Nos. 24-9511 & 24-9525

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

3484, INC. & 3486, INC.,

PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

On Review from the National Labor Relations Board
Nos. 27-CA-278463, 27-CA-278592, 27-CA-279117

PETITIONERS 3484, INC. & 3486, INC.'S REPLY BRIEF

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GLOSSARY

3484 or **3484 Production:** Petitioner 3484, Inc.

3486 or **3486 Production:** Petitioner 3486, Inc.

AFL.Br.: Brief of Amicus American Federal of Labor-Congress of Industrial Organizations in Support of National Labor Relations Board

ALJ: administrative law judge

Amicus: Amicus American Federal of Labor-Congress of Industrial Organizations

Board: National Labor Relations Board

Exc.Br.: Brief in Support of Respondents' Exceptions to the Decision of the Administrative Law Judge (attached (Doc. 43-2) to NLRB's Motion to Lodge Employers' Brief in Support of Exceptions, Doc. 43-1, filed Oct. 3, 2024)

Local 222: International Brotherhood of Teamsters Local 222

Local 399: International Brotherhood of Teamsters Local 399

NLRA: National Labor Relations Act

NLRB: National Labor Relations Board

NLRB.Br.: Brief for the National Labor Relations Board

Op.Br.: Petitioner 3484, Inc. & 3486, Inc.'s Opening Brief

Section 7 or **§7:** 29 U.S.C. § 157

Section 8 or **§8:** 29 U.S.C. § 158

Section 8(a)(1) or **§8(a)(1):** 29 U.S.C. § 158(a)(1)

Section 8(a)(3) or **§8(a)(3):** 29 U.S.C. § 158(a)(3)

Section 10(c) or **§10(c):** 29 U.S.C. § 160(c)

ULP: Unfair Labor Practice

Union(s): Local 222 and/or Local 399

INTRODUCTION

NLRB attempts to ignore the significant evidence showing the union plan—developed before either the 3484 or the 3486 production began—to use strikes as leverage to force economic concessions. The Court should not accept union organizer Staheli's self-serving testimony about the nature of the strikes—he, of course, claims they were ULP strikes—without considering his admitted intention from the beginning to seek economic benefits. The Board's decision below should be vacated for the independent reason that the Board exceeded its statutory powers or violated Petitioners' constitutional rights.

ARGUMENT

I. THE BOARD FAILED TO BASE ITS DECISION ON SUBSTANTIAL EVIDENCE

Considering "the record as a whole," the Board's decision is not "supported by substantial evidence." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366 (1998). Substantial evidence "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict." *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). Evidence "opposed to the Board's view" cannot be ignored. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The substantiality of

evidence must reckon with "whatever in the record fairly detracts" from the Board's reasoning. *Norris v. NLRB*, 417 F.3d 1161, 1168 (10th Cir. 2005).

A. The finding that the drivers were entitled to reinstatement defies the record

1. NLRB (NLRB.Br. 22–23) now downplays evidence the Board ignored and accuses Petitioners of "substitut[ing] their own speculative narrative." But evidence shows the union's goal was always economic and that the ULP claims were pretext to justify an economic strike. *See* Op.Br. 3–11, 29–34. Among other things:

- ***Economic motives predated any ULP.*** Union Representative Staheli testified that by "early April"—*before* any ULP allegation—he was in contact with 3484 Drivers who "were interested in organizing" and that he was working with those Drivers "[t]o get a union contract in place." ROA.99, 101, 815.
- ***Staheli decided against organizing 3484's Drivers for lack of leverage.*** Staheli admitted that he didn't organize 3484's Drivers even after alleging a ULP because, given the late stage of the 3484 Production, striking "wouldn't have a huge effect." ROA.102. He lacked leverage to secure economic benefits. ROA.144.

- ***Staheli hunts for ULPs to use as "leverage" against 3486.*** Before the strike against 3486, Staheli emailed Driver Brewer a "list of ULP[s]," instructing him to "make sure the other Drivers have this" and to inform Staheli "if any of these happen." ROA.600. As Staheli candidly explained, "ULPs work as leverage and if all goes south we can use them to get people paid and force the company to hire everyone back." *Id.* Staheli added: "I have al[]ready filed a charge with the NLRB, the more we have the better the leverage." *Id.*
- ***Staheli directed the strike to maximize bargaining power.*** Staheli arrived the first day of 3486's filming and—immediately before the production was scheduled to move to a new location—encouraged a strike to disrupt the move. ROA.116, 119. He later offered to end the strike only when he knew that 3486 "would … need[] to hire drivers." ROA.131.
- ***The strike demands were solely economic.*** Two days before filming started on 3486 (a Friday), Staheli emailed Wulf: "We are interested in getting a deal that allows your Driver crew to get health insurance and retirement." ROA.599. Staheli attached

confirmation that the Board had received his ULP charge, wielding it as a cudgel to force economic concessions. ROA.599. On Sunday (first filming day), Staheli again emailed Wulf: "I sent a contract this morning. Did you receive it?" ROA.598. Staheli later responded to Wulf's lawyer's request to review the contract Monday: "Unfortunately, we will not be able to wait until Monday." ROA.596. After the strike, Union Representative Dougherty responded to Wulf's lawyer: "We are still available to talk if you're interested in negotiating a contract." ROA.596. Later, Dougherty responded to Wulf's email: "[Staheli] and myself have given you ample time to respond to our emails and have been trying to negotiate an agreement with you for about 4 days now. This so-called orchestration [referring to Wulf's description of the strike] is *nothing more* than the union trying to get a contract for workers that have demanded recognition." ROA.596 (emphasis added). And during the strike, the Drivers never raised ULPs; they demanded "benefits." ROA.304.

