No. 01-1292

In the Supreme Court of the United States

EPILEPSY FOUNDATION OF NORTHEAST OHIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

ARTHUR F. ROSENFELD
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
JOHN EMAD ARBAB
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals properly declined to enforce the Board's order against petitioner as resting on an erroneous retroactive application of a new interpretation of Section 7 of the National Labor Relations Act, 29 U.S.C. 157.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 01-1292

EPILEPSY FOUNDATION OF NORTHEAST OHIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 268 F.3d 1095. The decision and order of the National Labor Relations Board (Pet. App. 19a-95a) and the decision of the administrative law judge (Pet. App. 96a-122a) are reported at 331 N.L.R.B. No. 92.

JURISDICTION

The initial judgment of the court of appeals (Pet. App. 127a) was entered on November 2, 2001. A second judgment of the court of appeals (Pet. App. 123a-126a, 127a) was entered on December 3, 2001, replacing the

initial judgment. On January 24, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 4, 2002, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (Act), 29 U.S.C. 157, guarantees employees the right to engage in "concerted activities for the purpose of * * * mutual aid or protection." In *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), this Court held, in agreement with the National Labor Relations Board (Board), that Section 7 of the Act "creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline." *Id.* at 256. The Court therefore upheld the Board's conclusion that an employer violates Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by conducting such an "investigatory" interview after denying an employee's request that his union representative be present at the interview. 420 U.S. at 252.[1]

Weingarten itself involved a unionized employer, and this Court therefore did not specifically address whether the right recognized in that case would apply to non-union employees as well. In *Materials Research Corp.*, 262 N.L.R.B. 1010 (1982), the Board held that "the right enunciated in *Weingarten* applies equally" to employees who are not represented by a union. *Id.* at 1016. Thus, the Board concluded that a non-union

[1] Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157.

employer violates Section 8(a)(1) by conducting an investigatory interview after refusing the employee's "request to have a coworker present to assist him" at the interview. *Ibid.* Subsequently, however, the Board overruled *Materials Research Corp.* and held that "*Weingarten* rights are inapplicable" where the employee is not represented by a "certified or recognized union." *Sears, Roebuck & Co.*, 274 N.L.R.B. 230, 230 (1985). The Board later recognized that Section 7 "might be amenable to other interpretations," but, for policy reasons, "decline[d] to return to the rule of *Materials Research*." *E.I. DuPont de Nemours*, 289 N.L.R.B. 627, 628 (1988), petition for review denied *sub nom. Slaughter* v. *NLRB*, 876 F.2d 11 (3d Cir. 1989). See Pet. App. 6a-7a, 24a-25a.

2. Petitioner provides services to persons affected by epilepsy in northeastern Ohio. Pet. App. 20a, 97a. In 1993, petitioner was selected to conduct a research project concerning school-to-work transition for teenagers with epilepsy. *Id.* at 20a, 97a-98a. Arnis Borgs, an employment specialist, and Ashraful Hasan, a transition specialist, were hired to staff this project. *Id.* at 3a, 20a. On January 17, 1996, Borgs and Hasan sent Rick Berger, their supervisor, a memorandum discussing concerns about the project and stating that "your supervision of the program operations performed by [Borgs and Hasan] is not required." *Id.* at 3a-4a, 21a n.4. Borgs and Hasan also sent a copy of the January 17 memorandum to Christine Loehrke, petitioner's executive director. On January 29, 1996, Borgs and Hasan sent Loehrke a second memorandum that elaborated upon their earlier assertion that they no longer required Berger's supervision. *Id.* at 4a, 21a, 110a.

On February 1, 1996, Loehrke directed Borgs to meet with herself and Berger. Pet. App. 21a, 110a.

