CASE BEING CONSIDERED FOR TREATMENT PURSUANT
TO RULE 34(j) OF THE COURT'S RULES

Case No. 20-1067

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAED MCCRACKEN JARRAR
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review from the National Labor Relations Board

PETITIONER'S FINAL OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) and the Court's July 13, 2020 order, Petitioner Raed McCracken Jarrar, pro se, certifies as follows:

A. Parties, Intervenors, and Amici Curiae.

The parties to this action are:

1- Petitioner is Raed McCracken Jarrar ("Petitioner Jarrar")

2- Respondent is the National Labor Relations Board ("NLRB").

3- Amnesty International of the USA, Inc. ("AIUSA") is the only *amici curiae* to date.

All of the aforementioned were parties in the underlying case before the NLRB.

B. Rulings Under Review.

Petitioner Jarrar seeks review of the NLRB Decision and Order in Case No. 05-CA-221952, which was entered on November 12, 2019, and reported at 368 NLRB No. 112.

C. Related Cases.

Petitioner Jarrar is not aware of any related cases before this Court. Petitioner Jarrar is aware, however, of two related cases in other courts:

1- Case No. 1:19-CV-02579-EGS filed on August 27, 2019, in the United States District Court for the District of Columbia.

2- Case No. 2019-CA-8338 filed on December 19, 2019. In the Superior Court of the District of Columbia.

Dated: November 30, 2020

Respectfully submitted,

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TABLE OF CONTENTS

PAGE

I. JURISDICTIONAL STATEMENT.....1

II. STATEMENT OF ISSUES.....2

III. STATUTES AND REGULATIONS.....2

IV. STATEMENT OF THE CASE.....3

A. Overview of AIUSA's Operations.....5

B. AIUSA's Internship Program.....5

C. The Petition.....7

D. AIUSA's Response.....8

V. SUMMARY OF ARGUMENT.....11

VI. STANDING.....14

VII. ARGUMENT.....14

A. Standard of Review.....14

B. The NLRB Erred by Reversing the ALJ's Decision.....15

1. The Board departed from "well settled" standards and internal process.....19

2. The Board's findings are not supported by substantial evidence.....26

i. The Board went against substantial evidence on the record ……..…….28

ii. The Board made determination on matters not raised by the parties citing on "no evidence" to the contrary…….35

3. The Board erred by taking on a "pure" question of common-law……37

4. The NLRB Board departed from precedent without explanation ……..39

i. The NLRB Board departed from precedent and tore down protections under Section 7 of the Act……40

ii. The NLRB determined wrongly that the Petition was not for the mutual aid or protection …… 42

VIII. Conclusion.....45

TABLE OF AUTHORITIES

1. AMNESTY INTERNATIONAL OF THE USA, INC. AND RAED JARRAR, No. 05-CA-221952, 368 NLRB No. 112, 2019 L.R.R.M. (BNA) ¶ 433802, 2018-19 NLRB Dec. (CCH) ¶ 16606, 2019 WL 6003325 (N.L.R.B. Nov. 12, 2019) **Page:** 2

2. § 158. Unfair labor practices **Page:** 8

3. § 160. Prevention of unfair labor practices **Page:** 8

4. § 8. Unemployment data relating to Americans of Spanish origin or descent **Page:** 10

5. AMNESTY INTERNATIONAL OF THE USA, INC. AND RAED JARRAR. AN INDIVIDUAL, No. 5-CA-221952, 2019 WL 1253838 (N.L.R.B. Div. of Judges Mar. 18, 2019) **Page:** 17

6. Titanium Metals Corp. v. N.L.R.B., No. 03-1345, 392 F.3d 439, 176 L.R.R.M. (BNA) 2073, 364 U.S. App. D.C. 69, 150 Lab. Cas. P 10420, 2004 WL 2710041 (D.C.Cir. Nov. 30, 2004) **Page:** 21

7. Allentown Mack Sales and Service, Inc. v. N.L.R.B., No. 96-795, 522 U.S. 359, 118 S. Ct. 818, 139 L. Ed. 2d 797, 157 L.R.R.M. (BNA) 2257, 66 USLW 4100, 134 Lab. Cas. P 10105, 98 Cal. Daily Op. Serv. 635, 98 Daily Journal D.A.R. 831, 98 CJ C.A.R. 509, 11 Fla. L. Weekly Fed. S 305, 1998 WL 23154 (U.S.Dist.Col. Jan. 26, 1998) **Page:** 22

8. International Union of Electronic, Elec., Salaried, Mach. and Furniture Workers, AFL-CIO v. N.L.R.B., No. 93-1373, 41 F.3d 1532, 148 L.R.R.M. (BNA) 2070, 309 U.S. App. D.C. 377, 63 USLW 2395, 129 Lab. Cas. P 11279, 129 Lab. Cas. P 11251, 1994 WL 700739 (D.C.Cir. Dec. 16, 1994) **Page:** 22

9. National Labor Relations Board v. Southwest Regional Council of Carpenters, No. 11-1212, 826 F.3d 460, 206 L.R.R.M. (BNA) 3425, 423 U.S. App. D.C. 296, 166 Lab. Cas. P 10912, 2016 WL 3407723 (D.C.Cir. June 21, 2016) **Page:** 22

10. Comau, Inc. v. N.L.R.B., No. 10-1406, 671 F.3d 1232, 192 L.R.R.M. (BNA) 2993, 399 U.S. App. D.C. 399, 162 Lab. Cas. P 10453, 2012 WL 678140 (D.C.Cir. Mar. 02, 2012) **Page:** 22

11. Lone Mountain Processing, Inc. v. Secretary of Labor, No. 11-1431, 709 F.3d 1161, 404 U.S. App. D.C. 219, 2013 WL 1105004 (D.C.Cir. Mar. 19, 2013) **Page:** 23

12. National Labor Relations Board v. CNN America, Inc., No. 15-1112, 865 F.3d 740, 209 L.R.R.M. (BNA) 3402, 431 U.S. App. D.C. 393, 167 Lab. Cas. P 11033, 2017 WL 3318834 (D.C.Cir. Aug. 04, 2017) **Page:** 23

13. Pirlott v. N.L.R.B., No. 07-1025, 522 F.3d 423, 184 L.R.R.M. (BNA) 2001, 380 U.S. App. D.C. 398, 155 Lab. Cas. P 11011, 2008 WL 1757545 (D.C.Cir. Apr. 18, 2008) **Page:** 23

14. Universal Camera Corp. v. N.L.R.B., No. 40, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456, 27 L.R.R.M. (BNA) 2373, 19 Lab. Cas. P 66191 (U.S. Feb. 26, 1951) **Page:** 23

15. Tramont Manufacturing, LLC v. National Labor Relations Board, No. 17-1133, 890 F.3d 1114, 211 L.R.R.M. (BNA) 3106, 435 U.S. App. D.C. 427, 168 Lab. Cas. P 11094, 2018 WL 2406296 (D.C.Cir. May 29, 2018) **Page:** 23

16. Consolidated Communications, Inc. v. National Labor Relations Board, No. 14-1135, 837 F.3d 1, 207 L.R.R.M. (BNA) 3234, 426 U.S. App. D.C. 1, 167 Lab. Cas. P 10942, 2016 WL 4750914 (D.C.Cir. Sep. 13, 2016) **Page:** 23

17. Erie Brush & Mfg. Corp. v. N.L.R.B., No. 11-1337, 700 F.3d 17, 194 L.R.R.M. (BNA) 2673, 403 U.S. App. D.C. 91, 2012 WL 5907367 (D.C.Cir. Nov. 27, 2012) **Page:** 24

18. FedEx Home Delivery, an operating division of FedEx Ground Package System, Inc. v. National Labor Relations Board, No. 14-1196, 849 F.3d 1123, 208 L.R.R.M. (BNA) 3375, 428 U.S. App. D.C. 49, 167 Lab. Cas. P 10990, 2017 WL 836596 (D.C.Cir. Mar. 03, 2017) **Page:** 24

19. International Longshoremen's Ass'n, AFL-CIO v. N.L.R.B., No. 93-1812, 56 F.3d 205, 149 L.R.R.M. (BNA) 2449, 312 U.S. App. D.C. 241, 63 USLW 2780, 130 Lab. Cas. P 11369, 1995 WL 331024 (D.C.Cir. June 06, 1995) **Page:** 24

20. Community for Creative Non-Violence v. Reid, No. 88-293, 490 U.S. 730, 109 S. Ct. 2166, 104 L. Ed. 2d 811, 57 USLW 4607, 1989 Copr. L. Dec. P 26425, 10 U.S.P.Q.2d 1985, 16 Media L. Rep. 1769, 1989 WL 56840 (U.S.Dist.Col. June 05, 1989) **Page:** 25

21. Rule 10. The Record on Appeal **Page:** 25

22. U.S. v. Kennedy, No. 98-1421, 225 F.3d 1187, 2000 CJ C.A.R. 5486, 2000 WL 1352891 (10th Cir.(Colo.) Sep. 20, 2000) **Page:** 25

23. Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp., No. 00-1308, 532 U.S. 943, 121 S. Ct. 1406, 149 L. Ed. 2d 348, 69 USLW 3629, 69 USLW 3626, 69 USLW 3576, 25 Employee Benefits Cas. 2824, 2001 WL 167623 (U.S. Mar. 26, 2001) **Page:** 25

