LABOR RELATIONS LAW

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2024 CUMULATIVE SUPPLEMENT

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Preface

This Supplement updates the fourteenth edition through the end of the 2023-24 Supreme Court term and includes relevant Labor Board and lower court decisions through July 2024. We thank our students and Casebook users for their helpful suggestions. The bold page numbers indicate the place in the Casebook affected by the supplemental materials.

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Part One

Introduction and Historical Background

Section I. Historical Background

C. The Period Since 1933

6. Organized Labor from the 1970s to the Present

Page 24.

There have been a number of successful union organizing campaigns over the last few years. Since 2021, workers at over 300 Starbucks stores from across the country have voted for union representation. *See* Michael Sainato, *"The Law Is Finally Catching Up": The Union Contract Fight at Starbucks*, GUARDIAN, May 12, 2023. At the same time, thousands of graduate teaching and research assistants at a number of universities—including Yale, Northwestern, Chicago, Johns Hopkins, Boston University, and the University of Southern California—won representation elections, often by historic margins (the Boston University vote was 1,414 - 28 in favor of unionization). *See* Dave Kamper, *What's Fueling the Graduate Worker Union Upsurge*, LAB. NOTES, Mar. 22, 2023. Workers at several other well-known retail establishments such as Apple, Trader Joe's, and REI also voted to unionize.

Despite these high-profile union victories, and the fact that unions now enjoy their highest rate of public approval in over fifty years, *see* Lydia Saad, *More in U.S. See Unions Strengthening and Want It That Way*, GALLUP (Aug. 30, 2023); Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), the percentage of the workforce who belong to unions continues its downward trajectory. The overall share of union membership declined from 10.3% in 2021 to 10.1% in 2022 to 10.0% in 2023, the lowest on record. While the number of workers belonging to unions actually increased by over 400,000 from 2021 to 2023, the total number of wage and salary workers grew by over 8.1 million, swamping the union gains. *See* Union Members Summary, U.S. Bureau of Labor Statistics (Jan. 23, 2024), https://www.bls.gov/news.release/union2.nr0.htm; Union Membership (Annual) News Release, U.S. Bureau of Labor Statistics (Jan. 19, 2023), https://www.bls.gov/news.release/archives/union2_01192023.htm.

Section II. Introductory Materials

A. Coverage of the National Labor Relations Act

3. Exclusions from Coverage

a. Independent Contractors

Page 29, after second full paragraph.

In *FedEx Home Delivery*, 361 NLRB 610 (2014) (*FedEx II*), the Obama Board rejected the D.C. Court of Appeals' approach elevating entrepreneurial opportunity as the "animating principle" of the test, and asserted that it would continue to be guided by the non-exhaustive common-law factors enumerated in the Restatement (Second) of Agency, Section 220 (1958), with no single factor being decisive. Although the Trump Board reversed course five years later in *SuperShuttle DFW, Inc*., 367 N.L.R.B. No. 75 (2019), making the opportunity for entrepreneurial gain the core of its common-law test, the Biden Board returned to form in *The Atlanta Opera, Inc.*, 372 N.L.R.B. No. 95 (2023), where it overruled *SuperShuttle* and reinstated the *FedEx II* standard. The *Atlanta Opera* majority found strong support for its multifactor approach in the Supreme Court's 1968 decision *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968), where the Court noted that "there is no shorthand formula or magic phrase that can be applied to find the answers, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."

B. Organization and Procedure of the National Labor Relations Board

3. Organization of the Board and the General Counsel

Page 39.

The President's power to remove the General Counsel was recently put to the test when President Biden, on his first day in office, removed General Counsel Peter Robb ten months prior to the expiration of his term. Shortly thereafter, Robb's replacement, Then-Acting General Counsel Peter Ohr, issued an unfair labor practice complaint against an office services company for failure to bargain with its newly certified union. The company claimed that the issuance of the complaint was beyond Ohr's powers because the President unlawfully removed Robb. While the Board declined at that point to rule on the President's removal powers, *Exela Enter. Sols., Inc*., 370 N.L.R.B. No. 120 (2021), the Fifth Circuit, on review, found that the President's power to remove derives from Article II of the Constitution and that no provision of the NLRA curbed that power with respect to the General Counsel. *Exela Enter. Sols., Inc. v. NLRB*, 32 F.4th 436 (5th Cir. 2022). The court found the Presidential power to remove the General Counsel to be in stark contrast to Congress's clear provision of removal protection for NLRB Board Members. *Id*.; *accord Aakash, Inc*., 371 N.L.R.B. No. 46 No. (2021) (finding that the Supreme Court's recent decision in *Collins*

v. Yellen, 594 U.S. 220 (2021), had foreclosed any reasonable argument that the President lacked authority to remove General Counsel Robb).

Part Two

The Right of Self-Organization and Protection against Employer Unfair Labor Practices

Section I. Employer Interference, Restraint, or Coercion

A. Limiting Organizational Activities on Employer's Premises

Page 59, New Note between Notes 2 and 3—Constitutional Restrictions on Organizer Access.

In *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), the Supreme Court restricted the ability of any future Board (or Congress) to expand organizer access to the premises of private employers. While agricultural laborers are expressly excluded from coverage under the NLRA, the state of California grants them organizational rights and makes it an unfair labor practice under California state labor law for employers to interfere with those rights. In furtherance of those aims, the state labor board promulgated a regulation that grants labor organizations the right to access the premises of an agricultural employer "for the purpose of meeting and talking with employees and soliciting their support." CAL. CODE REGS., tit. 8, §20900(e). The regulation allows organizers, with written notice to the state labor board and the property owners, to access the premises up to three times a day for 120 days a year to speak with workers before or after work or on their lunch breaks. *Id*. In a 6-3 decision along party lines, the Supreme Court found that the state access regulation involved an "appropriation" of private property, and thus declared it a *per se* physical taking without compensation in violation of the Fifth and Fourteenth Amendments. The case is significant for federal labor law as well, since any potential expansion of the rights of organizer access under the NLRA will have to confront this new interpretation of the Takings Clause. While the *Lechmere* limitations on organizer access were presented as questions of statutory interpretation, the *Cedar Point Nursery* restrictions actually constitutionalize a key aspect of an employer's ability to resist efforts to organize its employees.

Page 62, End of Note 3c—Buttons and Other Union Paraphernalia.

