

**No. 20-1067**

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

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**RAED McCRACKEN JARRAR**

**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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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAED McCRACKEN JARRAR,	)	
	)	
Petitioner	)	
	)	No. 20-1067
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD,	)	05-CA-221952
	)	
Respondent	)	
	)	

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

**A. Parties and Amici**

Raed McCracken Jarrar (“Jarrar”) is the Petitioner in case No. 20-1067, and the Board is the Respondent. Amnesty International of the USA, Inc. (“Amnesty”) is amicus for the Respondent. In the administrative proceeding, Jarrar was the charging party and Amnesty was the respondent.

**B. Rulings under Review**

The case under review is a Decision and Order issued by the Board dismissing claims against Amnesty in Board Case No. 05-CA-221952, entitled *Amnesty International of the USA, Inc.*, and reported at 368 NLRB No. 112, 2019 WL 6003325 (Nov. 12, 2019).

**C. Related Cases**

The ruling under review was not previously before this or any other court, and Board counsel is not aware of any related case currently pending or about to be presented in this or any other court. The cases cited in Jarrar's Rule 28 certificate are not related to this one because they do not involve substantially the same parties, or raise similar issues. *See* D.C. Cir. Rule 28(a)(1)(C).

s/ David Habenstreit  
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Dated at Washington, DC  
this 7th day of October 2020

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**GLOSSARY**

<b>The NLRA</b>	National Labor Relations Act, 29 U.S.C. § 151 et seq.
<b>Amnesty</b>	Amnesty International of the USA, Inc.
<b>The Board</b>	National Labor Relations Board
<b>Br.</b>	Opening brief of Raed McCracken Jarrar
<b>D&amp;O or Order</b>	Decision and Order of the Board in <i>Amnesty International of the USA, Inc.</i> , 368 NLRB No. 112, 2019 WL 6003325 (Nov. 12, 2019).
<b>GCX</b>	Exhibit introduced by the General Counsel
<b>The General Counsel</b>	Counsel for the Board's General Counsel
<b>Jarrar</b>	Raed McCracken Jarrar
<b>JX</b>	Joint exhibit
<b>RTr.</b>	Transcript of audio recording (GCX 2)
<b>Tr.</b>	Transcript of hearing before Administrative Law Judge Michael A. Rosas on Jan. 16, 2019

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**BRIEF FOR  
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**JURISDICTIONAL STATEMENT**

This case is before the Court on the petition for review of Raed McCracken Jarrar of a Board Decision and Order dismissing an unfair-labor-practice complaint against Amnesty International of the USA, Inc. The Board's Decision and Order, reported at 368 NLRB No. 112 (Nov. 12, 2019), is final. The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the National Labor Relations Act ("the NLRA"), as amended, 29 U.S.C. § 151 et seq., § 160(a).

All filings with the Court are timely. The Court has jurisdiction under Section 10(f) of the NLRA, which provides that petitions to review Board orders may be filed in this Court. *Id.* § 160(f).

### **ISSUE STATEMENT**

Whether the Board had a rational basis for dismissing the complaint, which alleged that Amnesty unlawfully interfered with, restrained, or coerced employees in the exercise of their rights under the NLRA.

### **RELEVANT STATUTORY PROVISIONS**

Relevant sections of the National Labor Relations Act and the Board's Rules and Regulations are reproduced in the Addendum to this brief.

### **STATEMENT OF THE CASE**

Acting on unfair-labor-practice charges filed by Jarrar, the Board's General Counsel issued a complaint alleging that Amnesty violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by making statements that interfered with, restrained, or coerced employees in the exercise of the rights guaranteed them by the NLRA. (GCX 1(a), (b), (c), (g).)<sup>1</sup> A hearing was held before an administrative law judge, who found that Amnesty violated the NLRA as alleged. (D&O 7-16.) Amnesty filed exceptions to the judge's decision, and the General Counsel filed a

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<sup>1</sup> The record abbreviations in this proof brief are explained in the Glossary. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

limited cross-exception and answering brief. After considering the decision and the record in light of those pleadings, the Board reversed the judge's conclusions and dismissed the complaint in its entirety. (D&O 1-4.) The Board's findings of fact and its conclusions and Order are summarized below.

## **I. THE BOARD'S FINDINGS OF FACT**

Amnesty is a non-profit organization with several offices throughout the United States, including one in Washington, DC. (D&O 1, 8; Tr. 87-88, 91.) Its executive director is Margaret Huang. (D&O 1, 7; Tr. 88-89, 111.) During the relevant period, Amnesty's nationwide staff comprised about 100 employees and 30 to 40 unpaid student interns, with approximately 25 employees and 15 interns in the Washington office. (D&O 1, 7, 8; Tr. 15-16, 92, 118.) Interns typically work for an academic semester and perform a variety of administrative and other tasks, including covering congressional hearings and drafting content for publication. (D&O 1, 8; Tr. 16, 93.) Amnesty employed Jarrar as the advocacy director for the Middle East and North Africa, and assigned him to the government-relations unit. (D&O 7; Tr. 13.)

In February 2018, the Washington office interns resolved to submit a petition requesting compensation for their services. They sought advice from Jarrar, who gave them feedback and helped edit their draft. (D&O 1, 9; Tr. 16-17.) Jarrar also helped collect petition signatures from Washington office employees.

(D&O 1, 9; Tr. 18, 19-20, 53.) The final petition was signed by 14 interns and “[s]upported by” 21 employees, including Jarrar. (D&O 9; JX 1 at 4-7.)

On April 2, 2018, the Washington office’s government-relations unit held its weekly meeting. They were joined by Huang, who was there to present the results of an annual employee-satisfaction survey. (D&O 9; Tr. 20, 44, 51-52, 91-92.) After the presentation, Jarrar suggested that Amnesty consider paying its interns and summarized the moral arguments for such a change. (D&O 9; Tr. 21, 44, 52, 94.) Huang responded positively, explaining that Amnesty’s executive team had been considering such a program for about a year and was to discuss its implementation at a meeting later that week. (D&O 9; Tr. 52-53, 94-95.) Huang also explained that doing so would entail reducing the number of interns across the entire organization from several dozen to only three. (D&O 9; Tr. 45-46, 57.)

On April 3, Huang received the interns’ petition and was surprised to see that it was signed by several employees who had participated in the April 2 meeting. (D&O 9-10; JX 1, Tr. 95-96, 111.) She forwarded the petition to the executive team ahead of their scheduled meeting the following day. At that meeting, the executive team decided to implement the paid-internship program in September 2018, a year earlier than originally planned. (D&O 10; Tr. 96, 98-99, 107, 111, 117.)

