IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14-4523

UPMC PRESBYTERIAN SHADYSIDE,
Appellant,

v.

NATIONAL LABOR RELATIONS BOARD,
Appellee.

[*caption continued on next page*]

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR A DEMOCRATIC WORKPLACE, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF APPELLANTS AND URGING REVERSAL

On Appeal from the United States District Court for the
Western District of Pennsylvania
Nos. 2-14-mc-00109, 2-14-mc-00110, 2-14-mc-00111

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Nos. 14-4524

UPMC,
Appellant,

v.

NATIONAL LABOR RELATIONS BOARD,
Appellee.

Nos. 14-4525

UPMC,
Appellant,

v.

NATIONAL LABOR RELATIONS BOARD,
Appellee.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amici curiae are non-profit business associations. None of the *amici* has a parent corporation, and no publicly held corporation owns 10% or more of any of the *amici*'s stock.

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae Chamber of Commerce of the United States of America ("the Chamber"), Coalition for a Democratic Workplace ("CDW"), National Association of Manufacturers ("the NAM"), and National Federation of Independent Business ("NFIB") are national nonprofit organizations that are concerned about the overly aggressive, biased, anti-employer tactics used by the National Labor Relations Board ("NLRB"). The NLRB is supposed to be a neutral and unbiased arbitrator of labor relations. But, as is the case with the breathtakingly broad administrative subpoenas *duces tecum* at issue in this appeal, the NLRB often acts at the behest of national labor unions such as the Service Employees International Union ("SEIU"). The Chamber, CDW, the NAM, and NFIB are submitting this brief to urge this Court to ensure that district courts "act as courts and not as administrative adjuncts [or] automata carrying out the wishes" of federal agencies such as the NLRB. *Penfield v. SEC*, 330 U.S. 585, 604 (1947) (Frankfurter, J., dissenting). Without meaningful judicial review, American business will be left without any check against misuse or abuse of administrative subpoenas.

The Chamber is the world's largest federation of businesses. It represents 300,000 direct members and indirectly represents the interests of more than

[1] All parties have consented to the filing of this *amicus* brief. No party's counsel authored this brief in whole or part, and no party, party's counsel, or other person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

CDW, which consists of hundreds of members representing millions of employers nationwide, was formed to give its members a meaningful voice on labor reform. CDW's members—the vast majority of which are covered by the National Labor Relations Act ("NLRA") or represent organizations covered by the NLRA—have a strong interest how the NLRA is interpreted and applied by the NLRB.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

NFIB is the nation's leading small business association, representing 350,000 members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the

rights of its members to own, operate and grow their businesses. NFIB is greatly concerned about the pro-labor policies put forward by this particularly aggressive NLRB and frequently resorts to the courts to make sure the NLRB fulfills its original mission to be an impartial moderator between businesses and unions.

The Chamber, CDW, the NAM, and NFIB frequently participate as *amicus curiae* in judicial and administrative proceedings that raise important questions arising under the NLRA or otherwise affecting American employers' statutory rights and obligations. For example, the Chamber, the NAM, and NFIB participated as *amici curiae* before this Court in *EEOC v. Kronos, Inc.*, 620 F.3d 287 (3rd Cir. 2010) ("*Kronos I*"), a case which the district court here misinterpreted as requiring it to "rubber stamp" NLRB administrative subpoenas. *See* JA31. As another example, all four *amici* participated in *Browning-Ferris Indus. of Cal., Inc. v. FPR II-LLC*, Case No. 32-RC-109684 (NLRB July 22, 2013), an administrative proceeding threatening to overturn the NLRB's longstanding "joint employer" interpretation, which is based on this Court's decision in *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117 (3rd Cir. 1982).

INTRODUCTION & SUMMARY OF ARGUMENT

This appeal involves the NLRB's attempt under Section 11(2) of the National Labor Relations Act, 29 U.S.C. § 161(2), to enforce three sweeping administrative subpoenas *duces tecum*. The NLRB issued the subpoenas to Appellant UPMC Presbyterian Shadyside Hospital, and under an improper "single employer" theory,

to its corporate parent, Appellant UPMC, purportedly in connection with an NLRB investigation of unfair labor practice charges filed by the SEIU against Presbyterian Shadyside. The district court found that those subpoenas are unprecedented in breadth and almost entirely unrelated to the union's underlying unfair labor practice charges. The subpoenas are another example of the NLRB's continuing, all-out efforts to increase the number of dues-paying union members in a way that conflicts with the NLRA and decades of legal precedent, and without regard to the significant negative impacts that such tactics have on employer-employee relations and the nation's economy.