- ***Staheli admittedly told the Drivers to claim a ULP violation.*** Acting on the "specific instructions" of a union attorney, Staheli

directed the Drivers to claim that "the purpose of the strike" was the alleged ULP "[b]ecause [he] wanted [them] to be able to get their jobs back." ROA.111. As Staheli explained to Brewer, "if all goes south we can use [ULPs] to get people paid and force the company to hire everyone back." ROA.600.

NLRB (at 21–23) defends the ULP-strike finding primarily by backfilling its reasoning. That attempt fails on the law and the facts. It is black-letter law that the "grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Any "*post hoc* rationalizations offered by agency officials or counsel" offer NLRB no refuge. *Def. of Wildlife v. U.S. Forest Service*, 94 F.4th 1210, 1220 (10th Cir. 2024) (cleaned up).

Nor, as detailed above, do the facts support NLRB's retelling. NLRB speculates (at 23) that "[o]bviously, the desired resolution" of the strike "would have been for 3486 to *stop* unlawfully threatening its employees." But the only evidence NLRB cites makes no such demand. *See* ROA.608 (email ending strike and "demand[ing] [union] recognition"). Despite consistently making economic demands, Union Representatives never

demanded cessation of any alleged ULPs. And as Staheli admitted, he ended the strike not because he received assurances that 3486 would do so, but because he knew that 3486 "would be needing to hire drivers." ROA.131.

NLRB (at 21) also tries to ease its burden, insisting that "the decision to go on strike was explicitly tied to" and "raised in conjunction with" the ULP allegation. But that's not enough. The ULP allegation must have "*motivated*" the strike. *Capital Steel & Iron Co. v. NLRB*, 89 F.3d 692, 698 (10th Cir. 1996) (emphasis added). And the record here shows the strike was motivated solely by economic concerns. As Dougherty explained, the strike was "nothing more than the union trying to get a contract." ROA.596. NLRB's assertion (at 21), that the strike was associated with the ULP allegation "[f]rom the very start," is contradicted by uncontested evidence showing Staheli's efforts to organize the Drivers predated both productions and any ULP allegation.

NLRB (at 21) further claims that "the Union and the drivers identified [the strike] as an unfair-labor-practices strike." But the "mere fact" that "employees were informed of" a ULP does not establish a ULP strike. *Facet Enter., Inc. v. NLRB*, 907 F.2d 963, 977 (10th Cir. 1990). The

only reason that the strike was "identified" as a ULP strike was because Staheli told the Drivers to claim as much. That they ignored him and demanded only economic benefits underscores the point that the strike was solely economic.

NLRB's attempt (at 23) to recast Staheli's hunting-for-ULPs email to Brewer as evidence that the ULP allegation was a "primary consideration of Brewer and the other drivers" is similarly misguided. Staheli's email proves that *he* was looking for ULPs; it does not prove anyone else was motivated by a ULP. And, again, Staheli's informing Brewer about a ULP allegation is irrelevant. *Facet Enter.*, 907 F.2d at 977.

Finally, NLRB (at 22) endeavors to cloak its finding in the veil of its "witness-credibility determinations," claiming that Petitioners "contest[]" those determinations "in effect" by highlighting the "self-serving" nature of Staheli's testimony. That's a red herring. The Board's error was not simply that it credited Staheli's self-serving testimony, but also, that it ignored contrary evidence, Op.Br. 31–32, including Staheli's admissions that he used ULP allegations as "leverage" for economic benefits.

2. Regardless, Driver misconduct vitiated any right to reinstatement. Here, again, NLRB failed to reckon with relevant evidence—namely, that the Drivers took and damaged vehicles and equipment without authorization from their rightful possessor and intentionally disrupted the 3486 production. Op.Br. 10–11, 33–38.[1]

NLRB (at 26) contends that the misconduct was "insufficient [to] justify[] denying the employees reinstatement." But NLRB recognizes that "strikers have been deemed to lose the Act's protection when," as here, "they seized the employer's property." *Gen. Tel. Co. of Mich.*, 251 N.L.R.B. 737, 739 (N.L.R.B. Aug. 27, 1980) (quoting *Coronet Casuals, Inc.*, 207 N.L.R.B. 304, 304 (N.L.R.B. Nov. 14, 1973)); *see also* ROA.808 (Board's approvingly citing *General Telephone*).