On April 9, Huang and Amnesty's interim head of human resources met with the employees who had signed the petition to announce that the paid-internship program would begin that fall.<sup>2</sup> (D&O 10; Tr. 22-23, 55-56, 78, 99-100.) To her surprise and frustration, the reaction was overwhelmingly negative. (D&O 10; Tr. 81, 101, 119.) Employees expressed particular concern that dropping the number of interns to three nationwide would significantly hinder their ability to perform their work. (D&O 10; Tr. 24, 59-61, 82, 101-02.) Huang responded that she was disappointed employees had not sought to discuss the matter with her directly, or requested a meeting with the executive team, before joining the interns' petition. (D&O 10; Tr. 55-56, 78-79, 119.) She also stated that, in her view, the petition came across as adversarial and threatened litigation unless Amnesty acceded to its demands. (D&O 10; Tr. 24, 56, 120-21.) Finally, Huang told employees that having fewer interns would require rethinking work plans and adjusting program goals. (D&O 10; Tr. 59-61, 102.)

On May 9, Jarrar initiated a meeting with Huang to discuss various issues, including the interns' petition. (D&O 11; Tr. 26, 107.) Jarrar recorded the conversation on his phone. (D&O 11; Tr. 27.) He explained that the tense nature of the April 9 meeting had led some employees to fear retaliation for supporting the petition, and that he had grown concerned himself when his supervisor began

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<sup>2</sup> Huang had already informed the Washington office interns of the change in a meeting earlier that morning. (D&O 10; Tr. 99-100.)

asking questions about his involvement. (D&O 11; RTr. 6, 8, 10, 12-14.) Jarrar also disputed Huang's perception of the petition as threatening legal action. (D&O 11; RTr. 9.)

Huang responded that Amnesty had never discharged anyone for signing a petition, but that the episode had left her feeling "very embarrassed" and disappointed that she did not have the "kind of relationship with staff" in which employees would feel comfortable requesting policy changes to her directly. (D&O 2, 11; RTr. 6, 37-38.) She also noted that the executive team shared her view that the petition came across as "litigious," as though it was "levy[ing] a threat." (D&O 2, 11-12; RTr. 17-18, 45.) Huang opined that it would have been "really helpful" to have advance notice of the interns' desire for paid internships, or if someone had told the interns to "give me the heads-up to let me know it's coming." (D&O 2, 11; RTr. 22.) She emphasized that she was "not asking anybody to tell on somebody," but added that, from her perspective, "it helps . . . to know it's coming, if you let [me] know your intentions, what you are seeking." (D&O 2, 11; RTr. 22, 45.) As it was, the petition felt "adversarial" to her because it came the day after she had expressed Amnesty's support for paid internships. (D&O 11; RTr. 22.)

As to that latter point, Huang drew from her own experience to explain that while petitions are helpful to "demonstrate popular support for a demand . . . [, i]f

the demand can be met without applying that pressure,” a petition could be counter-productive because “[i]t actually sets off a more adversarial relationship.” (D&O 2, 11; RTr. 34.) In this case, Huang continued, “tactically it felt very strange” to receive the interns’ petition the day after sharing with employees that Amnesty was seriously considering a move to paid internships. (D&O 2, 11; RTr. 37.) Huang suggested that staff “try talking to [management] before you do another petition” in the future. (D&O 2, 11; RTr. 33.)

## **II. THE BOARD’S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board (Chairman Ring and Member Kaplan; Member McFerran, concurring in the result) dismissed the complaint in its entirety. (D&O 1.) The Board found, contrary to the judge, that Huang’s statements did not violate Section 8(a)(1) of the NLRA in any respect. (D&O 1 n.3, 4.) Reviewing the surrounding circumstances, the Board noted that Huang made her remarks at a time of surprise and disappointment over the negative reaction to her announcement of the paid-internship program. In this context, the Board found, Huang’s statements did not convey that she was angry against employees, let alone that she was threatening them with reprisals or accusing them of disloyalty. Likewise, the Board found that Huang’s views about communicating workplace concerns to management were at most suggestions, and not commands or even direct requests. (D&O 3-4.)

Separately, the Board rejected the judge's finding that by joining the interns' petition, Amnesty's employees engaged in concerted activity "for other mutual aid or protection," 29 U.S.C. § 157. As the Board explained, activity advocating only for nonemployees is not for mutual aid or protection, and Amnesty's interns were not employees under Section 2(3) of the NLRA, 29 U.S.C. § 152(3), because there was no evidence of any economic relationship between them and Amnesty.

(D&O 2 & n.7.) In so ruling, the Board rejected the judge's finding that they were employees—a finding that he based on the standard used to assess the status of interns assisting for-profit entities under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. The Board also rejected the General Counsel's argument that the interns' petition for compensation made them analogous to job applicants, who are entitled to some NLRA protections. (D&O 2 n.7.) Finally, the Board rejected the judge's speculative suggestion that even if the interns were not statutory employees, Amnesty employees' support for the petition was protected because it affected their own employment terms, specifically, their use of interns and involvement in the intern-selection process. Instead, the Board found no evidence that Amnesty's employees joined the petition in order to defend or improve their own terms and conditions of employment.<sup>3</sup> (D&O 2 & n.7.)

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<sup>3</sup> Although Member McFerran agreed with the majority that Huang's statements were not unlawful, and concurred in the complaint dismissal on that basis, she

## SUMMARY OF ARGUMENT

1. The Board had a rational basis for dismissing the complaint, which alleged that Amnesty violated its employees' Section 7 rights. As the Board noted, Section 8(c) of the NLRA protects employers' right to express their views about employees' Section 7 conduct so long as they do not make threats of reprisal or force, or promises of benefit. Moreover, it is settled that the lawfulness of an employer's statements must be considered in the context in which they occurred. Applying those basic principles here, the Board reasonably concluded that Huang's statements did not violate Section 8(a)(1) of the NLRA in any respect.

Specifically, the Board reasonably found that Huang's statements did not imply any threat of reprisal or accuse employees of being disloyal. Reviewing the context in which she made her statements, the Board observed that Huang had responded positively when employees first raised the idea of paid internships, even sharing that the executive team was considering such a proposal. However, when she announced the decision to fast-track the program, the response among employees who signed the petition—those whom Huang would reasonably expect to welcome the news—was overwhelmingly negative. The Board reasonably found that this abrupt and unexpected change in employee sentiment informed

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would have also found that the NLRA protected Amnesty's employees in joining the nonemployee interns' petition. (D&O 4-7.)

Huang's response, which the Board viewed as conveying surprise and frustration rather than anger or ill will.

In these circumstances, the record as a whole supports the Board's reasonable inference that Huang did not threaten employees or accuse them of betraying Amnesty or herself. Instead, she merely expressed her disappointment and embarrassment that Amnesty's well-intentioned effort to satisfy the interns' demands had become a source of anguish for employees. Likewise, the Board reasonably found that Huang did not order or request that employees raise their concerns directly to Amnesty's management before resorting to petitions. Rather, she simply offered suggestions and expressed her opinions about how to efficiently resolve employees' workplace concerns.