24. Ross v. Kemp, No. 82-8413, 785 F.2d 1467 (11th Cir.(Ga.) Mar. 20, 1986 **Page:** 25

25. Turk v. U.S., No. 19872, 429 F.2d 1327 (8th Cir.(Neb.) Aug. 27, 1970) **Page:** 25

26. Haines v. Kerner, No. 70-5025, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652, 16 Fed. R. Serv. 2d 1 (U.S.Ill. Jan. 13, 1972) **Page:** 25

27. Erickson v. Pardus, No. 06-7317, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081, 75 USLW 3643, 07 Cal. Daily Op. Serv. 6362, 2007 Daily Journal D.A.R. 8015, 20 Fla. L. Weekly Fed. S 317, 2007 WL 1582936 (U.S. June 04, 2007) **Page:** 26

28. Estelle v. Gamble, No. 75-929, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (U.S.Tex. Nov. 30, 1976) **Page:** 26

29. Independent Stave Co., No. 9-CA-19619-1, 287 NLRB 740, 287 NLRB No. 76, 127 L.R.R.M. (BNA) ¶ 1204, 1987-88 NLRB Dec. (CCH) ¶ 19235, 1987 WL 90112 (N.L.R.B. Dec. 16, 1987) **Page:** 28

30. Flyte Tyme Worldwide, No. 04-CA-115437, 362 NLRB 393, 362 NLRB No. 46, 202 L.R.R.M. (BNA) ¶ 2015, 2014-15 NLRB Dec. (CCH) ¶ 15935, 2015 WL 1439925 (N.L.R.B. Mar. 30, 2015) **Page:** 28

31. Clear Haven Nursing Home, No. 6-CA-10115, 236 NLRB 853, 236 NLRB No. 102, 98 L.R.R.M. (BNA) ¶ 1314, 1978 NLRB Dec. (CCH) ¶ 19333, 1978 WL 7763 (N.L.R.B. June 12, 1978) **Page:** 29

32. Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. N.L.R.B., No. 85-1459, 806 F.2d 269, 123 L.R.R.M. (BNA) 3129, 256 U.S. App. D.C. 370, 55 USLW 2334, 105 Lab. Cas. P 12091 (D.C.Cir. Dec. 02, 1986) **Page:** 32

33. Consolidated Edison Co. of New York v. N.L.R.B., No. 19, 305 U.S. 197, 59 S. Ct. 206, 83 L. Ed. 126, 3 L.R.R.M. (BNA) 645, 1 Lab. Cas. P 17038 (U.S.N.Y. Dec. 05, 1938) **Page:** 33

34. Litton Microwave Cooking Products Div., Litton Systems, Inc. v. N.L.R.B., No. 87-5583, 868 F.2d 854, 130 L.R.R.M. (BNA) 2773, 111 Lab. Cas. P 11039, 1989 WL 14914 (6th Cir. Feb. 27, 1989) **Page:** 34

35. Pease Co. v. N.L.R.B., No. 78-1395, 666 F.2d 1044, 109 L.R.R.M. (BNA) 2092, 92 Lab. Cas. P 13154 (6th Cir. Dec. 16, 1981) **Page:** 34

36. VSL Corporation v. U.S., No. 81-1565, 456 U.S. 974, 102 S. Ct. 2237, 72 L. Ed. 2d 847 (U.S. May 17, 1982) **Page:** 34

37. Larand Leisurelies, Inc. v. N.L.R.B., No. 74-2325, 523 F.2d 814, 90 L.R.R.M. (BNA) 2631, 77 Lab. Cas. P 11100 (6th Cir. Oct. 01, 1975) **Page:** 34

38. Crown Stationers, No. 19-CA-14570, 272 NLRB 164, 272 NLRB No. 36, 117 L.R.R.M. (BNA) ¶ 1260, 1984-85 NLRB Dec. (CCH) ¶ 16709, 1984 WL 36814 (N.L.R.B. Sep. 20, 1984) **Page:** 35

39. Hanes Hosiery, Inc., No. 11-CA-5681, 219 NLRB 338, 219 NLRB No. 47, 90 L.R.R.M. (BNA) ¶ 1027, 1974-75 NLRB Dec. (CCH) ¶ 16060, 1975 WL 5721 (N.L.R.B. July 22, 1975) **Page:** 35

40. WAL-MART STORES, INC. AND UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL UNION 99R, CLC AND UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, CLC., No. 28-CA-16832, 352 NLRB 815, 352 NLRB No. 103, 184 L.R.R.M. (BNA) ¶ 1235, 2008 WL 2616510 (N.L.R.B. June 30, 2008) **Page:** 35

41. SERVICE EMPLOYEES INTERNATIONAL UNION, NURSES ALLIANCE, LOCAL 121RN (POMONA VALLEY HOSPITAL MEDICAL CENTER) AND CAROLE JEAN BADERTSCHER., No. 21-CB-14428, 355 NLRB 234, 355 NLRB No. 40, 188 L.R.R.M. (BNA) ¶ 1089, 2010-11 NLRB Dec. (CCH) ¶ 15283, 2010 WL 2311381 (N.L.R.B. June 08, 2010) **Page:** 35

42. PRINT FULFILLMENT SERVICES LLC AND GRAPHIC COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS DISTRICT COUNCIL 3, LOUISVILLE LOCAL, 619-M, No. 09-CA-068069, 361 NLRB 1243, 361 NLRB No. 144, 202 L.R.R.M. (BNA) ¶ 1053, 2014 WL 7189245 (N.L.R.B. Dec. 16, 2014) **Page:** 36

43. Sogard Tool Co., No. 1-CA-23967, 285 NLRB 1044, 285 NLRB No. 129, 127 L.R.R.M. (BNA) ¶ 1009, 1987-88 NLRB Dec. (CCH) ¶ 19032, 1987 WL 89913 (N.L.R.B. Sep. 24, 1987) **Page:** 36

44. Westwood Health Care Center, No. 18-CA-11703, 330 NLRB 935, 330 NLRB No. 141, 163 L.R.R.M. (BNA) ¶ 1225, 2000 WL 309119 (N.L.R.B. Mar. 20, 2000) **Page:** 37

45. TITO CONTRACTORS, INC. AND INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO DISTRICT COUNCIL 51, No. S 05-CA-119008, 05-C, 366 NLRB No. 47, 210 L.R.R.M. (BNA) ¶ 2171, 2018-19 NLRB Dec. (CCH) ¶ 16396, 2018 WL 1559885 (N.L.R.B. Mar. 29, 2018) **Page:** 37

46. VALLEY HOSPITAL MEDICAL CENTER, INC. AND NEVADA SERVICE EMPLOYEES UNION, LOCAL 1107, AFFILIATED WITH SERVICE EMPLOYEES INTERNATIONAL UNION., No. 28-CA-21047, 351 NLRB 1250, 351 NLRB No. 88, 183 L.R.R.M. (BNA) ¶ 1169, 2008-09 NLRB Dec. (CCH) ¶ 15024, 2007 WL 4661202 (N.L.R.B. Dec. 28, 2007) **Page:** 38

47. Kinder-Care Learning Centers, No. 32-CA-8140, 299 NLRB 1171, 299 NLRB No. 164, 136 L.R.R.M. (BNA) ¶ 1056, 1989-90 NLRB Dec. (CCH) ¶ 16278, 1990 WL 164026 (N.L.R.B. Sep. 27, 1990) **Page:** 38

48. The Boeing Company, No. 19-CA-089374, 362 NLRB 1789, 362 NLRB No. 195, 204 L.R.R.M. (BNA) ¶ 1620, 2014-15 NLRB Dec. (CCH) ¶ 16024, 2015 WL 5113238 (N.L.R.B. Aug. 27, 2015) **Page:** 40

49. Heck's, Inc., No. 6-CA-16888, 293 NLRB 1111, 293 NLRB No. 132, 131 L.R.R.M. (BNA) ¶ 1281, 1988-89 NLRB Dec. (CCH) ¶ 15517, 1989 WL 224497 (N.L.R.B. May 18, 1989) **Page:** 40

50. RYDER TRUCK RENTAL, INC., D/B/A RYDER TRANSPORTATION SERVICES AND DISTRICT LODGE NO. 90, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, A/W INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO AND OTIS E. CARP, No. CASES 25-CA-27551-1, 341 NLRB 761, 341 NLRB No. 109, 175 L.R.R.M. (BNA) ¶ 1179, 2004-05 NLRB Dec. (CCH) ¶ 16679, 2004 WL 963370 (N.L.R.B. Apr. 30, 2004) **Page:** 42

51. Arcata Graphics/Fairfield, Inc. and Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Indus. and Allied Workers, Local 32, AFL-CIO, No. 5-CA-21407, 304 NLRB 541, 304 NLRB No. 68, 138 L.R.R.M. (BNA) ¶ 1044, 1991-92 NLRB Dec. (CCH) ¶ 16839, 1991 WL 172394 (N.L.R.B. Aug. 27, 1991) **Page:** 42

52. N.L.R.B. v. SW General, Inc., No. 15-1251, 137 S. Ct. 929, 197 L. Ed. 2d 263, 208 L.R.R.M. (BNA) 3397, 85 USLW 4097, 167 Lab. Cas. P 10994, 17 Cal. Daily Op. Serv. 2656, 2017 Daily Journal D.A.R. 2693, 26 Fla. L. Weekly Fed. S 467, 2017 WL 1050977 (U.S. Mar. 21, 2017) **Page:** 45

53. N.L.R.B. v. Hearst Publications, No. 336, 322 U.S. 111, 64 S. Ct. 851, 88 L. Ed. 1170, 14 L.R.R.M. (BNA) 614, 8 Lab. Cas. P 51179, 1944 WL 28020 (U.S. Apr. 24, 1944) **Page:** 45

