**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| **H&M INTERNATIONAL TRANSPORTATION, INC.,** | ) | |
| | ) | |
| **Petitioner/Cross-Respondent** | ) | **Nos. 16-1317, 16-1348** |
| | ) | |
| **v.** | ) | **Board Case Nos.** |
| | ) | **22-CA-089596** |
| **NATIONAL LABOR RELATIONS BOARD** | ) | **22-CA-095095** |
| | ) | **22-CB-106127** |
| **Respondent/Cross-Petitioner** | ) | |

**OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD**
**TO MOTION TO STAY MANDATE**

To the Honorable, the Judges of the United States
Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board ("the Board"), by its Deputy Associate General Counsel, opposes the motion of H&M International Transportation, Inc. ("H&M") to stay issuance of mandate for 90 days pending H&M's intent to file a petition for a writ of certiorari.

## I. BACKGROUND

On March 1, 2016, the Board found that H&M violated the National Labor Relations Act, as amended ("the Act"), 29 U.S.C. § 151, et seq, when H&M unlawfully suspended and discharged four employees in December 2012 for

engaging in union and protected concerted activity. (JA 1577-78.)[1] The Board's Order requires H&M, among other things, to offer the four employees full reinstatement, make them whole for any lost earnings and benefits, and post a remedial notice. (JA 1577-78, 1610.)

Thereafter, H&M filed a motion for reconsideration and to reopen the record with the Board, challenging Acting General Counsel Lafe Solomon's appointment under the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. §§ 3345 et seq., and asserting that he lacked the authority to delegate to the Regional Director the power to issue the complaint.[2] (JA 1613-22.) The Board denied the motion, finding that H&M waived its FVRA argument by failing to raise it in its exceptions to the administrative law judge's decision, as required by the Board's Rules and Regulations, *see* 29 C.F.R. § 102.46(b)(2), (g) (2016). (JA 1623-25.)

On March 20, 2018, in an unpublished per curiam judgment, the Court (Circuit Judges Tatel and Katsas, and Senior Circuit Judge Ginsburg) enforced the Board's Order in full. *H&M Int'l Transp., Inc. v. NLRB*, 719 F. App'x 3. Citing in-circuit precedent and the Board's Rules and Regulations, the Court held that

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[1] "JA" references are to the deferred joint appendix.

[2] That initial complaint issued during the period Acting General Counsel Solomon served in violation of the FVRA. *See NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017), *affirming* 796 F.3d 67 (D.C. Cir. 2015).

H&M had forfeited its FVRA argument by failing to raise it in its exceptions to the administrative law judge's decision, and explained that raising the issue "anew in a motion for reconsideration . . . comes 'too late.'" *Id.* at 4-5 (quoting *Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008)). On the merits issue, the Court found it unnecessary to reach H&M's argument that the judge erred in admitting an audio recording into evidence because the Board's finding was supported by substantial evidence even absent that evidence. *H&M*, 719 F. App'x at 5.

On May 10, H&M filed a motion to stay issuance of mandate, in which it stated its intent to seek Supreme Court review of the Court's per curiam judgment. As we show below, H&M has failed to meet its burden of showing that a stay is appropriate in this case, and the motion should be denied.

## II. H&M HAS NOT MET ITS BURDEN OF SHOWING THAT A STAY OF MANDATE IS APPROPRIATE

Pursuant to Rule 41(d)(2)(A) of the Federal Rules of Appellate Procedure, "[i]n order to obtain a stay of the mandate pending a petition for certiorari, a party must show that the 'petition would present a substantial question and that there is good cause for a stay.'" *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 2003 WL 22319584, at *1 (D.C. Cir. Sept. 30, 2003) (Edwards, J., concurring) (quoting Fed.R.App.P. 41(d)(2)(A), citing Cir.R. 41(a)(2)). A stay is a form of

temporary injunction. *United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993) (Ripple, J., in chambers). Thus, to stay the issuance of the mandate, the moving party must show "a reasonable probability that certiorari will be granted . . . , a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm . . . if the judgment is not stayed." *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers). *See also Holland*, 1 F.3d at 456-57 (discussing Supreme Court cases applying same standard for stay of issuance of mandate) (Ripple, J., in chambers). Failure to establish either a reasonable probability of success *or* irreparable harm requires denying a motion to stay. *See, e.g.*, *United States v. Microsoft Corp.*, 2001 WL 931170, at *1 (D.C. Cir. Aug. 17, 2001) (per curiam) ("We need not decide . . . whether Microsoft's objections constitute a 'substantial question' likely to lead to Supreme Court review, because Microsoft has failed to demonstrate any substantial harm that would result from [issuance of mandate].").