In an extraordinary introduction to its Supplemental/Amended Memorandum Opinion Granting NLRB's Three Applications to Enforce Subpoena *Duces Tecum*, dated September 2, 2014, the district court emphasized that the three subpoenas'

> scope and nature . . . are *overly broad and unfocused*. The Court has *never* seen a document request/Subpoena Duces Tecum of such a *massive* nature. The Court does not see how these requests have *any legitimate relationship or relevance* to the underlying alleged unfair labor practices. . . . [T]he requests have *no proportionality* to the underlying charges; and the requests seek information that a union *would not be entitled to receive* as part of a normal organization effort.

JA23 (emphases added). Indeed, the district court indicated that in view of "the NLRB's efforts to obtain said documents for, and on behalf of, the SEIU, arguably moves the NLRB from its investigatory function and enforcer of federal labor law,

to *serving as the litigation arm of the Union*, and a co-participant in the ongoing organization effort of the Union." JA24 (emphasis added).

Although the district court found that (i) "there is a minimal or no relationship between the Subpoenas and the underlying unfair labor practice charges"; (ii) "the unfair labor practices are being used, under the guise of the 'single employer' rubric, to attempt to legitimize a massive document request"; and (iii) compliance with the subpoenas "would be an expensive, time-consuming, and potentially disruptive of the daily business activities" of the Appellants, the court nonetheless *granted* the NLRB's application to enforce the subpoenas. JA29. According to the court, the "practical effect" of the Third Circuit's "case law as to enforcement of subpoenas of federal government agencies is that [the district court] is *constrained to essentially* '*rubber stamp*' the enforcement of the Subpoenas at hand." JA31 (emphasis added) (citing *EEOC v. Kronos, Inc.*, 620 F.3d 287 (3rd Cir. 2010) ("*Kronos I*") and *EEOC v. Kronos, Inc.*, 694 F.3d 351 (3rd Cir. 2012) ("*Kronos II*")). Believing that it was confronted with a "legal predicament" regarding its ability to deny enforcement of the unduly broad NLRB/SEIU subpoenas, the district court indicated that it was "at a loss how to adequately address" the situation, and thus expressly left it to this Court to determine whether the district court "has the authority to conduct a meaningful and/or thorough review of the three (3) Subpoena Duces Tecum at issue here." JA32.

Consistent with the separation of powers and the NLRA, this Court's case law is clear that a district court *must* conduct a thorough and meaningful review when the NLRB seeks to enforce an administrative subpoena *duces tecum* over an employer's objections. Affording an overly zealous NLRB free rein to foster unionization through the investigation and prosecution of unwarranted unfair labor practice charges—including through issuance of the type of punitive subpoenas *duces tecum* at issue in this appeal—would upset the delicate employer-employee balance that the NLRA seeks to achieve, and in turn, would be detrimental to the U.S. economy.

ARGUMENT

I. DISTRICT COURTS ARE NOT REQUIRED TO "RUBBER STAMP" NLRB ADMINISTRATIVE SUBPOENAS, ESPECIALLY WHERE AS HERE, THEY ARE OVERLY BROAD AND UNRELATED TO A LEGITIMATE INVESTIGATORY PURPOSE

Sections 11(1) and 11(2) of the NLRA, 29 U.S.C. §§ 161(1) & (2), govern the scope, issuance, and enforcement of NLRB administrative subpoenas. Although Section 11(1) authorizes the NLRB to issue a subpoena *duces tecum* if it seeks information relevant to an unfair labor practice investigation, Section 11(2) vests the district courts with the sole and exclusive jurisdiction to review, consider objections to, and enforce, modify, or reject such subpoenas:

> In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person

> guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence *if so ordered* . . . .

29 U.S.C. § 161(2) (emphasis added).

In other words, the NLRB lacks the authority to compel an employer to produce information, such as documents demanded by an administrative subpoena. Instead, that authority, which necessarily requires impartial evaluation of an employer's objections to the subpoena, is vested exclusively in Article III courts. "This structural limitation on the NLRB's authority, emanating from the Constitution's separation of powers and due process requirements, 'protect[s] against abuse of subpoena power.'" *NLRB v. Interbake Foods, LLC.*, 637 F.3d 492, 498 (4th Cir. 2011) (*quoting United States v. Bell*, 564 F.2d 953, 959 (Temp. Emer. Ct. App. 1977)).