Borgs felt intimidated by the prospect of meeting alone with Loehrke and Berger because, at a meeting with Loehrke and Berger in December 1995, Borgs had received a reprimand for discussing salaries with other employees. *Id.* at 21a & n.5, 110a.[2] Borgs expressed those reservations to Loehrke and asked whether Hasan could also be present at the meeting. *Id.* at 4a, 21a-22a, 110a. Loehrke denied Borgs's request and, after Borgs continued to express his opposition to meeting alone with Loehrke and Berger, Loehrke told him to go home for the day. *Id.* at 4a, 22a, 110a. When Borgs returned to work the following day, Loehrke terminated him for refusing to meet with herself and Berger on February 1. *Ibid.*

3. a. Acting on a charge filed by Borgs, the Board's General Counsel issued a complaint alleging, in pertinent part, that petitioner violated Section 8(a)(1) of the Act by discharging Borgs for refusing to meet with Loehrke and Berger without Hasan on February 1, 1996. Pet. App. 96a, 114a-115a. After a hearing, the administrative law judge (ALJ) dismissed that allegation. *Id.* at 115a. Applying the Board's decision in *Du Pont*, the ALJ concluded that, although Borgs had reason to believe that the February 1, 1996, meeting could lead to disciplinary action, "*Weingarten* rights to representation in investigatory interviews are limited to 'employees in unionized workplaces who request the

[2] The administrative law judge (ALJ) found that petitioner violated Section 8(a)(1) of the Act by coercively interrogating and reprimanding Borgs at the December 1995 meeting with Loehrke and Berger. Pet. App. 21a n.5, 102a-105a, 118a. Petitioner did not challenge the ALJ's findings before the Board (see *id.* at 21a n.5) or in the court of appeals (see *id.* at 124a), and petitioner does not contest those finding in this Court.

presence of a union representative.'" *Ibid.* (quoting *Du Pont*, 289 N.L.R.B. at 631).

b. A majority of the Board reversed the ALJ. Pet. App. 19a-95a. After an extensive review of the statutory and policy issues, the Board overruled *DuPont* and "return[ed] to the standard set forth in *Materials Research Corp.*," namely, that "the rule enunciated in *Weingarten* applies to employees not represented by a union as well as to those that are." *Id.* at 30a-31a. The Board explained, among other things, that, as in a unionized workplace, the right of unorganized employees to the presence of a coworker at an investigatory interview "greatly enhances the employees' opportunities to act in concert to address their concern 'that the employer does not initiate or continue a practice of imposing punishment unjustly.'" *Id.* at 26a (quoting *Weingarten*, 420 U.S at 260-261).

The Board further concluded that application of "the rule enunciated today to the facts of this case" would not work a "manifest injustice" under the retroactivity doctrine. Pet. App. 31a. The Board found "no evidence in the record even remotely suggesting that [petitioner] was relying on the state of Board law when it decided to take action against Borgs." *Ibid.* The Board also noted that petitioner's commission of independent, uncontested unfair labor practices showed that petitioner was "not receptive to the right of its employees to engage in protected concerted activity." *Id.* at 32a; see note 2, *supra*.

Accordingly, the Board found that petitioner violated Section 8(a)(1) of the Act by terminating Borgs "for insisting on having his coworker, Hasan, present at an investigatory interview." Pet. App. 31a; see *id.* at 32a n.14. As a remedy for that violation, the Board ordered

petitioner to reinstate Borgs with back pay. See *id.* at 32a n.14, 39a-40a.

4. The court of appeals granted in relevant part a petition for review filed by petitioner. Pet. App. 1a-18a. The court upheld, as a reasonable interpretation of Section 7, the Board's determination that "an employee's request for a coworker's presence at an investigatory interview is concerted action for mutual aid and protection." *Id.* at 9a; see *id.* at 3a. The court explained that "the presence of a coworker gives an employee a potential witness, advisor, and advocate in an adversarial situation, and, ideally, militates against the imposition of unjust discipline by the employer." *Id.* at 8a.

The court of appeals agreed with petitioner, however, that, "even if the NLRB's new interpretation of [Section] 7 is upheld," the Board's holding in this case "should not apply retroactively to impose damages for Borgs' discharge." Pet. App. 12a. The court concluded that "the Board erred in giving retroactive effect to its new interpretation of [Section] 7" because, in the circumstances of this case, "it would be a 'manifest injustice' to require [petitioner] to pay damages to an employee who, without legal right, flagrantly defied his employer's *lawful* instructions." *Id.* at 13a; see *id.* at 3a. The court of appeals explained (*id.* at 13a):

> At the time when this case arose, the Board's policy on the application of *Weingarten* rights was absolutely clear—employees not represented by a union could not invoke *Weingarten*. Thus, Borgs unquestionably had no right to have a coworker present at an interview with his supervisors. And the employer obviously acted in conformity with the prevailing law in denying Borgs' request to have a

> coworker present during his scheduled interview. Neither Borgs nor [petitioner] could have known for sure that the established law might change, so Borgs acted at his peril in defying his employer and [petitioner] acted with no apparent risk in following the law.