[1] NLRB claims that Petitioners "did not sufficiently raise" and "abandoned" the argument that the Drivers "moved vehicles leased by 3486 without permission and 'disrupted' filming." But NLRB (at 25–26) cites Petitioners' filings below (Exc.Br. 13–15), which argued that "the strikers" committed "misconduct" by "removing equipment and generators." Regardless, as NLRB's case explains, forfeiture applies to "arguments" and "issues," not evidence. *In re Syngenta AG MIR 162 Corn Litig.*, 111 F.4th 1095, 1112 (10th Cir. 2024). Thus, while "[c]laims and arguments can be abandoned at the administrative-appeal level[,] evidence cannot be." *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 305 F.R.D. 256, 295 (D.N.M. 2015). Here, Petitioners undisputably preserved their argument concerning reinstatement, and it can therefore rely on facts in the record. Exc.Br. 13–15.

Finally, NLRB (at 25) faults Petitioners for not "identif[ying] specific drivers who engaged in misconduct." But all nine Drivers participated in the strike, and the Board found that "*the striking drivers* determined which pieces of vehicles and equipment to collect" and move. ROA.819, 821 (emphasis added). No evidence suggests that any Driver objected to or failed to participate in the misconduct.

B. The ULP findings lack substantial evidentiary support

1. Miller's lack of authority. NLRB (at 15–16) does not defend the finding that Wulf "directed" Miller to make the relevant statements. And for good reason—no evidence supports it. And NLRB's argument (at 16), that Miller could speak for 3486 as a supervisor because he had "authority to hire, discipline, assign, and promote drivers," is not supported by substantial evidence. Op.Br. 26–29.[2]

First, while the Board found Miller could "discipline" drivers because he could issue "final warnings," ROA.815, these "warnings"

[2] NLRB again invokes forfeiture, asserting (at 16) that Petitioners "failed to object to the [ALJ's] dispositive findings" that underlie the supervisor finding and (at 17) to "the finding of agent status." Wrong again. *See* Exc.Br. 9–12 (arguing "ALJ erroneously concluded that ... Miller was a supervisor and agent," Miller "did not have independent authority to hire and discharge," and Miller "could not change a driver's job responsibilities"). *See also* Op.Br. 25–29.

consisted of Miller's "just telling the person you've messed up and this is your last chance," ROA.47. He lacked authority to enforce that threat; only Wulf or Ricci could fire (or hire) a driver. ROA.47, 814. Miller's "power" to promote meant only that he could select a "transportation captain" to serve as an intermediary between Miller and other drivers. ROA.36, 827. And Miller's power to "assign" drivers was a clerical duty of scheduling and organizing. ROA.813. Notably, Miller shared this "assignment" power with the transportation captain, here Brewer. ROA.813. If this power sufficed to make its holder a "supervisor," then Brewer was also a supervisor—and NLRB could not claim that Miller violated Brewer's NLRA rights. *See In re Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 688 (N.L.R.B. Sept. 29, 2006); 29 U.S.C. § 157.

NLRB (at 17) also offers a muddle of actual- and apparent-agency theories, claiming "Wulf expressly directed Miller to represent 3486" and that "drivers would have understood Miller to be a representative of 3486." Neither works. An "agent has actual authority to take action designated or implied in the principal's manifestations to the agent." Restatement (Third) of Agency § 2.02(1) (Am. L. Inst. 2006). Wulf never authorized Miller to threaten or interrogate the Drivers, ROA.48, and

Miller's statements were thus beyond any actual authority. Apparent authority exists only when a third party's reasonable belief that the actor had authority "is traceable to the principal's manifestations." *Id.* § 2.03. Wulf made zero representations *to the drivers* about Miller's authority and, therefore, Miller lacked apparent authority too.

2. Unsupported interrogation findings. As Petitioners explained, under any faithful application of the *Westwood Health* factors, Ricci's and Miller's informal inquiries about rumors of union activity were lawful. Op.Br. 17–20, 24–25 (applying *Westwood Health Care Ctr.*, 330 N.L.R.B. 935, 939 (N.L.R.B. Mar. 20, 2000)). In ruling otherwise, the Board failed to consider evidence that undercut its coercion findings.[3]

NLRB (at 12) stresses that Ricci "texted [Hanson] after hours," when Hanson "was alone," and that they spoke on a "private call." NLRB (at 18) similarly emphasizes that Miller engaged Brewer in "a private, one-on-one conversation." But this evidence militates *against* a finding of coercion. According to NLRB, one factor to consider is the "[p]lace and

[3] NLRB's defenses of the findings concerning Ricci and Miller have significant overlap. To avoid repetition, Petitioners address them together. Petitioners maintain, and NLRB does not dispute, that 3484 and 3486 are distinct entities.

method of interrogation," including whether there was "an atmosphere of unnatural formality." *Westwood*, 330 N.L.R.B. at 939. Neither Ricci nor Miller engaged with an employee in an "unnatural[ly] formal" setting. *Id.* Ricci engaged with Hanson via text and phone. And Miller spoke privately to Brewer, whom he selected as transportation captain and with whom he worked closely. ROA.813. As the Board has held, these kinds of private and informal conversations are non-coercive. *See First Am. Enter.*, 369 N.L.R.B. No. 54, 2020 WL 1911428, at *2–3 (N.L.R.B. Apr. 9, 2020) (finding no coercion where employer "asked [employee] only a single question" alone "in an empty room"); Op.Br. 11–21.