H&M has not met its "heavy burden" here because it has not demonstrated a reasonable probability that the Supreme Court will grant certiorari and reverse the Court's judgment, or that it will suffer irreparable harm in the absence of a stay. *See Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers).

### A. H&M Is Highly Unlikely To Persuade the Supreme Court To Grant Certiorari and Reverse the Judgment

There is little probability that the Supreme Court will grant certiorari, let alone reverse the Court's per curiam judgment. H&M's claim that it properly raised its FVRA argument before the Board, and that the Court and the Board both "misinterpret[ed] the NLRB's rules" in finding the argument forfeited, borders on the specious. (Mot. 2.) Here, the Court engaged in the straightforward application of settled legal principles, and its judgment presents no issue warranting Supreme Court review. The Board's Rules and Regulations at the time clearly state that "[n]o matter not included in exceptions . . . may thereafter be urged before the Board, or in any further proceeding." 29 C.F.R. § 102.46(g) (2016). *See also id.* § 102.46(b)(2) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived."). The Court, in turn, lacks jurisdiction to hear any objection not "urged before the Board," absent extraordinary circumstances.[3] 29 U.S.C. § 160(e). *See Woelke & Romero Framing, Inc.*, 456 U.S. 645, 665 (1982).

[3] Significantly, the administrative law judge's decision specifically drew the parties' attention to the Board's Rules and Regulations and informed them that "[i]f no exceptions are filed . . . the findings, conclusions, and recommended Order shall . . . be adopted by the Board and all objections to them shall be deemed waived for all purposes." (JA 1610 n.52.)

Guided by these settled principles, the Court correctly held H&M's FVRA argument forfeited.[4] As the Court explained, it was deprived of jurisdiction to hear the objection because H&M failed to raise that argument in its exceptions to the Board. Further, the Court rejected H&M's argument that it nonetheless had preserved the issue for judicial review by raising it first in its answer to the complaint, and later raising it again in its motion for reconsideration. As the Court explained, "[a]n argument made in the answer to the complaint but not renewed in an exception to the decision of the ALJ is forfeit." *H&M*, 719 F. App'x at 4-5 (citing *HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016)). Thus, the Court rightly concluded that H&M's "[r]aising it anew in a motion for reconsideration, as we held in *Parkwood*, comes 'too late' to preserve an issue for our review absent exceptional circumstances, which are not present here." *H&M*, 719 F. App'x at 5 (quoting *Parkwood*, 521 F.3d at 410 (holding that the Court will "defer to the Board's interpretation of its own regulations [if] that interpretation is neither plainly erroneous nor inconsistent with the regulations")).

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[4] Four circuits agree with this Court that the "typical NLRA exhaustion doctrine applies" to FVRA challenges to Solomon's service as Acting General Counsel. *Marquez Bros. Enter., Inc. v. NLRB*, 650 F. App'x 25, 27 (D.C. Cir. 2016). *Accord Creative Vision Res., L.L.C. v. NLRB*, 882 F.3d 510, 527-28 (5th Cir. 2018); *Quality Health Servs. of P.R. v. NLRB*, 873 F.3d 375, 381-84 (1st Cir. 2017); *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 120-21 (2d Cir. 2017), *as amended* (May 9, 2017); *1621 Route 22 W. Operating Co., LLC v. NLRB*, 825

H&M erroneously asserts that it can preserve an argument for judicial review by raising it in its answer to the complaint, because the answer is part of the administrative record before the Board. (Mot. 2-4.) It is well settled that a party seeking judicial review of a Board decision not only must have first "urged" its arguments before the Board, 29 U.S.C. § 160(e), but also have "present[ed] those arguments in a procedurally valid way," *Parkwood*, 521 F.3d at 410. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection *made at the time appropriate under its practice*" (emphasis added)); *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 418 (D.C. Cir. 1996) (stating that "under the plain language of Section 10(e), an issue may not be preserved for appeal simply by raising it before the ALJ").