54. N. L. R. B. v. United Ins. Co. of America, No. 178, 390 U.S. 254, 88 S. Ct. 988, 19 L. Ed. 2d 1083, 67 L.R.R.M. (BNA) 2649, 57 Lab. Cas. P 12520 (U.S. Mar. 06, 1968) **Page:** 45

55. Nationwide Mut. Ins. Co. v. Darden, No. 90-1802, 503 U.S. 318, 112 S. Ct. 1344, 117 L. Ed. 2d 581, 60 USLW 4242, 14 Employee Benefits Cas. 2625, 1992 WL 52920 (U.S.N.C. Mar. 24, 1992) **Page:** 45

56. § 32-1002. Definitions. **Page:** 46

57. Eastex, Inc. v. N.L.R.B., No. 77-453, 437 U.S. 556, 98 S. Ct. 2505, 57 L. Ed. 2d 428, 98 L.R.R.M. (BNA) 2717, 84 Lab. Cas. P 10654 (U.S.Tex. June 22, 1978) **Page:** 47

58. Sam's Club, No. 7-CA-36934, 322 NLRB 8, 322 NLRB No. 2, 153 L.R.R.M. (BNA) ¶ 1085, 1997-98 NLRB Dec. (CCH) ¶ 16139, 1996 WL 501585 (N.L.R.B. Aug. 27, 1996) **Page:** 48

59. Fresh and Easy Neighborhood Market, Inc., No. 28-CA-064411, 361 NLRB 151, 361 NLRB No. 12, 200 L.R.R.M. (BNA) ¶ 1401, 2014-15 NLRB Dec. (CCH) ¶ 15847, 2014 WL 3919910 (N.L.R.B. Aug. 11, 2014) **Page:** 48

60. § 157. Right of employees as to organization, collective bargaining, etc. **Page:** 48

61. In re Southern Pride Catfish, No. 10-CA-28960, 331 NLRB 618, 331 NLRB No. 81, 171 L.R.R.M. (BNA) ¶ 1369, 2000-01 NLRB Dec. (CCH) ¶ 15516, 2000 WL 942281 (N.L.R.B. June 30, 2000) **Page:** 50

62. N. L. R. B. v. Wooster Div. of Borg-Warner Corp., No. 53, 356 U.S. 342, 78 S. Ct. 718, 2 L. Ed. 2d 823, 42 L.R.R.M. (BNA) 2034, 34 Lab. Cas. P 71492 (U.S. May 05, 1958) **Page:** 50

63. Houston Chapter, Associated General Contractors of America, Inc. (Local 18, Hod Carriers), No. 23-CA-1347, 143 NLRB 409, 143 NLRB No. 43, 53 L.R.R.M. (BNA) ¶ 1299, 1963 NLRB Dec. (CCH) ¶ 12427, 1963 WL 16238 (N.L.R.B. June 28, 1963) **Page:** 51

64. Dave Castellino & Sons, No. 20-CA-17005, 277 NLRB 453, 277 NLRB No. 50, 120 L.R.R.M. (BNA) ¶ 1274, 1985-86 NLRB Dec. (CCH) ¶ 17648, 1985 WL 46060 (N.L.R.B. Nov. 14, 1985) **Page:** 51

65. St. John's Hosp., No. 6-CA-14603, 281 NLRB 1163, 281 NLRB No. 157, 124 L.R.R.M. (BNA) ¶ 1311, 1986-87 NLRB Dec. (CCH) ¶ 18296, 1986 WL 54417 (N.L.R.B. Sep. 30, 1986) **Page:** 52

66. Rule 32. Form of Briefs, Appendices, and Other Papers **Page:** 53

GLOSSARY OF ABBREVIATIONS

NLRB Order	NLRB Decision and Order, 368 NLRB No. 112. (Nov 12, 2019)
AIUSA	Amnesty International of the USA, Inc.
NLRA or Act	The National Labor Relations Act
NLRB or Board	The National Labor Relations Board
ALJ	Administrative Law Judge Michael Rosas
JA	Joint Appendix

I. JURISDICTIONAL STATEMENT

This case concerns the Decision and Order of the National Labor Relations Board ("NLRB") reversing the March 18, 2019 findings of Administrative Law Judge Michael Rosas ("ALJ"). The NLRB Decision and Order was entered on November 12, 2019 and reported at 368 NLRB No. 112. (the "NLRB Order").

The NLRB had jurisdiction over the underlying unfair practice proceeding under Section 8(a)(1) of the National Labor Relations Act ("NLRA" or the "Act"), 29 U.S.C. §158(a)(1). This Court has jurisdiction over Petitioner's appeal under Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that "[a]ny person aggrieved by a final order of the NLRB granting or denying in whole or in part the relief sought may obtain a review of such order in any United States courts of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in." Petitioner was Charging Party before the NLRB. Petitioner is thus a "person aggrieved by a final order of the Board." Id.

Petitioner's appeal was filed on March 18, 2020. The filing is timely because the Act places no time limit on the filing of an appeal of an NLRB order.

II. STATEMENT OF ISSUES

The issues presented by this petition for review are as follows:

1. Whether the NLRB erred by reversing the ALJ decision and holding that AIUSA's statements did not violate Section 8(a)(1) of the NLRA, even though AIUSA agreed to admit wrongdoing in a Formal Settlement.
2. Whether the NLRB erred by determining that AIUSA interns were not statutory employees under Section 2(3) of the NLRA, even though the issue was not raised by AIUSA in its exceptions.
3. Whether the NLRB erred in determining that "[a]ctivity advocating only for nonemployees is not for 'other mutual aid or protection' within the meaning of Section 7 and accordingly does not qualify for the Act's protection", even though the issue was not raised by AIUSA in its exceptions.
4. Whether the NLRB erred by determining that AIUSA employees did not join the Petition in order to change or protect their own conditions of employment, even though the issue was not raised by AIUSA in its exceptions.

III. STATUTES AND REGULATIONS

Section 8(a)(1) of the Act, 29 U.S.C. §158(a)(1), provides:

> (a) It shall be an unfair labor practice for an employer to:

> (1) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

Sections 10(a), (f) of the Act, 29 U.S.C. §§ 160(a), (f), provide:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce….
> (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 court a written petition praying that the order of the Board be modified or set aside[.]

IV. STATEMENT OF THE CASE

This case arises out of a petition with a simple request: interns, who worked side-by-side with paid employees, should get paid for their work.

AIUSA staff and unpaid interns signed the Petition together in April 2018. In response, AIUSA made unlawful statements in violation of the Act. Petitioner Jarrar filed a charge with the NLRB on June 6, 2018 and the NLRB General Counsel issued a complaint on September 24, 2018. The case was tried before an ALJ on January 16, 2019, who found that AIUSA's statement violated the Act.

AIUSA appealed the case to the NLRB Board by filing two exceptions, but later agreed to enter a Formal Settlement and admit wrongdoing.

Counsel for the General Counsel requested that the NLRB Board wait until the settlement process was ongoing, and the Secretary of the NLRB Board confirmed that the case would be put on hold during settlement negotiations. A few weeks later, the Board abruptly took on the case and reversed the ALJ decision.

In addition to reversing the decision pertaining to AIUSA's unlawful statements, this hyper-partisan NLRB Board went out of its way and, although not raised by AIUSA, declared that actions like the Petition are not protected by the Act – an interpretation that is described by the dissenting NLRB Board member as "another instance of the majority reaching out to wrongly narrow statutory protections for employees."

The NLRB Board also ruled that, although not raised by AIUSA, AIUSA's interns were not employees under the Act.

Lastly, the NLRB Board found, in a departure from precedent, that employees did not participate in the Petition for their own aid – a matter that was not raised by any party.

A. Overview of AIUSA's Operations

AIUSA is a non-profit grassroots organization with six offices throughout the United States, including a "nerve-center"[1] office in Washington, DC ("the DC office") and 210,000 members. At all times relevant hereto, AIUSA employs approximately 100 paid staff, including 25 staff members in the DC office. At the relevant times, Margaret Huang ("Huang") was AIUSA's executive director of AIUSA. She was the highest-ranking employee within the organization. (JA 7)

Petitioner was employed as Advocacy Director for the Middle East and North Africa from September 11, 2017 until July 28, 2018. In this role, he was responsible for the organization's lobbying efforts on issues pertaining to these regions, as well as other in-house tasks such as leading the organization's compliance with lobbying regulations. He was assigned to the Government Relations Unit.

B. AIUSA's Internship Program

AIUSA regularly employed interns who performed work for the organization on an unpaid basis or with stipends.

As of August 2019, there were about 30 to 40 interns at any given time, including approximately 15 interns in the DC office.

[1] As defined in Hertz Corp. v. Friend, 559 U.S. 77 (2010)

AIUSA's Employee Handbook, effective April 2018, lists classifications for full and part-time employees; temporary employees, interns/fellows, consultants and member volunteers. Interns/Fellows, the classification at issue, are defined as follows (JA 90):

> An intern is an individual who performs work on an unpaid or stipend basis for the individual's own purposes, which includes but is not limited to meeting educational requirements or expectations for a degree being pursued by the individual, and/or providing support for human rights initiatives/causes.
>
> AIUSA currently offers a number of fellowships typically to recent graduates or activists relatively new to the human rights field. These include the Ladis Kristoff Fellow, the Youth Leadership Fellow, and the Styron Fellow. Individuals awarded a fellowship often work on special projects that are designed to align with the organization's priorities. A fellow may be considered a full-time, exempt employee.
>
> Interns/Fellows are subject to all AIUSA policies that apply to employees during the period of their internship/fellowship, as appropriate for the duties they are assigned.