Despite longstanding precedent that employees have a Section 7 right to wear union insignia on their employer's premises absent a showing of "special circumstances" justifying employer restrictions, *see Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945), the Board continues to struggle with basic applications of that standard. For example, in *Wal-Mart Stores, Inc*., 368 N.L.R.B. No. 146 (2019), a divided Board declined to apply the "special circumstances" test to evaluate the lawfulness of an employer's dress code policy that only partially restricted the display of union buttons and insignia. Wal-Mart's policy granted employees the right to wear "small, non-distracting logos or graphics . . . no larger than the size of your [employee] name badge." Pursuant to the policy, Wal-Mart allowed smaller union buttons that met its size restrictions but disallowed a 3.5-inch diameter union button. Instead of analyzing this application of the dress code policy under the "special circumstances" standard, the Board chose to apply the new, less-demanding test announced in *Boeing Co*., 365 NLRB No. 154 (2017). That

test applies more generally to any facially neutral employer rule that may nevertheless, reasonably interpreted, potentially interfere with section 7 rights. It requires the Board to weigh "(i) the nature and extent of the potential impact on NLRA rights [from the employees' perspective], against (ii) legitimate [business] justifications [associated with the rule's requirements]," and strike the proper balance between them. Just three years later, however, the Biden Board overruled *Wal-Mart* and returned to its "special circumstances" test when employers interfere "in any way" with their employees' right to display union insignia. *Tesla Inc*., 371 N.L.R.B. No. 131 (2022). In *Tesla*, the employees wore union T-shirts instead of the uniforms that Tesla required—black shirts with Tesla's name and logo—and the employer disciplined them for violating its uniform policy. Tesla argued that the Board's application of its standard effectively made all company uniforms presumptively unlawful. The Fifth Circuit agreed, vacating the Board's decision and finding that the Biden Board's standard exceeded the Board's statutory authority. The court instead endorsed the Board's earlier standard in *Wal-Mart Stores*, *supra*. *Tesla, Inc. v. NLRB*, 86 F.4th 640 (5th Cir. 2023).

Page 63, End of Note 3e—Off-Duty Employees.

Upon review, the D.C. Circuit found both the first step and the application of the second step of the Board's new access standard in *Bexar County* arbitrary, and invited the Board to "decide whether to proceed with a version of the test it announced and sought to apply in this case or to develop a new test altogether." *Local 23, Am. Fed'n of Musicians v. NLRB*, 12 F.4th 778 (D.C. Cir. 2021). On remand, the Biden Board abandoned the revised access standard adopted in *Bexar County* and returned to the previous test announced and approved by the circuit court in *New York-New York Hotel & Casino*, 356 NLRB 907 (2011), *enforced*, 676 F.3d 193 (D.C. Cir. 2012); *Bexar County Performing Arts Ctr. Found.*, 372 NLRB No. 28 (2022) (*Bexar County II*).

B. Anti-Union Speeches and Publications

Page 71, New Note 3—Captive Audience Speeches.

Employers frequently capitalize on their property rights by holding so-called "captive audience" meetings that employees are required to attend, and making anti-union speeches, showing anti-union videos, and engaging in other strategies to dissuade union organization. Recent years have seen legislative activity in several states seeking to ban captive audience meetings in which an employer expresses its views on religious or political matters, including the right to union organizing. Connecticut, Illinois, Maine, Minnesota, New Jersey, New York, Oregon, and Washington have enacted such statutes, and similar measures are pending in other states. Some of the statutes create a civil right of action for equitable relief, damages, and attorneys' fees and costs. *See, e.g.*, *An Act Protecting Employee Free Speech and Conscience*, amending CONN. GEN. STAT. §§ 31-51q. An open question remains whether the statutes are preempted by the NLRA under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), since such state legislation arguably trenches upon NLRA section 8(c)'s protection for employer speech. A challenge to the Connecticut statute on that basis is pending in federal court. Alternatively, the legislation may violate employers' First Amendment rights under the Constitution. *See* Complaint, *Chamber of Commerce v. Bartolomeo*, No. 3:22-cv-1373 (D. Conn. Nov. 1, 2022).

Page 76, End of Note 1—Distinguishing Threats from Predictions

The Board has recently confronted a number of cases involving potential threats by employers communicated through social media platforms. Tesla CEO Elon Musk, for example, used his personal Twitter account to tweet about Tesla's business plans, personnel matters, and breaking news. When the workers at Tesla's Fremont, California production facility began an organizing campaign, Musk was asked "How about unions?" by another Twitter user. In response, Musk tweeted:

> Nothing stopping Tesla team at our car plant from voting union. Could do so tmrw if they wanted. But why pay union dues & give up stock options for nothing? Our safety record is 2X better than when plant was UAW & everybody already gets healthcare.

In *Tesla, Inc.*, 370 N.L.R.B. No. 101 (2021), *enforced*, 63 F.4th 981 (5th Cir. 2023), the Board found that Musk's tweet was an unlawful threat that employees would lose their stock options if they selected the union as their representative. In its opinion enforcing the Board's order, the Fifth Circuit specifically rejected Tesla's argument that Musk's tweet was protected by Section 8(c) of the Act. 63 F.4th at 991-92. Citing *Gissel Packing*, the court explained that "a statement implying that unionization will result in the loss of benefits, without some explanation or reference to the collective-bargaining process, economic necessity, or other objective facts, is a coercive threat, while such a statement is not a threat if made in the context, for example, of explaining that existing benefits may be traded away during the bargaining process." *Id*. at 992. The court also emphasized the importance of judging speech in its broader context, noting that "Tesla's history of labor violations supports the NLRB's finding that employees would understand Musk's tweet as a threat to commit another violation by rescinding stock options as retaliation." *Id*. at 993. The Fifth subsequently vacated its decision, however, and granted a rehearing en banc. *Tesla, Inc. v. NLRB*, 73 F.4th 960 (5th Cir. 2023).

The Board took a similar position in *FDRLST Media, LLC*, 370 N.L.R.B. No. 49 (2020), *enforcement denied*, 35 F.4th 108 (3d Cir. 2022). There, the executive officer of an online media company that published *The Federalist* reacted to a walkout by employees of another, unionized media company by tweeting, "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." In finding that statement to be an unlawful threat, the Board affirmed the ALJ's finding that "[i]n viewing the totality of the circumstances surrounding the tweet, this tweet had no other purpose except to threaten the FDRLST employees with unspecified reprisal, as the underlying meaning of 'salt mine' so signifies." The Sixth Circuit disagreed and refused to enforce the order, finding that a reasonable employee would not view the tweet as a plausible threat of reprisal. The court believed that Board erred by viewing the tweet in isolation, and that a combination of factors—including the employer's claim that the tweet was intended to be satirical and the lack of evidence that any FDRLST employee actually perceived the tweet as a threat—militated against its finding of an unlawful coercion. 35 F.4th at 122-25. Interestingly, the court also found that the medium itself—Twitter—weighed against a finding of coercion because the platform "encourages users to express opinions in exaggerated or sarcastic terms." *Id*. at 126.