A party may raise, and subsequently abandon, any number of issues during the administrative proceeding. Importantly, a party's exceptions to the administrative law judge's decision apprise the Board of the questions it "intend[s] to press," and "afford[] the Board opportunity to consider on the merits questions

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F.3d 128, 138-43 (3d Cir. 2016).

to be urged upon review of its order." *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 255-56 (1943). *See* 29 C.F.R. § 102.48(a)-(c) (2016) (then-applicable regulations governing exceptions to administrative law judge's decision). Just as "[j]udges are not like pigs, hunting for truffles buried in briefs," neither are Board members expected to ferret out and address every last argument in the administrative record. *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

H&M's hyperbolic claim that the Court's unpublished per curiam judgment will have "wide-ranging impact for all parties that litigate before the Board," is belied by its failure to cite a single Board or court case supporting its sweeping suggestion that anything raised in the administrative record is fair game for judicial review. (Mot. 2-4.) The Supreme Court is highly unlikely to find such an issue worthy of certiorari review, and even less likely to adopt H&M's tortured reading of the Board's Rules and Regulations to save it from its procedural misstep.

Likewise, on the merits issue, there is no reasonable probability that the Supreme Court will entertain H&M's evidentiary argument. (Mot. 4-5.) In its exceptions before the Board, and on review before this Court, H&M argued that the administrative law judge erred in admitting an audio recording. But the judge, the Board, and the Court all agreed that the record evidence supported the unfair-labor-practice findings, even absent admission of the audio recording. (JA 1577

n.1, 1605 n.48.) *H&M*, 719 F. App'x at 5. H&M's argument boils down to nothing more than an unremarkable substantial-evidence challenge, which the Supreme Court will not review. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings.").

### B. H&M Has Failed to Show that It Will Suffer Irreparable Harm if the Court Denies a Stay

Given H&M's failure to show a reasonable probability that certiorari will be granted and that this Court's judgment will be reversed, the Court need not consider the element of irreparable harm. *See Judicial Watch*, 2003 WL 22319584, at *1 (Edwards, J., concurring). In any event, H&M has not established that it will suffer irreparable harm as a result of complying with the Board's Order while any petition for certiorari it may file is pending.

To start, H&M has not established that, in the very unlikely event the Supreme Court reverses this Court's judgment, any payments made in accordance with the Board's Order would be non-recoverable. *See Conkright v. Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers) (no irreparable harm disbursing funds to beneficiaries where pension plan failed to "establish that recoupment will be impossible"); *McBride v. CSX Transp., Inc.*, 611 F.3d 316, 318 (6th Cir. 2010) (Ripple, J., in chambers) (no irreparable harm in paying monetary award to employee pending certiorari, where employer failed to explain "with any

specificity" why it was unlikely that employee would be able to repay monetary judgment if Supreme Court reversed). Further, contrary to H&M's contention (Mot.5-6), it is far from clear that it will be required to make the employees whole before the Supreme Court considers its certiorari petition. The Board determines the backpay owed and addresses any challenges to those calculations during the compliance stage of this proceeding, a stage that has been likened to "the damages phase of a civil proceeding." *NLRB v. Katz's Delicatessen*, 80 F.3d 755, 771 (1996) (citation omitted). That stage can take several months, and the Supreme Court may rule on H&M's petition for a writ of certiorari before all compliance issues are resolved.

Finally, H&M completely ignores an important factor in considering whether to stay the issuance of mandate—that is, "balanc[ing] the equities to determine on which side the risk of irreparable harm weighs most heavily." *Blum v. Caldwell*, 446 U.S. 1311, 1315 (1980) (Marshall, J. in chambers). While exaggerating its own claims of harm, H&M fails to address the actual harm to the four employees who are owed reinstatement offers and "nearly six years of back pay and benefits" (Mot. 6) as a result of H&M's unfair labor practices. Any further delay in issuing mandate unnecessarily postpones the process of making these employees whole and vindicating important employee rights under the Act.

Respectfully submitted,

/s/ Linda Dreeben

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Dated at Washington, DC
this 17th day of May 2018

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2), the Board certifies that this document contains 2,185 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 17th day of May 2018

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## CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, and that all counsel are registered CM/ECF users.

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Dated at Washington, DC
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