The intern recruitment process is initiated by employees with the assistance of the human resources department. As Huang testified before the ALJ on January 17, 2019 (JA 39):

> So individual managers would often post a position for an intern, having decided that they needed some additional support or some particular expertise for a project they were working on. This was all overseen by the human resources department to try to make sure that we were being consistent in how we brought interns into the organization. But the relationship is primarily between the manager and the intern.

Once selected, interns are assigned to staff members to work on specific projects. Weekly schedules range from one day per week to every day.

Since AIUSA did not employ paid administrative assistants, staff members relied on interns to perform administrative tasks. Most staff members, including Petitioner Jarrar, relied heavily on interns to accomplish their work goals.

AIUSA's Career Level Guide, from November 2014, set the salary range, qualifications, and "authority" for each level at the organization. It listed managing interns as one of the main points under authority. For example, Level 1 (Assistant), has "no personnel authority (e.g. cannot supervise interns)." Level 2 (Associate) "May supervise interns."

C. The Petition

In early 2018, Petitioner Jarrar was approached by a some of the interns working in the DC office who complained that they were not being compensated for their work. After a few conversations, they decided to submit a petition requesting compensation for interns. Petitioner Jarrar assisted the interns after they drafted a petition (the "Petition") by providing feedback and edits.

Petitioner Jarrar got involved to support his colleagues who happened to be interns, but also because he feared that continuing the unpaid internship program would negatively impact staff workplans, goals, and workplace conditions. To that end, the Petition stated, in part (JA 76-79):

> Providing compensation for internships would demonstrate true commitment to, making Amnesty an equal opportunity employer and creating a diverse workplace. Amnesty International's commitment to human rights should be proven from within first. It is a basic human right to be able to seek employment and the lack of monetary compensation in this position restricts the ability to carry out that right. Without pay, AIUSA's internships are more available to students of higher socioeconomic status, which serves to limit racial and socioeconomic diversity. In order to create a more diverse and varied work environment it is imperative that Amnesty help include those people who cannot afford to live without a fair and standardized pay.

In early April 2018, all interns in the DC office signed the Petition. Along with another employee who was a shop steward for the Union as well as a former AIUSA intern herself, Petitioner Jarrar helped collect signatures on the Petition by walking around the DC office and inviting paid staff to sign it.

On April 3, Huang received the petition in an email from an intern on behalf of the DC office interns. The Petition was signed by fourteen "DC interns" (JA 77-78) and "[s]upported by" the additional signatures of twenty-one staff members (JA 79) in the DC office, including Petitioner.

D. AIUSA's Response

As the ALJ noted, upon reading the petition, Huang was disappointed and dismayed by the suggestion of hypocrisy on the part of AIUSA. It was not something that she wanted people outside of the organization to believe about AIUSA. (JA 10)

Huang immediately forwarded the email to AIUSA's executive team for consideration at its meeting the next day.

Sometime later that week, Huang sent an Outlook calendar invite to an April 9, 2018 meeting to all of the paid staff who signed the interns' petition (JA 10). As the ALJ noted, this invite was atypical because it did not specify the purpose of the meeting and because of its formality. AIUSA's customary practice had been to send an informal email asking to meet and discuss an issue, rather than the more formal approach in an Outlook calendar invitation.

On April 9, Huang, accompanied by the head of HR, first met with the DC office interns. She informed them that, in response to the petition, AIUSA would start paying interns as of September 2018. That change, however, had no bearing on the interns in attendance, since their internships were ending before then.

Huang then met with the paid employees who signed the petition. Huang informed the employees that AIUSA would be implementing a paid internship program. However, AIUSA would only be able hiring three interns for the entire organization (JA 10), including one in the DC office.

Concerned about retaliation for his role with the petition, Jarrar arranged to meet with Huang in her office on May 9, 2018. Petitioner recorded most of the conversation on his telephone (JA 50).

Huang's statements during the April 9 and May 9, 2018 meetings were found to have violated the Act by both the NLRB General Counsel and the ALJ because she (1) instructed employees to communicate complaints to management orally before submitting them in writing, (2) threatened employees with unspecified reprisal because they engaged in protected concerted activity, (3) equated protected concerted activity with disloyalty, and (4) requested that employees report to management employees who are engaging in protected concerted activity.

E. NLRB procedural history

1- June 11, 2018: Petitioner filed a charge with the NLRB (JA 63-68).

2- September 24, 2018: Region 5 of the NLRB issued a Complaint and Notice of Hearing (JA 69-73).

3- January 16, 2019: The case was tried before ALJ Michael A. Rosas in Washington, DC. (JA 17-49)

4- March 18, 2019, the ALJ issued his Decision finding that AIUSA violated Section 8(a)(1) of the Act. Amnesty Int'l of the USA, Inc. & Raed Jarrar, No. 5-CA-221952, 2019 WL 1253838 (Mar. 18, 2019) (JA 77)

5- April 15, 2019: AIUSA filed the following two exceptions (JA 178-197):

a. "In the Totality of Circumstances, Huang's Statements Were Not Threatening."

b. "The Characterization of AIUSA's Interns as Employees Under the Fair Labor Standards Act Should Be Rejected."

6- On July 5, 2019, the NLRB informed Petitioner Jarrar that AIUSA has agreed to a Formal Settlement. The email read in part:

> We think we have an agreement with Amnesty to resolve this case. They are willing to enter into formal settlement stipulation under which they would be agreeing to entry of a Board order covering all of the violations found by Judge Rosas, which would include a cease-and-desist remedy as well as posting a notice for employees. It's basically a consent decree. It is exactly what we would get if were to prevail on appeal before the Board, plus it's perhaps better in that Amnesty would be waiving its right to appeal to a Court of Appeals or to challenge our seeking enforcement of the Board's order in such a court.

7- On November 12, the NLRB abruptly issued its NLRB Order (JA 1-16).

8- On November 13, 2019, Counsel for the NLRB General Counsel confirmed to Petitioner Jarrar

> Settlement talks with Amnesty were ongoing. We had made a proposal and Amnesty had requested some revisions that we were considering. The Region was under the impression from discussions with the Board's Executive Secretary's office that a decision would not be issuing pending these talks. It was very much a surprise that it came out.

9- On March 18, 2020, Petitioner Jarrar filed this appeal.

V. SUMMARY OF ARGUMENT

This case is another casualty of a hyper-partisan NLRB Board that, according to the NLRB Board's own dissenting member, has been tearing down NLRA protections "at every opportunity, real or invented." As a matter of law, the NLRB breached immutable legal principles and this Court should accordingly grant this petition for review and vacate the NLRB Board's decision on one or more of the following grounds:

First, the NLRB Board went against its own internal procedure and precedent pertaining to settlements. The NLRB Board should not have issued this NLRB Order in the first place. Counsel for the NLRB General Counsel was finalizing a Formal Board Settlement agreement with AIUSA. The NLRB Board's Executive Secretary's office informed the NLRB General Council and NLRB Region 5 that a Board's decision would not be issuing pending these talks. The NLRB Board departed from its own precedent and internal procedure and abruptly stepped in to issue this controversial NLRB Order.

Second, the NLRB Board went against substantial evidence on the record and made determinations with no evidence whatsoever on matters not raised by the parties in the first place. On the one hand, AIUSA statements were in violation of the Act according to the NLRB General Counsel, according to evidence (included recorded conversations) relied upon by the ALJ, and also

according to AIUSA itself when it agreed to admit wrongdoing in a Formal Settlement. On the other hand, The NLRB Board made determination on matters not raised by the Petitioner, the ALJ, or even AIUSA in its exceptions, then claimed there was "no evidence" to support the contrary.

Third, it the Board overstepped its authority, as designated by Congress in the Act, by making a determination on the interns' employment status. Although AIUSA did not file an exception on this, the NLRB Board went out of its way to rule that AIUSA interns were not employees under the Act, erroneously citing "no evidence" to support the contrary. The NLRB Board has no authority to recast traditional common-law principles in identifying covered employees. Instead, the inquiry into the content and meaning of the common law is a pure question of law, and its resolution requires no special administrative expertise that a court does not possess. For this reason, the Court should review the NLRB Board's interpretation of the common law de novo.

Fourth, The NLRB Board departed without explanation from binding precedent, including on protections under Section 7 of the NLRA and on employees joining the petition to protect their own conditions of employment. On the one hand, the petition was a protected activity under Section 7 of the Act according to the NLRB General Counsel, the ALJ, NLRB precedent and the Supreme Court. No parties ever contested this. Yet, the NLRB Board went out of

its way to declare that the Petition, and therefore any future concerted activity by employees for the aid of "nonemployees," is not protected by the Act. On the other hand, AIUSA employees, including Petitioner Jarrar, signed the petition in order to improve and protect their own conditions of employment. Supervising interns is listed in the terms and conditions of their employment. Although the NLRB Board claims "there is no evidence suggesting that the employees joined the petition in order to change or protect their own conditions of employment," there is plenty of evidence, but the issue was not raised by any of the parties and no such evidence is necessary because the test of whether an activity is for "mutual aid or protection" is an objective one based on the NLRB Board's own precedent.

VI. STANDING

Pursuant to 29 U.S.C. § 160(f), Petitioner has standing to seek review in this Court as he was Charging Party before the NLRB and is thus a "person aggrieved by a final order of the Board."

VII. ARGUMENT

A. Standards of Review

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" exercising their rights under the Act.