The court of appeals therefore "reverse[d] the Board's retroactive application of their new interpretation and the Board's finding[] that [petitioner] discharged Borgs * * * for engaging in protected activity." Pet. App. 18a; see *id.* at 123a-126a.

ARGUMENT

Petitioner contends (Pet. 10-18) that the Board's new construction of Section 7 of the Act in this case is based on a "misinterpretation" of that provision and raises "important constitutional concerns." However, review by this Court of petitioner's claim is not warranted. Petitioner is not aggrieved by the judgment of the court of appeals in this case; rather, in the court of appeals, petitioner prevailed on its contention that the Board's order is not entitled to enforcement in relevant respects. In any event, petitioner's abstract challenge to the Board's interpretation of Section 7 raises no issue warranting further review by this Court. The petition for certiorari should therefore be denied.

1. This Court has explained that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording relief and cannot appeal from it." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980). See *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939) (successful party has no standing to appeal from decree denying injunction sought against it). In the present case, the court of appeals has afforded petitioner full

relief from the Board's order at issue. As explained above, petitioner sought review of a Board order directing that it reinstate employee Borgs with back pay, and the court of appeals declined to enforce the Board's order. In the court's view, the Board had erroneously applied its new interpretation of Section 7 retroactively to hold petitioner liable for an unfair labor practice in respect to its discharge of employee Borgs. See Pet. App. 12a-13a, 18a, 31a-32a & n.14, 39a-40a.[3] Accordingly, the judgment entered by the court of appeals enforced only certain unrelated portions of the Board's order, which petitioner did not contest in the court of appeals. See *id.* at 123a-126a; see also note 2, *supra*.

Moreover, subsequent to the issuance of its judgment, the court of appeals granted petitioner further relief by awarding it attorneys' fees and costs as a "prevailing party" under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). *Epilepsy Found. of Northeast Ohio* v. *NLRB*, No. 00-1332 (D.C. Cir. Mar. 29, 2002), slip op. 2.[4] Because the court of appeals has awarded petitioner full relief from the Board's order in this case (including an award of fees), the question

---

[3] The Board has not sought this Court's review of the court of appeals' ruling on the retroactivity issue.

[4] A copy of the court of appeals' EAJA order has been lodged with the Clerk of this Court. In that order, the court of appeals noted that, while petitioner was a "prevailing party" for purposes of an EAJA award, the Board had prevailed on the issue of "[t]he Board's modification of the *Weingarten* doctrine." *Epilepsy Found.*, slip op. 3. The fact that the Board did prevail on one legal issue for EAJA purposes does not cast doubt on the conclusion that petitioner was not aggrieved by the court of appeals' underlying judgment, which refused to enforce the relief granted by the Board in relevant part.

whether the Board's new interpretation of Section 7 is reasonable is, in this case, entirely academic. See *New Orleans* v. *Emsheimer*, 181 U.S. 153, 154 (1901) (where decree upheld party's contention, that party "is in no position to complain that it is aggrieved by its own success"; such a decree "cannot be reversed at [the successful party's] instance because put on one of the grounds it urged rather than another").

Petitioner acknowledges (Pet. 6) that "the court of appeals relieved [petitioner] of any back pay liability for the discharge of Borgs," but suggests that, because it "continues to have employees," petitioner is "adversely affected by the Board's new rule." There is no merit to that suggestion. As petitioner concedes (*ibid.*), the fact that petitioner continues to employ unrepresented workers does not distinguish it from "all other nonunion employers." Petitioner is no more entitled than those other employers to an advisory opinion from this Court. Further review of the Board's new interpretation of Section 7, if necessary, should await a case in which a court of appeals has actually enforced the Board's application of that interpretation to a particular nonunion employer. See *California* v. *Rooney*, 483 U.S. 307, 314 (1987) (noting that it would be "most premature" for this Court to review an issue "which has never been the subject of an actual judgment").