2. In addition to finding that Huang's statements did not violate the NLRA in any respect, the Board reasonably found that Amnesty's employees did not engage in protected activity by joining the interns' petition. Specifically, the Board found that the employees' actions in support of the interns' petition were not "for other mutual aid or protection" under Section 7 of the NLRA because the interns were not statutory employees. In so ruling, the Board rejected the judge's finding that the interns were employees under a different statute, the FLSA, which the Board has never applied in the NLRA context. Instead, as the Board reasonably found, Amnesty's interns did not qualify as employees under the

NLRA because there was no record evidence that they received or expected economic compensation for their work. The Board also rejected the General Counsel's argument that the interns, by virtue of their petition for compensation, were like job applicants who have some protection under the NLRA. Finally, the Board found no evidence that Amnesty's employees joined the petition in order to protect or improve their own terms and conditions of employment. Accordingly, the Board reasonably concluded that the employees' actions in support of the interns' petition were not protected under the NLRA.

Although Jarrar attempts to challenge most of these findings in his opening brief, the Court lacks jurisdiction to consider his arguments because he failed to preserve them below. Section 10(e) of the NLRA bars appellate courts from considering arguments that have not been raised before the Board in the first instance. In this case, the exceptions that Amnesty filed with the Board argued only that the judge erred in finding that the interns were employees under the FLSA. In response, the General Counsel filed an answering brief arguing only that the Board did not need to decide the interns' status under the FLSA, and that they should be treated as job applicants under the NLRA. Despite being represented by counsel, Jarrar did not file an answering brief or cross-exceptions to the judge's decision, or a motion to reconsider the Board's Decision. Thus, no party raised the arguments posited in Jarrar's opening appellate brief, which means the Court is

barred from considering them. Although Jarrar mentions the General Counsel's claim that Amnesty's interns were like job applicants under the NLRA, he does so only in passing, without any supporting argument, which does not suffice to preserve it for review.

In any event, Jarrar's arguments are meritless. Thus, he mainly challenges the Board's finding that Amnesty's interns are not employees under the NLRA by asserting that the Board lacks authority to apply common-law principles in interpreting that statutory term. However, it is settled that the Board bears the primary responsibility for interpreting the NLRA, including Section 2(3)'s definition of "employee," which incorporates the common-law meaning of that term. Jarrar fares no better in arguing that the Board "ignored evidence" of the interns' purported employee status—a claim he improperly bases on extra-record assertions, not record evidence. For the same reason, he fails in challenging the Board's reasonable finding that there was no record evidence employees joined the petition to protect their own terms and conditions of employment.

3. In his opening brief, Jarrar contends for the first time that the Board erred in deciding this case while the parties were pursuing settlement negotiations. Not only does the Court lack jurisdiction to consider that claim, which Jarrar failed to raise in a motion for reconsideration below, but it is also wholly without merit. As Jarrar acknowledges, the Board acted before any settlement was finalized or

approved. In those circumstances, the Board was hardly precluded from exercising its statutory authority to issue a Decision and Order.

### STANDARD OF REVIEW

The Court’s “role in reviewing an NLRB decision is limited.” *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). The Court upholds the Board’s application of the governing law to the facts of a case unless it is arbitrary or otherwise erroneous. *Oberthur Techs. of Am. Corp. v. NLRB*, 865 F.3d 719, 723-24 (D.C. Cir. 2017). Moreover, because the Board bears “the primary responsibility for developing and applying national labor policy,” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990), its interpretations of the NLRA are “entitled to considerable deference” and must be upheld if they are “reasonably defensible,” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984); accord *First Student, Inc. v. NLRB*, 935 F.3d 604, 614 (D.C. Cir. 2019).

The Court must treat the Board’s factual findings as conclusive if they are “supported by substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e); *Wayneview*, 664 F.3d at 348. Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). Under that standard, “the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary.” *Bally’s Park Place, Inc. v. NLRB*,

646 F.3d 929, 935 (D.C. Cir. 2011); *see also Universal Camera*, 340 U.S. at 488 (reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.”). Notably, the substantial-evidence standard “is not modified in any way when the Board and its examiner disagree.” *Universal Camera*, 340 U.S. at 496; *accord Island Architectural Woodwork, Inc. v. NLRB*, 892 F.3d 362, 370 (D.C. Cir. 2018).

Ultimately, in cases like this one, where the Board concludes that there has been no violation of the NLRA, the Court will uphold the Board’s determination unless it has “no rational basis.” *Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284, 286 (D.C. Cir. 1991) (quotation marks and citation omitted). In other words, a reviewing court may reverse the Board’s dismissal only where “the evidence *required* the Board” to find that a violation occurred. *Amalgamated Clothing Workers v. NLRB*, 334 F.2d 581, 581 (D.C. Cir. 1964) (per curiam) (emphasis added). The application of the “rational basis” standard in dismissal cases “particularizes the general rule that the court will defer to Board findings of facts supported by ‘substantial evidence on the record considered as a whole.’” *Cincinnati Newspaper Guild*, 938 F.2d at 286-87 (quoting 29 U.S.C. § 160(f)).

Finally, the Board acknowledges the general principle that pro se filings are to be “liberally construed,” *Myers v. Comm’r*, 928 F.3d 1025, 1031 (D.C. Cir.

2019), but also notes that Jarrar was represented by counsel in the Board proceeding. (*See* D&O 7 (“*Monique Miles, Esq. (Old Towne Associates, P.C.)*, of Alexandria, Virginia, for the Charging Party.”).)

## **ARGUMENT**

### **THE BOARD HAD A RATIONAL BASIS FOR DISMISSING THE COMPLAINT, WHICH ALLEGED THAT HUANG’S STATEMENTS INTERFERED WITH, RESTRAINED, OR COERCED EMPLOYEES IN THE EXERCISE OF THEIR SECTION 7 RIGHTS**

As shown below, the Board had a rational basis for dismissing the complaint, based on its finding that Huang’s statements did not violate Section 8(a)(1) in any respect. Thus, the Board found that Huang was open to the idea of paid internships, and she worked with the executive team to fast-track such a program. Therefore, she was understandably flustered when her announcement of the program was greeted so negatively by employees who had signed the interns’ petition. The Board found that, in those circumstances, Huang’s statements were protected expressions of surprise and frustration, and not unlawful threats or accusations of disloyalty. Accordingly, the Board reasonably concluded that Huang’s statements did not interfere with, restrain, or coerce employees in the exercise of their Section 7 rights in any respect, including their right to engage in future protected activity.

As also shown below, the Board had a reasonable basis for its further finding that Amnesty’s employees were not protected by the NLRA in signing the petition

because the interns were not statutory employees, and there was no evidence that the employees joined the petition to protect their own terms and conditions of employment. The Court, however, lacks jurisdiction to consider nearly all of Jarrar's challenges to those findings because he failed to raise them before the Board in the first instance. (The Court likewise lacks jurisdiction to consider Jarrar's baseless claim that settlement discussions precluded the Board from deciding this case.) To be sure, there is one discrete argument that the General Counsel preserved by raising it in his answering brief below—namely, the claim that the interns were analogous to job applicants. But Jarrar's opening brief only mentions that argument in passing, which is not sufficient to preserve a challenge to the Board's contrary finding—a finding that in any event is supported by substantial record evidence.

