No. 24-60500

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STARBUCKS CORPORATION,
Petitioner/Cross-Respondent
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner

On Appeal from a Decision of the National Labor Relations Board,
No. 21-CA-304228

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE THE NEWSGUILD – CWA IN SUPPORT OF RESPONDENT/CROSS-PETITIONER NATIONAL LABOR RELATIONS BOARD TO ENFORCE THE BOARD'S ORDER

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The NewsGuild, an affiliate of the Communications Workers of America, respectfully moves to file an amicus curiae brief in the above matter.

As the representative of approximately 27,000 employees in the news and media industry, including journalists, multi-media reporters, photographers, videographers and other news gatherers throughout the United States, the NewsGuild submits that it, on behalf of its members, has a vital interest in the outcome of this matter.

The enforcement of Petitioner's subpoena seeking communications between employees and the media would have major impacts on both the labor rights of media workers to speak freely with members of the press about labor conditions pursuant to Section 7 of the National Labor Relations Act, and the ability of media workers to perform their jobs through interactions with potential employee-sources about working conditions and efforts to engage in collective action, impacting the right of freedom of the press under the First Amendment to the United States Constitution.

The NewsGuild-CWA, as the representative of tens of thousands of these workers, offers a unique perspective on the harmful effects that the enforcement of such a subpoena would have.

WHEREFORE, the NewsGuild-CWA respectfully requests that this Court grant its Motion for Leave to File Amicus Curiae Brief in Support of Respondent/Cross Petitioner National Labor Relations Board.

Respectfully submitted,

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June 26, 2025

CERTIFICATE OF COMPLIANCE

The foregoing motion complies with the word limits of Fed. R. App. P. 32(g)(1) and Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Fed. R. App. P. 27(d)(2), the word count feature in Microsoft Word reports that this document contains 313 words.

The foregoing motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, size 14 font.

/s/ Matthew Holder
Matthew Holder

June 26, 2025

CERTIFICATE OF CONFERENCE

I hereby certify under 5th Cir. R. 27.4 and Fed. R. App. P. 29(a)(2) that on June 25, 2025 Counsel for the NewsGuild-CWA contacted the Petitioner/Cross-Respondent, Respondent/Cross-Petitioner, and the Intervenor by electronic mail and that all parties consented to the filing of the Brief of *Amicus Curiae*.

/s/ Matthew Holder
Matthew Holder

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2025, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Matthew Holder

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STATEMENT OF IDENTITY OF AMICUS CURIAE

The NewsGuild-CWA ("Guild"), affiliated with the Communications Workers of America, represents approximately 27,000 employees in the news and media industry. The Guild represents journalists, multi-media reporters, photographers, videographers and other news gatherers employed by newspapers throughout the United States and in Puerto Rico.

The Guild submits that one of the subpoena requests at issue in this case, threatening to expose employee communications with the media about their workplace concerns, illegally chills not only the exercise of protected labor rights by Guild-represented employees in the media industry, but also the First Amendment activities they perform in their daily newsgathering role.

Thus, the Guild, as representative of tens of thousands of journalists, has a clear and substantial interest in the outcome of this case and seeks, along with the Respondent/Cross-Petitioner, National Labor Relations Board, enforcement of the NLRB's order finding that Petitioner/Cross-Respondent ["Starbucks"] violated Section 8(a)(1) of the National Labor Relations Act ["NLRA"] in issuing the subpoena to two of its employees.

Accompanying this amicus brief is the Guild's Motion for Leave to File Amicus Curiae Brief in Support of Respondent/Cross-Petitioner, National Labor Relations Board.

STATEMENT REGARDING FINANCIAL CONTRIBUTION AND PARTICIPATION OF A PARTY IN THE AMICUS CURIAE'S BRIEF

Counsel for The NewsGuild solely authored this brief. Counsel for the Respondent/Cross-Petitioner, National Labor Relations Board, did not author any parts of this brief, nor did any other parties to this action. Furthermore, no party, party's counsel, or other outside person contributed any money to fund this brief.