2. In any event, there is no merit to petitioner's contention (Pet. 11) that the Board's current interpretation of Section 7 "cannot be reconciled with the plain language of the statute." Section 7 grants "[e]mployees" the right to engage in "concerted activities for the purpose of * * * mutual aid or protection." 29 U.S.C. 157. It is settled that an employee's effort to obtain the assistance of his union representative at a confrontation with his employer "clearly falls within the

literal wording of [Section] 7." *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975). So too does the Board's interpretation of Section 7 in this case. The rights afforded by Section 7 extend to all "[e]mployees," whether organized or not.[5] In the non-union setting, an employee's request for the assistance of a fellow employee at an investigatory interview is "concerted" activity "in its most basic and obvious form" because, in that scenario, "employees are seeking to act together." *Materials Research Corp.*, 262 N.L.R.B. 1010, 1015 (1982). Such concerted activity is also for the purpose of "mutual aid or protection," because "by such, all employees can be assured that they too can avail themselves of the assistance of a coworker in like circumstances." *Ibid.* See Pet. App. 25a-26a (Board concludes to return to position articulated in *Materials Research Corp.*).[6]

---

[5] See, *e.g.*, *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962) (Section 7 protects walkout by group of unorganized employees to protest lack of heat in plant); see also *Materials Research Corp.*, 262 N.L.R.B. 1010, 1012 (1982) (noting "axiomatic" general principle that "the protection afforded by Section 7 does not vary depending on whether or not the employees involved are represented by a union"); Pet. App. 27a (Act "clearly protects the right of employees—whether unionized or not—to act in concert for mutual aid or protection").

[6] Although petitioner asserts (Pet. 11) that the Board's "repeated reexamination of this issue" has created "confusion," the relevant law was clear under the respective regimes of *Materials Research Corp.*, *Sears*, and *Du Pont*. In this case, the Board has made clear that the governing law is "the standard set forth in *Materials Research Corp.*" Pet. App. 31a. Moreover, "[a]n otherwise reasonable interpretation of [Section] 7 is not made legally infirm because the Board gives *renewed*, rather than new, meaning to a disputed statutory provision." *Id.* at 3a; see *Weingarten*, 420 U.S. at 265-266.

Petitioner asserts (Pet. 11) that employees cannot be engaged in "concerted" activity within the meaning of Section 7 unless they have "previously manifested shared interests." According to petitioner (*ibid.*), the Board's interpretation of Section 7 is based on an "irrebuttable presumption that all employees must have shared interests—whether they realize it or not." That (putative) presumption is improper, petitioner argues (Pet. 12), because, under the Act, employees "retain their own individual interests" unless they "declare [that] they have shared interests." There is no merit to petitioner's contentions, which are based on a mischaracterization of the Board's decision and on a misunderstanding of settled legal principles.

First, the Board created no "presumption" of any kind in this case. Rather, as discussed above, the Board simply, and reasonably, concluded that an unrepresented employee's request for a coworker's presence at an investigatory interview qualifies as "concerted" action for "mutual aid or protection" within the meaning of Section 7. Second, contrary to petitioner's suggestion, to be engaged in "concerted" activity, employees need not have "previously manifested shared interests," nor must employees "declare that they have shared interests." Section 7 does not require "an employee's activity and that of his fellow employees [to] combine with one another in any particular way." *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984). Moreover, it is settled that "concerted" activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action." *Meyers Indus., Inc.*, 281 N.L.R.B. 882, 887 (1986), enforced *sub nom. Prill* v. *NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988). An unrepresented employee is plainly seeking to

"initiate * * * group action" when he requests a coworker to accompany him to an investigatory interview conducted by the employer. 281 N.L.R.B. at 887.

There is also no merit to petitioner's contention (Pet. 12) that the Board's interpretation of Section 7 conflicts with "the realities of the workplace." That assertion is premised on petitioner's view (*ibid.*) that, where allegations of drug abuse or sexual harassment are involved, "only the interests of the individual employee will be at stake" during the investigative interview. As the present case itself illustrates (see Pet. App. 20a-22a), however, the use of investigatory interviews by employers is not limited to allegations of drug abuse or sexual harassment. See, *e.g.*, *Weingarten*, 420 U.S. at 254 (allegation that employee paid only $1 for a box of chicken that sold for $2.98); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 278 (1975) (employee's refusal to resume production). The Board's interpretation of Section 7 reflects the practical reality that, whatever the nature of the alleged offense, affording the accused employee "a potential witness, advisor, and advocate in an adversarial situation" reasonably "militates against the imposition of unjust discipline by the employer." Pet. App. 8a.

