

[ORAL ARGUMENT NOT YET SCHEDULED]  
Nos. 15-1082, 15-1154

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In the United States Court of Appeals  
for the District of Columbia Circuit

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AMPERSAND PUBLISHING, LLC, D/B/A SANTA BARBARA NEWS-PRESS,  
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,  
*Respondent.*

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On Petition for Review of an Order  
of the National Labor Relations Board

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**PETITIONER'S REPLY BRIEF**

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**GLOSSARY OF ABBREVIATIONS & ACRONYMS**

<b>Term</b>	<b>Abbreviation</b>
Administrative Law Judge	ALJ
Brief for the National Labor Relations Board	R.B.
Federal Labor Relations Authority	FLRA
Graphics Communications Conference International Brotherhood of Teamsters	the Union
Joint Appendix	J.A.
National Labor Relations Act	NLRA or the Act
National Labor Relations Board	the Board
Ampersand Publishing, LLC, d/b/a Santa Barbara News-Press	the News-Press
Opening Brief of Petitioner Ampersand Publishing, LLC, d/b/a Santa Barbara News-Press	P.O.B.
Unfair Labor Practices	ULPs

## INTRODUCTION

The News-Press has long maintained that the formation of the Union for the purpose of seizing editorial control of the paper from its publisher and the actions of the Union in furtherance of that purpose, endorsed by the Board through its countless investigations and enforcement actions, violate the First Amendment rights of the News-Press. And for nearly as long, the Union and the Board have fought that conclusion. Indeed, it was not until December 2012, when this Court released its decision in *Ampersand Publishing, LLC v. NLRB (Ampersand I)*, 702 F.3d 51 (D.C. Cir. 2012), that the Union appeared to back down from its position that it had the legal authority to demand control over the way the News-Press reported the news.

Until that time, the Union advanced its primary goal by, inter alia, harassing the News-Press with countless unjustifiable ULP charges in hopes that the company would submit. While that scheme is arguably going on to this day, it is not arguable that it was being employed when the alleged ULP at the heart of this case was filed in 2009. The charge is thus undeniably related to the employees' primary organizing purpose and part of a continued pattern of harassment by former News-Press employees, the Union, and the Board to interfere with the News-Press' editorial control.

For that reason, the First Amendment shields the News-Press from liability in this case and the charge should have been dismissed.

Feigning surprise that the News-Press would raise the First Amendment defense, the Board contends that, pursuant to 29 U.S.C. § 160(e), this Court lacks jurisdiction to entertain the argument simply because the News-Press brings it for the first time on appeal. But the Board fails to examine whether the “extraordinary circumstances” exception to section 160 gives the Court proper cause to consider the News-Press’ claims, notwithstanding the fact that they had not been raised below. Here, the News-Press illustrates how the unique history of this case, along with the Board’s sua sponte dismissal of the argument out of hand, establish exactly the sort of “extraordinary circumstances” that authorize the News-Press to present its First Amendment defense to the Court now.

In any event, the Board wholly failed to meet its burden to establish that the News-Press violated section 8(a)(1) of the NLRA when it personally served subpoenas on two former employees and substitute-served 3 current and 5 former employees seeking copies of employee affidavits to the Board. Opting not to present any evidence or fact-based argument that a reasonable employee would feel intimidated by the News-Press’ conduct, the Board relied

entirely on a rule of per se liability. But no such rule has been adopted by this Court, and the authorities the Board cites to suggest otherwise hardly stand for the proposition that the context of the employer's request is immaterial. To the contrary, the cases the Board cites illustrate, almost without exception, that a "mere request" is hardly sufficient to find a violation of section 8(a)(1). Relying on nothing more than its unauthorized per se rule and the News-Press' concession that it caused the subpoenas to be sent, the Board has not shown that the News-Press violated the Act and the decision below should be vacated.

## **ARGUMENT**

### **I. The First Amendment Shields the News-Press from Liability for ULPs Filed by a Union Formed Primarily for the Improper Purpose of Seizing Editorial Control**

#### **A. The Court Has Jurisdiction to Hear Petitioner's First Amendment Argument Because Extraordinary Circumstances Exist**

29 U.S.C. § 160(e), section 10(e) of the NLRA, generally bars the introduction of arguments or defenses on appeal unless they were previously raised before the Board. 29 U.S.C. § 160(e); *see also* *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). Where a party could not have brought an argument in its post-hearing briefing or exceptions, it must do so in a motion for reconsideration. *See Int'l Ladies' Garment Workers' Union v. Quality*

*Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975); *S. Power Co. v. NLRB*, 664 F.3d 946, 949 (D.C. Cir. 2012). But, where “extraordinary circumstances” exist, the failure or neglect to urge [an] objection *shall* be excused.” 29 U.S.C. § 160(e) (emphasis added). Because such circumstances exist here, and the Board makes no argument they do not, the News-Press’ failure to assert its First Amendment freedom of the press defense until appeal must be excused.