Consistent with the separation of powers, and to ensure that objecting parties are provided with appropriate due process protections, Article III courts long have been vested with the exclusive authority to review and enforce administrative subpoenas issued by Executive Branch agencies. "Instead of authorizing agencies to enforce their subpoenas, Congress has required them to resort to the courts for enforcement." *Penfield*, 330 U.S. at 604 (Frankfurter, J., dissenting).[2]

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[2] As the U.S. Department of Justice's Office of Legal Policy explained in a report to Congress, "judicial involvement in enforcement [of administrative

For example, more than a century ago, in *Interstate Commerce Commission v. Brimson,* 154 U.S. 447 (1894), *overruled on other grounds in Bloom v. Ill.*, 391 U.S. 194 (1968), the Supreme Court analyzed the Interstate Commerce Commission's subpoena power. The subpoena power originally granted to the now-defunct ICC was comparable to that given to the NLRB in Section 11 of the NLRA. *See id*. at 461-62 (discussing Interstate Commerce Act, Pub. L. No. 49-41 (1887)). In discussing the ICC's subpoena power, the Court held that a federal court's responsibility to decide whether administratively subpoenaed evidence should be tendered to a federal agency cannot be delegated to an administrative tribunal:

> The inquiry whether a witness before [an agency] is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession, and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination.

Id. at 485; *cf. Upjohn Co. v. United States,* 449 U.S. 383 (1981) (addressing the applicability of the work–product doctrine in judicial proceedings to enforce Internal Revenue Service summonses).

As to the NLRB specifically, "the NLRA carefully recognizes the appropriate divide between the administrative authority to conduct hearings and issue orders and

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subpoenas] ensures a good degree of fairness." U.S. Dept. of Justice, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities*, § I.A. (2002), *available at* http://www.justice.gov/archive/olp/rpt_to_congress.htm#11a (last visited April 9, 2015).

the exclusively judicial power of Article III judges to enforce such orders." *Interbake Foods*, 637 F.3d at 497. "This reservation of authority to Article III courts *protects against abuse* of the subpoena power . . . ." *Id.* at 498 (emphasis added). This Court should clarify that a district court need not "rubber stamp" NLRB subpoenas. *See id.* (a court cannot enforce NLRB subpoenas "blindly" or "as a matter of course").

Instead, a district court not only must consider an employer's objections (including by holding an evidentiary hearing, if necessary), but also must refuse to enforce NLRB subpoenas that either seek information that is not relevant to a legitimate investigatory purpose or are unreasonably broad or burdensome in scope. *See, e.g., Kronos I,* 610 F.3d at 296-97. Here, the district court remarkably found that the NLRB's three subpoenas are (i) "overly broad and unfocused," (ii) lack "any legitimate relationship or relevance to the underlying alleged unfair labor practices," (iii) represent an "attempt to legitimize a massive document request" under "the guise of the 'single employer' rubric," (iv) seek "highly confidential and proprietary information" (including from an independently incorporated and operated employer's corporate parent) that "a union would not be entitled to receive as part of a normal organization effort," (v) would be "expensive, time-consuming, and potentially disruptive of the [employers'] daily business activities," and (vi) "arguably moves the NLRB from its investigatory function . . . to serving as the litigation arm of the Union." JA23, JA27, JA29. "[A]pplying the applicable 'test,'" the district court emphasized

that it "would *deny*" the NLRB's applications to enforce the subpoenas. JA29-30 (emphasis added). And indeed, any one of these findings standing alone would have been sufficient to justify the court's conclusion that the NLRB subpoenas at issue do not satisfy the Third Circuit's longstanding, relevant-to-a-legitimate-purpose and not-unreasonably-broad-and-burdensome test for enforcement of an administrative subpoena. *See* JA29 (citing *Univ. of Med. & Dentistry of N.J. v. Corrigan*, 347 F.3d 57, 64 (3rd Cir. 2003)).

