting the rise of worker-based campaigns outside the NLR model of union-based bargaining).

OUR Walmart has designed a campaign based on exerting public pressure rather than traditional bargaining.¹⁴⁵ At the heart of the campaign are one-day walkouts on notable commercial days such as Black Friday.¹⁴⁶ For a small labor movement such as OUR Walmart, one-day efforts can raise public and media awareness without forcing participants to sacrifice days of wages or even their jobs.¹⁴⁷ For its part, Walmart believes that such strikes do not and should not receive NLRA protection.¹⁴⁸ In support of its contention, Walmart cites the substantial problems these tactics pose for its operations and its ability to serve customers and the burdens imposed on non-striking employees who are forced to pick up the slack of their co-workers.¹⁴⁹

An employee strike does not mean an employer's operations can or should grind to a halt.¹⁵⁰ A strike may be just as effective for employees when an employer is faced with the economic and operational burden of training replacement workers and reassigning remaining employees, and this is not even taking into account the media scrutiny strikes tend to attract.¹⁵¹ With intermittent strikes, however, employers such as Walmart assert that their rights, such as the right to hire replacements, are being bulldozed.¹⁵² Hiring and training replacement workers for one or two days is impractical at best and economically agonizing at worst.¹⁵³ Accordingly, Walmart has terminated and disci-

¹⁴⁵ See Jamieson, *supra* note 9 (detailing very public campaigns against Walmart, including Black Friday strikes).

¹⁴⁶ See Jamieson, *supra* note 8 (noting three consecutive years of protests on Black Friday by Walmart workers across the United States); Kieler, *supra* note 8.

¹⁴⁷ See Jamieson, *supra* note 9. Such tactics have been likened to guerilla warfare, and have garnered beneficial media attention, shedding light on OUR Walmart's mission. Oswalt, *supra* note 117, at 599–600 (explaining how social media helped rally support and draw attention to the strikes).

¹⁴⁸ See Rosenfeld, *supra* note 21 (noting Walmart's opposition to the unfair labor practice charges filed against it).

¹⁴⁹ See *id.* Walmart's Attorney, Steven Wheelless, noted that, "Walmart does not believe Congress created intermittent strike leave to serve as a prop for union campaign messaging at the expense of customer service, operational efficiency, and the co-workers who have to cover for employees who intermittently come and go from their scheduled shifts at a union's bidding." *Id.*

¹⁵⁰ *The Right to Strike*, NAT'L LAB. REL. BOARD, (Mar. 8, 2018), [https://www.nlrb.gov/strikes/\[https://perma.cc/29C8-HW7V\]](https://www.nlrb.gov/strikes/[https://perma.cc/29C8-HW7V]) (listing employer's rights when employees go on strike).

¹⁵¹ Jeffrey M. Place, *Hot Desert Winds Never Cease . . . or Do They? Intermittent Strikes: What They Are, When They Are Protected and How They Are Being Used in the "Fight for 15,"* COMMITTEE ON DEV. L. UNDER NLRA 17 (Feb. 27, 2017), https://www.americanbar.org/content/dam/aba/events/labor_law/2017/02/dll/mw2017dll_agenda.authcheckdam.pdf [<https://perma.cc/8EVU-Y3P9>] (noting that training replacements is a significant burden on employers); Jamieson, *supra* note 8 (detailing Black Friday protests); Kieler, *supra* note 8 (detailing additional strikes).

¹⁵² See Rosenfeld, *supra* note 21 (detailing the Walmart counterargument to the unfair labor practice claims).

¹⁵³ Jonathan J. Spitz et al., *'Fight for \$15' Walk-Outs and Protests Continue: Are You Prepared for November 10?*, JACKSON LEWIS (Nov. 6, 2015) <http://www.jacksonlewis.com/publication/fight-15-walk-outs-and-protests-continue-are-you-prepared-november-10> [<https://perma.cc/2FHX-ZAME>] (advising employers on the many courses of actions they can take when employees strike).

plined workers for engaging in such tactics, leading the workers, in turn, to file unfair labor practice charges with the NLRB.¹⁵⁴

Walmart is not the only employer currently walking this legal tightrope.¹⁵⁵ The fast food industry is also seeing its fair share of labor turmoil, most notably spearheaded by the “Fight for 15” campaign.¹⁵⁶ Fight for 15 seeks to raise the minimum wage to \$15 dollars for fast food workers and is mainly spearheaded by McDonald’s employees.¹⁵⁷ Similar to OUR Walmart, Fight for 15 is using intermittent strikes, often pre-arranged with a defined plan to return to work, in place of longer, more widespread traditional strikes.¹⁵⁸ Also resembling OUR Walmart, Fight for 15 is economically supported and advised by a traditional union, the Service Employees International Union, without being a formal member thereof.¹⁵⁹ In a recent example of their activities, on November 29, 2016, Fight for 15 members planned and operated one of their most widespread strikes to date, organizing a one day strike across multiple industries and multiple states.¹⁶⁰ Some protestors faced police discipline for their actions—many others awaited potential consequences from their employers.¹⁶¹ Similar to Walmart’s dealings with OUR Walmart, McDonald’s has had to navigate the opaque intermittent strike law while responding to the surging Fight

¹⁵⁴ Rosenfeld, *supra* note 21.

¹⁵⁵ See Jamieson, *supra* note 9; Place, *supra* note 151, at 2 (detailing a walk-out at a Subway sandwich shop).

¹⁵⁶ See, e.g., Jamieson, *supra* note 9 (detailing campaigns against McDonald’s).

¹⁵⁷ See Jamieson, *supra* note 9; Place, *supra* note 151, at 2 (detailing an employee walk-out at a Subway sandwich shop).

¹⁵⁸ Al Neal, *The Power of the One-Day Strike*, PEOPLE’S WORLD (Oct. 13, 2016), <http://www.peoplesworld.org/article/the-power-of-the-one-day-strike/> [<https://perma.cc/V468-MELP>].

¹⁵⁹ Spitz et al., *supra* note 153.

¹⁶⁰ Juliette Dryer, *Austin Fast Food Workers Strike as Part of ‘Fight for \$15’*, CBS AUSTIN (Nov. 29, 2016), <http://keyetv.com/news/local/austin-fast-food-workers-strike-as-part-of-fight-for-15> [<https://perma.cc/C68Q-EDSZ>] (describing protests in Austin, TX); Anthony Kurzweil et al., *‘Fight for 15’ Protesters Taken into Custody After Blocking Downtown L.A. Intersection*, KTLA, (Nov. 29, 2016), <http://ktla.com/2016/11/29/fight-for-15-protesters-march-outside-downtown-l-a-mcdonalds/> [<https://perma.cc/J49S-FJSU>] (describing Fight for 15 protests in Los Angeles, CA); Jay Scott Smith, *Demonstrators Go Inside McDonald’s, Tell Workers to Go on Strike Right Now*, WHY Y PHILA. (Nov. 29, 2016), <https://why.org/articles/demonstrators-go-inside-mcdonalds-tell-workers-to-go-on-strike-right-now/> [<https://perma.cc/NQ4Q-9WNM>] (describing Fight for 15 protests in Philadelphia, PA); Sam Thielman, *Fight for 15 Plans ‘Most Disruptive’ Wage Protest and Strike After Thanksgiving*, GUARDIAN (Nov. 21, 2016), <https://www.theguardian.com/us-news/2016/nov/21/fight-for-15-protest-strike-thanksgiving-trump> [<https://perma.cc/U3GU-SPET>] (noting that protests could take place at twenty different airports).