To appreciate the “extraordinary circumstances” surrounding this case, an understanding of the procedural history of this case is necessary. ALJ Parke’s decision came down more than five years ago, on February 5, 2010. J.A. II 307-16. The parties filed exceptions and related briefing in the months that followed, and the Board adopted the Parke decision without significant revision on September 27, 2012. J.A. II 383. The News-Press filed a motion for reconsideration on the grounds that a constitutional challenge to interim appointments to the Board was ongoing. J.A. I 004; J.A. II 393 n.2. The Board denied that motion on November 30, 2012. J.A. II 393.

Subsequently, on December 18, 2012, this Court adopted the News-Press’s argument in *Ampersand I*, 702 F.3d at 58-59, that the Union was motivated primarily by a desire to gain editorial control of the newspaper in violation of the News-Press’s First Amendment

rights. The decision, addressing vital First Amendment concerns and calling into question the very authority of the Union to file ULPs on behalf of News-Press employees, *id.* at 53, 58-59, came too late to be addressed in the News-Press' Motion for Reconsideration which was due on or before October 25, 2012, *see* 29 C.F.R. § 102.48 (d)(2). Had that been the end of it, there would be no question the News-Press could raise the issue on appeal.

But, because the Supreme Court subsequently decided in *NLRB v. Noel Canning*, -- U.S. --, 134 S. Ct. 2550, 2557 (2014), that certain recess appointments to the Board were unlawful, the Board's September 2012 decision was set aside—only to be summarily reaffirmed by an appropriately constituted Board on November 3, 2014. J.A. II 394-95. In that summary decision, the Board included a footnote, tersely stating that this Court's 2012 decision in *Ampersand I* “*does not affect [its] decision in this proceeding.*” J.A. II 394 n.1 (emphasis added).

In *NLRB v. FLRA*, 2 F.3d 1190, 1195 (D.C. Cir. 1993), this Court was faced with the same “thorny” jurisdictional issue raised here. There, the Board challenged, *inter alia*, Federal Labor Relations Authority (“FLRA”) findings that a Union proposal qualified as an appropriate arrangement for adversely affected employees and that the proposal “excessively interfere[d] with

management rights”—arguments the Board had not previously raised. *Id.* The “arrangement” issue had, however, been raised by the Union in late-stage briefing to which the Board had no opportunity to respond. *Id.* And the agency ultimately seized on that opportunity to decide the matter on those grounds. *Id.* The Board did not bring a motion for reconsideration; rather, it proceeded directly to the D.C. Circuit for review. *Id.* at 1196.

In holding that it was not barred from considering the matter pursuant to 5 U.S.C. § 7123(c),<sup>1</sup> this Court held that the FLRA’s recent rejection of the contested argument in other proceedings, coupled with the “almost sua sponte nature” of the agency’s consideration of the issue, made pursuing a motion for reconsideration “patently futile”—an “extraordinary circumstance” excusing the NLRB’s failure to act. *NLRB v. FLRA*, 2 F.3d at 1196-97 (citing *U.S. Dep’t of the Interior Minerals Mgmt. Serv. v. FLRA*, 969 F.2d 1158, 1161 (D.C. Cir. 1992)). “Given the similarity of the FLRA’s and NLRB’s motion for reconsideration provisions, compare 5 C.F.R. § 2429.17 (1993) (FLRA), with 29 C.F.R. § 102.48(d) (1992) (NLRB), [this] holding[] should apply with equal force to” NLRB proceedings pursuant to section 10(e). *Id.* at 1196.

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<sup>1</sup> The relevant portion of 5 U.S.C. § 7123(c) creates the same jurisdictional bar to raising new objections on review that section 160(e) [section 10(e)] does.

Here too, a motion for reconsideration would have been “patently futile.” The News-Press seeks to raise a First Amendment freedom of the press argument that it did not pursue during the hearing or in its exceptions to ALJ Parke’s decision. *See* P.O.B. 21-27. That argument, of course, was not fully ripe until this Court issued the December 2012 *Ampersand I* decision upon which the argument primarily relies—nearly two months after the deadline for the News-Press’ initial motion for reconsideration. *See* 9 C.F.R. § 102.48(d)(2); J.A. I 004. The Board nonetheless raised the issue *sua sponte* in its post-*Noel Canning* reaffirmation of the Board’s 2012 decision, explicitly rejecting any argument that the *Ampersand I* analysis “affect[s] [its] decision in this proceeding.” J.A. II 394 n.1.

What’s more, the Board had already rejected the News-Press’ freedom of the press defenses no fewer than *six other times* in the course of the larger dispute between the News-Press and the Union:

1. The Board mounted a firm opposition to the News-Press’ First Amendment defense before the Central District of California in *McDermott v. Ampersand Publ’g, LLC* (*McDermott I*), No. 08-1551, 2008 WL 8628728 at \*4 (C.D. Cal. May 22, 2008), a petition to enforce ALJ Kocol’s decision finding the News-Press violated the NLRA when it discharged employees, cancelled a reporter’s column,

and engaged in employee interrogation, among other things.<sup>2</sup>

2. Unsuccessful in the district court, the Board appealed to the Ninth Circuit, again resisting the News-Press' freedom of the press claims.<sup>3</sup>
3. After losing before the Ninth Circuit on First Amendment grounds, the Board reaffirmed the Kocol decision in 2011, explicitly rejecting the force of the binding precedent set forth in *McDermott II. Ampersand Publ'g, LLC*, 357 N.L.R.B. No. 51, 6-9 (Aug. 11, 2011).<sup>4</sup>
4. In *Ampersand Publishing, LLC*, 358 N.L.R.B. No. 141, 18 (Sept. 27, 2012), the matter on appeal in D.C. Circuit Case No. 15-1074, the Board adopted ALJ Anderson's brusque rejection of the *McDermott II / Ampersand I*