**A. Huang's Statements Did Not Violate Section 8(a)(1) in Any Respect Because They Did Not Imply a Threat of Reprisal Against Employees or Suggest That They Had Been Disloyal to Amnesty or Herself**

The Board reasonably found that Huang's statements were not expressions of anger, betrayal, or threats of reprisal towards Amnesty's employees, and thus did not violate Section 8(a)(1) "in any respect." (D&O 1 n.3, 4.) Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of" their Section 7 rights. 29 U.S.C. § 158(a)(1). But the NLRA also recognizes that employers have the right to

express “any views, argument, or opinion” about employees’ protected conduct, so long as those statements “contain[] no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c); *see generally* *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006).

The Board analyzes the lawfulness of employer statements under a totality-of-circumstances test. *Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 543 (D.C. Cir. 2016); *S. Bakeries, LLC*, 364 NLRB No. 64, 2016 WL 4157598, at \*2 (2016) (employer statements “must be considered in context, not in isolation”), *enforcement granted in part and denied in part on other grounds*, 871 F.3d 811, 823 (8th Cir. 2017). In reviewing the Board’s determination, the Court “recognize[s] the Board’s competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship.” *Progressive Elec.*, 453 F.3d at 544 (quoting *Gissel Packing*, 395 U.S. at 620).

Exercising its authority to interpret Section 8(a)(1) and draw its own legal inferences, the Board reasonably rejected the judge’s finding that Huang’s statements unlawfully coerced employees in their ability to engage in protected activity. (D&O 3-4.) The Board specifically disagreed with the judge’s conclusion that Huang unlawfully suggested employees were disloyal for signing the petition; told them to discuss grievances with management before petitioning

for change; threatened them with unspecified reprisals for signing a petition she deemed threatening and adversarial; and told them to report future protected conduct by their colleagues. (D&O 13-15.) As the Board explained, viewed in their proper context, Huang's statements simply conveyed her disappointment and embarrassment at how an issue on which everyone seemed to agree—paying interns for their work—had become so divisive and fraught. (D&O 3-4.)

The Board reasonably concluded that Huang's statements did not threaten employees with reprisals or imply that they were disloyal to Amnesty or herself. (D&O 4.) Reviewing the entire record, the Board observed that Huang consistently expressed support for paid internships, as demonstrated by her positive response when the issue came up at the April 2 meeting. Huang explained that Amnesty's executive team considered this an important issue, which had been under discussion for the past year and was actually on the agenda for the team's upcoming meeting. (Tr. 53, 94-95.) She was also transparent in telling employees that Amnesty could only afford three paid interns nationwide, and there is no evidence employees reacted negatively to that disclosure. (Tr. 45-46, 57.)

Given the positive tenor of the conversation, Huang was understandably surprised to receive the interns' petition the very next day, and to see that it had been signed by employees who were present at the meeting. (Tr. 96.) She was even more taken aback by the overwhelmingly negative response she received

when she announced the new paid-internship program on April 9. (Tr. 81, 101, 119.) Huang explained her reaction at that meeting as follows:

I was unhappy because I had expressed the organization's commitment to doing this and support for doing this, and that I didn't know there was a petition underway being discussed and being signed, and that when I told people the decision that we had made to support the petition, I was actually greeted with dismay and disappointment from staff who signed the petition. So I was very frustrated by that.

(Tr. 119.)

As the Board noted, it was in this context that Huang told staff she was disappointed that people did not avail themselves of her open-door policy before resorting to a petition that came across as adversarial and litigious. (D&O 3; Tr. 55-56, 78-79, 119.) Huang conveyed the same message to Jarrar on May 9, when she said that having advance notice of the problem would have been "really helpful" because she "would have understood the intentions" behind the petition, instead of having a situation where "it comes out of the blue after I just had the conversation, and it feels adversarial. It doesn't feel constructive." (RTr. 22.) Huang further explained that she felt "really embarrassed" that her own staff would think they had resort to a formal petition because they were not comfortable raising the issue to her in person. (RTr. 6.) Until then, Huang thought her relationship with staff was one "where people could come and express their views and ask for consideration of a change in policy," but instead she now felt like she was "the man." (RTr. 6.)

Against this backdrop, the Board reasonably found that Huang's statements reflecting disappointment and embarrassment, and describing the petition as "adversarial," were simply expressions of surprise and frustration. (D&O 3.) As the Board explained, nothing in Huang's statements conveyed that she was angry or contemplating some form of retaliation. Instead, they reflected Huang's feelings of being blind-sided by the backlash against a well-meaning attempt to implement a program that seemed to enjoy broad employee support. Likewise, there was no evidence in Huang's language or demeanor that would compel a finding that she was accusing employees of being disloyal to Amnesty or herself. *Compare Ferguson-Williams, Inc.*, 322 NLRB 695, 699 (1996) (supervisor's statement that home office heard employee's pro-union comments and was "greatly offended by her disloyalty" unlawfully equated union sympathies with disloyalty to the employer), *with Okla. Installation Co.*, 309 NLRB 775, 775 (1992) (absent direct reference to disloyalty, supervisor did not violate the NLRA by telling an employee he had "hurt [his] feelings" by starting "all this Union bull" and distributing union paraphernalia, and telling another that he was "disappointed" in them both "because of their union activities and that he had thought that they would 'shoot straight' with him"), *enforcement denied on other grounds*, 27 F.3d 567 (6th Cir. 1994) (per curiam) (unpublished table case). Therefore, substantial evidence supports the Board's finding that Huang's opinions about

handling future petitions are properly viewed as suggestions rather than commands or even direct requests.

Jarrar disputes the Board's finding on several grounds, none of which are persuasive. Contrary to his claim (Br. 28), it is beyond dispute that Amnesty's initial willingness to settle this case, and any terms to which it may or may not have been agreeable, do not amount to an admission that Huang's statements were unlawful. If that were true, parties would never even open settlement discussions out of fear that doing so could later be held against them as evidence of guilt. Nor does the fact that Huang only invited employees who signed the petition to the April 9 meeting support an inference that they had been branded as disloyal.<sup>4</sup> (Br. 30.) Indeed, it could just as easily indicate that Huang wanted to announce the new program first to employees who expressed the greatest support for paid internships, perhaps expecting, not unreasonably, that they would welcome the news.

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<sup>4</sup> In challenging this finding, Jarrar relies on wholly distinguishable cases. *See, e.g., Westwood Health Care Ctr.*, 330 NLRB 935, 940-42 (2000) (employer unlawfully implied that supporting union would be regarded as disloyal when it told employee, "You can't stay neutral. You need to take a side. It just doesn't work like that and we need you on our side," and questioned why another employee who supported the union "would do this to us."); *Tito Contractors, Inc.*, 366 NLRB No. 47, 2018 WL 1559885, at \*1 (2018) (employer unlawfully equated protected activity with disloyalty when telling employee, "[W]hat you guys are, are a stabber; you guys are stabbing me in my back."), *enforced mem.* 774 F. App'x 4 (D.C. Cir. 2019).