NLRB (at 12–13) contends that "subsequent events" involving the separate 3486 Production "cast Ricci's earlier" inquiry during the 3484 Production "in an even more ominous light." But as NLRB (at 11) itself stresses, the only question is whether the "statements would reasonably tend to coerce employees." Here, evidence of later events involving 3486—totally disconnected from the 3484 Production—does not "throw [any] light" on Ricci's question. *Westwood*, 330 N.L.R.B. at 940 n.17. If anything, the evidence—that Hanson was hired for 3486 and voted to strike—shows that Hanson was not coerced. *See* Op.Br. 18–19.

NLRB (at 13) accuses Petitioners of "impos[ing] a heightened" burden by pointing to *this Court's* opinions on unlawful interrogation. Op.Br. 21–22 (citing cases). NLRB provides no reason to jettison those opinions. And the lone case cited by NLRB lends it no support. NLRB.Br. 13 (citing *YMCA of Pikes Peak Region, Inc. v. NLRB*, 914 F.2d 1442, 1445 (10th Cir. 1990)). There, unlike here, a part-time employee was publicly approached at her workspace by YMCA's executive director, with whom she would not ordinarily interact; marched into a supervisor's office; and questioned by multiple people about her and her coworkers' contact with union representatives. That case had all the hallmarks of "unnatural formality"—which are absent here.

3. Unsupported confidentiality request finding. Ricci's request for discretion in dealing with a fast-moving yet legally perilous situation was not coercive. As Petitioners explained, the ALJ's finding was essentially copy-and-pasted reasoning based on the erroneous premise of a surveillance allegation. Op.Br. 22–23. The Board adopted a different "rationale" and faulted Petitioners for not providing a "business justification" for the request. ROA.807. Now, NLRB (at 14) suggests that all requests for confidentiality necessarily violate the NLRA because they

"have a self-evident tendency" to restrain protected conduct. But NLRB doesn't cite a single case eschewing its burden to show that an employer's action tended to restrain an employee's rights. Op.Br. 15-23. And, as noted above, the evidence shows that Hanson was hired by the later 3486 Production and joined the strike. Her rights to protected conduct were not remotely restrained.

II. THIS COURT HAS JURISDICTION TO CONSIDER ALL PETITIONERS' ARGUMENTS

NLRB argues that Petitioners failed to meet the exhaustion requirement of 29 U.S.C. § 160(e), which states that "[n]o 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." This argument fails.

A. The Court has jurisdiction to consider NLRB's award of compensatory damages

Contrary to NLRB (at 29–31), this Court may hear Petitioners' challenge for two reasons. First, Petitioners raised the issue below. Second, §160(e) does not apply when, as here, NLRB acts beyond its statutory authority and in cases of extraordinary circumstances.

1. Petitioners raised the issue

Petitioners specifically objected to the ALJ's award of damages based on the Board's decision in *Thryv, Inc.*, 372 N.L.R.B. No. 22, 2022 WL 17974951 (N.L.R.B. Dec. 13, 2022). *See* ROA.783 (Exception 14). The objection included citations to *Thryv* and to the ALJ's Decision. *See* ROA.783 (Exception 14, citing ALJD, p. 48, lines 22–29). Petitioners *separately* objected to the ALJ's other distinct orders. *See id.* (Exceptions 13, 15, and 16). The compensatory nature of the damages awarded pursuant to *Thryv* distinguishes that award from the ALJ's other ordered remedies. There can be no confusion about Petitioners' challenges to the award of compensatory damages.

This Court has found objections like Petitioners' here satisfy 29 U.S.C. § 160(e). In *Coreslab Structures (TULSA), Inc. v. NLRB*, 100 F.4th 1123 (10th Cir. 2024), petitioner objected to the "retroactive grant of [a] profit[-]sharing benefit remedy," to the "grant of [a] profit[-]sharing benefit remedy," and to mandated "contributions to the Central Pension Fund" as "contrary to the law and substantial weight of the record." *Id.* at 1143 (quoting objections). According to this Court, these "terse" objections were "sufficient to satisfy § 160(e)'s preservation requirement."

Id. The Court "[could]not say the brevity of [the] objections rendered them inadequate to place the issue before the Board on intra-agency review. And [it] observe[d], … [petitioner] included citations to the record where the ALJ reasoned through the challenged action." *Id.*

The same conclusion applies here; Petitioners preserved the argument.