CERTIFICATE OF INTERESTED PARTIES

Case No. 24-60500

STARBUCKS CORPORATION,
Petitioner/Cross-Respondent
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner

Pursuant to Fifth Circuit Rules 29.2 and 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. The NewsGuild-Communications Workers of America

2. Petitioner/Cross-Respondent: Starbucks Corporation

3. Respondent/Cross-Petitioner: National Labor Relations Board

4. Intervenor: Workers United, affiliated with the Service Employees International Union

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/s/ Matthew Holder
Matthew Holder

Attorney of record for the
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CONSTITUTION AND STATUTES

ARGUMENT

This brief focuses solely on the unlawful and coercive nature of the subpoena request of Petitioner Starbucks Corporation ["Starbucks"], to two of its employees, threatening to expose all "Communications with the media concerning Your employment with Starbucks, the Union, and/or the allegations contained in the Complaint."

The employer's threat to subpoena workers' private communications with the press regarding confidential union organizing activity is inherently coercive of Section 7 rights under the NLRA. Allowing Starbucks to wield its subpoena as a tool for worker intimidation would undermine future media coverage of newsworthy unionization efforts, by chilling employees' willingness to talk to journalists about their labor disputes. Such coercive subpoena activity would further undermine the First Amendment right of the press to effectively report on labor disputes and potential labor violations of significant public interest. We urge this Court to uphold the decision of the NLRB, finding that Starbucks violated Section 8(a)(1) of the NLRA by threatening to subpoena such information from employees Jazmine Cardenas and Andrea Hernandez.

A. Employees have a Section 7 right to communicate with the media about terms and conditions of employment, including unionization efforts

The Supreme Court held long ago that employees have protection under Section 7 of the NLRA's "mutual aid or protection" clause "when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Protected third-party channels include employee communications with the media. "Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute. This includes communications about labor disputes to newspaper reporters." *Valley Hospital Medical Center, Inc*., 351 NLRB 1250, 1252 (2007).

The NLRB has been steadfast in granting Section 7 protection to worker communications with the press about a wide range of workplace concerns including pay and staffing issues, *Pilot Development Southwest*, 317 NLRB 962, 966 (1995), concerns about poor ventilation and low wages that had prompted a strike, *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 fn. 1 (1984), and the poor nursing care provided to nursing home residents by replacement workers during the course of a strike, *Beverly Health and Rehabilitation Services, Inc.,* 346 NLRB 1319, 1321 (2006). Section 7 protection has been granted to workers who have

spoken to reporters about changes to their compensation system and deceptive company practices, *Mas-Tec Advanced Technologies*, 357 NLRB 103 (2011), and who have aired complaints to the press about inadequate patient staffing levels and the cutting of nurses' work shifts. *St. Luke's Episcopal Presbyterian Hospital,* 331 NLRB 761 (2000).

Likewise, numerous federal circuit courts have upheld the Section 7 right of employees to communicate with the media about their working conditions. In *DIRECTV, Inc. v. NLRB*, 837 F.3d 25, 33 (D.C. Cir. 2016), the D.C. Circuit found employee participation in a news segment addressing an unfavorable change in their compensation to be protected concerted activity. The Ninth Circuit, in *Nevada Service Employees Union, Local 1107, SEIU v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009), found that Section 7 protections extend to worker statements published in a newspaper article about staff shortages at the employer's hospital. The Sixth Circuit, in *Automobile Club of Michigan v. NLRB,* 610 F.2d 438, 439 (6th Cir. 1979), granted statutory protection to a worker press release concerning a lawsuit filed against their employer. Likewise, in *Community Hospital of Roanoke Valley, Inc. v. NLRB*, 538 F.2d 607, 608 (4th Cir. 1976), the Fourth Circuit upheld NLRB protection of a nurse's comments to a television station about employer staffing levels. In *Delta Health Ctr., Inc. v. NLRB*, the Fifth Circuit relied on *Community Hospital of Roanoke Valley* to find that an employer violated the NLRA when it

terminated two employees for raising concerns about working conditions. 1993 U.S. App. LEXIS 39388, *14 (5th Cir. 1993).