"Judicial review of NLRB determinations in unfair labor practice cases is generally limited, but not so deferential that the court will merely act as a rubber stamp for the Board's conclusions." Titanium Metals Corp. v. NLRB, 364 U.S. App. D.C. 69, 392 F.3d 439, 445 (D.C. Cir. 2004). A Board order will not survive review when its factual determinations are not supported by substantial evidence. See Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 361, 118 S. Ct. 818, 139 L. Ed. 2d 797 (1998). A Board's decision will also be set aside when it has no reasonable basis in law, fails to apply the proper legal standards, or departs from established precedent without reasoned justification. Titanium Metals Corp. v. National Labor Relations Board, 392 F.3d 446 (2004)

A reviewing court will uphold a Board decision only if it is "rational and consistent with the Act," and so long as the Board's reasoning is not "inadequate, irrational, or arbitrary." Allentown Mack, 522 U.S. at 364. In other words, this Court should vacate the NLRB Board's NLRB Order if, upon reviewing the record as a whole, the Court concludes that the Board's findings are not supported by "substantial evidence," 29 U.S.C. § 160(f), or that "the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." Int' l Union of Electronic, Electrical, Salaried, Mach. & Furniture Workers v. NLRB, 309 U.S. App. D.C. 377, 41 F.3d 1532, 1536 (D.C. Cir. 1994).

"A decision of the Board that 'departs from established precedent without a reasoned explanation' is arbitrary." NLRB v. Sw. Reg' l Council of Carpenters, 826 F.3d 460, 464 (D.C. Cir. 2016) (quoting Comau, Inc. v. NLRB, 671 F.3d 1232, 1236 (D.C. Cir. 2012)). Although the Board "need not address 'every conceivably relevant line of precedent,'. . . it must discuss 'precedent directly on point.'" Id. (quoting Lone Mountain Processing, Inc. v. Sec'y of Labor, 709 F.3d 1161, 1164 (D.C. Cir. 2013)). Ultimately, "[a]n agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making." NLRB v. CNN Am., Inc., 865 F.3d 740, 751 (D.C. Cir. 2017) ("Indeed, it is elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent." (citation and internal quotation marks omitted)). In other words, the NLRB must follow its precedent, and if it decides to chart a new path, it must acknowledge doing so and present a reasoned justification.

This Court should consider whether the "Board's factual findings are not supported by substantial evidence, or the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." Pirlott v. NLRB, 522 F.3d 423, 432 (D.C. Cir. 2008). "Substantial evidence is more than a mere scintilla." Universal Camera Corp. v. NLRB, 340 U.S. 474, 478 (1951) (noting that "substantial evidence . . . must do more than create a suspicion of the

existence of the fact to be established"). The Court "bear[s] the responsibility to examine carefully both the Board's findings and its reasoning." Erie Bush & Mfg. Corp. v. NLRB, 700 F.3d 17, 21 (D.C. Cir. 2012).

Congress delegated to the National Labor Relations Board the authority to make tough calls on matters concerning labor relations, but not the power to recast traditional common-law principles of agency in identifying covered employees and employers. Instead, the inquiry into the content and meaning of the common law is a "pure" question of law, and its resolution requires no special administrative expertise that a court does not possess. For that reason, this court should review Board's interpretation of the common law de novo. See FedEx Home Delivery v. NLRB, 849 F.3d 1123, 1128, 428 U.S. App. D.C. 49 (D.C. Cir. 2017) ("[T]his particular question [regarding who is an employee or independent contractor] under the Act is not one to which we grant the Board Chevron deference[.]"); cf. International Longshoremen's Ass'n v. NLRB, 56 F.3d 205, 212, 312 U.S. App. D.C. 241 (D.C. Cir. 1995) (because the term "agent" in the Act "incorporat[es] common law agency principles," courts do not "defer to the agency's judgment as we normally might under [Chevron]"). That no-deference rule applies just as much to the common-law meaning of "employer" under the Act as it does to that of "employee." That is because both inquiries turn on pure questions of law about the scope of

traditional common-law agency principles. Cf. Community for Creative Non-Violence, 490 U.S. at 739-740.

This Court may expand the record under Federal Rule of Appellate Procedure 10(e). Normally, the record on appeal consists of "the original papers and exhibits filed in the district court," "the transcript of proceedings, if any" and "a certified copy of the docket entries prepared by the district clerk." However, "if anything material to either party is omitted from or misstated in the record by error or accident," the rule allows "the omission or misstatement [to] be corrected and a supplemental record [to] be certified and forwarded." Fed. R. App. P. 10(e)(2). Rule 10(e)(2) allows correction of the record either by agreement of the parties, by order of the district court, or by order of the court of appeals.

The Court can also supplement the record based on this Court's inherent equitable authority to expand the record. Several circuits have held that they have an inherent equitable authority to supplement the record on appeal under circumstances where Fed. R. App. P. 10 would not apply. See United States v. Kennedy, 225 F.3d 1187, 1192 (10th Cir.2000), cert. denied, 532 U.S. 943, 121 S.Ct. 1406, 149 L.Ed.2d 348 (2001); Ross v. Kemp, 785 F.2d 1467, 1474 n. 12 (11th Cir.1986); Turk v. United States, 429 F.2d 1327, 1329 (8th Cir.1970).

Finally, The Supreme Court held that pro se complaints are to be held "to less stringent standards than formal pleadings drafted by lawyers." Haines v.

Kerner, 404 U.S. 519, 520 (1972). Pro se pleadings are liberally construed and held to a less stringent standard than pleadings drafted by lawyers. Erickson v. Pardus, 551 U.S. 89, 94 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)); Haines v. Kerner, 404 U.S. 519, 520 (1972). Liberal construction means that the Court will read the pleadings to state a valid claim to the extent that it is possible to do so from the facts available.

B. The NLRB Erred by Reversing the ALJ's Decision

This case is another example of how a politically motivated NLRB Board that has been tearing down protections under the Act[2]. Under the applicable standards of review, the Court should vacate the Board's decision on one or more of the following grounds:

1. The Board departed from its "well settled" standards and internal process

The NLRB Board should not have issued this NLRB Order in the first place. Counsel for the NLRB General Counsel was finalizing a Formal Settlement agreement with AIUSA.

On July 5, 2019, Counsel for the NLRB General Counsel emailed Petitioner Jarrar, via counsel, with the following:

[2] Lynn Rhinehart, Under Trump the NLRB Has Gone Completely Rogue An agency founded to defend workers' rights, The Nation, April 7, 2020, https://www.thenation.com/article/politics/nlrb-workers-rights-trump/ (accessed August 23, 2020

From: [redacted] <[redacted]@nlrb.gov>
Sent: July 5, 2019 2:09 PM
To: [redacted] <[redacted]>
Subject: Amnesty NLRB Case: Settlement Update

Hi [redacted],

We think we have an agreement with Amnesty to resolve this case. They are willing to enter into a formal settlement stipulation under which they would be agreeing to entry of a Board order covering all of the violations found by Judge Rosas, which would include a cease-and-desist remedy as well as posting a notice for employees. It's basically a consent decree. It is exactly what we would get if were to prevail on appeal before the Board, plus it's perhaps better in that Amnesty would be waiving its right to appeal to a Court of Appeals or to challenge our seeking enforcement of the Board's order in such a court.

There's really only one thing in the outline of a settlement that we've discussed that might be objectionable from your perspective. The Region would agree to Amnesty's request that the settlement be conditioned on vacating the judge's decision and/or disclaiming the portion of the decision concluding that the unpaid interns should have been paid under the FLSA. I know Raed was pleased about this part of the decision because he hopes that it is a boost to whatever legal efforts the interns might undertake against Amnesty. I told him when I last spoke with him that I don't think a NLRB ALJ's decision under a statute other than the NLRA would be persuasive to a federal court in a FLSA case much less constitute collateral estoppel, especially when the issue wasn't fully litigated. The interns' situation isn't part of the Region's calculus because it's under a different statute, but I think there would be no harm to the interns' position while achieving a full vindication of rights under our statute.

The Region is still working on drafting the formal stipulation and we may have some details to iron out with Amnesty. But I wanted to reach out to see if Raed would be on board and to try to address any concerns he might have, so give me a call if you have any questions. I will be out on vacation [redacted] If we manage to get something finalized before I go (not likely), we will definitely be in touch.

Thanks,
[redacted]
Field Attorney
National Labor Relations Board, Region 5
[redacted]
[redacted]@nlrb.gov

Over the next few weeks, Petitioner Jarrar agreed to the terms of the Formal Settlement, including vacating the ALJ's decision and/or disclaiming the

portion of the decision concluding that the unpaid interns should have been paid under the FLSA.

According to the NLRB's own "Guide to Board Procedures,"[3] effective April 2017:

> (a) Can I settle my case after the Administrative Law Judge has issued a decision and the case has been transferred to the Board?
> Yes. You should contact the Regional Compliance Officer if you desire to settle. You may also want to consider participating in the Board's ADR program.
> (b) What must I file if a case pending before the Board has settled?
> Except for formal settlements that provide for a Board Order and court judgment, the Board does not approve settlements or approve withdrawals. It prefers to remand the case to the Regional Director for approval of settlements and withdrawals. Thus, the best procedure is to file a motion for remand.
> Although the Board generally will not approve the settlement, this is not to say that the settlement and its terms are irrelevant. Indeed, the movant must disclose the terms of the settlement to the Board. Merely stating that the case has settled is insufficient. If the settlement is written, a copy should be submitted with the motion. In reviewing the parties' motion to remand based on a settlement, the Board balances public policy concerns with the wishes of the parties. To do so, the Board will analyze all the surrounding circumstances, including, but not limited to: 1) whether the charging party, the respondent, and individual discriminatees have agreed to be bound, and whether the General Counsel agrees with the settlement; 2) whether the settlement is reasonable in light of the nature of the alleged violations, the risks of continued litigation, and the stage of litigation; 3) whether the settlement was obtained through fraud, coercion, or duress by any of the parties; and 4) whether the respondent has a history of violating the Act or breaching previous settlements. See Independent Stave, 287 NLRB 740, 744 (1987). The Board does not require that pending exceptions be withdrawn, but the parties may want to do so as an indication of their good faith (subject to reinstatement if the motion for

[3] NLRB, Guide to Board's Procedures, July, 2020, https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/guide-to-board-procedures-2020-august-2020-final.pdf (accessed August 23, 2020)

> remand is denied). Even if the settlement satisfies the Independent Stave criteria, the Board may refuse to remand the case because it deems that a public policy outweighs the wishes of the parties. See Flyte Time, 362 NLRB No. 46 (2015) (Board denied motion to remand finding that approval of the settlement would not effectuate policies of the Act).