2. The Board exceeded its statutory authority

The Court may "exercise [its] jurisdiction over a challenge" "in the case of 'extraordinary circumstances,' 29 U.S.C. § 160(e), or where the decision at issue clearly demonstrates the Board exceeded its statutory authority." *Coreslab*, 100 F.4th at 990 n.8 (citing *NLRB v. Cheney Cal. Lumber Co.*, 327 U.S. 385, 388 (1946) ("[I]f the Board has patently traveled outside the orbit of its authority," then "there is legally speaking no order to enforce.")).

Here, again, the NLRA limits the Board to equitable remedies. *See* 29 U.S.C. § 160(c) (authorizing NLRB to issue an "order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or

without back pay, as will effectuate the policies of this subchapter"); *see also* Op.Br. 39, 40–43; below (Section III).

Therefore, the Board cannot award consequential damages without exceeding its statutory authority. As a result, this Court has jurisdiction to consider that award.

B. The Court has jurisdiction to consider Petitioners' constitutional challenges

NLRB claims (at 43–46) that Petitioners did not raise any exceptional circumstances to satisfy §160(e) but instead merely argued that the Board lacks expertise to address constitutional questions. But the Petitioners' main argument is more fundamental: The Board has *no authority* to address or resolve constitutional issues. *See* Op.Br. 63–64.

According to the Supreme Court, it "makes little sense to require litigants to present claims to adjudicators *who are powerless to grant the relief requested*." *Carr v. Saul*, 593 U.S. 83, 93 (2021) (emphasis added) (simplified). Indeed, "[s]uch a vain exercise will rarely 'protec[t] administrative agency authority' or 'promot[e] judicial efficiency.'" *Id.* (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)); *see also Reid v. Engen*, 765 F.2d 1457, 1461 (9th Cir. 1985) (applying statute

substantively identical with 29 U.S.C. § 160(e),[4] and observing that courts may "decide an issue not raised in an agency action if the agency lacked … the power … to decide it") (citations omitted).

The Supreme Court takes the same view of §160(e), through which "Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as to all issues *that were contestable before the Board* but were in fact not contested." *Cheney*, 327 U.S. at 389 (emphasis added). Here, because the Board *lacks jurisdiction* to consider constitutional issues, *Jacobo Marti & Sons, Inc. v. NLRB*, 676 F.2d 975, 979 n.4 (3d Cir. 1982) (citing *Califano v. Sanders*, 430 U.S. 99, 109 (1977)), those issues were not "contestable before the Board."[5]

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[4] *See* 49 U.S.C. § 1486(e) ("No objection to an order of the Board or Secretary of Transportation shall be considered by the court unless such objection shall have been urged before the Board or Secretary of Transportation or, if it was not so urged, unless there were reasonable grounds for failure to do so."), *as quoted in Reid*, 765 F.2d at 1460.

[5] While the Board's jurisdiction is broad, it's not unlimited. *See, e.g.*, *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1124–25 (D.C. Cir. 2017) (NLRA does not cover relationship between business and independent contractors). Nowhere does the NLRA authorize the Board to resolve constitutional issues—which would raise additional Article III problems.

NLRB's contention, that "structural constitutional challenges 'have no special entitlement to review,'" NLRB.Br. 44 (citations omitted), misses the point. The question isn't (solely) whether the Petitioners are entitled to review because of the importance of a claim; the key question is whether the Board could have resolved a claim in the first place. Because the Board cannot resolve constitutional claims, a party has no obligation to raise them, and this Court may consider them.

Finally, and separately, questions implicating fundamental separation-of-powers concerns easily qualify as extraordinary circumstances. *See, e.g.*, *Noel Canning v. NLRB*, 705 F.3d 490, 496–98 (D.C. Cir. 2013) (holding, pursuant to 29 U.S.C. § 160(e), questions concerning the power of the Board to act that implicate fundamental separation of powers concerns present "extraordinary circumstances"), *aff'd on other grounds*, 573 U.S. 513 (2014); *see also Advanced Disposal Services East, Inc. v. NLRB*, 820 F.3d 592, 598 (3d Cir. 2016) (A "challenge like this one, which goes to the authority of the Board to act, constitutes an 'extraordinary circumstance' under § 160(e) and can thus be raised for the first time on appeal.") (citation omitted); *Cmty. Hospitals of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1088 (D.C. Cir. 2003) (The

"exception to the rule that an objection to an agency decision must be timely raised before the agency in order for the court to grant review is limited to jurisdictional challenges 'that concern the very composition or constitution of an agency.'") (citation omitted).

Petitioners' constitutional claims challenge the ability of the Board to resolve ULP claims via administrative adjudication without a jury. The Board has no jurisdiction to resolve those claims. This Court does.

NLRB tries to get around its lack of power to address constitutional issues by claiming (at 45–46) that it could provide relief by dismissing its administrative action. But dismissal of the administrative action would not resolve NLRB's constitutional defects. *See, e.g.*, *K&R Contractors, LLC v. Keene*, 86 F.4th 135, 146 (4th Cir. 2023) (Even if the DOL's Benefits Review Board could "'grant the requested relief of reassignment to a different ALJ' who has been properly appointed by the Secretary, … what relief could the Board offer if it agreed … that the relevant statutes unconstitutionally shield DOL ALJs from removal?") (citations omitted).