Section III. Employer Discrimination

B. Discrimination to Encourage Union Membership

4. State "Right-to-Work" Legislation

Page 144.

In March 2023, Michigan became the first state in decades to repeal its "right-to-work" law, *see* MICH. COMP. LAWS § 423.14 (2023), leaving twenty-six states with constitutional or statutory prohibitions on union security arrangements.

C. Which Activities Are Protected Under Section 7?

1. Concerted Activity on Social Media

Page 150.

In *Lion Elastomers LLC*, 372 N.L.R.B. No. 83 (2023), the Board expressly overruled *GM LLC and Charles Robinson*, 369 N.L.R.B. No. 127 (2020), rejecting application of the *Wright Line* test and returning to its setting-specific standards for determining whether employers have unlawfully disciplined employees engaged in abusive conduct in connection with protected concerted activity. In the context of concerted activity on social media posts, this would have meant a return to the totality-of-the-circumstances test applied in *Pier Sixty* and other earlier cases. But the Fifth Circuit recently found that the Board incorrectly used the remand proceeding to overrule *GM LLC and Charles Robinson* and, in doing so, violated the employer's due process rights. *Lion Elastomers, LLC v. NLRB*, 108 F.4th 252 (5th Cir. 2024). The broader impact of the Fifth Circuit's decision on opprobrious conduct is discussed more fully below. *See* Page 178, Note 3—Opprobrious Conduct.

2. Employer Work Rules and Policies Potentially Restricting § 7 Activity

Page 152.

In August 2023, the Biden Board overturned the *Boeing* standard applicable to employer work rules, finding that it gave too little weight to the chilling effect that overbroad work rules could have on employees' exercise of section 7 rights. In *Stericycle, Inc.*, 372 N.L.R.B. No. 113 (2023), the Board rejected *Boeing's* categorical approach to work rules, and adopted the following test, which it characterized as building on and revising the *Lutheran Heritage Village* test. First, the General Counsel must establish that a challenged rule has a reasonable tendency to chill employees from exercising section 7 rights. If the General Counsel does so, the rule is presumptively unlawful. The employer may rebut the presumption by proving that the rule advances a legitimate and substantial business interest and that a more narrowly tailored rule would not advance that interest. The Board explained:

> To begin, the current standard fails to account for the economic dependency of employees on their employers. Because employees are typically (and understandably) anxious to avoid discharge or discipline, they are reasonably inclined both to construe an ambiguous work rule to prohibit statutorily protected activities and to avoid the risk of violating the rule by engaging in such activity. In turn, *Boeing* gives too little weight to the burden a work rule could impose on employees' Section 7 rights. At the same time, *Boeing's* purported balancing test gives too much weight to employer interests. Crucially, *Boeing* also condones overbroad work rules by not requiring the party drafting the work rules—the employer—to narrowly tailor its rules to only promote its legitimate and substantial business interests while avoiding burdening employee rights.
>
> The standard we adopt today remedies these fundamental defects. We adopt a modified version of the basic framework set forth in *Lutheran Heritage*, which recognized that overbroad workplace rules and polices may chill employees in the exercise of their Section 7 rights and properly focused the Board's inquiry on NLRA protected rights. . . . However, although *Lutheran Heritage* implicitly allowed the Board to evaluate employer interests when considering whether a particular rule was unlawfully overbroad, the standard itself did not clearly address how employer interests factored into the Board's analysis. The modified standard we adopt today makes explicit that an employer can rebut the presumption that a rule is unlawful by proving that it advances legitimate and substantial business interests . . . . Because we overrule *Boeing*, *LA Specialty Produce*, and the work rules cases relying on them, including those that placed rules into an "always lawful" category based simply on their subject matter, we reject Boeing's categorical approach, instead returning to a particularized analysis of specific rules, their language, and the employer interests actually invoked to justify them. As under *Lutheran Heritage*, our standard requires the General Counsel to prove that a challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights. We clarify that the Board will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity. Consistent with this perspective, the employer's intent in maintaining a rule is immaterial. Rather, if an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable. If the General Counsel carries her burden, the rule is presumptively unlawful, but the employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule. If the employer proves its defense, then the work rule will be found lawful to maintain.

Id. at 1-2.

Page 153.

While the Trump Board decided against applying its *Boeing* standards to the terms found in severance agreements, it independently expanded the types of provisions that employers could lawfully include in those agreements. In *Baylor Univ. Med. Ctr.*, 369 N.L.R.B. No. 43 (2020), the Board found that an employer's offer of severance agreements with "No Participation in Claims" and "Confidentiality" clauses did not reasonably tend to interfere with, restrain, or coerce employees in the exercise of their rights under the Act. The ALJ in the case had found both clauses unlawful under the new *Boeing* test: the "No Participation" clause banned individuals from voluntarily assisting the Board in its investigations of unfair labor practices and was unsupported by any legitimate employer rationale; the "Confidentiality" clause could be construed as prohibiting protected discussions of wages, hours, and working conditions without a significant countervailing employer interest in confidentiality. On review, the Board generally rejected application of *Boeing* to severance agreements because such agreements were not mandatory and only applied to post-employment activities. It then upheld the legality of both contested provisions, and distinguished its approach from earlier decisions on the legality of severance agreements such as *Shamrock Foods Co*., 366 N.L.R.B. No. 117 (2018), by explaining that they had all involved employees who had been unlawfully discharged or involved other coercive circumstances. *Accord IGT*, 370 N.L.R.B. No. 50 (2020).

This new approach to severance agreements was short-lived. In *McLaren Macomb*, 372 N.L.R.B. No. 58 (2023), The Biden Board overruled *Baylor* and *IGT*, and found a severance agreement that both prohibited employees from making statements that could disparage the employer and further barred them from disclosing the terms of the agreement to be unlawful. The Board explained that it was returning to "the prior, well-established principle that a severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and that employers' proffer of such agreements to employees is unlawful." Shortly after the decision, General Counsel Jennifer Abruzzo issued a memorandum giving guidance on the impact of the case on severance agreements. Gen. Couns. Memo. GC 23-05 (Mar. 22, 2023). A few months later, the General Counsel issued a memorandum on a related issue, taking the position that, generally speaking, the proffer, maintenance, and enforcement of non-compete agreements that prohibit employees from accepting certain types of jobs or operating certain types of businesses after the end of their employment also violate Section 8(a)(1) of the Act. Gen. Couns. Memo. GC 23-08 (May 30, 2023). Her memo reasoned that non-compete agreements interfere with employees' efforts to improve working conditions by blocking their ability to concertedly resign, carry out concerted threats to resign, concertedly seek or accept employment with local competitors to obtain better working conditions, solicit coworkers to work for local competitors as part of a broader course of concerted activity, or to seek employment in order to engage in concerted activity elsewhere. The Board has yet to weigh in on the General Counsel's approach to non-compete agreements.