¹⁶¹ Lisa Baertlien & Timothy McLaughlin, *Scores Arrested in First ‘Fight for \$15’ Protest Since Trump Win*, REUTERS (Nov. 29, 2016), <http://www.reuters.com/article/us-usa-wages-protests-idUSKBN1300M8> [<https://perma.cc/QXB6-DNL4>] (noting dozens of arrests in New York City, Cambridge, Detroit, and Los Angeles); *‘Fight for \$15’ Protests Sweeping the Country*, CBS NEWS (Nov. 29, 2016), <http://www.cbsnews.com/news/fight-for-15-minimum-wage-protests-chicago-ohare-nyc-laboston/> [<https://perma.cc/J4QH-UKX4>] (noting as many as twenty-five people arrested during a minimum wage protest). In these instances, protestors were arrested for blocking streets. Baertlien & McLaughlin, *supra*; *‘Fight for \$15’ Protests Sweeping the Country*, *supra*.

for 15 campaign, responding to a slew of unfair labor practice charges for disciplining striking workers.¹⁶²

Walmart, McDonald's, and other massive corporations have a distinct advantage when an employee files an unfair labor practice charge in the wake of discipline stemming from an intermittent strike: the employers have the resources to drag the cases out in front of the NLRB and in subsequent appeals.¹⁶³ They can take advantage of the vague intermittent strike law and flex their economic muscle to stall negotiations, often times to the effect of mainstream media losing interest in the case, thus avoiding the type of negative public relations on which intermittent strikes depend.¹⁶⁴ Perhaps even worse from the employee perspective, the employee may have unknowingly participated in an activity falling outside of Section 7 protection, leaving them devoid of the rights they thought they were exercising.¹⁶⁵ Almost any employee knows they have a right to strike, but narrowing down what types of strikes are protected by Section 7 is currently a difficult task, especially for nonunionized employees who face well-prepared employers.¹⁶⁶

C. Recent Instances of Intermittent Strike Adjudication

In the absence of a clear-cut framework for adjudicating intermittent strikes, the NLRB currently applies standards from murky case law on an ad

¹⁶² Baertlien & McLaughlin, *supra* note 161 (describing a few of the unfair labor practice cases filed against McDonald's); 'Fight for 15' Campaign to Target McDonald's Stores April 14, CHI. TRIB. (Mar. 30, 2016), <http://www.chicagotribune.com/business/ct-fight-for-15-campaign-mcdonalds-20160330-story.html> [<https://perma.cc/AV7J-PMWF>] (detailing labor disputes between McDonald's and Fight for 15); 'Fight for \$15' Protests Sweeping the Country, *supra* note 161 (detailing a number of the strikes involving McDonald's employees).

¹⁶³ See Becker, *supra* note 22, at 353 (noting that economic factors have lessened the strike's impact); Spitz et al., *supra* note 153 (detailing steps an employer can take when employees strike).

¹⁶⁴ See Becker, *supra* note 22, at 353 (noting the leverage employers have over employees); Spitz et al., *supra* note 153 (describing employer's rights during employee strikes).

¹⁶⁵ See Schwartz, *supra* note 20 (noting employees' difficulties in determining which activities are protected and which are unprotected).

¹⁶⁶ See Olney, *supra* note 14 (noting the difficulties non-union employees face in organizing organically). In the early parts of the OUR Walmart and Fight for 15 campaigns, an outpouring of guidance from labor blogs and academics sought to clarify intermittent strike law. See, e.g., Timothy J. Ryan et al., *Fight for 15: Your Non-Union Employees Have Walked Out. Now What?*, JACKSON LEWIS (Sept. 12, 2014), <http://www.jacksonlewis.com/resources-publication/fight-fifteen-your-non-union-employees-have-walked-out-now-what> [<https://perma.cc/ZLB3-RHZJ>] (noting that, whether or not a union is involved, walkouts may be protected concerted activity); Anne R. Yuengert, *Can Your Non-Union Workers Strike? Yes, They Can*, LAB. & EMP. INSIGHTS (Jan. 28, 2016), <https://www.employmentlawinsights.com/2016/01/can-your-non-union-workers-strike-yes-they-can/> [<https://perma.cc/CCE3-E2GV>] (listing various rights afforded to employees not affiliated with a traditional union); *Non-Union Employees Have the Right to Strike*, SHAW ROSENTHAL LLP (Mar. 31, 2014), <https://www.employmentlawalliance.com/firms/shawe/articles/shawe-rosenthal-march-2014-e-update> [<https://perma.cc/G76T-KAUG>] (summarizing an NLRB decision which reaffirmed non-union employees' right to strike).

hoc basis to decide whether certain activities constitute unprotected intermittent strikes.¹⁶⁷ One such recent example was the NLRB's 2017 decision in *EYM King of Missouri, LLC*.¹⁶⁸ In *EYM King*, employees of a Burger King franchise filed an unfair labor practice claim following discipline related to work stoppages.¹⁶⁹ The employer hinged their argument that they did not commit an unfair labor practice on the fact that the discipline was in response to an allegedly unprotected one-day strike.¹⁷⁰ While again affirming that intermittent and partial strikes fall outside the bounds of NLRA protection, the Board here found the one-day work stoppage was not an intermittent strike.¹⁷¹ The Board cited a series of cases all broadly defining what an intermittent strike is and then comparatively analyzed the employees' actions in the case at hand.¹⁷² In sum, the Board wrote that lawfulness of these types of strikes turn on: "frequency and timing, whether the strikes were part of a common plan, whether there was Union involvement, whether the strikes were intended to harass the employer into a state of chaos, whether the strikes were for distinct acts of the employer, and whether the alleged discriminatees intended to reap the benefits of strike action without assuming the vulnerabilities of a forthright and continuous strike," but also noted that each one of these prongs contain exemptions and limitations.¹⁷³ After reviewing the one-day strike against these factors, the Board ultimately held that the conduct did not amount to an intermittent strike and was instead protected concerted activity.¹⁷⁴

¹⁶⁷ Becker, *supra* note 22, at 413 (noting the absence of predictability in current case law).

¹⁶⁸ *EYM King of Mo., LLC*, 365 N.L.R.B. No. 16, at 1 (Jan. 24, 2017).

¹⁶⁹ *Id.* at 3. A Burger King employee was disciplined for engaging in campaigns for better wages, hours, and working conditions. *Id.* At the heart of the issue was the employee's participation in a number of brief strikes, only one of which spanned more than one day. *Id.*

¹⁷⁰ *Id.* at 10 (noting the employer's contention that employees should be subjected to discipline because their actions constituted an unprotected intermittent strike).

¹⁷¹ *Id.* at 14.

¹⁷² *Id.* at 11–14 (citing *Farley Candy Co.*, 300 N.L.R.B. 849, 849 (1990)) (holding that intermittent strikes involve an express plan to strike, return to work, and strike again); *Audubon Health Care Ctr.*, 268 N.L.R.B. 135, 136 (1983) (noting that partial strikes are not protected under Board doctrine); *Polytech, Inc.*, 195 N.L.R.B. 695, 696 (1972) (distinguishing intermittent strikes from "genuine" strikes).