Instead, dismissal would allow NLRB to evade judicial review of those defects. NLRB effectively concedes as much: In a footnote, it contends (46 n.9) that Petitioners probably lack standing to raise

constitutional challenges outside the administrative action here. Administrative law presumes judicial review, and the Court should not allow NLRB to avoid constitutional challenges.

III. NLRB'S ORDER OF CONSEQUENTIAL DAMAGES WAS UNLAWFUL

A. Section 10(c) does not authorize legal damages

Section 10(c) allows the Board to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter …." 29 U.S.C. § 160(c). As Petitioners explained (at 40–43), this section authorizes only *equitable* remedies. In response, NLRB makes the astounding claim (at 35) that there is no basis for Petitioners' common-law distinction between legal and equitable relief.

But Petitioners explained that the Board's power "to command affirmative action is remedial," "to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of [a] violation where those consequences are of a kind to thwart the purposes of the [NLRA]." Op.Br. 40 (quoting *Local 60 v. NLRB*, 365 U.S. 651, 655 (1961)). The Board's "cease and desist" orders are "somewhat analogous" to "injunction[s]." *Id.* (quoting *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945)).

Ultimately, even NLRB doesn't believe its argument that no distinction between equitable and legal relief exists because, as discussed below, it strenuously objects that the award based on *Thryv* constitutes damages. NLRB.Br. 33–34. If the distinction doesn't exist, NLRB shouldn't worry about the nature of the award in *Thryv*.

As suggested above, NLRB does not dispute that the language of §10(c) lacks express textual language authorizing the Board to award damages beyond backpay "for all direct or foreseeable pecuniary harms." *Thryv*, 372 N.L.R.B. No. 22, at *21. Instead, NLRB effectively claims (at 34–37) that it can take whatever "affirmative action" it believes, in its sole discretion, effectuates the law. As explained next, if that is correct, then §10(c) and the Board run into significant constitutional problems.

B. If the NLRA allows the Board to impose compensatory damages, constitutional problems arise

1. Major Questions Doctrine

The Board's newly claimed power to impose consequential damages violates the Major Questions Doctrine because consequential damages are far beyond the scope of the Board's authority to award "make-whole" remedies. *See* Op.Br. 44–47.

In response, NLRB erroneously claims (at 38) that its decision in *Thryv* merely modified its "standard" make-whole remedy to "more routinely" include "direct or foreseeable pecuniary harms is in line with decades of Board precedent and principles repeatedly affirmed by the Supreme Court." It then claims (*id.*) that the *Thryv* remedy "fits squarely within the Board's express statutory authority …."

But *Thryv*, while occasionally couched in qualified language, demonstrates a radical—and permanent—change. First, the Board in *Thryv* asked for briefing on the question whether it should "*modify* its traditional make-whole remedy in *all* pending *and future* cases to include relief for *consequential* damages …." 2022 WL 17974951, at *9 n.8 (emphasis added). The Board later caught its Freudian slip and disclaimed any intent to award consequential damages, which are "awarded in *other* areas of the law …." *Id.* at *13 (emphasis added).

Curiously, however, *Thryv* goes to great lengths to justify its power grab by relying on the word "including" in 29 U.S.C. § 160(c), which allows the Board to "take such affirmative action including reinstatement with or without backpay." *See Thryv*, 2022 WL 17974951, at *15; *see also id.* at *16 ("[T]he plain language of the statute clearly allows for remedies

beyond reinstatement and backpay ….”). Yet, if the term “including” allows the Board to alter its remedial power without limit, it faces non-delegation problems. Ultimately, the Board’s claim of authority to award damages for any “foreseeable” harm—no matter how attenuated—goes far beyond what the Board has previously done. *See Thryv*, 372 N.L.R.B. No. 22, at *18 (dissent).

The Board and Amicus avoid the dispositive issue. The Board argues that the Order against 3846 “is even more plainly not of vast economic or political significance.” NRLB Br. 38 n.8 (citing *Bradford v. U.S. Dep’t of Labor*, 101 F.4th 705, 725 n.5 (10th Cir. 2024)). Similarly, Amicus claims (AFL.Br. 21) that the Major Questions Doctrine doesn’t apply to agency adjudication, which deals only with the parties in the case. These arguments are non sequiturs. In Major Questions cases, the issue is not a particular order or action; the issue is the *extent of authority* claimed by the government. *See Bradford*, 101 F.4th at 725 n.5 (focusing on “President’s authority”). Amicus’s additional claim (at 22)—that the Board, “in any given adjudication, is free to tailor its remedy to the facts before it”—similarly misses the point. The Board is “free” to do only that which the NLRA allows. *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355,

374 (1986); *see* Op.Br. 42. And when, as here, the Board "claims to discover in a long-extant statute an unheralded *power* representing a transformative expansion in its regulatory *authority*," it violates the Major Questions Doctrine. *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (emphasis added) (simplified).[6]

2. Due Process

An order "'operates retroactively' when it seeks to impose 'new legal consequences to events completed before its' announcement." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1168 (10th Cir. 2015). That's precisely what happened here—as *Thryv* itself stated expressly. *See* 372 N.L.R.B. No. 22, at *21 (applying new rule "retroactively in this case and in all pending cases in whatever stage") (cleaned up).