The case precedent is clear. Workers have statutory protection to speak to reporters about workplace disputes and unionization efforts. Press communications are an essential Section 7 tool by which employees seek to improve working conditions by raising public awareness of their labor disputes. It is a violation of Section 7 for an employer to take coercive action that interferes with these rights, including issuing coercive subpoenas for such information.

B. Employees' confidentiality interests regarding communications with the media far outweigh any employer right to such information

The Section 7 protections of workers are unduly compromised where, as here, an employer threatens to broadly discover confidential union-related activity through the issuance of a subpoena duces tecum wholly unnecessary to an employer's legal defense. The Board below properly adopted the balancing test articulated in *National Telephone Directory*, 319 NLRB 420, 421 (1995), as well as the ALJ's finding here that the "employees' rights under Section 7 to keep their protected activities confidential outweighed the employer's need for the information to present its defense."

The "confidentiality interests of employees have long been an overriding concern to the Board" in safeguarding workers' Section 7 rights to engage in

concerted protected activity. *Id*. That right of privacy is "necessary to full free exercise of the organizational rights guaranteed by the [Act], given the 'potential chilling effect on union activity that could result from employer knowledge of the information.'" *Veritas Health Services v. NLRB*, 671 F.3d 1267, 1274 (D.C. Circuit 2012). The threat of worker intimidation in the exercise of Section 7 rights is particularly acute during an organizing campaign, such as the Starbucks campaign that gave rise to the subpoena dispute in this case. *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999), *enforced*, 200 F.3d 1162 (8th Cir. 2000); *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172, 1182 (5th Cir. 1978).

That subpoenas duces tecum are a generally-permitted element of NLRB administrative procedure does not shield Starbucks from liability for its illegal actions here.[1] The subpoena request for all employee communications with reporters regarding Starbucks' employment and union activity is chilling in its

[1] The foreseeable chilling of Section 7 rights has motivated both the Board and the courts to prevent employers from obtaining information through otherwise legal means including Freedom of Information Act requests, *Committee on Masonic Homes v. NLRB*, 556 F.2d 214. 221 (3d Cir. 1977), and employee interviews, *Id*., citing *Hanover Concrete Co.*, 241 NLRB 936 (1979); *Dependable Lists, Inc.*, 239 NLRB 1304, 1305 (1979); *Campbell Soup Co.*, 225 NLRB 222 (1976)). This precedent extends to subpoenas duces tecum issued by employers to their workers during NLRB litigation. See *Chino Valley Medical Center*, 362 NLRB 283, 283 n. 1 (2015) (subpoenas duces tecum seeking communications between workers and the union including membership cards and union authorization cards violated the Act), enforced *United Nurses Associations of Cal. v. NLRB*, 871 F. 3d 767, 785 (2017); *see also Medieval Times U.S.A. Inc.*, 2025 NLRB LEXIS 40, *248, 2025 WL 511270 (February 13, 2025); *Interstate Power Tools & MacHining Inc*., 2025 NLRB LEXIS 1, *29, 2025 WL 32471 (January 3, 2025).

inherently coercive breadth. That request goes vastly beyond those documents needed for Starbucks to defend against the narrow legal claims in the attendant unfair labor practice proceeding—that Starbucks had issued an unlawful directive that there be "no talking" about the union while working. The dragnet subpoena was obviously intended to intimidate the workers and chill their exercise of Section 7 right, by threatening disclosure of confidential union activity long shielded from employer disclosure under the Act.

The Board below properly balanced the rights of workers to keep their Section 7 protected activities confidential against Starbucks' transparently baseless claim that it needed the information to present its legal case—and found the subpoena threat coercive in its effect. Starbucks cannot overcome the strong presumption of employee confidentiality in their Section 7-protected communications with the press. The mere threat of forced disclosure of employee messages, texts and communications with journalists, which would expose the identities and activities of workers engaged in confidential union organizing efforts, is inherently coercive of Section 7 rights. Where, as here, the employer wields a subpoena, not as a legitimate litigation tool, but as a weapon of employee intimidation, that litigation tactic itself is an unfair labor practice, as the NLRB held.