Jarrar gains no more ground by suggesting that Huang's expression of personal disappointment was tantamount to threatening employees with future reprisals or accusing them of disloyalty. (Br. 29.) Huang described her surprise and chagrin when she realized that employees did not feel comfortable raising their concerns to her in person, saying: "I was very embarrassed actually that nobody had talked to me. It really made me feel like I was the man, which I didn't expect to feel." (RTr. 6.) Viewed in this context, the Board reasonably found (D&O 3) that Huang's statements did not convey anger at employees for signing the petition, but rather surprise and frustration that a genuine effort to meet the demand for paid internships had been so misunderstood by the very employees who supported the idea. *See Seaward Int'l, Inc.*, 270 NLRB 1034, 1042 (1984) (supervisor's statement that he was "disappointed in" employee due to his union activity was lawful expression of opinion that did not convey any threat of retaliation or intimidation). Huang's openness to dialogue, her calm demeanor throughout, and her measured statements are a far cry from the cases on which Jarrar relies. Thus, he errs by citing (Br. 29) distinguishable cases like *Sogard Tool Company & Adell Corporation*, 285 NLRB 1044, 1047-48 (1987), which involved unlawful statements likening union activity to a "cancer," and *Print Fulfillment Services LLC*, 361 NLRB 1243, 1243-44 (2014), where a supervisor's agitated behavior

betrayed his “strong feelings” about union activity, leading reasonable employees to fear that his “disappointment” could manifest itself in subsequent reprisals.

Contrary to Jarrar’s further suggestion, the Board was not required to infer from Huang’s description of the petition as “adversarial” and “litigious” that her statements were coercive in nature.<sup>5</sup> (Br. 30, 33-34.) Huang plainly used those terms in referring to the interns’ petition, not the employees who signed it. Moreover, Huang’s perception of the petition as “adversarial” was informed by her own experience. As she explained, petitions are helpful to apply pressure by demonstrating popular support for a demand; but if the same demand can be obtained without pressure, then a petition can have the counter-productive effect of antagonizing the recipient. (RTr. 34.) That is why it struck Huang as “tactically . . . very strange” to receive the petition after she had just told employees that Amnesty was amenable to, and indeed seriously considering, moving to paid internships. (RTr. 37.)

Jarrar fares no better in mischaracterizing Huang’s remarks as “attempting to dictate her own procedural process for collective action,” or encouraging him to “inform on the protected concerted activity of others.” (Br. 32, 34.) As Jarrar concedes, Huang’s statements were not couched as orders, recommendations, or

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<sup>5</sup> Jarrar errs in claiming that Huang described the petition as “aggressive” in nature (Br. 30). The judge mistakenly stated that Huang used that term to describe the petition (D&O 10, 14), but it is nowhere to be found in the hearing transcript or in the transcript of Jarrar’s recorded conversation with Huang.

even requests. (Br. 32-33.) Moreover, “whether a rule is unlawful ‘is not premised on mandatory phrasing, subjective impact, or even evidence of enforcement, but rather on the reasonable tendency of such a prohibition to coerce employees in the exercise of’” their rights. *The Boeing Co.*, 362 NLRB 1789, 1791 (2015) (quoting *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992), *enforced*, 987 F.2d 1376 (8th Cir. 1993)).

Despite Jarrar’s suggestion to the contrary (Br. 33), the Board scrupulously adhered to those principles in deciding this case. Indeed, the Board reviewed all the surrounding circumstances, including Huang’s public expressions of disappointment and embarrassment at the way things had transpired, before finding that her statements were properly viewed as suggestions at most. (D&O 3.) The Board’s finding is eminently reasonable and consistent with precedent. *Compare Easter Seals Conn., Inc.*, 345 NLRB 836, 838 (2005) (requirement to submit unresolved concerns in writing to supervisors found lawful because it did not limit employees’ ability to discuss such concerns among themselves), *with Kinder-Care Learning Ctrs., Inc.*, 299 NLRB 1171, 1172 (1990) (rule requiring employees to report work-related complaints to employer first or face potential discipline found unlawful).

In sum, the record amply supports the Board’s reasonable finding that Huang’s statements did not convey threats of reprisal or accusations of disloyalty,

and thus did not unlawfully interfere with, restrain, or coerce employees in their ability to engage in protected conduct in any respect. Accordingly, the Board acted rationally by dismissing the complaint in full.<sup>6</sup>

**B. The Court Lacks Jurisdiction To Consider Jarrar’s Meritless Challenges to the Board’s Finding that Amnesty’s Employees Did Not Engage in Protected Activity by Signing the Interns’ Petition**

**1. Jarrar failed to preserve all but one of his arguments, and his remaining claim is waived**

Jarrar challenges the Board’s finding (D&O 2 & n.7) that Amnesty’s employees, by joining the interns’ petition, did not engage in Section 7 activity for “other mutual aid or protection” because the interns were not employees under the NLRA, and there was no evidence the employees acted to protect their own terms and conditions of employment.<sup>7</sup> Specifically, Jarrar relies on extra-record factual assertions to claim (Br. 35-36) that the Board should have found the interns were employees under the NLRA because they received or expected economic compensation for their work. He also cites extra-record material in arguing

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<sup>6</sup> In challenging the Board’s finding, Jarrar erroneously relies (Br. 31-32) on an email purportedly written by an Amnesty shop steward that was not offered into evidence at the hearing and was not part of the record before the Board. As shown below (pp. 26-31), the Court lacks jurisdiction to consider such extra-record material under Section 10(e) of the NLRA, 29 U.S.C. § 160(e).

<sup>7</sup> In so ruling, the Board rejected the administrative law judge’s reliance on FLSA standards to find the interns were employees. The Board also rejected his speculative suggestion that the employees’ support for the petition was protected because it affected a specific condition of their own employment, namely, the process by which they selected and utilized interns. (D&O 2 n.7, 12-13.)

(Br. 42-45) that the employees' act of signing the petition should be protected because the petition affected their own terms and conditions of employment. Finally, he argues (Br. 40-41) that the employees' petition-signing should be protected even if it was solely for the benefit of nonemployees. The Court, however, lacks jurisdiction to consider those claims because no party raised them below at the appropriate time under the Board's procedures.