¹⁷³ *EYM King*, 365 N.L.R.B. No. 16, at 11. For example, the employer argued that the strike in question, as the ninth strike in a series nationwide, ought to be an illegal intermittent strike—but the Board noted that despite this commonality the nationwide actions did not affect their analysis here. *Id.*

¹⁷⁴ *Id.* at 11–14. The Board noted that the employees' purpose in striking was not to harass the employer. *Id.* They also noted that the employer was able to proceed with business operations with but a small degree of nuisance. *Id.* In their rationale, however, the Board only focused on what *did not* occur in this situation, rather than suggesting factors that might have triggered an opposite decision. *See id.* (noting simply that the activities in this case did not rise to the level of illegality).

The *EYM King* decision demonstrates perfectly the unwieldiness of the current state of law.¹⁷⁵ These employees were not part of a larger union that could have offered them guidance on best strike practices.¹⁷⁶ Given the subjectivity of the test the Board applied, the decision could have gone the other way if the employees had acted in a slightly different manner.¹⁷⁷ For example, the Board noted that frequency is an important factor, yet offered little guidance on how often is too often.¹⁷⁸ The Board asked whether the intent was to harass the employer, but gave no measuring stick for determining the purpose of a strike.¹⁷⁹ Given the increasing stakes of whether or not these types of strikes fall under NLRA protection, many have argued that the NLRB must clarify their decisions to create a bright line between protected and unprotected activities.¹⁸⁰

D. The OGC's Model Brief and Proposed Framework for Intermittent Strike Protection

The OGC's now-rescinded brief began with the express argument that the Board "should clarify its jurisprudence on intermittent and partial strikes and extend the [NLRA]'s protection to multiple strikes over the same labor dispute."¹⁸¹ The brief acknowledged the "imprecise" jurisprudence to date, and

¹⁷⁵ Becker, *supra* note 22, at 413 (noting the absence of predictability in current case law), *see also* Wal-Mart Stores, Inc., 364 N.L.R.B. No. 118, 1 (Aug. 27, 2016) (holding that a brief one-day strike was not an intermittent strike).

¹⁷⁶ *See EYM King*, 365 N.L.R.B. No. 16, at 3 (noting that employees were not unionized).

¹⁷⁷ *See id.* at 11–14. The Board focused on the particular activities of the case without suggesting factors that might have led to an opposite outcome. *See id.* (noting the absence of a specific test that could have guided their decision).

¹⁷⁸ *Id.* at 11 (balancing the character of the strike with the frequency, and noting that frequency is an important factor but not suggesting how frequent would be too frequent).

¹⁷⁹ *Id.* at 7. In this prong, the Board cites the oft-quoted question of whether the intent was to "harass the employer into a state of chaos," but seems to offer no concrete definition of "chaos" and merely notes that the strike's impact on the employer was that some customers had to wait a few extra minutes to receive their food, and this is not the type of "chaos" envisioned. *Id.* Moreover, this is seemingly inapposite to the well-accepted notion that the very purpose of a strike is to pressure an employer. *Id.* If there were not at least a minute degree of "chaos" associated with a strike, strikes would seemingly lose all impact. *Id.* The Board acknowledges that disruption of employer activities does not render a strike unprotected, but still relies on an undefined standard of "chaos" to determine whether the strike should be protected. *Id.*

¹⁸⁰ Andrias, *supra* note 51, at 88–89 (noting that the issue of intermittent and partial strikes is ripe for Board re-interpretation); W. Melvin Haas III & Carolyn J. Lockwood, *The Elusive Law of Intermittent Strikes*, 14 LAB. L. 91, 91, 116 (1998) (noting that practical application of the intermittent strike doctrine is a difficult task and that the doctrine is "blurred by confusion"); LeRoy, *supra* note 64, at 269 (posing the question of why the law should allow full-scale strikes but not smaller, more manageable strikes).

¹⁸¹ OGC Model Brief, *supra* note 31, at 1. The Brief starts out by explicitly asking the Board to clarify its jurisprudence regarding intermittent and partial strikes. *Id.* It also asks the Board to extend the NLRA's protection to multiple strikes over the same labor dispute, an area of ambiguity in many past cases. *Id.*; Young, *supra* note 21 (noting the rescission of OM Memorandum 17-02, the model brief regarding intermittent strikes).

noted how the lack of precision affects employees.¹⁸² Moreover, the brief argued, there has not been a “compelling rationale” for the declination to extend Act protection to non-traditional strikes.¹⁸³ In light of declining union membership that otherwise would have buoyed protracted strike efforts, short-term strikes are becoming an increasingly necessary tool for non-unionized employees.¹⁸⁴ The OGC ultimately asked the Board to extend protection to multiple strikes if they meet the specified criteria, and to clarify the difference between partial and intermittent strikes.¹⁸⁵ Under the criteria, multiple strikes would be afforded protection if, (1) work completely ceased and the frequency isn’t such that the effort amounts to a work slowdown, (2) the strikes are designed to exert economic pressure rather than impose permanent conditions of work, and (3) the employer is made aware of the reasons behind the strike.¹⁸⁶

With this distinction in place, the OGC brief next questioned the faulty logic on which the narrow definition of protected strikes lies.¹⁸⁷ *Briggs & Stratton*, the brief argued, lacked any justification for why the activity at issue there was unprotected.¹⁸⁸ Since that decision, however, the Board has relied on it to limit non-traditional strikes.¹⁸⁹ In their cases supporting this limitation, the Board has relied on three bases: (1) work stoppages should be unprotected

¹⁸² OGC Model Brief, *supra* note 31, at 1. The brief cites a number of academic articles that call attention to this very issue. *Id.* at 1 & n.1. The articles date back as far as 1955 and all call for protection of intermittent strikes. *Id.* Moreover, many articles argue that current jurisprudence is simply contradictory to labor policy, thus necessitating review of the law. *Id.*

¹⁸³ *Id.* at 2. This reference to the lack of a “compelling rationale” seemingly invokes cases such as *Briggs & Stratton*, *Insurance Agents*, and *Lodge 76*, which failed to fully articulate their holdings, just that the Court was so holding because the action was indefensible or that the Board should not reach into these areas. *Id.*; see *supra* notes 75–118 and accompanying text. See generally *Lodge 76*, Int’l Ass’n of Machinists & Aerospace Workers v. Wisc. Emp’t Relations Comm’n, 427 U.S. 132, 152–53 (1976); *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 490 (1960); *Int’l Union, Local 232 v. Wisc. Emp’t Relations Bd. (Briggs & Stratton)*, 336 U.S. 245, 264–65 (1949).

¹⁸⁴ OGC Model Brief, *supra* note 31, at 2. The OGC here recognizes the trend of increasing numbers of short-term strikes, such as the one detailed earlier in the OUR Walmart campaign. *Id.*

¹⁸⁵ *Id.* at 3. The OGC model brief also proposes distinct definitions for partial strikes and intermittent strikes—two categories whose distinctions the Board had previously blurred. *Id.* Partial strikes involve the refusal to perform select portions of a job, such as overtime. *Id.* Intermittent strikes involve a complete work stoppage, a return to work, and then a subsequent total stoppage. *Id.* In the absence of this distinction, the brief argues, the Board has at times drawn arbitrary lines and at other times used “partial strike” as a blanket term describing anything other than a full on “traditional” strike. *Id.* at 4. Adoption of these bright line definitions would aid future Board decisions, and would be a necessary first step toward creating a uniform body of rules and case law. *Id.*

¹⁸⁶ *Id.* at 3. For exact text of the proposed framework, see *supra* note 34 and accompanying text.