But instead, the court granted the NLRB's applications to enforce these three subpoenas based on the assumption that this Court's decisions in *Kronos I* and *Kronos II* somehow effected a sea change in the role that district courts are supposed to play when asked to enforce federal administrative subpoenas. *See* Appellants' Brief at 3. Contrary to the district court's view, those cases do not weaken the impartial, adjudicatory role of a federal district judge by requiring a court to rubber stamp even the flimsiest administrative subpoenas the NLRB presents for enforcement. And neither the district court's belief that it was confronted with a "legal predicament" imposed by *Kronos I* or *Kronos II*, JA31, nor its concern—having been reversed twice in the *Kronos* litigation—that "any denial of the present Applications to Enforce Subpoenas will not be affirmed," *id.*, remotely suggests reversal of its long-held view that "[t]he district court's role is *not that of a mere rubber stamp*, but of an independent reviewing authority called upon to insure the integrity of the proceeding." *Wearly v. FTC*, 616 F.2d 662, 665 (3rd Cir. 1980) (emphasis added).

Nor do the *Kronos* decisions suggest otherwise. *Kronos I* recognizes that subpoena power of federal administrative agencies does not confer "unconstrained investigative authority;" instead the relevance requirement is "designed to cabin" that authority and to "prevent fishing expeditions." *See Kronos I*, 620 F.3d at 296-97; *see also* Appellants' Brief at 26 (noting that *Kronos II* reversed the district court for not following its mandate and "not because it thought the court lacked the authority to review the subpoenas at issue").

The district court erred by assuming that it "lacks authority to conduct a meaningful review of the [NLRB] subpoena enforcement requests . . . essentially leaving UPMC without a judicial remedy under the law." JA68. The district courts in this Circuit have both the authority and the obligation to police the boundaries of an agency's exercise of its administrative subpoena power to ensure that the subpoena seeks only information relevant to a legitimate investigatory purpose and that the subpoena is not unduly broad or overly burdensome in scope. This Court should reverse the district court's rubber stamping of the NLRB subpoenas, and in so doing, ensure that district courts understand the independent, impartial, and meaningful judicial review role they are required to fulfill when requested to enforce an NLRB or other federal agency subpoena.

II. AMERICAN BUSINESS RELIES ON THE JUDICIAL SYSTEM TO CONDUCT IMPARTIAL AND MEANINGFUL REVIEW OF FEDERAL AGENCY ACTIONS, INCLUDING REQUESTS TO ENFORCE ADMINISTRATIVE SUBPOENAS

The NLRB is composed of five members who, along with the Board's general counsel, are appointed by the President and confirmed by the Senate. 29 U.S.C. § 153(a); *see also NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014) (summarizing appointment process). Although the NLRB is structurally bipartisan (the President traditionally appoints three Board members from his own political party and two from the opposing party), the current NLRB is widely seen not as a "neutral arbiter" of labor law, but instead facilitating an aggressively pro-union agenda. *See, e.g.,* Review and Outlook, *Another NLRB Power Grab,* Wall St. J., Jan. 8, 2013.[3]

Thus, the unwarranted, retaliatory fishing expedition that the NLRB at the behest of the SEIU seeks to conduct through enforcement of the subpoenas at issue is unfortunately not surprising. The documents sought by the SEIU against Appellant UPMC have nothing to do with the substance of its unfair labor practice claims against UPMC's separately incorporated and independently operated subsidiary, Shadyside Presbyterian Hospital. Instead, the SEIU's expansive demand for UPMC documents appears to be focused exclusively on attempting to establish a joint employer relationship consistent with that union's broader organizing objectives. The district court's unequivocal findings that those subpoenas lack a

[3] *Available at* http://www.wsj.com/articles/SB10001424127887324461604578189443097965414.

legitimate investigatory purpose and are just an extension of SEIU's own anti-employer agenda, JA23-24, should be enough to deny enforcement of the subpoenas.

Indeed, in light of the NLRB's abdication of its role as a neutral governor of labor practices, it is all the more critical that the *amici*'s millions of members be able to rely upon the federal courts to protect their due process rights. The *amici curiae* filing this brief have written extensively and testified about, filed other *amicus* briefs on, and even initiated lawsuits to challenge the NLRB's brazen pro-union agenda that threatens the ability of the nation's employers to improve economic growth and create jobs.[4] For example, *amici* have advocated against the following NLRB's actions—

- the NLRB's interference with The Boeing Company's decision to open a second airplane production line for Boeing's 787 Dreamliner in South Carolina,