Section 10(e) of the NLRA, 29 U.S.C. § 160(e), provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances,” which are not alleged here.<sup>8</sup> This jurisdictional bar precludes appellate courts from considering arguments that were not raised before the Board at the right time under its rules. Here, that would have been in cross-exceptions to the judge's recommended decision, or an answering brief to Amnesty's exceptions. As this Court recognizes, even a party that prevails before the administrative law judge must challenge before the Board the judge's unfavorable findings and his failure to make additional findings that could have

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<sup>8</sup> The mere fact that Jarrar prevailed before the judge is not an extraordinary circumstance excusing his failure to assert all relevant arguments at the appropriate time, even though the Board later reversed the judge's decision. *NLRB v. R.J. Smith Constr. Co.*, 545 F.2d 187, 192 (D.C. Cir. 1976). Moreover, by failing to make an extraordinary-circumstances argument in his opening brief, Jarrar has waived that defense and cannot raise it in his reply. *See Fox v. Gov't of D.C.*, 794 F.3d 25, 29-30 (D.C. Cir. 2015) (appellant waived challenge to issue by failing to argue it in opening brief).

further aided the party's cause. *Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 933-34 (D.C. Cir. 2013); *R.J. Smith Constr.*, 545 F.2d at 192.

Moreover, the Section 10(e) bar also applies when the Board's Decision addresses an issue in the first instance. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (failure to seek reconsideration of issue raised sua sponte by the Board "prevents consideration of the question by the courts"); accord *Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 216-17 (D.C. Cir. 2015). It is also settled that "a party may not rely on arguments raised in a dissent or on a discussion of the relevant issues by the [Board] majority to overcome the 10(e) bar; the NLRA requires the party to raise its challenges itself." *HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016).

All of these issue-preservation rules implement the basic principle, recognized long ago by the Supreme Court, 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." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

In this case, all but one of the claims Jarrar asserts in his opening brief are barred by Section 10(e) because he (and the General Counsel) failed to raise them to the Board in cross-exceptions or an answering brief to the judge's decision. *See* 29 C.F.R. § 102.46(f) ("Matters not included in exceptions or cross-exceptions

may not thereafter be urged before the Board, or in any further proceeding.”); *id.* § 102.46(a)(1)(ii) (“Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived.”). Thus, Jarrar could have argued to the Board, in cross-exceptions or an answering brief, that interns should be treated as employees under the NLRA. Similarly, he could have argued that employees signed the petition in order to protect their own terms and conditions of employment, and that the petition affected their jobs in ways other than the limited one noted by the judge. Jarrar’s failure to take those actions below bars judicial consideration of his arguments on review.

Moreover, the parties that did seek Board review—Amnesty and the General Counsel—raised only limited arguments regarding the interns’ status and the petition’s impact on employees’ terms and conditions of employment. Thus, Amnesty merely excepted to the judge’s finding that interns should be classified as employees under the FLSA. (Amnesty Ex. Br. 13-16.) And although the General Counsel filed an answering brief, he mainly argued that the Board did not need to resolve the interns’ FLSA status because Huang’s statements unlawfully coerced employees in the exercise of their right to engage in future protected activity. (GC Ans. Br. 22-24.) He also made a discrete argument that the interns were akin to job applicants (who have NLRA protections) because they were seeking to obtain

paid employment by filing their petition. (GC Ans. Br. 24-25.) As for Jarrar, although he was represented by counsel at the time, he did not file cross-exceptions or an answering brief.<sup>9</sup> Thus, no party raised, at the time appropriate under the Board's practices, the arguments Jarrar presents in his opening brief.

As for the lone challenge preserved by the General Counsel below but rejected by the Board—that the interns were like job applicants—Jarrar waived that claim on review by failing to provide any supporting argument in his opening brief. *See Fox*, 794 F.3d at 29-30; Fed. R. App. P. 28(a)(8)(A) (argument section of a brief must contain “appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies”).

In addition, no party even attempted to introduce at the unfair-labor-practice hearing the extra-record factual material that Jarrar cites for the first time in his opening brief. In administrative-review proceedings like this one, the record before the Court is the same as the record before the agency, and parties cannot rely on extra-record factual allegations.<sup>10</sup> Nor did Jarrar file a motion to reopen the

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<sup>9</sup> Jarrar’s counsel did however file a motion to strike Amnesty’s exceptions and supporting brief on procedural grounds, which the Board denied. (D&O 1 n.1.)

<sup>10</sup> *See* 29 C.F.R. § 102.45(b) (“The charge upon which the complaint was issued and any amendments, the complaint and any amendments, notice of hearing, answer and any amendments, motions, rulings, orders, the transcript of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the Administrative Law Judge’s decision and exceptions, and any cross-exceptions or answering briefs as provided in § 102.46, constitutes the record in the case.”).

record below—a motion that, in any event, would have required him to establish extraordinary circumstances for failing to present the evidence at the hearing. *See* 29 C.F.R. § 102.48(c). Accordingly, the Court lacks jurisdiction to consider his extra-record factual assertions.

Furthermore, to the extent some of the Board’s findings might be considered as having been made sua sponte, there would still be a Section 10(e) bar. Thus, as to the Board’s finding that the interns are not employees under the NLRA, neither Jarrar nor the General Counsel filed a post-decisional motion for reconsideration. *See* 29 C.F.R. § 102.48(c). For this additional reason, the Court lacks jurisdiction to consider his arguments challenging those findings. *See Woelke*, 456 U.S. at 665-66; *accord DHSC, LLC v. NLRB*, 944 F.3d 934, 939 (D.C. Cir. 2019) (“The Board’s sua sponte discussion of [an issue] does not excuse [the aggrieved party’s] failure to raise the issue on its own.”); *Contractors’ Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061 (D.C. Cir. 2003) (court lacks jurisdiction to hear issue that could have been raised in motion to reconsider).

Indeed, Jarrar repeatedly acknowledges that the findings he attempts to challenge on review were not contested by the parties in the proceedings below. (Br. 13, 35-36, 42.) His error is in then assuming that because those arguments were not preserved in exceptions, cross-exceptions, or answering briefs, the Board lacked authority to reach those issues. To the contrary, the Board, as an agency

governed by the Administrative Procedure Act, 5 U.S.C. § 500 et seq., may decide a case based on theories not propounded or preserved by the parties. *See, e.g., Woelke*, 456 U.S. at 665-662; *see generally* Charles H. Koch, Jr., *Admin. L. & Prac.* § 5:27[4](b) (3d ed. 2010) (“[T]he administrative review authority may consider an issue *sua sponte* even though the issue was not raised by a party.” (footnote omitted)). But litigants have no such liberty; instead, their “objection must be presented to the administrative review authority or it cannot be raised on judicial review.” Koch, Jr., *supra*, at § 5:27[4](b) (footnote omitted). As noted above, under Section 10(e) of the NLRA, the effect of a party’s failure to present arguments to the Board in the first instance is to bar the reviewing court from considering them.