¹⁸⁷ OGC Model Brief at 4 (noting the imprecise legal history of intermittent strike adjudication).

¹⁸⁸ *Id.* at 5. Part of the reason for the *Briggs & Stratton* decision, the brief opines, was that it occurred during a period of significant labor unrest. *Id.* This may have contributed to the adverse decision against the employees, as the Supreme Court was seeking to discourage this sort of behavior in bargaining. See *id.* (detailing the history behind the decision). Nevertheless, the OGC seems to suggest that it was a misapplication of law on the Court’s part. *Id.*

¹⁸⁹ Becker, *supra* note 22, at 377 (noting that *Briggs & Stratton* has since been cited for principles such as these that it did not intend to establish).

when they are designed to harass and confuse the company, (2) it is inequitable when employees can get the benefit of a strike without taking the necessary economic risks, and (3) employees do not receive protection when they are exerting pressure so as to dictate (rather than bargain for) their own terms and conditions.¹⁹⁰ The brief then knocked down each of these propositions for reasons such as inapplicability and baselessness.¹⁹¹

Finally, the OGC brief proposed a new standard for intermittent strikes that “appropriately respects the employees’ right to strike.”¹⁹² The OGC argued that these criteria will ensure that employees will not be able to strike without potential economic risks, one of employers’ major concerns.¹⁹³ Additionally, employees cannot, under the proposed test, use intermittent strikes to effectuate a work slowdown as opposed to a complete stoppage.¹⁹⁴ Lastly, by making their grievances known, employees will not be dictating the terms of employment, but merely bargaining toward those ends.¹⁹⁵ The OGC concluded by urging the Board to adopt the new standard and correct the rationale used in past cases that led to the ambiguous and unfair doctrine today.¹⁹⁶

III. THE MODEL BRIEF WOULD HAVE BROUGHT NEEDED CLARITY BUT STILL CONTAINED CURABLE POINTS OF AMBIGUITY

The OGC’s model brief would have undoubtedly provided a better and more coherent option for adjudicating these types of labor claims as opposed to attempting to navigate the confusing and contradictory case law in this ar-

¹⁹⁰ OGC Model Brief, *supra* note 31, at 7–8.

¹⁹¹ *Id.* at 7–12. In response to point (1), the OGC argues that characterizing a strike based on its effectiveness is “antithetical” to the entire concept of strikes. *Id.* at 8. Strikes are designed to exert pressure. *Id.* at 9. Just because one form does that particularly well does not mean it should be unprotected. *Id.* Moreover, as has been noted in prior cases and the OGC notes again here, employers are not without their own self-help tactics. *Id.* They are free to pursue lockouts or hire replacements in response to striking workers. *Id.* Regarding point (2), the OGC argues that intermittent strikers do indeed face economic risk. *Id.* at 10. Anytime they stop working they will not be paid, and once again, an employer may pursue its own tactics to exert economic pressure right back on employees. *Id.* Finally, regarding point (3), the OGC argues that it is simply baseless to think that intermittent strikers are attempting to dictate terms of employment rather than force the employer to bargain. *Id.* at 11. In support of this argument, the OGC cites the Supreme Court’s own logic in a factually similar case where the Court held that an intermittent strike is merely a form of strike—not an attempt to impose a condition. *Id.*

¹⁹² *Id.* at 12.

¹⁹³ *Id.* at 13. The Supreme Court has recognized that employees should not have unfettered ability to exert economic pressure on employers without a corresponding risk. See *Briggs & Stratton*, 336 U.S. at 264 (warning of the dangers of allowing the strike as an absolute right).

¹⁹⁴ OGC Model Brief, *supra* note 31, at 3 (noting the differences between work slow-downs, which are illegal, and true intermittent strikes).

¹⁹⁵ *Id.* at 14.

¹⁹⁶ *Id.* (noting the legal ambiguity in which the law currently exists).

ea.¹⁹⁷ The question remains, however, should a future OGC endeavor to re-propose this framework, whether the model brief actually would have achieved its stated ends.¹⁹⁸ Section A discusses the OGC's attempt at balancing costs and benefits to employers and employees in their proposal.¹⁹⁹ Section B suggests areas where the OGC model brief, should it ever be re-circulated, could offer even more clarity, make the framework easier to apply, and perhaps be more agreeable to both employers and employees.²⁰⁰

A. The Proposed Framework Is Beneficial to Employers and Employees

First and foremost, any degree of clarity in this area of law would be welcomed on both sides of the bargaining table.²⁰¹ Many employers, however, may have felt that the previously proposed framework disproportionately benefits employees.²⁰² Intermittent strikes can be extremely effective when timed properly.²⁰³ Employers, as previously noted, often need to make extensive plans for strikes, such as hiring replacement employees, reassigning managerial employees to different positions, or closing certain operations.²⁰⁴ When the strikes are brief, however, such as one day or a half-day, employers may not have time to train replacement employees.²⁰⁵ From an employee perspective, however, intermittent strikes somewhat minimize, though do not totally negate,

¹⁹⁷ See *id.* at 13 (providing adjudication guidance); see also *supra* notes 75–118 and accompanying text (providing a discussion of the confusing and contradictory case law surrounding intermittent strikes).

¹⁹⁸ See generally OGC Model Brief, *supra* note 31. The brief proposes a test that the OGC believes will lead to clarity in this area of law, but it relies on a few terms that could use further precision. *Id.* at 3.

¹⁹⁹ See *infra* notes 201–222 and accompanying text.

²⁰⁰ See *infra* notes 223–267 and accompanying text.

²⁰¹ See OGC Model Brief, *supra* note 31, at 1; Kennedy, *supra* note 63, at 125–26 (arguing that the Board needs to grant protection to intermittent strikes both from a policy perspective and because the current doctrine is unwieldy); LeRoy, *supra* note 64, at 239 (arguing that the current application of the NLRA to intermittent strikes is “muddled” and in need of clarification).

²⁰² *NLRB Considering Potentially Seismic Shift in Labor Law*, CUE: AN ORG. FOR POSITIVE EMP. REL. (Oct. 6, 2016), <http://www.cueinc.com/nlr-considering-potentially-seismic-shift-in-labor-law/> [<https://perma.cc/7ZPM-UWPC>] (referring to the model brief as “very problematic for employers” and noting the NLRB’s unwelcome foray into settled law); David Pryzbylski, *The Hits Keep On Coming: NLRB General Counsel’s Office Seeks Potential Modifications to the Law Regarding Intermittent Strikes*, BARNES & THORNBURG LLP (Oct. 5, 2016), <http://www.btlaborrelations.com/the-hits-keep-on-coming-nlr-general-counsels-office-seeks-potential-modifications-to-the-law-regarding-intermittent-strikes/> [<https://perma.cc/779S-SE6S>] (noting an “aggressive push” to strip employers of NLRA rights).