[4] *See, e.g.*, Thomas J. Donohue, *The Truth Behind the Labor Agenda*, U.S. Chamber of Commerce Blog (March 23, 2015-9:00 a.m.), https://www.uschamber.com/blog/truth-behind-labor-agenda; http://myprivateballot.com/nlrb/ (last visited April 10, 2015); James Skelly, *The National Labor Relations Board's Aggressive Agenda Threatens Manufacturers*, Nat'l Ass'n of Mfrs. (July 25, 2011), http://www.nam.org/Issues/Labor/The-National-Labor-Relations-Boards-Aggressive-Agenda-Threatens-Manufacturers/; *NFIB Pushes Back Against the Big Labor Agenda*, http://www.nfib.com/article/nfib-pushes -back-against-the-big-labor-agenda-59200/ (last visited April 15, 2015).

and its attempts to require that second production line to be operated by Boeing's union workforce in the State of Washington;[5]

- the NLRB's sweeping new standard for determining an appropriate bargaining unit which increases the number of so-called "micro-unions";[6]

- the NLRB's adoption of unprecedented election rules which promote increased union organizing by shortening the timeframe for businesses to hold elections and for employees to make informed decisions about whether to join a union;[7]

- the NLRB's pursuit of an extraordinary complaint against McDonald's USA, LLC and its independent franchisees, claiming that the franchisor and its separate franchisees should be held liable as a "joint employer" for alleged labor violations as part of a union campaign to accelerate membership more quickly than by one franchise at a time;[8]

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[5] *The Boeing Company*, NLRB Case No. 19-CA-32431 (Complaint Apr. 20, 2011).

[6] *In re Specialty Healthcare*, 357 NLRB No. 83 (2011), *enforced sub. nom.*, *Kindred Nursing Centers East v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

[7] Case Procedures, 79 Fed. Reg. 74,307 (Dec. 15, 2014); *see also* Complaint, *Chamber of Commerce et al. v. NLRB*, Case No. 1:5-00009 (D.D.C. Jan. 5, 2015) and Plaintiff NFIB/Texas' allegations in Complaint, *Associated Builders and Contractors of Tex. et al. v. NLRB*, Case No. 1:15-00026 (W.D. Tex. Jan. 13, 2015).

[8] NLRB McDonald's Fact Sheet, http://www.nlrb.gov/news-outreach/fact-sheets/mcdonalds-fact-sheet (summarizing NLRB's position that McDonald's USA, LLC, through its long-standing, historic relationship with its franchisees is a so-called "joint employer" with those franchisees).

- the NLRB's authorization of an employee's use of an employer's email system during nonworking time to engage in union organizing;[9] and

- the NLRB's aggressive policing of non-union employers' social media and personal conduct policies by claiming that such policies interfere with employees' collective activities protected under the NLRA.[10]

Unless this Court clarifies for the district courts in this Circuit that they need not—and should not—"rubber stamp" agency abuse of their administrative subpoena powers, the NLRB, in concert with SEIU and other labor unions, will be emboldened to engage in comparable discovery tactics against other employers. Protecting employers from unfettered administrative abuse is precisely why Congress long ago determined, as reflected in Section 11(2) of the NLRA, that the NLRB should not have the authority to enforce its own subpoenas. This Court should therefore confirm that it is part of the judicial responsibility to provide meaningful review of objectionable administrative subpoenas.

CONCLUSION

This Court should reverse the district court's judgment and deny enforcement of the NLRB's subpoenas, or alternatively, should vacate the district court's

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[9] *Purple Communications, Inc.*, 361 NLRB No. 126 (2014).

[10] *Hispanics United of Buffalo*, 359 NLRB No. 37 (2012) (employer's termination of employees for harassing comments made on Facebook violated NLRA); *see, e.g., Lytton Racheria of Cal.*, 361 NLRB No. 148 (2014) (finding policy that prohibited insubordination or other disrespectful conduct toward management violated the NLRA).

judgment and remand this case for further proceedings in light of this Court's precedents.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Bar Membership. Robin S. Conrad, Lawrence S. Ebner, and Mark Keenan are members in good standing of the Bar of this Court.

Word Count. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,619 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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By: */s/*
Robin S. Conrad

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 15, 2015, the Brief of *Amici Curiae* Chamber of Commerce of the United States of America, Coalition For A Democratic Workplace, National Association of Manufacturers and National Federation of Independent Business was served on all counsel of record listed on the CM/ECF Service List.

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