4. Constructive Concerted Activity

Page 164, End of Note 2—When Is Individual Activity Concerted?

In *Miller Plastic Products, Inc*., 372 N.L.R.B. No. 134 (2023), the Board overruled *Alstate Maintenance*, which had effectively narrowed the test for determining concerted activity by adopting more restrictive test for defining concerted activity by introducing a mechanical checklist of factors in place of the Board's traditional, fact-sensitive approach based on the totality of the evidence. In *Home Depot USA, Inc.*, 373 N.L.R.B. No. 25 (2024), the Board applied its traditional totality of the circumstances test and found that a single employee discharged for refusing to remove hand-drawn letters on his orange work apron spelling out BLM (the acronym for Black Lives Matter) was engaged in protected concerted activity. The Board reasoned that the employee's refusal to remove the BLM marking was concerted because it was a "logical outgrowth" of prior group complaints about racially discriminatory working conditions and was part of an attempt to bring those group complaints to the attention of Home Depot managers. For a discussion of the connection between the concertedness and mutual aid aspects of section 7 protection, as well as the difficulty the Board faces in cases like *Home Depot* when the potentially protected activity involves a social justice movement not directly linked to wages, hours, or unionism, see Marion Crain, *Profit, Mission and Protest at Work*, 108 MINN. L. REV. 2243, 2302-07 (2024)

6. Loss of Protection Due to Unlawful Objective, Unlawful Means, or Means Against Public Policy

Page 177, New Note between Notes 2 and 3—Property Damage

A number of cases over the years have confronted the issue of whether employees can withhold their labor when doing so risks damage to their employer's property. In an early case involving a sit-down strike, the Supreme Court made clear that the plant seizure at issue was unprotected, but then opined more broadly:

> [I]n its legal aspect, the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its goods, or the despoiling of its property, or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force, instead of legal remedies, and to subvert the principles of law and order which lie at the foundations of society.

NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 253 (1939). Over the ensuing decades, the Board shaped a requirement that striking employees must take "reasonable precautions" to protect against foreseeable injury to people, premises, or equipment that might be caused by their sudden work stoppage. *See, e.g.*, *Marshall Car Wheel & Foundry Co.*, 107 NLRB 314 (1953), *enforcement denied on other grounds*, 218 F.2d 409 (5th Cir. 1955) (strike not protected when employees at a foundry walked off the job leaving a foundry furnace full of molten iron, threatening to cause

severe damage to the employer's equipment as it solidified); *General Chemical Corp*., 290 NLRB 76 (1988) (strike not protected when employees at a chemical plant walked off the job without turning off the equipment, potentially threatening employees and others living in the vicinity with exposure to hazardous materials). At the same time, the Board repeatedly found that employees have no duty to prevent the loss of perishable goods or, more broadly, to time their work stoppages in a way that avoids economic harm to their employers. *See, e.g.*, *Lumbee Farms Coop.*, 285 NLRB 497 (1987) (strike protected when employees at a poultry plant walked off the job at the time when the largest number of chickens were being processed, threatening loss of its product on the line); *Leprino Cheese Co.*, 170 NLRB 601 (1968) (strike protected when employees at a cheese manufacturer walked off the job at a time that created a risk of spoilation of the cheese).

The Supreme Court recently revisited the issue of potential damage to employer property in an important case involving NRLA preemption (discussed more fully below in Part Four VII.A). *Glacier Northwest, Inc. v. Teamsters Local No. 174*, 598 U.S. 771 (2023). Glacier Northwest delivered concrete to customers using trucks with rotating drums that prevent the concrete from hardening during transport. Concrete is perishable in the sense that if not promptly poured it will harden and damage the vehicles in which it is stored as well as render the concrete itself unusable. A union representing the delivery truck drivers called for a strike on a morning it knew the company was making deliveries of substantial amounts of concrete. Many of the drivers ignored the company's request that they finish their deliveries and instead returned to the facilities with their fully loaded trucks. While the company took steps to keep its vehicles from sustaining significant damage, all of the concrete mixed that day hardened and became useless.

As part of its preemption analysis, the Court determined that the conduct of the striking drivers was not even arguably protected under the NLRA. While the Court, in theory, stuck with the Board's existing standard—that the NLRA does not protect strikers who fail to take "reasonable precautions" to protect their employer's property from foreseeable, aggravated, and imminent danger due to the sudden cessation of work—its application of that standard appears to narrow the range of protected conduct. For example, the Court distinguished earlier Board opinions on perishable products by noting that the truck drivers here had "prompted the creation" of the perishable product by reporting for duty and "pretending" as if they would deliver the concrete. *Id*. at 783 (emphasis in first quotation removed). Then, by waiting to walk off the job until the concrete was mixed and poured in the trucks, the strikers not only destroyed the concrete but also put employer's trucks in harm's way. *Id*. at 783-84.

Page 178, Note 3—Opprobrious Conduct.

In *Lion Elastomers LLC*, 372 N.L.R.B. No. 83 (2023), the Board overruled *GM LLC and Charles Robinson*, 369 N.L.R.B. No. 127 (2020), rejecting application of the *Wright Line* test and returning to its setting-specific standards for determining whether employers have unlawfully disciplined employees engaged in abusive conduct in connection with protected concerted activity. In the context of employee conduct towards management in the workplace, this means a return to the longstanding four-factor *Atlantic Steel* test discussed above. In the context of picket-line conduct, this means reversion to the standard in *Clear Pine Mouldings*, *Inc.*, 268 NLRB 1044 (1984), *enforced mem.* 765 F.2d 148 (9th Cir. 1985), where the Board considers, under all the

circumstances, whether non-strikers reasonably would have been coerced or intimidated by the picket-line conduct.

Although the NLRB in *Lion Elastomers* appears committed to a return to the *Atlantic Steel* test, the Fifth Circuit recently found that the Board incorrectly used the remand proceeding in that case to overrule *GM LLC and Charles Robinson* decision and, in doing so, violated the employer's due process rights. *Lion Elastomers, LLC v. NLRB*, 108 F.4th 25 (5th Cir. 2024). The court found that its original remand order was not an invitation for the Board to reconsider what legal standard to apply, but rather was an instruction to apply the existing legal standard laid out in *GM LLC and Charles Robinson*. Thus, the Fifth Circuit vacated the Board's *Lion Elastomers* decision and remanded the case with specific instructions to apply the previous standard.