There is nothing in the "Guide to Board's Procedure" that indicates a process in which the NLRB Board can disrupt ongoing settlement talks.

On November 12, 2019, with absolutely no prior notice, the NLRB Board did not follow its own internal process and abruptly stepped in to issue this controversial ruling. The next day, Counsel for the NLRB General Counsel emailed Petitioner Jarrar with the following:

> **From:** [redacted] <[redacted]@nlrb.gov>
> Date: Wed, Nov 13, 2019 at 10:31 AM
> Subject: RE: Amnesty NLRB Case: Settlement Update
> To: [redacted] [redacted] <[redacted]>, Raed Jarrar <jarrar.raed@gmail.com>
>
> Hi [redacted] and Raed,
>
> It is indeed brutal, very disappointing.
>
> Settlement talks with Amnesty were ongoing. We had made a proposal and Amnesty had requested some revisions that we were considering. The Region was under the impression from discussions with the Board's Executive Secretary's office that a decision would not be issuing pending these talks. It was very much a surprise that it came out.
>
> Raed, sorry I missed your calls yesterday, I had a deadline to meet by the end of the day. Either one of you, feel free to call me today and I should be available.
>
> Thanks,
> [redacted]
> Field Attorney
> National Labor Relations Board, Region 5
> [redacted]
> [redacted]@nlrb.gov

In addition to its internal procedure, the NLRB Board has outlined a relatively stringent, two-part legal test to be applied in determining whether or not to approve a settlement agreement and withdrawal of unfair labor practice charges. In Clear Haven Nursing Home, 236 NLRB 853 (1978), the Board outlined the "well settled," and relatively stringent, two-part legal test to be applied in determining "whether or not to approve a settlement agreement and withdrawal of unfair labor practice charges." First, the Board will assume that the case is meritorious and that the General Counsel is prepared to carry their burden of proof. Second, the Board will determine whether the settlement agreement "substantially remed[ies]" the alleged unfair labor practices. Among the most important of the considerations in assessing whether a settlement agreement substantially remedies the alleged unfair labor practices is a determination whether the agreement provides for traditional Board remedies such as reinstatement, backpay, and the posting of a notice. The absence of such remedies will impact the Board's approval of a proposed settlement.

The Board's policy against deference to private settlement agreements is grounded on the well-accepted principle that the Board, having filed an unfair labor practice complaint, proceeds in vindication of the public interest, not in vindication of private rights. Therefore, a settlement that seeks dismissal of an unfair labor practice complaint will not be found to be acceptable merely because

the private parties to the labor dispute are satisfied with its terms. Rather, the Board must pursue the public's interest in discouraging unfair labor practices by ensuring that those practices have been substantially remedied. As the Board observed in Clear Haven, "there is an overriding public interest in the effectuation of statutory rights which cannot be cut off or circumvented at the whim of individual [employees]."

The NLRB Order in this case, the Board made no attempt either to apply the above principles, or to reassess the standards it will use in dealing with the ongoing settlement talks. Indeed, the Board issued this NLRB Order without any reference whatsoever to its Clear Haven precedent. It goes without saying that the Board failed in its recognized obligation to ensure that unfair labor practices have been substantially remedied.

Under the Clear Haven test, for the limited purpose of passing on the acceptability of a proposed settlement, the Board must "of necessity" begin with the assumption that the case is meritorious. In the instant case, the Board made no attempt to explain its departure from this well-established principle.

The Board's "well settled" standards for assessing settlement agreements were delineated in Clear Haven. In this case the Board departed from those standards without explanation (and without even citing Clear Haven). An agency

may not depart from its precedent without explaining and justifying its change in position.

Moreover, On March 30, 2015, in *Flyte Tyme Worldwide*, NLRB denied the charging party's motion to withdraw an unfair labor practice charge against the employer stemming from a mandatory arbitration policy that contained a class and collective action waiver requirement. Although the parties reached a settlement of the matter in a separate but related class action wage and hour lawsuit, the Board found that the settlement did not effectuate the greater NLRA purposes of preventing unfair labor practices and ensuring employees' rights to engage in collective action concerning terms of employment (*362 N.L.R.B. slip op. 46 (Mar. 30, 2015)*.

Interrupting ongoing Formal Settlement talks with AIUSA then issuing an Order and Decision that weakens workers' protections under the Act in no way "effectuate the greater NLRA purposes of preventing unfair labor practices and ensuring employees' rights to engage in collective action concerning terms of employment."

In Oil, Chemical & Atomic Workers International Union v. Nat' l Labor Relations Bd., 806 F.2d 269 (D.C. Cir. 1986), this Court remanded the case to the NLRB Board over its settlement with a private company despite the objection of

the Board's General Counsel and without explaining its departure from established precedent in dealing with settlements.

2. The Board's findings are not supported by substantial evidence

Pursuant to section 10 (e) and (f) of the NLRA, 29 U.S.C. § 160(e), (f), the Court should reverse the Board if, "upon reviewing the record as a whole, we conclude that the Board's findings are not supported by substantial evidence or that the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." International Union of Elec., Elec., Salaried. Mach. & Furniture Workers v. NLRB, 309 U.S. App. D.C. 377, 41 F.3d 1532, 1536 (D.C. Cir. 1994). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938); see also Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 95 L. Ed. 456, 71 S. Ct. 456 (1951) ("[A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."). Moreover, the Board "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the

evidence fairly demands." Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 118 S. Ct. 818, 829, 139 L. Ed. 2d 797 (1998).

The ALJ's findings are part of the record this Court must review. In reviewing the substantiality of evidence, the Court "must take into account whatever in the record fairly detracts" from the weight of the evidence supporting a Board decision. Id.; Litton Microwave Cooking Prod. Div. v. NLRB, 868 F.2d 854, 857 (6th Cir. 1989). As the Supreme Court in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) instructs:

> We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The "substantial evidence" standard is not modified in any way when the Board and its examiner [now the ALJ] disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case.

When the NLRB Board finds facts and draws inferences different from those of the ALJ, a reviewing court must examine the evidence more carefully in cases where a conflict exists. Pease Co. v. NLRB, 666 F.2d 1044, 1047-48 (6th Cir. 1981), cert. denied, 456 U.S. 974, 72 L. Ed. 2d 848, 102 S. Ct. 2238 (1982); Larand Leisurelies, Inc. v. NLRB, 523 F.2d 814, 820 (6th Cir. 1975).

i. The Board went against substantial evidence on the record

The NLRB's determination that AIUSA's statements did not violate Section 8(a)(1) of the NLRA is arbitrary, unsupported by substantial evidence, and contrary to law and legal precedents. AIUSA statements were indeed in violation of the Act, not only according to the NLRB General Counsel and not only according to strong evidence, included recorded conversations, relied upon by the ALJ – but the statements were in violations of the Act according to AIUSA itself, which agreed to admit wrongdoing in a formal settlement.

Section 8(a)(1) of the Act makes it an unfair labor practice to interfere with, restrain, or coerce employees in their exercise of their protected right to concerted activity. In determining whether an employer's actions violate Section 8(a)(1) the employer's motivation is immaterial; what matters is whether the employer's conduct, viewed from the perspective of a reasonable person, tends to interfere with the free exercise of employee rights. E.g., Crown Stationers, 272 NLRB 164 (1984) (the test for interference or coercion is whether the conduct may reasonably be said to tend to interfere with the free exercise of employee rights); Hanes Hosiery, Inc., 219 NLRB 338 (1975) ("we have long recognized that the test of interference, restraint and coercion…does not turn on Respondent's motive, courtesy, or gentleness…the test is whether Respondent has engaged in conduct which reasonably tends to interfere with

the free exercise of employee rights under the Act."). Section 8(c) of the Act affords an employer the right to express its personal negative views concerted activity to its employees, but only so long as such expression does not contain an express or implied threat of reprisal or force or promise of benefit. Wal Mart Stores, Inc., 352 NLRB No. 103 at 8 (2008) (employer had the right to encourage use of its open-door policy as a superior alternative to representation). A threat need not be explicit; it may be implied. Pomona Valley Hospital Medical Center, 355 NLRB 234, 235 (2010) (holding that where words could reasonably be construed as coercive, they may violate the Act).

When a supervisor expresses personal disappointment about an employee's concerted activities, it is reasonable for an employee to read an implied threat of future reprisal into the employer's statements, making such statements coercive. Print Fulfillment Services, LLC, 361 NLRB 1243, 1243-44 (2014) (finding a violation where employer informed employee that the employer felt "disappointed" in the employee's pro-union activity). Suggesting that an employee's protected concerted activity is an act of disloyalty to the employer is also coercive. Sogard Tool Co., 285 NLRB 1044, 1047-48 (1987) (employer who conveyed belief that union activity was inimical to the employer's interests by comparing it to cancer acted unlawfully).