²⁰³ See LeRoy, *supra* note 64, at 256–57 (noting that even rumored or threatened walkouts affect customers and therefore the employer).

²⁰⁴ See *id.* at 257 (noting employers’ ability to plan for strikes); Spitz et al., *supra* note 153 (noting that, given the brief and often surprise nature of a one-day strike, employers may be better off temporarily reassigning duties to continue business operations).

²⁰⁵ Spitz et al., *supra* note 153 (noting the impracticality of training replacements when strikers are expected to return, particularly in the instances of strikes in the fast food industry).

the employees' risk of significant economic loss.²⁰⁶ They may not get paid for the day the strike occurred, but they are not missing weeks or months of work like employees engaging in traditional strikes.²⁰⁷

Ultimately, however, these potential harms are similar to the harm employers thought they would face when strikes were first approved of in the NLRA.²⁰⁸ A strike's relative effectiveness should have no bearing on its protected status, despite the fact that employers may have more difficulty in responding to certain tactics.²⁰⁹ Indeed, national labor policy depends on the freedom to strike, or the employees' maintenance of the threat of a strike, in order to usher in collective bargaining.²¹⁰ Erosion of collective bargaining and declining unionization, however, make necessary tactics such as intermittent strikes so that small groups of employees can exert economic pressure.²¹¹

Internalizing harm for the greater good of national labor policy, however, is not likely to sway employers.²¹² But the proposed framework may not have ultimately been as harmful as it would appear.²¹³ To be sure, the model brief and proposed framework approved of a strike tactic that employers have vigorously fought against.²¹⁴ In proposing what employees must do to be afforded NLRA protection, the OGC also attempted to clarify what employers can expect from employees.²¹⁵ If employees fall short of these standards—for example, if the striking employees do not make the employer aware of their pur-

²⁰⁶ See LeRoy, *supra* note 64, at 257 (noting potential employee benefits in minimizing the length of a strike).

²⁰⁷ *Id.* (noting that the limited nature of intermittent strikes can protect employees from large-scale wage loss).

²⁰⁸ Becker, *supra* note 22, at 352–53 (noting the strike's traditional role as an “economic weapon” within the collective bargaining scheme).

²⁰⁹ Swope Ridge Geriatric Ctr., 350 N.L.R.B. 64, 67 (2007) (noting that the envisaged purpose of a strike is disruption, and a strike's legality should not turn on its effectiveness); Allied Mech. Servs., Inc., 341 N.L.R.B. 1084, 1102 (2004) (noting the unrealistic expectation for employees to conduct a strike which does not affect employer operations); Feinberg & Willis, *supra* note 78, at 3 (arguing that strikes do not lose protection based on their effectiveness).

²¹⁰ GORMAN ET AL., *supra* note 42, at 47.

²¹¹ Becker, *supra* note 22, at 353 (describing the history of a strike and detailing its traditional role as an important bargaining tool).

²¹² *NLRB Considering Potentially Seismic Shift in Labor Law*, *supra* note 202 (noting that the model brief potentially poses large problems for employers).

²¹³ OGC Model Brief, *supra* note 31, at 13–14 (detailing rationales, and potential benefits, for clarifying the area of law including, *inter alia*, predictability for both employees and employers).

²¹⁴ *Id.* at 1 & n.2 (citing cases where employers have challenged the legality of strikes as unprotected intermittent strikes).

²¹⁵ *Id.* at 10–12 (noting the Board's previous contemplation of employer's rights in intermittent and partial strike situations).

pose—the employer can be more assured of their legal footing if they decide to take subsequent disciplinary measures.²¹⁶

In addition to the benefits of clarity, employers would have been afforded additional protections in each prong of the proposed framework.²¹⁷ The first prong, that the stoppage must involve a complete cessation rather than a slow-down, ensured that employees take a measure of economic risk in striking.²¹⁸ Likewise, employers would have been afforded at least some opportunity to replace striking workers.²¹⁹ The second prong, which states that the strike must not be designed to impose permanent conditions of work, also protects employers by assuring that their employees' purpose will be to bring about negotiations, rather than setting terms unilaterally.²²⁰ Finally, the third prong, that the employer be made aware of the purpose of the strikes, at a minimum afforded an employer the opportunity to negotiate and halt future strikes, and at a maximum may provide valuable notice before a strike occurs.²²¹ Altogether, while employers could have faced the possibility of an increase in one-day strikes, that risk should at least be tolerable due to the clarity and protections the framework affords.²²²

B. The Proposed Framework Could Be Improved for Employers and Employees by Clarifying Areas of Ambiguity

Were the previously proposed framework adopted verbatim, both employers and employees would gain a large measure of legal clarity, but there

²¹⁶ *Id.* at 10, 13 (noting that the proposed framework would actually protect employer's interests by ensuring that intermittent strikers do not receive benefits of a strike without taking on risk that is inherent to any strike action).

²¹⁷ OGC Model Brief, *supra* note 31, at 13–14 (describing the rationale for the proposed framework and the more equitable treatment that both employers and employees receive from the clarification).

²¹⁸ *Id.* The OGC argues that the first prong ensures employees take on at least some risk when engaging in a strike. *Id.* This risk, they argue, is the lack of pay and potential for replacement. *Id.* This also leaves employers with surer footing because they are more accustomed to dealing with these types of strike actions. *See id.*

²¹⁹ *See id.* (noting that under the proposed framework, employees will not be able to benefit from a strike without taking on attendant risks such as replacement or economic loss).

²²⁰ *Id.*

²²¹ *See id.* (noting that the third prong ensures that employees will not be able to strike in order to achieve non-communicated goals, and implying that employees will have to open some dialogue with employers during or before the strike action).

²²² *Id.*; Place, *supra* note 151, at 18 (agreeing with the General Counsel's conclusion that intermittent strike law needs clarification, but challenging that a multi-factorial test will provide any clarity in the area). Place notes that multi-factorial tests still leave too much discretion in the hands of the adjudicator, and as such, inconsistent decisions could still happen even with the OGC's proposed framework in place. Place, *supra* note 151, at 18. Place also notes that the framework could lead to an increase in these actions, another reason why a clear-cut framework is necessary. *Id.*

would still be a few points lacking necessary precision.²²³ In the first prong, the OGC proposed that protection should be afforded if multiple strikes “are not so . . . frequent that they are tantamount to work slowdowns.”²²⁴ First, as has been an issue in the past, frequency — how often is too often to strike — would likely have been fiercely debated.²²⁵ For example, would the Richmond, California Walmart workers who went on strike twice within a four-week period be considered to have gone on strike too often and thus lose protection?²²⁶ Second, whether the strikes are designed to impose permanent work conditions or to exert economic pressure is a seemingly subjective test that could benefit from a set of objective criteria.²²⁷

Until the remaining points of ambiguity discussed above are defined, the OGC’s proposed standard would offer necessary, but insufficient protection to employees.²²⁸ If it had been adopted verbatim, the Board and courts would still have to resolve ambiguity while balancing harm to employers and how much latitude to afford striking employees.²²⁹ As proven by the erosion of the strike

²²³ See OGC Model Brief, *supra* note 31, at 1 (noting the ad hoc nature of the Board’s jurisprudence regarding intermittent strikes). The framework still contains a few ambiguous terms and points, however. See *infra* notes 224–267 and accompanying text (discussing these matters).