In vacating *Lion Elastomers* on procedural grounds, the Fifth Circuit ensured that the Board can't enforce its decision under the new standard. But the broader impact of the decision, outside the Fifth Circuit, is unclear. The Board, under its non-acquiescence doctrine, typically ignores an appeals court ruling that breaks with its view of the law when pursuing cases outside of that particular circuit. Here, though, the court did not address the merits of the Boards decision and refuse to enforce its order. Instead, it vacated the Board's decision on procedural grounds, so application of the Board's typical non-acquiescence doctrine is uncertain.

E. Remedial Problems

Page 233, Note 3—Extraordinary Remedies.

In *Noah's Ark Processors, LLC*, 372 N.L.R.B. No. 80 (2023), *aff'd*, 98 F.4th 896 (8th Cir. 2024), the Board adopted the Administrative Law Judge's conclusion that the employer violated Sections 8(a)(5) and 8(a)(1) by bargaining in bad faith and implementing its final offer in the absence of a valid impasse. The Board further determined that a broad cease-and-desist order was warranted and, more generally, clarified the scope of its power to impose a wide range of potential remedies in cases involving parties who "have shown a proclivity to violate the Act or who have engaged in egregious or widespread misconduct." It then provided a non-exhaustive list of such remedies, including an explanation of rights, a reading of rights aloud to the employees, an explanation of rights mailing, the presence of managers or supervisors at the reading of rights, a notice signing by responsible representatives of the offending party, the publication of notices and explanations-of-rights in local publications, an extended posting of notices and explanations of rights, and visitation by the Board to inspect bulletin boards to ensure that the required postings are in place. In typical cases when employers violate workers' NLRA rights, employers have been required to make wrongfully terminated employees whole through backpay and reinstatement. The make-whole remedy has obvious significance for employees. Why do notice postings and readings of rights matter? What benefits do they have for unions?

Part Three

Representation Questions

Section I. Establishing Representative Status through NLRB Elections

A. Bars to Conducting an Election

Replace Pages 242-43 Note 4—Recognition Bars with the following.

4. *Recognition Bars* – The Board also applies a voluntary recognition bar to elections when an employer recognizes a union based on its claim of majority support. The recognition bar period is more flexible than the election and certification bar period, but generally lasts for at least six months from the time of recognition.

The precise mechanics of the voluntary recognition bar rules have oscillated with the Board's political makeup over the last two decades. In *Dana Corp.*, 351 NLRB 434 (2007), a closely divided Bush Labor Board announced a new rule with respect to the right of employees to challenge employer grants of voluntary recognition. Employees would have forty-five days after voluntary recognition has been granted to file a decertification petition challenging such action. The Board further indicated that the traditional contract bar doctrine would be suspended during this forty-five day period to allow the filing of a decertification petition even if a first contract has already been negotiated. A few years later, the Obama Labor Board overruled *Dana Corp*. in *Lamons Gasket Co.*, 357 NLRB 739 (2011), and returned to the traditional rule providing newly recognized labor organizations with a "reasonable period of time" to negotiate a first contract before it would entertain any decertification petition. The Trump Board then issued a series of amendments to its representation election rules in which it rejected *Lamons Gasket* and reinstated the *Dana Corp.* approach that would allow employees or rival labor organizations to challenge the validity of voluntary recognitions for up to forty-five days following such recognitions. 85 Fed. Reg. 18366 (proposed April 1, 2020) (to be codified at 29 C.F.R. pt. 103). The Biden Labor Board, however, recently rescinded the 2020 Trump rule, eliminating the forty-five day challenge period requirement. 89 Fed. Reg. 62952 (proposed Aug. 1, 2024) (to be codified at 29 C.F.R. pt. 103). The new rule also affirmed that the duration of the voluntary recognition bar was a reasonable period of time for collective bargaining, defined as no less than six months nor more than one year after the parties' first bargaining session. *Id*.

The Labor Board early on developed a practice of dismissing an election petition if substantial unfair labor practice charges affecting the unit have been filed and are unresolved—such charges are referred to as "blocking charges." *See U.S. Coal & Coke*, 3 NLRB 398 (1937) (dismissing decertification petition until unfair labor practice charges affecting the unit were resolved); NLRB, Casehandling Manual ¶ 11730 (2017) (describing blocking charge procedure). In 2020, however, the Labor Board amended its representation election rules to replace the blocking charge policy with either a vote-and-count or a vote-and-impound procedure. Thus, rather

than delaying the election until the unfair labor practices were resolved, the election was held, the ballots were counted or impounded, and the results were held until the charges were resolved. 85 Fed. Reg. 18366 (Apr. 1, 2020) (to be codified at 29 C.F.R. pt. 103). That rule, too, was recently revisited by the Biden Board, which rescinded the 2020 rule and returned to the Board's previous practice on blocking charges before an election, restoring a Regional Director's authority to delay an election if unfair labor practice conduct is sufficiently serious to interfere with employee free choice. 89 Fed. Reg. 62952 (proposed Aug. 1, 2024) (to be codified at 29 C.F.R. pt. 103).

B. Defining the Appropriate Unit

Page 253, Note 3—Non-Acute Healthcare Facilities, Retail Settings, Universities, and Other Contexts.

The Trump Board changes in this area were short-lived. In *Am. Steel Constr., Inc*., 372 N.L.R.B. No. 23 (2022), the Biden Board overruled the collective standard laid out in *PCC Structurals* and *Boeing* and reinstated *Specialty Healthcare*. The Board explained that the *PCC-Boeing* standard discounted the rights of employees seeking representation by making it too easy to invalidate a petitioned-for unit based on the supposed interest of excluded employees. The *Specialty Healthcare* standard's focus on "an appropriate" unit rather than "the optimal" one better fit with the statutory language and policy goals of the Act, in which unit determination "is to determine whether the petitioned-for unit is appropriate *for the purposes of collective bargaining*—an inquiry that focuses on whether the petitioned-for employees share a sufficient mutuality of interests, and which does not implicate the interests of the excluded employees."

Page 253, Note 4—Joint Employers.