**2. In any event, Jarrar’s challenges to the Board’s findings are meritless**

**a. Jarrar fails in his attempt to challenge the Board’s reasonable finding that Amnesty’s interns are not statutory employees**

Jarrar contests the Board’s finding that interns are not “employees” under Section 2(3) of the NLRA by claiming that the Board lacks authority to apply federal common law in interpreting that statutory term.<sup>11</sup> (Br. 36-38.) It is beyond dispute, however, that “the task of defining the term ‘employee’ is one that ‘has

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<sup>11</sup> Section 2(3) of the NLRA provides that “[t]he term ‘employee’ shall include any employee” aside from specific, enumerated exceptions. 29 U.S.C. § 152(3).

been assigned primarily to the agency created by Congress to administer the [NLRA].” *Sure-Tan*, 467 U.S. at 891 (quoting *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 130 (1944)). And it is equally uncontroversial that Section 2(3)’s definition of “employee” incorporates the common-law meaning of the term.<sup>12</sup>

Moreover, the record supports the Board’s reasonable finding that Amnesty’s interns are not statutory employees. Employee status is “bounded by the presence of some form of economic relationship between the employer” and the employee. *WBAI Pacifica Found.*, 328 NLRB 1273, 1274 (1999). In other words, a statutory employee is one who, inter alia, “works for a statutory employer in return for financial or other compensation.” *Seattle Opera v. NLRB*, 292 F.3d 757, 762 (D.C. Cir. 2002); *see also Town & Country Elec.*, 516 U.S. at 90 (“The ordinary dictionary definition of ‘employee’ includes any ‘person who works for another in return for financial or other compensation.’” (quoting *Am. Heritage Dictionary* 604 (3d ed. 1992))).

As the Board reasonably found, the record is devoid of any evidence establishing the existence of an economic relationship between Amnesty and its interns. (D&O 2 & n.6.) Jarrar disputes that finding, asserting that interns receive

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<sup>12</sup> *See NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 93-94 (1995) (“[W]hen Congress uses the term ‘employee’ in a statute that does not define the term, . . . ‘Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.’” (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992))).

“a flat-rate check of \$150-\$250” per semester, and that Amnesty has “a long history of hiring interns as staff members.” (Br. 35-37.) But Jarrar himself acknowledges that his factual assertions are not reflected in the record. (Br. 35-36.) Indeed, neither Jarrar nor the General Counsel sought to present evidence supporting those claims at the unfair-labor-practice hearing—the time appropriate under the Board’s practices. Nor does Jarrar contend that his assertions are based on newly-discovered evidence, which in any event would have required him to file a motion to reopen the record. *See* 29 C.F.R. § 102.48(c). In short, in an on-the-record proceeding such as this one, *see* 29 U.S.C. § 160(e), Jarrar cannot rely on, and the Court lacks jurisdiction to consider, factual allegations that are not part of the record on review. *See* pp. 29-31 above.

Jarrar gains no more ground by asserting (Br. 35) that the issue of compensation “was not a matter of controversy” below. The interns’ employee status was plainly at issue, and the parties could have presented relevant evidence at the hearing. Further, the judge’s decision, which applied the FLSA’s “primary beneficiary test” that considers whether interns have an expectation of compensation, also put the parties on notice that the compensation issue was in play. At that point, it was their responsibility to muster any argument and adduce any newly-discovered evidence supporting or contradicting the judge’s finding so the Board could consider it on review. *See Flagstaff Med. Ctr.*, 715 F.3d at 933-34

(employer forfeited challenge to judge's subsidiary finding by failing to raise it in exceptions, even though employer prevailed before the judge).

Finally, Jarrar's passing reference (Br. 39) to the General Counsel's claim that the interns were analogous to job applicants because they were petitioning for compensation does not suffice to preserve that argument for appellate review. As this Court recognizes, merely alluding to an issue in an opening brief, without supporting argument, is tantamount to waiver. *See City of Waukesha v. E.P.A.*, 320 F.3d 228, 250 n.22 (D.C. Cir. 2003) (argument raised "summarily, without explanation or reasoning" in opening brief is deemed waived); *see also* p. 29 above.

In any event, as the Board explained in *WBAI*, a job opening creates "at least a rudimentary economic relationship, actual or anticipated, between employee and employer." 328 NLRB at 1274 (discussing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941)). But in this case, Jarrar does not dispute the Board's finding that the interns were not applying to wage-earning positions that Amnesty was seeking to fill, and thus there was no economic relationship between them. (D&O 2 n.7.)

**b. Jarrar fails to impugn the Board’s reasonable finding that the NLRA does not protect conduct intended solely to benefit nonemployee interns**

As shown above (pp. 26-28), Section 10(e) bars judicial review of Jarrar’s challenge to the Board’s finding (D&O 2) that activity advocating only for nonemployees is not for “other mutual aid or protection” under Section 7 of the NLRA, 29 U.S.C. § 157. In any event, Jarrar’s claims lack merit. After all, “[t]he concept of ‘mutual aid or protection’ focuses on the *goal* of concerted activity; chiefly, whether the employee or employees involved are seeking to ‘improve terms and conditions of employment or otherwise improve their lot as employees.’” *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB 151, 153 (2014) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)). Accordingly, the Board has long held that statutory employees are not acting “for other mutual aid or protection” when they engage in activity that only benefits nonemployees. *See, e.g., Five Star Transp., Inc.*, 349 NLRB 42, 44 (2007) (“[R]aising safety or quality of care concerns on behalf of nonemployee third parties [as opposed to employees themselves] is not protected conduct under the [NLRA].”), *enforced*, 522 F.3d 46 (1st Cir. 2008).

Consistent with the language of Section 7, and given the interns’ non-employee status, the Board reasonably found that the NLRA did not protect the employees’ act of joining the interns’ petition. (D&O 2.) To be sure, the Board

did not rule out the possibility that such activity could be protected under circumstances not present here. As the Board explained, however, the key inquiry is not whether the petition *affected* the employees' own terms and conditions of employment, but whether employees *joined* the petition in order to change or protect their terms and conditions of employment. Thus, while the Board allowed that "the petition may have indirectly affected the employees' terms and conditions of employment," it found "no evidence suggesting that the employees joined the petition in order to change or protect their own terms and conditions of employment." (D&O 2 n.7.)

In challenging the Board's finding, Jarrar once again erroneously relies on extra-record material that neither his counsel nor the General Counsel attempted to enter into evidence at the time appropriate under the Board's practices. (Br. 36, 42-43.) Contrary to his suggestion, the failure to present that evidence at the unfair-labor-practice hearing is not excused even if, as he claims, the employees' purpose for joining the petition was "not a matter of controversy." Regardless of the reason why the evidence was not presented below, in this on-the-record appellate proceeding, Jarrar cannot rely on, and the Court lacks jurisdiction to consider, factual allegations that are not reflected in the record. *See* 29 C.F.R. § 102.45(b) (defining contents of administrative record).

**C. The Court Lacks Jurisdiction To Consider Jarrar’s Meritless Claim that Settlement Discussions Deprived the Board of Authority To Decide This Case**

Jarrar asserts that the Board departed from its own standards and internal processes by issuing its Decision while the parties were engaged in settlement discussions. (Br. 19-26.) The Court lacks jurisdiction to hear that claim because Jarrar failed to raise it to the Board in the first instance.<sup>13</sup> In any event, it is completely without merit.