According to the Supreme Court, however, newly promulgated agency rules should apply only prospectively absent express congressional approval. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 209 (1988). This Court applied the *Bowen* rule to newly announced rules via agency adjudication and declined to retroactively apply a new rule

[6] Amicus's claim concerning the scope of the Board's power also undermines any objection to the argument that the Board's actions here violate Petitioners' rights to an Article III court and a jury trial.

announced by the Board of Immigration Appeals in an adjudicated case. *See De Niz Robles*, 803 F.3d at 1172–73, 1180.

This retroactive application is inconsistent with the "underlying due process and equal protection principles" that cases like *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (*Chenery II*), seek to vindicate. *De Niz Robles*, 803 F.3d at 1173. "Allowing agencies the benefit of retroactivity always and automatically whenever they choose adjudication over rulemaking … create[s] a strange incentive for them to eschew" "due process" and "equal protection." *Id.* at 1174.

NLRB (at 39) justifies its retroactive application with *Thryv*'s self-serving "observ[ation]" that reliance interests will "generally" be negligible because the Board has "long utilized similar remedies" for ULP liability. But NLRB places unsupportable weight on the word "similar." As explained in its Opening Brief (at 47) and above, the Board adopted a new type of remedy—a remedy that was not available when the conduct at issue took place.

The Board's snide remark, that regulated parties would "cho[o]se" to violate federal law only if they did not expect to be held accountable, misses the point. As this Court explained, due process requires fair notice

not simply so that regulated parties know what is expected, but also to "prevent[] officers or agencies who enforce the law from acting in an arbitrary or discriminatory manner." *Blanca Tel. Co. v. FCC*, 991 F.3d 1097, 1116 (10th Cir. 2021) (citation omitted). And "[f]air notice concerns will arise 'when an agency advances a novel interpretation of its own regulation in the course of a civil enforcement action.'" *Id.* (citation omitted).

Finally, contrary to NLRB's suggestion (at 39–40) that due process concerns arise only when a remedy involves penalties, parties are entitled to fair notice of all potential remedies. *See, e.g.*, *United States v. AMC Enter., Inc.*, 549 F.3d 760, 774 (9th Cir. 2008) (vacating district court's award and remanding for modification of remedial order—a series of detailed injunctive orders—consistent with due process requirements).

3. Non-Delegation Doctrine

Petitioners submit that §160(c) violates the non-delegation doctrine *if* it is read to authorize the Board's new-found (2022) power to award consequential damages. Op.Br. 47–51. The Board ignores the substance of Petitioners' argument and, instead, cites decades-old decisions that never addressed this question. NLRB.Br. 40–42. For its part, Amicus

suggests (at 21 n.3) that the NLRA does have an intelligible principle, namely, the Board may impose any remedy so long as it's not punitive. But the NLRA does not allow the Board to impose any legal damages—punitive or otherwise. Amicus's proposed rule would still authorize the Board to act beyond the NLRA's statutory limits.

In response to Petitioners' non-delegation arguments, the Board (40–42) cites decisions that long predate its 2022 *Thryv* decision, in which the Board announced its new power to award consequential damages. That merely begs the question: It is precisely this new type of damages that raises the non-delegation problem.

IV. NLRB'S IN-HOUSE PROCESS VIOLATED PETITIONERS' RIGHTS UNDER ARTICLE III AND THE SEVENTH AMENDMENT

A. Article III. The Board agrees—as it must—that only Article III courts may exercise the judicial power of the United States and, therefore, that Congress may not assign this power to non-Article III tribunals. NLRB.Br. 47. The Board argues, however, that ULP claims are public rights—not private rights—which, therefore, were lawfully assigned to a non-Article III tribunal. *See id.* 47–50; *see also* AFL.Br. 4–10 (same).

Here, the Board (at 47–55) relies heavily on *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). But *Jones & Laughlin Steel* said nothing about the distinction between private rights and public rights, and it conducted no Article III analysis.[7] The Board (at 48) is simply incorrect that *Jones & Laughlin Steel* "conclusively resolved" the Article III question. It never even addressed it.

The Board (at 48–50, 52–53) and Amicus (at 6–8) cite several other cases, including *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977), to declare that the public-rights issue is settled. Yet the Board admits (at 47) that the Supreme Court has never "formulated a definitive framework" to distinguish between public and private rights. And the Board all but ignores the Court's latest public-rights discussion, which dooms the Board's arguments. In *Jarkesy v. SEC*, the Supreme Court identified a long-standing, limited set of "distinctive areas involving governmental prerogatives" that may be assigned to non-Article III tribunals: revenue collection, immigration, tariffs, Indian relations, public lands administration, and public benefits. 144 S.Ct. 2117, 2127,

[7] To the extent *Jones & Laughlin Steel* is held to control, Petitioners preserve their right to challenge its continuing viability.