The mere issuance of the employer's overly broad subpoena would predictably inhibit workers' willingness to communicate with the media about future labor disputes, workplace concerns or unionization efforts. The coercive impact of this subpoena would be to effectively deprive employees of their well-recognized statutory right to communicate through "channels outside the immediate employee-employer relationship," *Eastex, Inc.*, 437 U.S. at 565, in service of their efforts to improve their working conditions.

Thus, the Court should uphold the findings of the NLRB under *National Telephone Directory* that the Employer violated Section 8(a)(1) of the Act by issuing this subpoena.

C. Petitioner's subpoena infringes the right of the media to engage with the public, undermining the First Amendment right to freedom of the press

In its coercive threat to expose communications between its workers and the media, the Starbucks subpoena undermines the First Amendment right to freedom of the press. If such broad and coercive subpoenas become a regular feature of employer litigation tactics, reporters and their news organizations will likely hesitate to engage with workers as sources when they come forward with newsworthy information about working conditions or pending labor disputes. Reporters who fear that their confidential communications with news sources

could be subject to public disclosure will be more reluctant to report on such subjects of obvious public concern.

Journalism relies on frank and open dialogue between reporters and news sources. Courts have long recognized the potential for subpoenas directed at the press to restrain reporting by chilling reporter-source communications. *See Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) ("[J]ournalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant."); *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998) ("Courts afford journalists a measure of protection from discovery initiatives in order not to undermine their ability to gather and disseminate information."); *Gonzales v. NBC, Inc.*, 194 F.3d 29, 35 (2d Cir. 1998), *as amended* (Sept. 29, 1999) (noting that the threat of compelled disclosure may cause sources to be "deterred from speaking to the press, or insist[] on remaining anonymous, because of the likelihood that they w[ill] be sucked into litigation"); *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993) (noting "a lurking and subtle threat to the vitality of a free press if disclosure of non-confidential information becomes routine and casually, if not cavalierly, compelled." (citation and internal quotation marks omitted)).

Starbucks' subpoena threatened to obtain the very same information, but from the news source rather than the reporter. However, the same First Amendment concerns are in play. There is no colorable difference, from the standpoint of First Amendment press freedom, whether a subpoena is directed at the employee-source[2] or the journalist. The end result is to undermine responsible, essential and effective journalism because the fundamental and confidential reporter-news source relationship can no longer be protected and relied upon.

Likewise, the threatened exposure of journalist communications with employee-sources, where a subpoena itself is wielded as an anti-union cudgel rather than a legitimate litigation tool, will deter journalists from effective labor reporting. Thus, subpoenas of this nature threaten to constrain the editorial discretion of the news media by impacting its "selection and choice of material" for publication. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973). Journalists may hesitate to investigate newsworthy labor issues such as union drives or substandard working conditions, for fear their confidential source relationships with workers would be entangled and exposed in litigation. Likewise, news organizations may be reluctant to publish "any information they fear would

[2] It is worth noting that the subpoena in question was directed, not at plaintiff-litigants pursuing private claims and remedies in their own self-interest, but rather, NLRB litigation pursued by the Board General Counsel in the public interest.

excite the interest of current or prospective litigants." *United States v. Marcos*, No. SSSS 87 CR. 598 (JFK), 1990 WL 74521, at *2 (S.D.N.Y. June 1, 1990).

The threatened use of inherently coercive subpoenas in NLRB litigation to target and expose Section 7 protected activity would also chill First Amendment newsgathering by deterring employees from speaking to journalists about workplace concerns or union organizing activities. Fearing exposure, discipline and retaliation, employees will think twice about engaging with the press on workplace issues—and First Amendment press freedoms will be undermined.

CONCLUSION

For the foregoing reasons, the Court should uphold and enforce the NLRB's decision, finding that Starbucks violated Section 8(a)(1) of the NLRA through the issuance of an inherently coercive subpoena for worker "communications with the media concerning [their] employment with Starbucks, the Union and/or the allegations contained in the Complaint."

Respectfully submitted,

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June 26, 2025

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,138 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2025 in Times New Roman 14 point font.

/s/ Matthew Holder
Matthew Holder

June 26, 2025

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2025, I served the original of the foregoing Brief of Amicus Curiae, NewsGuild – Communication Workers of America, via the Court's appellate CM/ECF filing system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Matthew Holder
Matthew Holder