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<sup>2</sup> See Petitioner's Reply to Respondent's Opposition to Motion for Temporary Injunction, *McDermott v. Ampersand Publ'g, LLC*, No. 08-1551, 2008 WL 8628728 (C.D. Cal. May 22, 2008), 2008 WL 2132561.

<sup>3</sup> *McDermott v. Ampersand, Publ'g (Ampersand II)*, 593 F.3d 950 (9th Cir. 2010); Reply Brief for Petitioner-Appellant National Labor Relations Board 1, *McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950 (9th Cir. 2010), 2008 WL 6690747.

<sup>4</sup> Interestingly, the Board's analysis in 357 N.L.R.B. No. 51 is strikingly similar to the Board's response to the News-Press' substantive argument here—claiming first, that it is well-settled that the Act applies to news organizations and that the News-Press is improperly seeking some sort of special blanket immunity under the First Amendment (an argument the News-Press has never made), and second, that nothing about the ULP charges at issue are likely to limit a publisher's right to present the news as it sees fit. *Ampersand Publ'g, LLC*, 357 N.L.R.B. No. 51, 6-8; R.B. 33-34.

analysis as irrelevant to the dispute for anything more than academic purposes.

5. The Board then refused to follow *Ampersand I* in its Order Denying Motion for Reconsideration in that case—over the objection of the News-Press that the ULP at issue was simply part of an ongoing effort by the Union to wrest editorial control from the paper’s publisher. *Ampersand Publ’g, LLC*, 359 N.L.R.B. No. 127, 2 (May 31, 2013). In fact, the Board boldly relied on the very Board decision vacated by *Ampersand I* to support its finding that the News-Press had engaged in bad faith bargaining in its dealings with the Union. *Id.*
6. On April 17, 2014, just months before the Board’s post-*Noel Canning* affirmation of its decision in this case, the Board summarily denied a motion to dismiss grounded in *Ampersand I*’s First Amendment analysis and brought by the News-Press in in a third case against the paper.<sup>5</sup>

In short, the Board has never taken seriously the News-Press’ pleas that its First Amendment rights be given proper consideration. Indeed, every time the News-Press has raised the issue, the Board has either fought it or summarily rejected it. There would have been no reason to believe a motion for reconsideration—on a decision that was already twice affirmed by the Board—would suddenly inspire the Board to change its position.

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<sup>5</sup> NLRB Order Denying Motion to Dismiss, *Ampersand Publ’g, LLC*, Case Nos. 31-CA-029759, et al. (N.L.R.B. Apr. 17, 2014), available at <http://apps.nlr.gov/link/document.aspx/09031d45816adc71>; Motion to Dismiss 1, *Ampersand Publ’g, LLC*, Case Nos. 31-CA-029759, et al. (N.L.R.B. Mar. 3, 2014), available at <http://apps.nlr.gov/link/document.aspx/09031d458160eaed>.

Indeed, the remarkable similarity, described in footnote 4 above, between the Board's reasoning in *Ampersand Publ'g, LLC*, 357 N.L.R.B. No. 51, decided in 2011, and the arguments it raises here illustrates that the Board has not changed its adverse view of the News-Press' consistently held position that the prosecution of ULPs within the rather unique context of this case—one in which a Union was formed primarily to further the improper purpose of stripping a newspaper publisher of its editorial control—violates the News-Press' First Amendment rights. And it makes evident that the Board has held steadfast to its position, without significant change, since at least 2011, even in the face of two circuit court decisions adverse to its position. Under these circumstances, it is clear that the Board would have squarely rejected any motion for reconsideration predicated on the News-Press' First Amendment freedom of the press defense. And perhaps it is even more clear in this case than it was in *FLRA* because the Board has repeatedly rejected the challenged argument in the context of the ongoing dispute between these very parties, as opposed to different proceedings involving different litigants. *Compare supra*, Part I.A., 7-9, *with FLRA*, 2 F 3.2 at 1196-97.

Concededly, “the requirement that a litigant present such a petition is ordinarily not excused simply ‘because the [[Board]] was

unlikely to have granted it.’ ” *NLRB v. FLRA*, 2 F.3d at 1196 (quoting *Van Dorn Plastic Mach. Co. v. NLRB*, 881 F.2d 302, 306 (6th Cir. 1989)). But, when paired with the Board’s sua sponte refusal to apply *Ampersand I* to the present matter, “the patent futility of a rehearing petition constitutes an extraordinary circumstance,” excusing the News-Press of its failure to object. *Id.*

Moreover, application of section 10(e) to bar the News-Press’ First Amendment defense would not serve the recognized policy on which the waiver rule is founded. The rule “affords the Board the opportunity to bring its labor relations expertise to bear on the problem so that we may have the benefit of its opinion when we review its determinations.” *Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351, 358 (6th Cir. 1983) (quoting *NLRB v. Allied Prods. Corp.*, 548 F.2d 644, 653 (6th Cir.1977), and citing *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 256 (1943)). That policy would not be furthered in the present case for two reasons.