As an initial matter, Jarrar misrepresents what he refers to as the Board’s “internal processes.” Consistent with the Board’s rules and regulations, this case was transferred to the Board on the same day that the judge issued his decision.<sup>14</sup> (Order Transferring Case to Board 1.) Soon afterwards, Amnesty and the General Counsel filed exceptions to the judge’s decision, at which point the case was fully briefed and ready for the Board’s review.<sup>15</sup>

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<sup>13</sup> See pp. 26-27 above. Although Jarrar’s claim arose only after the Board issued its Decision, he could still have moved for the Board to reconsider its ruling in light of his allegations. Jarrar does not identify any extraordinary circumstance explaining his failure to do so, however, and thus the Court is without jurisdiction to consider his claim. See *Contractors’ Labor Pool*, 323 F.3d at 1061.

<sup>14</sup> See 29 C.F.R. § 102.45(a) (“Upon the filing of the [judge’s] decision, the Board will enter an order transferring the case to the Board, setting forth the date of the transfer and will serve on all the parties copies of the decision and the order.”).

<sup>15</sup> See 29 C.F.R. § 102.48(b)(1) (“Upon the filing of timely and proper exceptions, and any cross-exceptions or answering briefs . . . , the Board may decide the matter upon the record . . .”).

Contrary to Jarrar's claim (Br. 22), nothing in the Board's rules and regulations precludes it from deciding a case while the parties are discussing settlement. The "Guide to Board Procedures" on which Jarrar relies (Br. 21) recommends that if parties actually settle a case pending before the Board, they should move for remand to the Regional Director.<sup>16</sup> But no such motion was filed in this case—hardly a surprise because, as Jarrar acknowledges, the parties had not reached a settlement by the time the Decision issued. Thus, there is no basis for Jarrar's claim that the Board ignored its internal procedures by issuing its Decision when it did.<sup>17</sup> Nor is there any authority for Jarrar's remarkable suggestion that settlement discussions precluded the Board from issuing its Decision and Order.

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<sup>16</sup> NLRB, *Guide to Board Procedures* 41 (July 2020), available at <https://www.nlr.gov/sites/default/files/attachments/pages/node-174/guide-to-board-procedures-2020-august-2020-final.pdf> (last visited Oct. 7, 2020).

<sup>17</sup> Jarrar's discussion of *Clear Haven Nursing Home*, 236 NLRB 853 (1978), overruled by *Independent Stave Co.*, 287 NLRB 740, 743 (1987), is entirely inapposite because it refers to the Board's standard for deciding whether to approve existing settlements. (Br. 23-25.) Per Jarrar's admission, the parties never reached a final settlement in this case. (Br. 20, 22.) Likewise, *Flyte Tyme Worldwide*, 362 NLRB 393 (2015), and *Oil, Chemical & Atomic Workers International Union, AFL-CIO v. NLRB*, 806 F.2d 269 (D.C. Cir. 1986), both involve the Board's review of finalized settlements.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Jarrar's petition for review.

Respectfully submitted,

/s/ Julie Broido

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October 2020

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

<hr/>	)	
RAED McCRACKEN JARRAR,	)	
	)	
Petitioner	)	
	)	No. 20-1067
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD,	)	05-CA-221952
	)	
Respondent	)	
<hr/>	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) and 32(g)(1), the Board certifies that its proof brief contains 9,163 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word for Office 365. The Board further certifies that the PDF file submitted to the Court has been scanned for viruses using Microsoft Defender and is virus-free according to that program.

s/ David Habenstreit  
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Dated at Washington, DC  
this 7th day of October 2020

## **STATUTORY ADDENDUM**

**STATUTORY ADDENDUM**  
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## THE NATIONAL LABOR RELATIONS ACT

### **Section 2 of the Act (29 U.S.C. § 152) provides, in relevant part:**

When used in this Act--

\* \* \*

(3) The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

### **Section 7 of the Act (29 U.S.C. § 157) provides:**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

**Section 8 of the Act (29 U.S.C. § 158) provides, in relevant part:**

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

\* \* \*

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

**Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:**

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

\* \* \*

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the

failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

## THE BOARD'S RULES AND REGULATIONS

### **29 C.F.R. § 102.45 Administrative law judge's decision; contents; service; transfer of case to the Board; contents of record in case**

(a) *Administrative Law Judge's decision.* After a hearing for the purpose of taking evidence upon a complaint, the Administrative Law Judge will prepare a decision. The decision will contain findings of fact, conclusions of law, and the reasons or grounds for the findings and conclusions, and recommendations for the proper disposition of the case. If the Respondent is found to have engaged in the alleged unfair labor practices, the decision will also contain a recommendation for such affirmative action by the Respondent as will effectuate the policies of the Act. The Administrative Law Judge will file the decision with the Board. If the Judge delivers a bench decision, promptly upon receiving the transcript the Judge will certify the accuracy of the pages of the transcript containing the decision; file with the Board a certified copy of those pages, together with any supplementary matter the Judge may deem necessary to complete the decision; and serve a copy on each of the parties. Upon the filing of the decision, the Board will enter an order transferring the case to the Board, setting forth the date of the transfer and will serve on all the parties copies of the decision and the order. Service of the Administrative Law Judge's decision and of the order transferring the case to the Board is complete upon mailing.

(b) *Contents of record.* The charge upon which the complaint was issued and any amendments, the complaint and any amendments, notice of hearing, answer and any amendments, motions, rulings, orders, the transcript of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the Administrative Law Judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in § 102.46, constitutes the record in the case.

\* \* \*

**29 C.F.R. § 102.46 Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on the parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments.**

(a) *Exceptions and brief in support.* Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to §102.45, any party may (in accordance with Section 10(c) of the Act and §§102.2 through 102.5 and 102.7) file with the Board in Washington, DC, exceptions to the Administrative Law Judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions. The filing of exceptions and briefs is subject to the filing requirements of paragraph (h) of this section.

\* \* \*

(1) *Exceptions.*

\* \* \*

(ii) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

\* \* \*

(f) *Failure to except.* Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.

\* \* \*

**29 C.F.R. § 102.48 No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.**

\* \* \*

*(b) Exceptions filed.*

(1) Upon the filing of timely and proper exceptions, and any cross-exceptions or answering briefs, as provided in §102.46, the Board may decide the matter upon the record, or after oral argument, or may reopen the record and receive further evidence before a Board Member or other Board agent or agency, or otherwise dispose of the case.

\* \* \*

*(c) Motions for reconsideration, rehearing, or reopening the record.* A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this section must be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion to reopen the record must be filed promptly on discovery of the evidence to be adduced.

(3) The filing and pendency of a motion under this provision will not stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAED McCRACKEN JARRAR,	)	
	)	
Petitioner	)	
	)	No. 20-1067
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD,	)	05-CA-221952
	)	
Respondent	)	
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on October 7, 2020, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC  
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