²²⁴ OGC Model Brief, *supra* note 31, at 3, 13 (noting that work slowdowns would be outside of the Act’s coverage, as would many other forms of partial strikes). The OGC here notes the importance of employees taking on risk when engaging in strike activity. *Id.* at 10. A complete cessation of work, the OGC argues, avoids this issue by allowing employers to replace workers or dock pay. *Id.* This should sufficiently present the employees with risks attendant to strike activity without leaving them vulnerable to a course of unlawful discipline. See *id.* at 10 & n.36 (noting that by providing the framework, employers’ fears of employees’ striking risk-free should be quelled).

²²⁵ See *Robertson Indus.*, 216 N.L.R.B. 361, 362 (1975) (noting the absence of a “magic number” in discerning whether multiple work stoppages are unprotected). Compare *EYM King of Mo., LLC*, 365 N.L.R.B. No. 16, 12 (Jan. 24, 2017) (noting that a one day action is plainly not “intermittent” and that in past cases two separate days of striking did not cross the threshold, but offering little guidance on what amount of frequency would make a series of strikes intermittent), and *U.S. Serv. Indus.*, 315 N.L.R.B. 285, 285–86 (1994) (holding that multiple strikes, without evidence of intent to harass, do not make strikes unprotected intermittent strikes), with *Honolulu Rapid Transit Co.*, 110 N.L.R.B. 1806, 1807–11 (1954) (holding a series of weekend strikes to be unprotected and therefore an employer can suspend striking workers). By way of example, the model brief notes a few instances that would be considered too frequent. OGC Model Brief, *supra* note 31, at 13. A ten-minute strike every thirty minutes, or an hourly work stoppage once employees reach a quota are two examples. *Id.*

²²⁶ See *Wal-Mart Stores, Inc.*, 364 N.L.R.B. No. 118, 1 (Aug. 27, 2016) (describing a series of strikes involving particular employees at a Walmart store and finding that the strike activities did not constitute an unprotected intermittent strike).

²²⁷ OGC Model Brief, *supra* note 31, at 13. Once again, the OGC somewhat blindly asserts that instances of these specific strikes should be obvious from the facts, but there would still likely be cases on the margins of acceptability. *Id.*

²²⁸ See *id.* at 4 (arguing that the proposed framework offers necessary clarity); *Place*, *supra* note 151, at 18 (agreeing with the General Counsel’s conclusion that intermittent strike law needs clarification, but challenging that a multi-factorial test will provide any clarity in the area).

²²⁹ See OGC Model Brief, *supra* note 31, at 4 (noting that the proposed framework attempts to better balance employer and employee rights); *Place*, *supra* note 151, at 18 (noting the potential clarity that could be offered in this field). Were the Board to adopt the argument, it would still take multi-

over time, leaving this balancing of interests up to interpretation will likely lead to a promulgation of vague adjudication.²³⁰ Accordingly, the OGC would be wise to amend their argument to promote specificity, or alternatively, the Board should resolve these points of ambiguity in the event they adopt the proposed framework.²³¹

1. The Frequency Prong of the OGC's Framework Remains Ambiguous, Preventing Adoption of a Clear Workable Standard

To promote consistent adjudication, the OGC or the Board could and should decide how many strikes in a given number of weeks is so frequent that the actions are not entitled to Section 7 protection.²³² The way the standard is set up now, however, lends itself to a case-by-case basis adjudication.²³³ Whether a series of strikes “are not so brief and frequent that they are tantamount to work slowdowns” is a subjective standard.²³⁴ The answer could vary based on, *inter alia*, the number of employees striking, the total number of employees, the size of the business, the work that they are doing, and much more.²³⁵ This inherent subjectivity does not ultimately protect employees' best interests; an economically superior employer could simply drag the employees into protracted litigation.²³⁶ Ultimately, because the OGC did not propose a

ple applications to different sets of facts to establish a solid body of precedent on which parties could rely. See OGC Model Brief, *supra* note 31, at 4 (defining what an intermittent strike is, yet doing so using some terms that are still somewhat ambiguous).

²³⁰ Becker, *supra* note 22, at 353–54 (noting the slow erosion of the strike from an economic weapon for employees to one that is often bargained away during negotiations and left toothless).

²³¹ OGC Model Brief, *supra* note 31, at 14 (noting the need for clarity in this area of jurisprudence).

²³² See *id.* at 13. The brief suggests that multiple strikes over the same labor dispute would be protected, but fails to articulate what that may look like in practice. *Id.* If proposed again in the future, the brief could simply state a number that would constitute too many strikes. See generally *id.* The Model Brief does not provide clarity on situations, such as the OUR Walmart strikes, that occurred over a number of weeks. See Wal-Mart Stores, Inc., 364 N.L.R.B. No. 118, at 1 (describing a series of strikes in one Walmart store).

²³³ OGC Model Brief, *supra* note 31, at 6–7. The model brief cites to *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission* where the Supreme Court suggested case-by-case adjudication in order to establish the bounds of protection. See *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisc. Emp't Relations Comm'n*, 427 U.S. 132, 152 (1976); OGC Model Brief, *supra* note 31, at 6. That strategy is likely too time consuming and could be easily remedied with Board or OGC guidance. OGC Model Brief, *supra* note 31, at 6.

²³⁴ OGC Model Brief, *supra* note 31, at 13.

²³⁵ See *id.* (detailing the framework for intermittent strike adjudication, without diving into specifics that might influence findings at each prong).

²³⁶ See *id.* (detailing the proposed prongs for adjudication); Becker, *supra* note 22, at 352 (noting that employers' economic superiority has directly influenced the decreasing number of strikes); Lawrence E. Dubé, *Intermittent Strike Doctrine Could Get Boost from NLRB*, LAB. & EMP. ON BLOOMBERG L. (Oct. 24, 2016), <https://www.bna.com/intermittent-strike-tactic-n57982079023/> [<https://perma.cc/3KQK-W9K6>] (noting that more strikes could lead to protracted litigation).

magic number, employees would have to wait for case law to develop on the subject before being able to safely design strikes.²³⁷ In fact, the model brief seemingly suggested that the number of strikes that would be protected could be infinite so long as the three criteria of the framework are met.²³⁸

Case law on the issue of frequency, however, indicates that frequency is bound up with the issue of the employer's ability to respond to the strike, that is, the strikes only become too frequent when they effectively become work slowdowns.²³⁹ Indeed the proposed framework itself adopted this view by proposing that the strikes may not be so frequent that they become tantamount to slowdowns.²⁴⁰ Surprise walkouts, for example, can be left without protection when employers cannot adequately respond and properly carry on their business.²⁴¹ It appears that frequency is too closely related to the circumstances of each action for there ever to be a magic number that would promote clarity.²⁴²

Given that frequency is indirectly bound with the employer's ability to adequately respond, and such ability to respond will vary based on each unique circumstance, the framework could be both clearer and more fairly balanced by adopting a strike notice provision.²⁴³ If the employees give proper notice of their intent to completely stop working, they would avoid a situation where the

²³⁷ Oswalt, *supra* note 117, at 659 & n.394 (noting that the Board and the courts have been largely left to establish frequency on their own, with the sole guidance being that two strikes in a row generally do not fall outside NLRA protection).