First, while the Court benefits from the Board’s expertise on matters of *labor* law, no similar benefit is gained by forcing the petitioner to seek rehearing of the Board’s conclusions regarding matters of *constitutional* law before an appeal may be taken. For it is the province of the courts, not the Board, to preserve and defend the rights protected by our constitution. Indeed, the Court has a

statutory obligation to decide constitutional questions and to set aside any agency decision adverse to constitutional right, 5 U.S.C. § 706, a task it undertakes de novo, *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1044 (D.C. Cir. 2009).

Second, *three* federal courts have adopted the News-Press' argument that the employees' motive for unionization was to seize editorial control of the newspaper in violation of the publisher's rights under the First Amendment. *Ampersand I*, 702 F.3d at 59, *McDermott II*, 593 F.3d at 966, *McDermott I*, 2008 WL 8628728 at \*11-12, 14. And yet, the Board has repeatedly rejected the application of those decisions against the employees and the Union by manufacturing reasons to distinguish the current ULPs from the courts' rationale. *See supra*, Part I.A., 7-9. It has had ample "opportunity" to consider the merits of the argument that the First Amendment bars the prosecution of the ULPs against the News-Press unless the stain of the Union's illicit formation is treated. And it has dependably rejected the claim. No purpose is served by requiring "the petitioner to ask the Board to abandon a position which it has steadfastly maintained despite a decidedly cool reception by the courts of appeal; such an objection would amount, in this instance, to an exercise in futility, and it would not serve the

salutary purpose of [section] 160(e).” *Kitchen Fresh*, 716 F.2d at 358.

In short, the extraordinary circumstances present here give the Court proper justification to consider the News-Press’ vital First Amendment freedom of the press defense, notwithstanding the paper’s failure to press the issue before the Board in this case.

**B. The Board’s Decision Is Part of an Ongoing Unconstitutional Effort to Seize Editorial Control from the News-Press and Must Be Overturned Because It Arms the Union with Government Authority to Accomplish Its Improper Purpose**

The Board twists the News-Press’ First Amendment defense into the simple-minded and oft-rejected contention that the paper is somehow immune from the Act simply by virtue of its status as a newspaper publisher. R.B. 33-34 (citing P.O.B. 20-27). The News-Press makes no such claim.<sup>6</sup> It is instead making a more nuanced argument based on the unique factual history of this long-simmering labor dispute. P.O.B. 21-27.

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<sup>6</sup> To the contrary, the News-Press’s Opening Brief directly quotes the very language the Board employs in its attempt to invalidate what it wrongly claims is the News-Press’ argument. See P.O.B. 23 (quoting *Ampersand I*, 702 F.3d at 56 (“ ‘Newspapers, like other employers, are subject to the [NLRA].’ ”)); R.B. 34 (citing *McDermott v. Ampersand Publ’g, LLC*, 593 F.2d 950, 959 (9th Cir. 2010); quoting *Ampersand I*, 702 F.3d at 56 (“ ‘Newspapers, like other employers are subject to the [Act].’ ”)).

To reiterate, the News-Press contends that because its employees organized primarily for the illicit purpose of seizing the News-Press' editorial control, *Ampersand I*, 702 F.3d at 58-59, *McDermott II*, 593 F.3d at 966, *McDermott I*, 2008 WL 8628728 at \*11-12, 14, the regular filing of ULPs by the Union and the Board's unrelenting prosecution of those ULPs in furtherance of that improper purpose pose a significant threat to, and in fact violates, the First Amendment rights of the newspaper. The particular ULP charge at issue, though seemingly unrelated to content control on its face, is merely part of that ongoing, unconstitutional campaign.

Indeed, with 26 dubious ULP charges against the News-Press pending before various tribunals and at least 19 others having been dismissed or otherwise resolved, the News-Press has been forced to defend itself on several fronts for nearly a decade, incurring *millions of dollars* in legal costs—all because it dared to resist the unlawful demands that Ms. McCaw surrender control of the paper's content.

What's more, because the employees had no "statutorily protected right to engage in collective action" aimed at abrogating the News-Press' rights of free expression in the first place, *Ampersand I*, 702 F.3d at 59, the very authority of the Union to represent the employees and to file ULPs on their behalf is itself called into question. As such, the distinct ULP at issue cannot be

separated from the broader dispute because it stems directly from the improper formation of the Union.

Instead of addressing this argument, the Board simply claims that *Ampersand I* is distinguishable on the facts because the ULPs at issue in each case are so dissimilar. R.B. 33. For that reason, the Board seems to suggest, *Ampersand I* should not be read to shield the News-Press from liability here. R.B. 33-34.