Moreover, contrary to petitioner's suggestion, the interests of the individual employee are not the only interests implicated even in drug abuse or sexual harassment investigations. Like other types of alleged misconduct, allegations of drug abuse and sexual harassment may be factually unfounded in a particular case; or, even if substantiated, the allegation may result in discipline that is unduly harsh under the circumstances. In either event, the employment interests of both the accused employee and his coworkers are implicated. For, "the rest of the employees have an interest

in helping the solely aggrieved individual, because next time it could be one of them that is the victim of the employer's arbitrary or unfair practices." *El Gran Combo de Puerto Rico* v. *NLRB*, 853 F.2d 996, 1005 n.4 (1st Cir. 1988).[7]

There is also no merit to petitioner's contention (Pet. 10, 13) that the court of appeals' decision in this case conflicts with *E.I. DuPont de Nemours & Co.* v. *NLRB*, 707 F.2d 1076 (9th Cir. 1983). In *DuPont*, the Ninth Circuit emphasized that it did not hold that, as a categorical matter, non-union employees have no right to the presence of a coworker at an investigatory interview. See *id.* at 1079 ("We repeat that we do not foreclose the possibility that a request for a fellow employee may be found concerted in the nonunion setting."). Rather, consistent with the court of appeals below, the *DuPont* court concluded that "a request for a fellow employee may be found concerted in the nonunion setting." *Ibid.*; see *id.* at 1078 (finding it "undoubtedly true" that, "just as [S]ection 7 is not limited to unionized employees, so the holding in *Weingarten*

---

[7] Although petitioner suggests (Pet. 6) that the Board's decision in this case "will radically transform the manner in which nonunion employers carry out workplace investigations," that suggestion is unpersuasive. A nonunion employer is required to permit the presence of a coworker at an interview only if it is reasonable for the employee to believe that the interview might result in disciplinary action, and, in addition, only if the employee actually makes a request for the presence of a coworker. See Pet. App. 20a, 23a, 29a-30a. Moreover, the employer is free to reject the employee's request and to pursue the investigation without interviewing the employee (*id.* at 29a), thereby requiring the employee to choose between "having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one." *Weingarten*, 420 U.S. at 258.

cannot be so limited"). However, the *DuPont* court found, on the record before it, that the particular employee's request for "'any' coworker to witness his disciplinary proceeding" was not "concerted" activity. *Id.* at 1080. The court's ruling turned on the absence of evidence of "past activity involving [the employee] and other employees" or of an "indication that any other employee would respond to [the employee's] request." *Id.* at 1079. By contrast, the record here is replete with such evidence.[8] Accordingly, there is no reason to believe that the outcome of the present case would have been different in the Ninth Circuit.

3. Petitioner also contends (Pet. 15) that this Court's review is necessary in this case to determine whether the Board "can constitutionally place a content-based restriction on employer communications." Section 10(e) of the Act, 29 U.S.C. 160(e), provides that, absent

---

[8] For example, prior to Borgs's request on February 1, 1996, that Hasan be present at his investigatory interview, Borgs had, in the late fall of 1995, discussed wages with other employees. Pet. App. 99a. The ALJ found that Borgs's discussions constituted protected, concerted activity under Section 7 and that petitioner had unlawfully interrogated and reprimanded Borgs about those discussions. *Id.* at 101a-102a; see, *e.g.*, *id.* at 105a-107a, 113a (Borgs engaged in protected, concerted activity throughout 1995 when seeking an increase in the mileage reimbursement rate on behalf of himself and other employees); *id.* at 32a-33a, 107a (Borgs and Hasan conducted series of "brown bag lunch" meetings between August and December 1995, where they and other employees discussed matters of "mutual concern"); *id.* at 20a-21a (Borgs and Hasan acted together in preparing January 1996 memoranda to Berger and Loehrke). The record in this case therefore demonstrates "past activity involving [Borgs] and other employees" and makes clear that Hasan "would respond to [Borgs's] request" for Hasan's assistance, had petitioner honored Borgs's request. *DuPont*, 707 F.2d at 1079.

extraordinary circumstances, "[n]o objection that has not been urged before the Board * * * shall be considered by the court." Petitioner does not challenge the court of appeals' conclusion that petitioner failed to raise its constitutional claim before the Board. See Pet. App. 11a-12a. Moreover, the court of appeals found that, although petitioner sought to raise its claim for the first time in its appellate brief, petitioner had demonstrated "no extraordinary circumstances" excusing its failure to raise the claim before the Board "in the first instance." *Id.* at 11a. Accordingly, as the court of appeals correctly ruled (*id.* at 11a-12a), petitioner is jurisdictionally barred by Section 10(e) from raising its constitutional claim before the courts. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982).