²³⁸ OGC Model Brief, *supra* note 31, at 13 (arguing simply that multiple strikes, even over the same dispute, should be afforded protection if they fall under the framework).

²³⁹ *Embossing Printers, Inc.*, 268 N.L.R.B. 710, 711–12, 722–24 (1984) (declining to extend protection to three instances of walkouts); *Western Wirebound Box Co.*, 191 N.L.R.B. 748, 761–62 (1971) (declining to extend protection to two surprise short-term walkouts during a four week period); *Armour & Co.*, 25 N.L.R.B. 989, 993–96 (1940) (extending protection where employees ceased working for an hour after reaching a work quota). The OGC Model Brief emphasizes the “complete cessation of work” portion of the framework by arguing that only a complete cessation would achieve the proper balance between the risk to employees’ and employers’ retention of their own rights to continue business operations. OGC Model Brief, *supra* note 31, at 10–11.

²⁴⁰ OGC Model Brief, *supra* note 31, at 13.

²⁴¹ *See, e.g.*, *New Fairview Hall Convalescent Home*, 206 N.L.R.B. 688, 701–02 (1973) (declining to extend protection to three mid-day walkouts); *W. Wirebound Box Co.*, 191 N.L.R.B. at 761–62 (declining to extend protection to two surprise short-term walkouts during a four-week period). Partial strikes are unprotected for much the same reason. *See Kennedy, supra* note 63, at 125 (noting that during partial strikes, the operations of a company can become defunct when employees refuse to do specific tasks). Striking multiple times within the same day may ultimately have a similar effect to a partial strike, and therefore would be untenable. *See id.* (noting the differences between intermittent and partial strikes); OGC Model Brief, *supra* note 31, at 13 (noting that multiple strikes during the same day would not be afforded protection).

²⁴² *Robertson Indus.*, 216 N.L.R.B. at 362 (noting the absence of a “magic number” in discerning whether multiple work stoppages are unprotected).

²⁴³ *Id.* (noting that the frequency prong both assures employees take on risk and employers are given opportunity to respond); *see Int'l Union, Local 232 v. Wisc. Emp't Relations Bd.*, 336 U.S. 245, 249 (1949) (*Briggs & Stratton*) (noting that one of the cornerstones of the employees’ illegal strikes was reliance on lack of notice to inflict as much harm to the employer as possible).

strikes become “tantamount to work slowdowns.”²⁴⁴ Moreover, notice of a strike provides employers with the ability to exercise their right to continue their business operations.²⁴⁵ In the 2017 NLRB decision *EYM King of Missouri, LLC*, a one-day strike was protected even though the employer received late notice of the strike.²⁴⁶ Adopting a notice provision would avoid a situation where the Board could decide that the strikes were too frequent, and also balances employer and employee rights during a strike.²⁴⁷

Under current law, most employees do not have to provide notice prior to a walkout or other strike.²⁴⁸ There is currently an exception for the health care industry, where Congress passed legislation mandating ten days notice.²⁴⁹ It is also not uncommon for collective bargaining agreements (“CBA”) between an employer and a union to set forth their own agreed-upon notice requirements, and in any event, CBAs have their own separate Act-mandated notice requirements.²⁵⁰ In the absence of a CBA, as in the case of non-union employees, notice requirements are noticeably absent from current law.²⁵¹

²⁴⁴ See David Westfall & Gregor Thüsing, *Strikes and Lockouts in Germany and Under Federal Legislation in the United States: A Comparative Analysis*, 22 B.C. INT’L & COMP. L. REV. 29, 57 (1999) (noting the importance of notice to the employer towards ushering in collective bargaining, and giving the employer an opportunity to continue business as usual).

²⁴⁵ See *id.* (noting that, with notice, employers will have a better opportunity to prepare for a strike and take steps, such as hiring replacement workers, to avoid any harm).

²⁴⁶ *EYM King*, 365 N.L.R.B. No. 16, at 6 (noting that the employees notified the manager of the strike only after they had not shown up for work). The court did note, however, that the employer was able to continue operating with only minimal disturbance stemming from the strike. *Id.* at 12.

²⁴⁷ Westfall & Thüsing, *supra* note 244, at 57 (discussing the importance of notice procedures).

²⁴⁸ Schwartz, *supra* note 20 (noting that most union and non-union employees cannot be disciplined for lack of notice of a strike).

²⁴⁹ 29 U.S.C. 158 § 8(g) (2012). The notice needs to set forth the intended date and time of the action, and can be negotiated once issued. *Id.* The reader should note that the ten-day requirement ahead of a strike applies solely to unionized employees of healthcare institutions, rather than merely any employee at a healthcare institution. Scott Faust, *NLRB to Healthcare Employers Facing a Strike: You Can Ask, but Employees Don’t Have to Tell*, PROSKAUER LAB. REL. UPDATE (July 6, 2011), <https://www.laborrelationsupdate.com/nlr/employer-policies/nlr-to-healthcare-employers-facing-a-strike-you-can-ask-but-employees-dont-have-to-tell/> [<https://perma.cc/8RA3-XG74>]. Healthcare employers can ask employees questions such as the anticipated duration of the strike in order to line up replacements, but notably, employees can decline to answer. *Id.*

²⁵⁰ *Collective Bargaining (Section 8(d) & 8(b)(3))*, NAT’L LAB. REL. BOARD (Mar. 8, 2018), <https://www.nlr.gov/rights-we-protect/whats-law/unions/collective-bargaining-section-8d-8b3> [<https://perma.cc/P5KV-LXWW>]. CBA’s have their own Act-mandated notice requirements regarding parties’ intentions for the period when their agreement would otherwise be subject to termination, modification or expiration—the period of time that most frequently generates employee collective action in furtherance of the bargaining process. *Id.* If a party intends to modify or terminate a CBA, the party must provide notice sixty days prior to the CBA’s termination. *Id.* Once notice is served, employees must wait sixty days before participating in an economic strike. *Id.* This sixty-day period is referred to as a “cooling off” period, during which the goal is to avoid the strike altogether. *Id.*

²⁵¹ Kevin C. McCormick, *Who Says There’s No Free Lunch?*, 24 No. 10 Md. Emp. L. Letter 3 (West, July 2014) (describing an instance where restaurant employees went on strike at 7:30 A.M. after providing notice of their strike that same morning); John P. Hasman, *Fast-Food Restaurant*

The ten-day notice period required of health care institutions may be excessive in other areas of employment, but the concept itself is a sound one.²⁵² In retail or dining, a notice period of one to two days may be sufficient time to afford employers an ability to replace striking workers while still preserving the effectiveness of the strike.²⁵³ Accordingly, in order to promote clarity in the “frequency” section while balancing rights, the OGC could adopt a mandated notice period of a few days prior to a walkout.²⁵⁴ Further, adopting a strict notice provision would avoid the temptation to hold that a strike was too frequent because it was too effective.²⁵⁵ This notice period would help solve the issue of intermittent stoppages becoming “tantamount to slowdowns” by giving the employer an opportunity to take steps to continue business as usual, and therefore avoid the issue of putting a fixed number on how many strikes is too many.²⁵⁶

2. The Economic Pressure vs. Imposition of Conditions Prong Remains Ambiguous, Preventing Adoption of a Clear Workable Standard

The framework’s second prong states that multiple strikes should be protected if “they are not designed to impose permanent conditions of work, but rather . . . to exert economic pressure.”²⁵⁷ In other words, the purpose of the strike needs to be to force the employer to the bargaining table, rather than, for

Strikes Spread to St. Louis, 23 No. 5 Mo. Emp. L. Letter 3 (West, July 2013) (noting that all employees covered by the NLRA, with limited exceptions, have the right to participate in walkouts and other strikes).