As an initial matter, the distinction the Board draws is untenable. While *Ampersand I* involved a number of other charges, *both* cases involve similar claims that the News-Press violated section 8(a)(1)—i.e., coercing or intimidating employees in the exercise of their right to organize—by engaging in employee interrogation about union activity (in *Ampersand I*) and by requesting employee affidavits related to pending ULPs (in the present case). *Ampersand I*, 702 F.3d at 55. Further, both cases were pursued *prior* to this Court’s decision in *Ampersand I*, a “tainted” period during which both the Union and the Board had maintained that News-Press employees had a protected right to organize for the purpose of seizing editorial control and during which the Union vigorously pursued that end. *See id.* at 59. Contrary to the Board’s characterizations, the cases are far more alike than they are different. And because the outcome of

*Ampersand I* did not turn on the details of each alleged violation, *id.*, there is no reason to dismiss that binding authority because of superficial differences regarding the underlying ULP charges.<sup>7</sup>

More importantly though, the Board misses the forest through the trees, essentially arguing that the Court should ignore the larger context of this case and focus myopically on whether enforcement of the ULP charge at issue directly prevents the News-Press from “publish[ing] the news as it desires it to be published.” R.B. 33-34 (quoting *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1557 (D.C. Cir. 1984)). But, as *Ampersand I* makes clear, there is simply *no way* to separate the First Amendment issues in this case from seemingly unrelated labor quibbles. 702 F.3d at 58-59. First Amendment considerations have permeated nearly every aspect of this dispute dating back to the Union’s earliest calls for editorial

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<sup>7</sup> The Board’s follow-up claim that “[w]hether the Court previously found in another case that the employees organized, in part, to obtain editorial control over the [News-Press] has no relevance to whether the [News-Press] subpoena unlawfully coerced employees,” R.B. 33, misses the point entirely. Certainly that fact is not relevant to determining whether a reasonable employee would feel intimidated for purposes of finding a section 8(a)(1) violation. It *is* relevant, however, to whether the Union, armed with the full authority of the Board, is engaging in an ongoing and unlawful campaign to abrogate the free expression rights of the News-Press. It is also relevant to whether the Union is a proper representative of the News-Press employees, such that it may file ULPs on its behalf.

control. For that reason, the *Ampersand I* Court “vacate[d] the Board’s order and den[ied] the cross-application for enforcement *without addressing the parties’ arguments regarding the details of the individual violations the Board found . . .*” *Id.* (emphasis added). The Court should take the same approach in this case.

Ultimately, the Court should tread lightly here in light of both the long history of the Union and the Board’s regular enforcement activity against the News-Press in furtherance of the Union’s improper purpose. It should not place a stamp of approval on the continued harassment of the News-Press by the Union and the Board in retaliation for its owner’s refusal to surrender her constitutional right to direct the content of her publication.

## **II. The News-Press Did Not Violate the NLRA When It Served the 2009 Subpoenas Seeking Copies of Employee Affidavits to the Board**

### **A. A Fact-driven, Case-by-case Analysis, Not a Per Se Rule, Dictates Whether a Request for Employee Affidavits Violates the NLRA**

Recall, “[t]o establish a violation of section 8(a)(1), the Board’s General Counsel must establish that, under all of the circumstances, the employer’s conduct may reasonably tend to coerce or intimidate employees.” *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir. 1997). In the context of a claim that an employer, through premature requests for employee affidavits, has unlawfully coerced employees in the exercise of their right to

participate in enforcement proceedings, the Board must prove that the employer's request may be said to coerce or intimidate the "reasonable" employee. P.O.B. 28-29. The Board's insistence on a rule of per se liability for such conduct, however, relieves the General Counsel of its burden of proof and threatens the rights of employers to defend against pending ULPs. The Board provides no compelling authority to upend the system in this way.

The Board's brief mounts a beautiful defense of the agency's long-standing policy against pre-hearing disclosure of employee affidavits. R.B. 16-21. Trotting out case after case upholding that policy, the Board establishes that circuit courts generally "agree[] with the Board that investigative affidavits are generically exempt from pre-hearing discovery" due to the risk of coercion posed by premature disclosure of such documents. R.B. 17-19 (citing *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 239-43 (1978) (holding employee statements are exempt from pre-hearing disclosure pursuant to FOIA); *Polynesian Cultural Ctr. v. NLRB*, 600 F.2d 1327, 1329 (9th Cir. 1979) (same); *Red Food Stores, Inc. v. NLRB*, 604 F.2d 324, 325-26 (5th Cir. 1979) (overturning district court decision compelling pre-hearing disclosure)).

But contrary to the Board's claim that the News-Press takes issue with its " 'per se rule' prohibiting any pre-hearing request for

affidavits,” P.O.B. 24, the News-Press does not object to the policy. Rather, it objects to the Board’s draconian attempt to turn every violation of its policy, no matter the circumstances, into a violation of federal labor law. For none of the cases the Board relies on in justifying its policy, including *Robbins Tire*, stands for such a bold proposition.

The Board’s persistent reliance on *Robbins Tire* is, at best, misplaced. The Board cites *Robbins Tire* to support its claim that an employer’s pre-hearing request for disclosure of employee affidavits creates a risk of witness intimidation and necessarily interferes with the Board’s efforts to enforce employees’ statutory rights *in violation of section 8(a)(1)*. R.B. 18. But *Robbins Tire* does goes nowhere near that far.