Contrary to petitioner's assertion (Pet. 18), this Court's review in this case is not necessary to determine whether the jurisdictional bar of Section 10(e) applies to constitutional claims. The text of Section 10(e) is unambiguous in mandating that "[n]o objection" not urged before the Board may be considered on judicial review of the Board's order. Moreover, this Court and the courts of appeals have consistently applied Section 10(e) to constitutional claims. See, *e.g.*, *International Ladies' Garment Workers' Union*, 420 U.S. at 281 n.3 (barring procedural due process claim); *Radisson Plaza Minneapolis* v. *NLRB*, 987 F.2d 1376, 1382-1383 (8th Cir. 1993) (barring similar claim); *Polynesian Cultural Ctr.* v. *NLRB*, 582 F.2d 467, 473 (9th Cir. 1978) (barring First Amendment claim). Cf. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 896 n.7 (1984) (an "intervening, substantial change in controlling law" occasioned by a decision of this Court "qualifies as an 'extraordinary circumstanc[e]' " that permits considera-

tion of First Amendment claim). In interpreting the Act and applying it to the spectrum of labor-relations contexts, the Board regularly considers and resolves constitutional claims when timely raised.[9] It would therefore be particularly inappropriate for courts to "topple over" Board decisions "unless the administrative body not only has erred but has erred against [the] objection made at the time appropriate under its practice." *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952).

In any event, petitioner's First Amendment claim is without merit. Although petitioner argues (Pet. 15) that the Board's decision in this case creates a "content-based restriction" on employer communication, the mere presence of a coworker at an investigatory interview does not restrict employer speech. Moreover, whether an employee is entitled to the presence of a coworker is not based on the *content* of the employer's speech, but rather, on the *effect* of that speech upon the employee (*i.e.*, whether it is objectively reasonable for an employee to believe that the interview may result in disciplinary action). Any arguable limitation on employer speech created by such a Board rule is consti-

---

[9] See, *e.g.*, *In re*, *Wild Oats Markets, Inc.*, 336 N.L.R.B. No. 14 (Sept. 28, 2001), slip op. 4 (addressing claim that First Amendment protected lessee's communications with property manager concerning removal of picketers from parking lot); *Petrochem Insulation, Inc.*, 330 N.L.R.B. 47, 49-50 (1999) (interpreting Section 8(b)(4)(ii)(B) of the Act, 29 U.S.C. 158(b)(4)(ii)(B), to avoid First Amendment concerns with respect to unions' participation in state permitting proceedings), enforced, 240 F.3d 26 (D.C. Cir.), cert. denied, 122 S. Ct. 458 (2001); *Local Union 497, IBEW*, 275 N.L.R.B. 1290, 1291-1292 (1985) (addressing claim that compelled disclosure of union's membership list would infringe on members' First Amendment rights), enforced, 795 F.2d 836 (9th Cir. 1986).

tutionally permissible. See *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617 (1969) ("[A]ny balancing of [employers' First Amendment rights and employees' Section 7 rights] must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."). Although petitioner asserts (Pet. 16) that the Board's rule is "unquestionably" content-based because it applies only to interviews where discipline may be at issue (rather than to all employer-employee exchanges), here, as in *Weingarten*, the Board could reasonably conclude that an employee's need for coworker assistance is not necessary in respect to non-disciplinary matters. See *Weingarten*, 420 U.S. at 257-258 (noting that the Board does not apply its rule in that case to "run-of-the-mill" shop floor matters such as "the giving of instructions or training or needed corrections of work techniques"). Moreover, because petitioner prevailed in this case (see point 1, *supra*), its claims, including its First Amendment claim, are not properly presented for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ARTHUR F. ROSENFELD
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

JOHN EMAD ARBAB
Assistant General Counsel
National Labor Relations Board

MAY 2002