The 2020 joint employer rule was rescinded and replaced by the Biden Board in 2023. The new rule considers the alleged joint employers' authority to control essential terms and conditions of employment, whether or not such control is exercised, and without regard to whether any such exercise of control is direct or indirect. 88 Fed. Reg. 73946 (proposed Oct. 27, 2023) (to be codified 29 C.F.R. pt. 103). The new 2023 joint employer rule, however, was delayed and ultimately vacated by the District Court in the Eastern District of Texas before it went into effect. *Chamber of Commerce of U.S. v. NLRB*, __ F. Supp. 3d __, 2024 U.S. Dist. LEXIS 43016 (E.D. Tex. Mar. 8, 2024). The district court found the Board's rationale for rescinding the 2020 rule to be arbitrary and capricious, and further found the 2023 rule to be inconsistent with common law agency principles.

C. The Conduct of Representation Elections

Page 263-64, Note 1—New Election Rules, insert at the end of the end of the third paragraph.

The remaining parts of the 2019 rules were reversed by the Biden Board in 2023, which returns the key election procedures to those put in place by the 2014 rules. 88 Fed. Reg. 58076, Aug. 25, 2023 (effective Dec. 26, 2023).

Section II: Establishing Representative Status Through Unfair Labor Practice Proceedings

Replace Pages 278-98 with the following.

Cemex Construction Materials Pacific, LLC

National Labor Relations Board

372 NLRB No. 130 (2023)

. . . .

On March 7, 2019, employees of the Respondent in a unit of about 366 ready-mix cement truck drivers and driver trainers voted against representation by the Charging Party, International Brotherhood of Teamsters (the Union), by a margin of 179 to 166. The General Counsel and the Union allege that the Respondent engaged in extensive unlawful and otherwise coercive conduct before, during, and after the election, which requires, among other remedial measures, setting aside the results of the election and affirmatively ordering the Respondent to bargain with the Union under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

After a hearing conducted on 24 days between November 2020 and February 2021,[5] the judge found that the Respondent violated Section 8(a)(1) of the Act more than two dozen times, including by threatening employees with plant closures, job loss, and other reprisals if they selected the Union, surveilling employees and interrogating them about their union activity, prohibiting employees from talking with union organizers or displaying prounion paraphernalia, and hiring security guards in order to intimidate employees immediately before the election. The judge also found that the Respondent violated Section 8(a)(1) before the election by disciplining lead union activist Diana Ornelas for talking with union organizers on "company time" and Section 8(a)(3) and (1) after the election by suspending Ornelas for 8 days on July 10, 2019, and by discharging her on September 6, 2019, because of her union activity. In addition, the judge found merit in the Union's election objections alleging coercive threats of plant closure and other repercussions, surveillance, and increased use of security in order to intimidate employees. Most of the judge's findings and conclusions with respect to the Respondent's unlawful and objectionable conduct are firmly rooted in his record-supported credibility resolutions, and, with minor exceptions and clarifications discussed below, we affirm them.

In addition to the Board's ordinary remedies for the violations found, the judge recommended setting aside the election and ordering the Respondent to provide for the Board's remedial order to be read aloud to employees and to provide the Union with several special access remedies prior to a rerun election. The judge did not recommend the General Counsel's requested *Gissel* bargaining order. As discussed in detail below, we agree with the judge that the Respondent's conduct requires setting aside the election. We also adopt the judge's recommended

[5] The hearing involved testimony from 41 witnesses and produced a 3162-page transcript.

notice-reading remedy. However, contrary to the judge, we find that the Respondent's conduct also warrants a remedial affirmative bargaining order, and we shall amend the judge's recommended remedy and Order accordingly.

Finally, the General Counsel asks the Board, inter alia, to overrule *Linden Lumber* and reinstate a version of the *Joy Silk* standard. We find merit to the General Counsel's arguments, and, as explained below we shall modify the Board's approach in this area in certain respects.

I. BACKGROUND

The Respondent is a Delaware-registered subsidiary of a multinational building materials company that provides ready-mix concrete, cement, and aggregates to construction-industry customers including, relevantly here, in Southern California and Las Vegas, Nevada.

In late 2017 or early 2018, a group of the Respondent's ready-mix drivers in Ventura County, California, approached the International Brotherhood of Teamsters (the Union) about organizing for the purpose of collective bargaining. The Union had already been working with a group of the Respondent's drivers who were trying to organize in Las Vegas, Nevada, and decided, upon the Ventura County drivers' overtures, to expand its campaign to organize a large unit which would ultimately encompass approximately 366 ready-mix drivers and driver trainers employed by the Respondent at approximately 24 facilities in Southern California and Las Vegas.

During the spring and summer of 2018, a union organizing committee consisting of more than 35 drivers from various facilities met by conference call every other week to coordinate organizing efforts. Union organizers, both employees and nonemployees of the Respondent, distributed union paraphernalia and information and spoke with drivers during nonworking time at the Respondent's numerous plants and jobsites. The Union also set up public social media accounts, including YouTube and Facebook pages, which supported the campaign with photos and videos of prounion drivers. The Union's efforts achieved broad support: it gathered authorization cards signed by at least 207 drivers (approximately 57 percent of the unit) during October and November 2018. The Union filed a petition for a Board-supervised representation election on December 3, 2018.

The Respondent reacted quickly and aggressively to the Union's campaign. Bryan Forgey, the Respondent's vice president/general manager for ready-mix business in Southern California, learned in October 2018 that the Union was collecting authorization cards. He alerted the Respondent's national labor relations team, and the Respondent established a "steering committee" to coordinate its response. The steering committee consisted of Forgey, Iris Plascencia (the Respondent's human resources manager for Southern California ready-mix), the Respondent's vice president for national labor relations, and in-house and outside legal counsel. Before the end of October, the steering committee hired a company called Labor Relations Institute (LRI) to help execute the Respondent's campaign against the Union. The steering committee also reviewed all formal discipline issued during the campaign, and a version of the steering committee continued to operate as of the hearing in this matter.

Over the course of the campaign, LRI supplied as many as five independent consultants, who trained the Respondent's managers and supervisors about the legal limits on their efforts to

persuade unit employees not to support the Union. Between late October 2018 and early March 2019, LRI consultants also met with unit employees, as often as daily, in small group and individual encounters at the various plants. The consultants presented PowerPoint displays and answered questions at the small-group meetings. As discussed further below, the content presented in these small-group meetings was pre-scripted so that the same message would be presented to drivers across the unit. In December 2018, the Respondent recorded two video messages, which it referred to as "25th hour videos," urging employees to reject the Union. LRI consultants presented these videos to all unit employees in small-group meetings shortly before the March 7 election. Throughout the campaign, the Respondent also distributed stickers, flyers, pamphlets, and letters encouraging employees to reject the Union, with a special emphasis on the Teamsters' strike history and the potential economic impact of a strike on unit employees. The Respondent also monitored the Union's social-media messaging and communicated its antiunion message through its own social media sites.