In *Robbins Tire*, an employer made a request to the Board for employee Board statements regarding a pending ULP complaint pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. 437 U.S. at 216-17, 236. The Court thoroughly examined the NLRA and the FOIA, as well as the FOIA exemption for investigatory records, and held that “witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure at least until completion of the Board’s hearing.” *Id.* at 236-40.

While the *Robbins Tire* Court recognized the inherent risk that current employees might “be inhibited by fear of the employer’s . . . capacity for reprisal and harassment” in response to the pre-hearing release of their statements, *id.* at 240 (quoting *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80, 83 (3d Cir. 1976)), the Court had no occasion to rule on whether merely requesting those statements actually violated section 8(a)(1). As such, the Board’s “Supreme-Court-approved” policy of protecting employee affidavits from employers prior to trial as justified in *Robbins Tire* simply does not equate to a court-approved rule that any violation of that policy necessarily constitutes a violation of the Act. The Board’s attempt to make it so is unavailing.

The Board’s claim that this Circuit has adopted its per se rule for liability doesn’t fare any better. R.B. 20-21, 24 (discussing *Retail Clerks Int’l Ass’n v. NLRB*, 373 F.2d 655 (D.C. Cir. 1967)). For support, the Board claims that in *Retail Clerks International Association v. NLRB*, 373 F.2d 655, 658 (D.C. Cir. 1967), this Court held that an employer’s “mere request” for employee affidavits violates the Act. R.B. 20 (quoting *Retail Clerks*, 373 F.2d at 658). Not quite.

*Retail Clerks* involved an employer’s coercive interrogation of employee witnesses during which employees were presented with

questionnaires requesting information regarding section 7 (29 U.S.C. § 157) activity, including any statements made to the Board. 373 F.2d at 657-58. Some employees were threatened with discharge for refusal to cooperate. *Id.* at 658. And company attorneys directly interviewed employees, requesting copies of any statements made to Board investigators. *Id.* As the Court noted, the trial record clearly “supported a finding of coercion” in violation of the Act. *Id.*

Contrary to the Board’s artful quoting of the *Retail Clerks* decision, this Court did not hold that the “mere request” for employee affidavits was a violation of section 8(a)(1). The *Board* did.<sup>8</sup>

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<sup>8</sup> Compare R.B. 20 (quoting *Retail Clerks*, 373 F.2d at 658) (“[T]his Court has held that employer’s ‘mere request’ that employees produce affidavits before a hearing is “a violation of the Act.”), with *Retail Clerks*, 373 F.2d at 658 (“Though the record would have supported a finding of coercion that would distinguish such cases as *W.T. Grant Co. v. NLRB*, 337 F.2d 447, 449 (7th Cir. 1964), the **Board held** that the **mere request** was a violation of the Act. . . . **We hold** that by interrogating its employees as the contents of statements given to Board agents, **and** by seeking copies of these statements,” the employer violated section 8(a)(1).”) (emphases added).

Compare also R.B. 24 (quoting *Retail Clerks*, 373 F.2d at 658) (“explaining that while “the record would have supported a finding of coercion” based on the specific circumstances surrounding the employer’s request, a finding that “mere request” for affidavits violates the Act is equally “valid”), with *Retail Clerks*, 373 F.2d at 658 (finding not that the Board’s holding that a “mere request” violates the Act is “valid,” but that the requirement that the employer cease and desist from requesting employee affidavits was “valid” under the circumstances).

As a closer reading of the decision reveals, the Court merely affirmed that a violation occurred in light of the facts presented, i.e., the employers' direct interrogation of employees, *coupled with* its request for copies of employee statements. *Retail Clerks*, 373 F.2d at 657-58. In other words, this Court found that, under the circumstances, the employer's demand for employee statements was unlawful.

Finally, the Board cites a number of Board decisions enforced by the circuit courts on review. R.B. 19 (citing *Inter-Disciplinary Adv., Inc.*, 349 N.L.R.B. 480, 605 (Mar. 15, 2007), *enforced*, 312 F. App'x 732 (6th Cir. 2008); *Braswell Motor Freight Lines*, 156 N.L.R.B. 671, 675 (1966), *enforced*, 386 F.2d 190 (5th Cir. 1967); *Montgomery Ward & Co.*, 154 N.L.R.B. 1197 (1965), *enforced*, 373 F.2d 655 (D.C. Cir. 1967); *Winn-Dixie Stores, Inc.*, 143 N.L.R.B. 848, 849-50 (1963), *enforced*, 341 F.2d 750 (6th Cir. 1965)). But far from establishing that an employer's "mere request" for employee witness affidavits is a violation of section 8(a)(1), *per se*, each case confirms that, in determining whether an employer's conduct violates the NLRA, the facts do matter. Indeed, the cases the Board cites for support include discussions of facts tending to show that the employer's specific conduct was reasonably coercive. These were cases where employers or their attorneys *directly* interrogated