²⁵² S. REP. NO. 93-766, 93RD CONG., 2d SESS. (1974) (noting the importance for healthcare institutions to be given proper notice in order to make adequate arrangements); Eli Naduris-Weissman, *The Worker Center Movement & Traditional Labor Law: A Contextual Analysis*, 30 BERKLEY J. EMP. & LAB. L. 232, 304 (2009) (noting the importance of Section 8(g) in the health care industry in ensuring healthcare services can continue with minimal interruption).

²⁵³ See *EYM King*, 365 N.L.R.B. No. 16, at 6 (explaining that employees notified the manager of the strike only after they had not shown up for work, but ultimately finding against the employer for committing an unfair labor practice by disciplining the employees). In *EYM King*, the Board noted that despite the lack of notice, the employer could still carry on operations with minimal disturbance. *Id.*

²⁵⁴ See Naduris-Weissman, *supra* note 252, at 304 (noting the importance of Section 8(g) in the healthcare industry in ensuring healthcare services can continue with minimal interruption). See generally OGC Model Brief, *supra* note 31 (lacking mention of a notice provision regarding intermittent strikes).

²⁵⁵ Kennedy, *supra* note 63 at 125 (noting that Section 7 affords broad protection to concerted activities, without a qualifier regarding the effectiveness of said concerted activities). Indeed, as labor law policy dictates, just because a strike is effective does not mean it should lose protection. Becker, *supra* note 22, at 387–88 (noting that effectiveness should not dictate legality).

²⁵⁶ S. REP. NO. 93-766 (noting the importance of avoiding work slowdowns by adopting a notice provision prior to work stoppages); OGC Model Brief, *supra* note 31, at 3 (arguing strikes should not be protected when they are tantamount to work slowdowns).

²⁵⁷ OGC Model Brief, *supra* note 31, at 3.

example, striking every Friday because the employees do not want to work on Fridays anymore.²⁵⁸

The OGC's brief somewhat addresses this potential problem.²⁵⁹ They argue that intermittent strikes are no more dangerous than full-on strikes with regards to dictating conditions.²⁶⁰ By the nature of their activity, however, intermittent strikers have a much greater opportunity to dictate hours and conditions than do full on strikers.²⁶¹ The no Friday-work example above illustrates that potential.²⁶² Here, however, the third prong of the OGC test comes into play: that the "employer is made aware of the employees' purpose in striking."²⁶³ Only by holding striking employees to a stringent standard at the third prong can issues in the second prong be avoided.²⁶⁴ The best way to ensure a fair solution of this issue would again be through the notice provision.²⁶⁵ Notice provisions, at a minimum, can shed light on ongoing disputes, and give a proactive employer a few days to better understand the underlying issue.²⁶⁶ Notice provisions for intermittent strikes would do much the same, and it

²⁵⁸ See *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 496–97 & n.28 (1960) (noting absence of evidence that employees were attempting to unilaterally establish work conditions).

²⁵⁹ See OGC Model Brief, *supra* note 31, at 11 (arguing that intermittent strikes and full-on strikes are likely equally able to dictate terms and conditions of work).

²⁶⁰ *Id.* (noting generally that, with regards to attempts to set their own hours, intermittent strikes and traditional strikes are virtually indistinguishable).

²⁶¹ See *id.* (noting that workers who strike on an intermittent basis and workers who engage in full-on strikes have negligibly different opportunities to dictate terms and conditions of employment); Becker, *supra* note 22, at 355 (noting that short-term strikes are likely a more representative manifestation of urgent labor disputes).

²⁶² See *supra* notes 257–258 and accompanying text (providing an example of employees attempting to dictate terms and conditions of employment). By holding "intermittent strikes" only on Fridays, the employees are effectively saying they will not work on Fridays, and doing so without formal bargaining negotiations. See *id.* Such a result would plainly be untenable. See OGC Model Brief, *supra* note 31, at 13 (arguing that employees should not be allowed to dictate their terms and conditions of work through strikes, but merely force employers to bargain on the subject).

²⁶³ OGC Model Brief, *supra* note 31, at 13. If employees must make employers aware of their purpose in striking under the terms of the framework, it would be much easier to avoid situations where the strikes are simply transparent attempts to impose conditions, rather than to usher in bargaining. See *id.* (noting that attempts to dictate terms and conditions of employment would not be legal under the framework).

²⁶⁴ See *id.* (proposing that employees must make employers aware of their purpose in striking). When employers are informed of the purpose in striking, it will be much easier to determine whether the employees are attempting to effectuate work conditions or simply exert pressure to usher in collective bargaining. See *id.* Without an explicit notice, it is up to the trier of fact to make this determination based on non-explicit evidence. See *id.*

²⁶⁵ See *The Right to Strike*, *supra* note 150 (describing notice provisions under Section 8(g) for hospitals, and describing that such provisions are necessary to effectuate proper preparations ahead of a strike action).

²⁶⁶ See S. REP. NO. 93-766 (describing the policy goals of Section 8(g), such as providing proper notice so the employer can make necessary strike preparations).

would be much easier for an employer to analyze whether the strike is designed to impose work conditions or are for exerting economic pressure.²⁶⁷

CONCLUSION

After decades of inconsistent decisions by the courts and the NLRB that often rely on dicta and uncertainty on both sides of the bargaining table, the time is ripe for reexamining intermittent strike jurisprudence. Clarity is essential to providing both employers and employees with legal certainty in negotiating and maintaining their relationships.

The OGC of the NLRB, under President Obama, ultimately concluded that more protection is necessary for intermittent strikes because of the current state of organized labor. In place of massive and powerful unions are smaller grassroots campaigns that require different negotiating tactics to effectively support non-unionized workers. The OGC's framework, now-rescinded after the administration change, would have armed the grassroots movements with an expansion of permitted strike activity, and permitted employers to understand and exercise their own rights when employees engage in these types of strikes.

The framework, however, still would have fallen short on the important question of frequency—how many strikes are too frequent. The model brief seemed to suggest that as long as employees remained within the framework, the strike would be legal, but this result may have tipped the scales too heavily in favor of employees—and could have been the reason it was recently rescinded. One way to fix this issue may be to add a strict notice provision to the formerly proposed framework, so that employers are able to effectively respond to one-day strikes and continue their operations. This would properly protect employers and further promote clarity on both sides. Moreover, a notice provision would promote coherent expression of the employees' reasons for striking, avoiding many of the issues employers face when employees strike. Ultimately the framework should have been welcomed by both employers and employees because of the clarity it would have offered, but it appears that, for now, intermittent strikes remain in a state of haziness and unease. Wouldn't it be nice if the law were clearer, then we wouldn't have to wait so long to determine whether a given strike deserved NLRA protection.

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²⁶⁷ *See id.*