As the ALJ stated, Huang's April 9 statements were precisely the kind that the Board has found unlawful. They were made during an unusually-scheduled meeting in which only those employees who signed the interns' petition were invited, even though Huang's announcement—that AIUSA would be moving to a paid internship program—would be of importance to all employees, not just the petition's signatories. The fact that only a specific group of employees were singled out for her announcement reasonably suggested to those present that they had been branded as disloyal. See Westwood Health Center, 330 NLRB 935, 941-42 (2000) (employer unlawfully implied during a private conversation with employee that she would consider her disloyal if she supported a union); Tito Contractors, Inc., 366 NLRB No. 47, slip op. at 1 (2018) (supervisor violated Section 8(a)(1) by depicting concerted activity as a personal betrayal and considered employees who engaged in a protected lawsuit to be "stabbing [him] in [the] back.") During this meeting, Huang indicated that she believed the petition was adversarial, aggressive, and litigious—even though the petition was expressed in moral terms and neither referred to litigation nor regulations. These expressions are like those made in Sogard Tool Co., in that they indicate that concerted activity—here, a petition—is hostile to the employer's interests. 285 NLRB at 1047. Huang also expressed her own disappointment that the assembled employees had not made use of her open-door policy, a coercive statement of

personal affront like that found unlawful in Tito Contractors, Inc. 366 NLRB No. 47, slip op. at 1.

As the ALJ stated, Huang's statements to staff at the April 9 meeting were coercive in violation of Section 8(a)(1) of the Act. "[A]n employer may not interfere with an employee's right to engage in Section 7 activity by requiring that the employee take all work-related concerns through a specific internal process." Valley Hospital Medical Center, 351 NLRB 1250, 1254 (2007); Kinder-Care Learning Centers, Inc., 299 NLRB 1171, 1171-72 (1990) ("an employer may not impose procedural prerequisites to the exercise of Section 7 rights."); compare Wal Mart Stores, Inc., 352 NLRB No. 103 at 8 (2008) (employer was found not to be acting unlawfully by encouraging use of an open door policy as an alternative to union representation).

Immediately after the April 9 meeting, an AIUSA Union Shop Steward, after being approached by numerous AIUSA staff and interns, sent an email, a copy of which was provided by Petitioner Jarrar to the NLRB during its investigation of the matter. The email states that the April 9 meeting "has been described as hostile, to the extent that staff in the room felt fearful of retaliation just for this gesture of support (the signatures)." It describes the event as follows:

- Monday April 9: Margaret and Bart meet with DC staff that signed the petition. The tone of the meeting was upset and hostile.
    - It was conveyed that:

        - ...the letter/petition "felt like a hostile gesture", and Margaret was disappointed that we didn't come to her with this before resorting to a letter. (Again, this was intern-led)
        - ....the letter mentioned litigation (it didn't) and "threatened to bring in the union" (misstatement).
        - ....the E-Team had been planning to start paying interns later, but instead now they'll start having just 3 paid interns per semester for the full org, starting in the fall.
    - Staff responded as much as possible, given the temperature of the room and fear of retaliation:
        - ...With great surprise at this sudden decision
        - ...Saying that our intent was to stand in solidarity with the interns' initiative by means of a mechanism (petition) that we use every day as an organization to deliver requests
        - ...Offering an apology for any offense unintentionally provided
        - ...Expressing deep concern about the reduction of the intern workforce, on which we all depend
        - ...Posing suggestions to keep the conversation going as opposed to stopping with this extraordinarily sudden decision with which we were blind-sighted

The Union Shop Steward's email concludes with: "I want to make it clear that anyone who feels retaliated against, intimidated, etc. because of this is encouraged to talk to a Shop Steward. The union is behind us 100%."

As the ALJ concluded, Huang also coerced Petitioner Jarrar during their May 9 meeting by attempting to dictate her own procedural process for collective action, in violation of his Section 7 rights. Although Huang stopped short of outright commanding Petitioner Jarrar to cease using petitions and only use the AIUSA's open-door policy, her statements cannot be taken as the mere expression of an opinion as to the benefits of an open- door policy, as in Wal-

Mart Stores. Huang told Petitioner Jarrar that he should "try talking" to her before "doing another petition," that "the first step" should be to ask for a meeting rather than present a petition, and that "strategically you might get further if you request a meeting with management." Simply wording such instructions in a slightly less compulsory manner than they might otherwise be phrased does not serve to change their compulsory effect; statements need not be phrased as a direct command to constitute a directive. Boeing Co., 362 NLRB 1789, 1791-92 (2015) (previously mandatory policy that was altered to use the word "recommend" was still considered a directive); Heck's, Inc., 293 NLRB 1111, 1114, 1119 (1989) (statement that the "company requests you regard your wage as confidential" was still restrictive of employees' Section 7 activity). In Boeing Co., the employer was unable to make otherwise unlawful directives lawful simply by couching them as being recommendations; neither does Huang's use of ambiguous phrases like "you might get further" conceal the fact that these words conveyed the message that employees are expected to make use of an open-door policy before submitting a petition. 362 NLRB at 1791-92.

Furthermore, just as she did during the April 9 meeting, Huang characterized the petition in hostile terms, telling Petitioner Jarrar "I know you don't perceive it as adversarial…tactically, it felt very strange to me" and stating that "it felt coerced;" she described the petition as "a negative experience" and

even "a threat." As discussed at length above, an employer's speech tends to coerce employees when it suggests that concerted activity is hostile to the employer's interests, or a personal attack. Such speech tends to suggest to an employee the threat of future reprisal. E.g., Westwood Health Center, 330 NLRB at 941-42 (implications of disloyalty suggest threats of future reprisal). While it is true that Huang assured Jarrar that no one would be punished because of the petition that was already circulated, her strongly worded disapproval, coupled with her repeated calls to use the AIUSA's open-door policy, suggested that some sort of unknown reprisal might occur in the future.

Huang also told Petitioner Jarrar that it was "strange" to her that no one had thought to share with her that the interns were interested in compensation and that it "would have been helpful" if the interns had been told to give her advance notice of the petition (JA 55).

Finally, as the ALJ noted, Huang considered Petitioner Jarrar and other employees to have acted collectively with the interns in actions relating to their conditions of employment. As such, Huang's statement encouraged Petitioner Jarrar to inform on the protected concerted activity of others in violation of Section 8(a)(1). See, e.g., Ryder Transportation Services, 341 NLRB 761, 761-62 (2004) (unlawful for employer to instruct that employees report in writing if they subjectively felt harassed by coworkers soliciting for the union because such an

instruction effectively encouraged employees to report the identity of union card solicitors); Arcata Graphics/Fairfield, Inc., 304 NLRB 541, 542 (1991) (same).

ii. The Board made determination on matters not raised by the parties citing "no evidence" to the contrary.

The NLRB Board made determination on matters not raised or contested by the Petitioner, the NLRB General Counsel, the ALJ, or even AIUSA in its exceptions, then claimed there was "no evidence" to support the contrary.

One striking example is the NLRB Board's claim that AIUSA "did not create any expectation of a future economic relationship" because "[n]otably, there is no evidence that the Respondent ever hired interns as paid staff members following their internships." This statement is utterly false. AIUSA has a long history of hiring interns as staff members. As a matter of fact, at least four of the AIUSA staff members who signed the Petition, including the Union Shop Stewart who helped Petitioner Jarrar in collecting staff signatures, started as unpaid interns at AIUSA. Petitioner Jarrar supplied this information to the NLRB during its investigation. The NLRB Board's claim that there is "no evidence" presented on the issue is because this was not a matter of controversy.

Another example is the NLRB Board's claim that the "unpaid interns here did not receive or anticipate any economic compensation from the Respondent, and therefore they did not constitute "employees" under Section 2(3) of the Act."

This is also false because the interns received payments at the end of every semester in the form of a flat-rate check of $150-$250, and the interns anticipated to get paid after their explicit demand in the Petition.

The NLRB Board also claims that they disagree with the ALJ's finding that even if the interns were not employees, the Washington DC office employees' support for the interns' petition was protected because the petition affected their own terms and conditions of employment, specifically by affecting their future use of, and involvement in the selection of, interns, claiming "there is no evidence suggesting that the employees joined the petition in order to change or protect their own terms and conditions of employment." Although, as described in section D below, no evidence is required for this, the lack of presented evidence is only due to the fact that this was not a matter of controversy and no parties raised to contest this matter.

3. The Board erred by taking on a "pure" question of common-law

Although AIUSA did not file an exception on this matter, the NLRB Board went out of its way to rule that AIUSA interns were not employees under the Act. But even if AIUSA filed an exception, the Board had no legal authority to make a determination on this pure question of common-law.

The Board claims it reached to its conclusion in part because "unpaid interns here did not receive or anticipate any economic compensation from the

Respondent, and therefore they did not constitute "employees" under Section 2(3) of the Act." As indicated above, this is false because the interns received payments at the end of every semester in the form of a flat-rate check of $150-$250, and the interns anticipated to get paid after their explicit demand in the Petition. But more importantly for this section, and the NLRB Board's own dissenting member notes:

> The majority's cursory analysis of the issue is unpersuasive. According to the majority, the interns cannot be statutory employees because they were not compensated. But if, as a legal matter, the interns were entitled to compensation under the Federal Labor Standards Act, then the fact that they were not paid is immaterial. To be sure, treating the interns as entitled to compensation under the FLSA does not decide the question of whether they were employees under our Act, which incorporates the common-law test of employee status, not the FLSA's broader standard.