2132–34 (2024); *see id.* at 2147 (Gorsuch, J., concurring) (noting "serious and unbroken historical pedigree" of distinctive "public rights" exceptions). The Board's ULP claims fit nowhere within this set.

The most the Board can muster (at 52) is that *Jarkesy* quoted certain Supreme Court precedent "without disapproval." But nowhere did *Jarkesy* approve the public-rights reasoning in *Atlas Roofing* or other cases the Board leans on. To the contrary, *Jarkesy* expressly criticized *Atlas Roofing*'s "circular" definition of public rights. 144 S.Ct. at 2139; *see also id.* at 2149 (Gorsuch, J., concurring) (noting the Court's decision "does much to return us to a more traditional understanding of public rights").

Finally, the Board points to various ostensibly salutary benefits of administrative adjudication, *e.g.*, claims are limited to a "particularized area of the law" resolved by a single expert agency to ensure a uniform national policy. *See* NLRB.Br. 50 (discussing *Stern v. Marshall*, 564 U.S. 462, 489–94 (2011) (discussing public-rights exception); *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 191–93 (1978) (addressing federalism)); *see also* AFL.Br. at 8–9 (raising similar points). But these points find support only in pre-*Jarkesy*

decisions and the *Jarkesy* dissent. *See* 144 S.Ct. at 2175 (Sotomayor, J., dissenting) (positing "good reasons" for administrative adjudications rather than jury trials, including greater expertise and uniformity).

Pursuant to current Supreme Court jurisprudence, the Board's ULP claims do not fit within the narrow public-rights exception to Article III jurisdiction. *See Jarkesy*, 144 S.Ct. at 2127, 2132–34.

B. Seventh Amendment. In response to Petitioners' claimed right to a jury trial, the Board (at 51–53) argues again that this case involves public rights—incorrect, as explained above—and (at 53–56) that ULP claims are not legal in nature. The Board's argument is without merit.

The Board contends (at 53) that ULP claims are statutory claims unknown to the common law. *See* AFL.Br. 12 (same). Again, the Board's analysis needs updating. While *Jones & Laughlin Steel* relied on the "statutory" nature of the case, the Supreme Court long ago held that the Seventh Amendment may apply to statutory proceedings. For example, in *Curtis v. Loether*, 415 U.S. 189, 194 (1974), the Supreme Court emphasized, "[w]hatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing

statutory rights ….” *See also Tull v. United States*, 481 U.S. 412, 421–23 (1987) (same).

As *Jarkesy* confirmed, “whether [a] claim is statutory is immaterial” to the Seventh Amendment analysis, and the right to a jury trial “is *not* limited to the ‘common-law forms of action recognized’ when the Seventh Amendment was ratified.” 144 S.Ct. at 2128 (citation omitted). The Seventh Amendment “embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume.” *Id.* (quoting *Parsons v. Bedford*, 28 U.S. 433, 447 (1830)).

Thus, a jury is required when a statutory claim is analogous to an 18th-century English common law cause of action and imposes legal. *See* Op.Br. 59–61. The ULP claims here are analogous to an employee’s claim for wrongful discharge. *See, e.g.*, Kerry R. Lewis, Note, *A Reexamination of the Constitutional Right to a Jury Trial Under Title VII of the Civil Rights Act of 1964*, 26 Tulsa L.J. 571, 589–90 (1991); 1 *Blackstone Commentaries* *413.

And, following the Board’s decision in *Thryv*, a ULP claim may result in an award of foreseeable, consequential—legal—damages. *Cf.*

372 N.L.R.B. No. 22, at 18 (footnote omitted) (Members Kaplan & Ring, dissenting) (noting that the term "foreseeable" is a "central element of tort law"). The Board itself recognizes the impropriety of ordering reimbursement for losses that constitute tort damages. *In re Nortech Waste*, 336 N.L.R.B. 554, 554 n.2 (N.L.R.B. Sept. 28, 2001). The Board's focus on "merely" restoring the status quo is misleading. Petitioners recognize—*contra* the Board (at 55–56) and Amicus (at 14–21)—that an award of back pay is appropriate *because* it is incidental to the Board's equitable authority. Op.Br. 41. But the monetary award in *Thryv* was "a novel, consequential-damages-like labor law remedy." *Thryv Inc. v. NLRB*, 102 F.4th 727, 737 (5th Cir. 2024).

CONCLUSION

The Court should grant the Petitioners' petition, deny the Board's cross-application for enforcement, vacate the Board's Decision and Order, and award Petitioners all further relief to which they are entitled.

DATED: October 24, 2024

Respectfully submitted,

s/ Oliver J. Dunford

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 6,484 words, excluding the parts of the Brief excluded by Fed. R. App. P. 32(f).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared using Century Schoolbook 14-point font, a proportionately spaced typeface.

DATED: October 24, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2024, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify further that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

I certify that the foregoing document was served by electronic mail on October 24, 2024, on the following:

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