As noted above, the Union lost the March 7, 2019 election by a margin of 166 to 179 and subsequently filed the election objections and unfair labor practice charges at issue here.

II. DISCUSSION

A. The unfair labor practice allegations Unfair labor practices before the critical period:

We affirm the judge's conclusions, for the reasons given in his decision, that the Respondent violated Section 8(a)(1) of the Act on five occasions in August 2018, when Estevan Dickson, the Respondent's plant foreman/batchman for the Las Vegas Sloan and Losee plants: (1) threatened drivers Ibrahim Rida and Chris Lauvao that they could be fired or written up for having union stickers on their hardhats; (2) threatened Rida and Lauvao with discharge or reduced hours or benefits if they unionized; (3) instructed drivers Oscar Orozco and Lauvao that they were not to speak to "these union guys"; (4) instructed Orozco and Lauvao to "take those damn [union] stickers" off their hats; and (5) threatened Orozco and Lauvao with discharge or discipline if they refused to remove union stickers from their hardhats.

[The Board also affirmed the ALJ's findings that the Respondent committed over two dozen 8(a)(1) violations in the critical three-month period between the time the union filed the petition and the election and committed several additional 8(a)(1) and 8(a)(3) violations after the election.]

B. The election and election objections

The Board ordinarily sets aside the results of a representation election whenever an unfair labor practice has occurred during the critical period between the filing of the petition and the election, unless it is virtually impossible to conclude that the misconduct has affected the outcome of the election. In determining whether misconduct could have affected the results of the election, the Board considers the number and severity of the violations and their proximity to the election, the size of the unit and margin of the vote, and the number of employees affected and extent of dissemination of the misconduct. A party seeking to set aside an election has the burden of establishing that coercive conduct was sufficiently disseminated to affect the election's result.

Here, the impact of the Respondent's coercive conduct on the election is clear. As detailed above and in the judge's decision, the Respondent engaged in more than 20 distinct instances of objectionable or unlawful misconduct spanning the entire critical period, including, but not limited to, numerous unfair labor practices related to the Union's election objections. Specifically, the Union's second objection alleges that Cemex threatened employees with the closing of batch plants or other adverse consequences if they supported the Union. Among the most serious threats supporting this objection were plant foreman/batchman Dickson's telling drivers that "if the Union comes in . . . Cemex is just going to close their doors and take all their trucks to another state," and VP/GM Forgey's telling drivers that the Respondent retained the right to turn plants into "satellites," which could be turned on and off as needed. We also affirm the judge's finding that the Respondent delivered a third coercive threat of plant closure--not alleged by the General Counsel as an unfair labor practice--when LRI consultant Amed Santana told drivers during a meeting at the Respondent's Perris (Inland Empire) plant on January 28, 2019, that Cemex was a multibillion dollar company that did not need the ready-mix part of its business mix and could close its ready-mix operation if employees pushed enough and unionized.

We also find that the Respondent made at least 10 more coercive threats of adverse consequences during the critical period. While all of these threats were serious, the Respondent's implied threat of termination for engaging in protected strike activity, in the context of the Respondent's pervasive and persistent message that a strike would be likely if employees selected the Teamsters, likely had a particularly significant impact because, as noted above, it was conveyed not only by VP/GM Forgey, but also by LRI consultant Rosado and by consultant presentation material that was shown to all or most unit employees. Furthermore, the Board and the Courts have long recognized the particularly coercive nature of threats to close or transfer operations such as those delivered by Dickson, Santana, and Forgey.

In addition to these numerous coercive and unlawful threats, we have affirmed the judge's findings of unfair labor practices supporting the Union's seventh and eighth objections, alleging coercive surveillance and intimidation by increased use of security guards, respectively. We have also affirmed the judge's findings of at least seven more critical-period unfair labor practices not directly related to the Union's objections. Of these remaining unfair labor practices, the Respondent's unlawful directive to employees not to talk with union representative on "company time" may have had a particularly broad impact because, as discussed above, the record suggests that LRI consultants conveyed the same unlawful directive to drivers across the unit during individual and small group campaign meetings.

In short, the Respondent engaged in a large number of severe unfair labor practices and otherwise coercive conduct throughout the critical period. While some of these instances would likely have directly affected only the individual employee involved, many others included threats or other coercive conduct with unitwide consequences that would directly affect any unit employee who learned of them. Though the unit here was large, the election margin was small--a change of only 7 votes in the Union's favor from a total of 345 voting employees would have reversed the outcome. On this record, the Union clearly carried its burden of establishing sufficient dissemination of the Respondent's coercive conduct to affect the election result under *Crown Bolt*, above. For these reasons and those given by the judge, we adopt the judge's recommendation to set aside the results of the election.

C. The Gissel order

The Supreme Court held in *Gissel* that, where a union has at some point achieved majority support and a respondent has engaged in unfair labor practices which "have the tendency to undermine majority strength and impede the election processes," the Board "should issue" an order for the respondent to bargain with the union without an election if "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." In such a case, the Court emphasized, the bargaining order serves the two equally important goals of "effectuating ascertainable employee free choice" and "deterring employer misbehavior." The Court further observed that the Board "can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future." The Board accordingly properly considers a respondent's entire course of misconduct, both before and after the election, in determining whether a bargaining order is warranted.

The Board's determination whether misconduct is more appropriately remedied by a bargaining order or a rerun election takes into account the seriousness of the violations and their pervasive nature, as well as such factors as the number of employees directly affected, the identity and position of the individuals committing the unfair labor practices, and the size of the unit and extent of dissemination of knowledge of the Respondent's coercive conduct among unit employees.

. . . .

[The Board agreed with the ALJ that the Respondent's pervasive coercive misconduct here—including its unlawful discharge of the lead union activist, multiple threats of job loss and plant closure, and numerous other unfair labor practices—clearly supported the issuance of a bargaining order unless some significant mitigating circumstance exists. The Board disagreed with the ALJ's finding that the extent of dissemination of knowledge of the Respondent's past misconduct was a sufficient mitigating circumstance, and further found that neither the passage of time nor employee and management turnover made a bargaining order inappropriate in this case. Thus, the Board concluded that a bargaining order was warranted to effectuate the purposes of the Act.]

III. JOY SILK, GISSEL, AND LINDEN LUMBER

A. Statutory framework

Section 9(a) of the Act provides that "[r]epresentatives *designated or selected* for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining[.]" 29 U.S.C. § 159(a) (emphasis added). In turn, Section 8(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." Id. § 158(a)(5). Section 9(c) of the Act describes the Board's procedures for conducting representation elections and

certifying unions that prevail in Board-conducted elections. Id. § 159(c)(1)(A) & (B). Finally, Section 8(a)(2) prohibits an employer from recognizing and bargaining with a union that does not enjoy majority support. Id. § 158(a)(2); *Garment Workers (Bernhard Altmann Texas Corp.) v. NLRB*, 366 U.S. 731, 738-739 (1961).