This common-law test of employee status is not defined under the Act. The NLRB is charged with administering the Act and not determining common-law matters. NLRB v. SW General, Inc., 137 S. Ct. 929, 937, 197 L. Ed. 2d 263 (2017).

The question on how the Act's statutory obligations work in the case of interns should be left to the Courts and Congress to decide. In NLRB v. Hearst Publications, Inc., 322 U.S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944), the Supreme Court bypassed the common-law meaning of "employee" in favor of a definition that potentially swept in independent contractors, reasoning that the

latter definition better advanced the policies underlying NLRA, see id. at 131-132. Congress promptly and emphatically rejected that approach, amending the Act to specifically exclude "independent contractors" from the Act's definition of "employees."

"The obvious purpose" of the Taft-Hartley Amendments, the Supreme Court later ruled, "was to have the Board and the courts apply general [common-law] agency principles in distinguishing between employees and independent contractors under the Act." NLRB v. United Insurance Co. of America, 390 U.S. 254, 256, 88 S. Ct. 988, 19 L. Ed. 2d 1083 (1968); see also Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324-325, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992) (explaining the congressional reaction to Hearst).

The lesson from the Taft-Hartley Amendments and United Insurance is that Congress delegated to the NLRB Board the authority to make tough calls on matters concerning labor relations, but not the power to recast traditional common-law principles in identifying covered employees and employers. Instead, the inquiry into the content and meaning of the common law is a "pure" question of law, and its resolution requires "no special administrative expertise that a court does not possess." United Insurance, 390 U.S. at 260.

A good example of that is recent developments with Case No. 2019-CA-8338 filed on December 19, 2019 in the Superior Court of the District of

Columbia and listed as a "related case" to this matter. The case, filed by three former AIUSA interns on behalf of themselves and similarly situated interns, also involves the employment status of AIUSA interns.

Although AIUSA filed a motion to dismiss the case claiming former interns are not employees, the court order filed and entered on June 25, 2020 states:

> […] the Court finds Defendants' argument that D.C. Code Section 32-1002(2)(A) "expressly exempts individuals who volunteer for non-profit organizations from the definition of Employee" to be deficient, as the plain language of the statute does not exclude all volunteers, but only those who volunteer "without payment and without expectation of any gain, directly or indirectly ..." (emphasis added). The Court notes that Plaintiffs' Complaint alleges that Plaintiffs received payment and had an expectation of gain. As a result, the Court finds that Defendants' motion must be denied.

The NLRB Board should have either not made a determination on the interns' employment status or just accepted the General Counsel's sound determination that the interns' petition for compensation made the interns analogous to applicants for employment (JA 171), who are employees under NLRB precedent.

4. The NLRB Board departed without explanation from Precedent

The NLRB departed without explanation, and therefore arbitrarily and capriciously, from biding precedent, including:

i. The NLRB Board departed from precedent and tore down protections under Section 7 of the Act

The NLRB's primary rationale that "[a]ctivity advocating only for nonemployees is not for 'other mutual aid or protection' within the meaning of Section 7 and accordingly does not qualify for the Act's protection" is contrary to law and precedents. This out-of-the-ordinary ruling triggered this declaration by the NLRB Board's dissenting member: "Until today, it was clear that the National Labor Relations Act protected covered employees who joined together to help their coworkers, even if those workers were not covered themselves. Because the Board should uphold the protections of the Act, not tear them down at every opportunity, real or invented, I dissent." (JA 6)

According to the Supreme Court, employee conduct is protected under Section 7 of the Act when it is concerted and engaged in for mutual aid and protection. Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978). Petitions that relate to terms and conditions of employment—such as a petition for better wages—are a form of protected concerted activity. E.g., Sam's Club, 322 NLRB 8, 14 (1996) (holding that circulating a petition protesting labor conditions and soliciting signatures to the petition is concerted activity). Concerted activity undertaken solely for the benefit of or in solidarity with other employees is also protected. Fresh & Easy Neighborhood Market, 361 NLRB 151, 155 (2014)

("Congress created a framework for employees to band together in solidarity to address their terms and conditions of employment…even if only one of them has any immediate stake in the outcome.")

Section 7 of the Act provides in relevant part: "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. . . ." 29 U.S.C. §157.

Eastex, Inc. v. NLRB, 437 U.S. 556 (1978) (holding that employees' distribution of newsletter opposing "right-to-work" legislation and supporting voter registration to elect candidates favoring minimum-wage increase was for "mutual aid or protection").

According to the NLRB Board's own dissenting member, the NLRB Board's determination that AIUSA employees did not engage in protected concerted activity presents a basis on which the employees may seek judicial review of the Board's order as "person[s] aggrieved." (JA 4)

This dangerous holding has the independent effect of permitting AIUSA, or other employers, to discipline or discharge employees for any past or future concerted activity on behalf of interns or other similarly-situated individuals.

ii. The NLRB determined wrongly that the Petition was not for the mutual aid or protection of AIUSA paid staff

The NLRB determined wrongly and contrary to law and legal precedents that, even if the interns were not employees, the activity of AIUSA employees was not mutual aid and protection although it was also for the mutual aid and protection of other AIUSA employees who are fulltime staff members.

Although the issue was not raised by AIUSA in its exception, the NLRB Board claimed there was no merit in the ALJ finding that employees' support for the interns' Petition was protected because the Petition affected their own terms and conditions of employment, and therefore was for the mutual aid and protection of other AIUSA employees. The NLRB Board claims that "[a]lthough the petition may have indirectly affected the employees' terms and conditions of employment, there is no evidence suggesting that the employees joined the petition in order to change or protect their own terms and conditions of employment."

On the one hand, the only reason evidence was not presented is that this was not a matter of controversy and it was not raised by the parties. For example, AIUSA's Career Level Guide, from November 2014, set the salary range, qualifications, and "authority" for each level at the organization. It listed managing interns as one of the main points under authority. For example, Level 1

(Assistant), has "no personnel authority (e.g. cannot supervise interns)." Level 2 (Associate) "May supervise interns."

On the other hand, no such evidence is necessary because the test of whether an activity is for "mutual aid or protection" is an objective one, according to Fresh & Easy, supra, 361 NLRB at 153. By basing their determination on the lack of presented evidence, the NLRB Board departed from its precedent set in Fresh with no explanation.

AIUSA employees and the interns worked side-by-side with each other, similar to Cf. Southern Pride Catfish, 331 NLRB 618, 620 (2000) when employees' walkout to protest discharge of supervisor, excluded from statutory coverage by Sec. 2(3), was protected concerted activity because discharge affected employees' own terms and conditions of employment.

Aside from the employee status of interns, the process by which the AIUSA employees selected and utilized them is in and of itself a condition of their employment. See NLRB v. Wooster Division or Borg Warner Corp., 356 U.S. 342 (1958) (subjects that directly concern or settle an aspect of the relationship between the employer and employees are conditions of employment). An appropriate analogy is that relating to concerted activity over hiring practices, which the Board has held to be protected. See Houston Chapter, Associated General Contractors of America, Inc. (Local 18, Hod Carriers), 143 NLRB 409,

411 (1963) (the word "employment" in the phrase "terms and conditions of employment" connotes the initial act of employing, in determining that a hiring hall relates to the conditions of employment); Dave Castellino & Sons, 277 NLRB 453 (1985) (employee engaged in protected concerted activity by refusing to cross picket line protesting failure to hire local residents).

Prior to the petition, the intern selection process was initiated by employees desiring help on projects. With the assistance of the human resources department, the employee would post a solicitation for interns and make the selection.

As Huang testified before the ALJ in January 2019: (JA 39)(emphasis added)

> Q. Okay. Who determined what functions interns would perform?
> A. **So individual managers would often post a position for an intern, having decided that they needed some additional support or some particular expertise for a project they were working on**. This was all overseen by the human resources department to try to make sure that we were being consistent in how we brought interns into the organization. **But the relationship is primarily between the manager and the intern.**

Huang also testified that: (JA 40)(emphasis added)

> Q: How are interns different from or similar to a AIUSA member or volunteer?
> A. Great question. **So interns generally come in for a very specific period of time, for a particular project that they agree with the manager they're going to work on**. […]

With the shift to a process involving only three paid interns for the entire organization, the employee's control over the intern selection process ceased. The

transfer of duties previously done by employees constitutes a change in a condition of employment. See St. John's Hosp., 281 NLRB 1163, 1166 (1986) (a change in employee's duties is a mandatory subject of bargaining and employer was obligated to bargain over a transfer of certain work duties from secretaries to nurses' assistants). The role of AIUSA's interns also directly correlated to employee performance since it dictated how many projects or campaigns the employee could handle. Thus, the Petition seeking to compensate interns necessarily and directly affected the terms and condition of employment of AIUSA employees.

VIII. CONCLUSION

This Court should vacate NLRB Order No. 05-CA-221952 reported at 368 NLRB No. 112 because it is not supported by substantial evidence, it took on a "pure" question of common-law, and it departed without explanation from "well settled" standards, internal process, and precedent.

Date: November 30, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Federal Rule of Appellate Procedure 32(a) that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 10,986 words, excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared with Microsoft Word in a proportional 14-point typeface in Times New Roman font.

CERTIFICATE OF SERVICE

I certify that I electronically filed this PETITIONER'S FINAL OPENING BRIEF with the United States Court of Appeals for the District of Columbia Circuit via the Court's CM/ECF system on November 30, 2020, and that service will be made on counsel of record for all parties to this case through the Court's CM/ECF system.