current employees *and* requested copies of employee statements. *Inter-Disciplinary Adv.*, 349 N.L.R.B. at 502-03; *Braswell*, 156 N.L.R.B. at 678; *Winn-Dixie*, 143 N.L.R.B. at 868; *Montgomery Ward*, 154 N.L.R.B. at 1195. Like *Retail Clerks*, two the Board's cases even established a record of actual coercion or threats of reprisal. *Retail Clerks*, 373 F.2d at 656, 658; *Inter-Disciplinary Adv.*, 349 N.L.R.B. at 504-05; *Montgomery Ward*, 154 N.L.R.B. at 85. Because the courts reliably consider the circumstances surrounding each section 8(a)(1) claim regarding requests for employee affidavits, weighing each act's propensity for coercion, rather than simply finding that the mere act of making the request violated the Act, it is clear that no per se rule for liability is intended.

And surely this must be. As circuit courts have repeatedly recognized:

Any interrogation by the employer relating to union matters presents an ever present danger of coercing employees in violation of their 7 rights. *On the other hand, fairness to the employer dictates that he be given a reasonable opportunity to prepare his defense.* Accommodation of these interests requires that the scope and manner of permissible questioning be strictly confined to the necessities of trial preparation.

*Retail Clerks*, 373 F.2d at 658 (quoting *Tex. Indus., Inc. v. NLRB*, 336 F.2d 128, 133 (5th Cir. 1964), and citing *Joy Silk Mills v. NLRB*,

185 F.2d 732, 742-43 (D.C. Cir. 1950)) (emphasis added). The Board's proposed per se rule for section 8 liability interferes with the careful balance the courts have struck between the statutory rights of employees and the due process rights of employers. See, e.g., *Retail Clerks*, 373 F.2d at 658; *Tex. Indus.*, 336 F.2d at 133-34; *Joy Silk Mills*, 185 F.2d at 742-43. It flies in the face of case law recognizing that there may be some circumstances in which "an employer would be justified in obtaining copies of employees' statements." *Tex. Indus.*, 336 F.2d at 134. And it strips the trial judge of the necessary discretion to authorize the release of such documents in those cases in which the employer's right to mount its defense outweighs the actual risk of employee coercion.

This Court should not now adopt a per se rule that would find the News-Press in violation of the NLRA for the mere issuance of subpoenas for employee affidavits. As described in Part II.B, *infra*, the record here is void of *any* factual showing that a reasonable employee would be coerced by the News-Press' particular conduct, an error the Board seeks relief from through the application of its per se rule simply because the News-Press concedes that it sent the subpoenas. To adopt the Board's position would be to ignore the weight of authority demanding at least some factual showing that the reasonable employee would be coerced or intimidated under the

circumstances. The Court should decline the Board's invitation to do so.

**B. The Record Does Not Support the Board's Finding that the News-Press Violated the NLRA**

Again, in order to sustain a finding that the News-Press violated section 8(a)(1), the record must establish that the "reasonable employee" under the circumstances would have felt coerced or intimidated by the employer's request. *Joy Silk Mills*, 185 F.2d at 743-44; *Miller v. Elec. Pump & Plumbing*, 334 N.L.R.B. 824, 824 (2001). For the reasons above, that standard must be reviewed on a case-by-case basis, reflecting on whether the employer's particular conduct was coercive. *See supra*, Part II.A. Here, the record is void of any evidence that a reasonable employee would have been coerced or intimidated by the News-Press' conduct. As such, the Board's finding that the News-Press violated section 8(a)(1) must be vacated.

Here, counsel for the News-Press, in preparing a defense to pending ULPs served several subpoenas to appear and to produce documents. J.A. I 008-137. Among the many types of documents requested was a request for employee statements to the Board made regarding the pending charges. J.A. I 017, 030-31, 045, 059, 069, 083-84, -97-98, 111-12, 125-26, 135. The subpoena did not

demand disclosure of the documents to the News-Press until the hearing, and the release of documents was expressly subject to the orders of the trial judge, ALJ Anderson. J.A. I 138-84. He ultimately ruled that the affidavits could be requested and released only after the employee testified, quashing the pre-hearing request without sanction. J.A. I 168-70, 174.<sup>9</sup>

The subpoenas were directed at 10 News-Press employees: seven former (i.e., Melinda Burns, Blake Dorfman, Dawn Hobbs, Richard Mineards, Dennis Moran, Tom Schultz, Lynn Ward) and just three current (i.e., Karna Hughes, Marilyn McMahon, Nora Wallace). J.A. I 008-17, 022-31, 036-045, 050-59, 064-69, 074-84, 089-98, 103-112, 117-26, 131-35. Two of the subpoenas were personally served on former employees, Dorfman and Mineards. J.A. I 064-69, 131-35; II 335. The remaining eight were served on Union counsel, Ira Gottlieb, who accepted service on behalf of the other eight employees. J.A. 008-17, 022-31, 036-045, 050-59, 074-

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<sup>9</sup> In so doing, Anderson recognized that the request (though recidivist) was not the sort of “villain[ous]” behavior that demands sanctions of the employer or even of counsel. J.A. I 167-68. ALJ Anderson’s musings raise the question: If the News-Press’ conduct was not the sort that is even “sanctionable” in a Board proceeding, how could it possibly rise to the level of a violation of federal labor law?

84, 089-98, 103-112,117-26; II 335. The Board did not present any evidence, however, that any of the eight current and former employees who were substitute served *ever even received a copy of the subpoena* before they were quashed by ALJ Anderson. *More importantly, there was no evidence that any current employee ever received a copy.*

There was no evidence of a direct “ask” for employee statements made by any member of the News-Press management. There was no direct employee interrogation that culminated in a demand that the employee produce her Board statements. There was no evidence of a promise of reward or threat of reprisal. Nor was there testimony that any employee felt coerced or intimidated in any way. Indeed, both the General Counsel and ALJ Parke blocked any attempt to elicit testimony from former employee Mineards, the only witness called, regarding whether he felt coerced or intimidated when he received the subpoena. J.A. I 239-41.

Based on these facts, all supported by the record (or absence thereof), it cannot be said that a “reasonable employee” would likely be coerced or intimidated by the News-Press’ conduct here—i.e., the mere issuance of subpoenas primarily to *former* employees and *served on Union counsel* without face-to-face interrogation of employees or threat of reprisal. Indeed, this case is unlike the great

majority of cases in which a reviewing court has found sufficient evidence to sustain the Board's finding of a section 8(a)(1) violation. *See, e.g., Retail Clerks*, 373 F.2d at 658 (employer directly interrogated current employees, threatened discharge, *and* made demand for Board statements); *Inter-Disciplinary Adv.*, 312 Fed. App'x 737, 742-43 (evidence of direct employee interrogation, actual coercion, and employee fear of angering employer's attorney); *NLRB v. Ambox, Inc.*, 357 F.2d 138, 141 (5th Cir. 1966) (employer's solicitation of current employee statements included promise of reward for cooperation); *Winn-Dixie*, 143 N.L.R.B. at 862-63, *enforced* 341 F.2d 750 (employer directly interrogated current employees *and* made demand for Board statements); *but see NLRB v. Maxwell*, 637 F.2d 698, 702-03 (9th Cir. 1981) (evidence of indirect request made without assurance that there would be no reprisal and without evidence that the statement was required for trial preparation).

What's more, the very fact that the Board failed to prove that any current employee actually received the offending subpoena should be fatal to the Board's case. For it would be absurd to claim that a request for Board statements never actually communicated to the employee is likely to coerce or intimidate that employee. And as regards the two former employees who were personally served,

their very status as *former* employees challenges the presumption of inherent coercion discussed in *Robbins Tire* and its progeny. To be sure, “the danger of witness intimidation is particularly acute with respect to *current* employees . . . over whom the employer, by virtue of the employment relationship, may exercise intense leverage.”

*Robbins Tire*, 437 U.S. at 239 (emphasis added). But that risk simply does not attach to former employees no longer subject to the control of an employer who can retaliate against an employee unwilling to comply. The Board has presented nothing to establish the coercive effect of the News-Press subpoenas on former employees beyond blanket statements that pre-hearing affidavit requests pose an inherent threat of intimidating (current) employees. R.B. 21-25. These limited conclusions fall well short of the requisite showing that, in light of the facts, the News-Press’ conduct was objectively coercive.

In sum, the Board carries the burden to establish that the “reasonable employee” would be coerced or intimidated. *See Grand Canyon Mining*, 116 F.3d at 1044; *DHL Express, Inc. v. NLRB*, 813 F.3d 365, 379 (D.C. Cir. 2016). Instead of presenting any evidence or argument that the News-Press’ particular conduct met that standard, the General Counsel relied entirely on the Board’s own per se rule that all “pre-hearing requests for affidavits have an

inherent tendency to chill participation in Board proceedings,” and so necessarily constitute a violation of section 8(a)(1). R.B. 26.

Because this Court has not gone so far as to hold that every pre-hearing request for employee statements constitutes a violation of the NLRA without regard to the particular facts of the case, the General Counsel did not meet its burden here. The Board’s decision finding that the News-Press violated section 8(a)(1) on that ground must be vacated.<sup>10</sup>

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<sup>10</sup> As discussed in the News-Press’ Opening Brief, to the extent ALJ Parke and/or the Board alternatively relied on the News-Press’ 2007 subpoena transgression or ALJ Kocol’s vacated decision as passing on this question, they did so in error. P.O.B. 33-36 (citing J.A. II 391).

**CONCLUSION**

For these reasons and those detailed in Petitioner's Opening Brief, the News-Press respectfully requests that this Court grant its Petition for Review, vacate the Board's decision and order, and deny the Board's cross-application for enforcement.

Date: May 6, 2016

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) because it contains 6,767 words, exclusive of those parts of the brief exempted by Rule 32(a)(7)(B)(iii).

The foregoing brief also complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Bookman Old Style font.

Date: May 6, 2016

**MICHEL & ASSOCIATES, P.C.**

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 6, 2016, an electronic PDF of Petitioner's Opening Brief was uploaded to the Court's CM/ECF system, which will send notice of filing to counsel for all participants in the case who are registered CM/ECF users:

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