As the Supreme Court has recognized, Section 9 is animated by the principle that representation cases should be resolved fairly and expeditiously. See *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946) ("[T]he Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently, and speedily."). When interpreting Section 9, the Court has relied on the Act's legislative history, which reflects Congress's judgment that delays in resolving questions of representation can risk undermining employees' choice to seek union representation and increase the risk of labor disputes and disruptions to interstate commerce. In interpreting Section 9(a), the Supreme Court has acknowledged that "a 'Board election is not the only method by which an employer may satisfy itself as to the union's majority status' since § 9(a), 'which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen.'" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 597 (1969) (quoting *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 71, 72 fn. 8 (1956)). The Court emphasized that because Section 9(a) "refers to the representative as the one 'designated or selected' by a majority of the employees without specifying precisely how that representative is to be chosen," a union may establish a valid bargaining obligation "by convincing support, for instance, . . . by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes." *Gissel*, 395 U.S. at 596-597.

Although Congress considered an amendment to Section 8(a)(5) in an early version of the Taft-Hartley legislation that would "permit the Board to find a refusal-to-bargain violation only where an employer had failed to bargain with a union 'currently recognized by the employer or certified as such [through an election] under section 9,'" that proposed change was not incorporated in the Taft-Hartley amendments. *Gissel*, 395 U.S. at 598. Instead, the Taft-Hartley amendments provided that a Board election is a precondition to a bargaining representative's *certification* by the Board, a status that confers certain additional advantages on the union. See 29 U.S.C. § 159(c)(1)(A) & (B). In *Gissel*, the Supreme Court relied upon this legislative history to reject the contention that the Taft-Hartley amendments undermined the use of signed union-authorization cards to establish an enforceable statutory bargaining obligation.

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B. Administrative/ judicial interpretations

In the years immediately following the passage of the Wagner Act in 1935, the Board exercised the power "to certify a union as the exclusive representative of the employees in a bargaining unit when it had determined, by election or 'any other suitable method,' that the union commanded majority support." *Brooks v. NLRB*, 348 U.S. 96, 98 (1954) (quoting Section 9(c) of the Wagner Act). After an employee or a union filed a petition requesting certification, the Board investigated the petition and conducted a hearing if it found that a question concerning representation existed. If the union presented evidence during the hearing sufficient to establish

that employees had designated the union as bargaining representative, the Board would certify the union without an election.

By 1939, the Board reversed course. In *Cudahy Packing Co.*, 13 NLRB 526 (1939), and *Armour & Co.*, 13 NLRB 567 (1939), the Board held that a Board-conducted election was a prerequisite to certification. In the Taft-Hartley amendments that followed in 1947, Congress amended the text of Section 9(c) of the Act to codify the requirement that an election precede Board certification. However, after *Cudahy Packing* and the passage of the Taft-Hartley amendments, the Board continued to enforce an employer's statutory bargaining obligation, regardless of certification, in unfair labor practice cases where a union that had not won a Board election could prove that it represented a majority when it requested recognition.

Then, in *Joy Silk Mills, Inc.*, 85 NLRB 1263, 1264 (1949), enfd. 185 F.2d 732 (D.C. Cir. 1950), cert. denied 341 U.S. 914 (1951), the Board reaffirmed and restated the principles that had begun to emerge in unfair labor practice cases involving allegations that an employer violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with a union that claimed majority support in an appropriate unit. In *Joy Silk*, the Board held that an employer unlawfully refuses to recognize a union that presents authorization cards signed by a majority of employees in a prospective unit if it insists on an election motivated "not by any *bona fide* doubt as to the union's majority, but rather by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union.'" Id. (quoting *Artcraft Hosiery*, 78 NLRB 333 (1948)). The Board explained that, in analyzing an employer's good-faith doubt, it would consider "all relevant facts in the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct." Id.

Applying that standard, the Board found that because the employer in *Joy Silk* had "engaged in unfair labor practices during the preelection period, the first of its illegal acts having occurred only 5 days after it agreed to a consent election and less than 3 weeks after the Union's initial bargaining request," the "Respondent's insistence upon an election was not motivated by a good faith doubt of the Union's majority," but was instead intended "to gain time within which to undermine the Union's support." Id. at 1264-1265. The Board specifically emphasized that "the unfair labor practices, because of their nature and timing, color the [employer's] intent . . . and support a finding that the doubt advanced" as "the reason for refusing to bargain with the Union, was feigned and advanced in bad faith." Id. at 1265 fn. 5. The Board rejected the employer's contention that a remedial order directing it to bargain with the Union would "deprive the [employer] of its right under Section 9(c)(1)([B]) of the Act to petition the Board for an election" as "untenable" because the employer's refusal to recognize and bargain with the Union was not based on "an honest doubt as to the Union's majority status." Id. at 1265.

The District of Columbia Circuit enforced the *Joy Silk* decision. *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950). The District of Columbia Circuit agreed with the Board's view that determining "whether an employer is acting in good or bad faith at the time of the refusal is, of course, one which of necessity must be determined in the light of all relevant facts in the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct.'" Id. at 742. In the years immediately following the

District of Columbia Circuit's enforcement, every circuit similarly approved the *Joy Silk* framework.

. . . .

Joy Silk remained Board law until the late 1960s, but was significantly modified by cases such as *John P. Serpa, Inc.*, supra, and *Aaron Bros.*, supra, which placed the burden on the General Counsel to demonstrate the employer's lack of good-faith doubt in its refusal to recognize and bargain with the union, and required a showing of "substantial unfair labor practices" to establish the lack of that doubt. During oral argument in *Gissel*, the Board's attorney stated that the Board had abandoned *Joy Silk*. The *Gissel* Court acknowledged the Board attorney's statement, but it found that, in the consolidated cases before it, it "need not decide whether a bargaining order is ever appropriate in cases where there is no interference with the election processes." 395 U.S. at 594-595.

As discussed extensively above, the Supreme Court held in *Gissel* that, where a union has achieved majority support and an employer engages in unfair labor practices which "have the tendency to undermine majority strength and impede the election processes," the Board "should issue" an order for the respondent to bargain with the union without an election if "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." In this context, the Court emphasized, the bargaining order serves the two equally important goals of "effectuating ascertainable employee free choice" and "deterring employer misbehavior." The Court in *Gissel* also explicitly approved the Board's view that union-authorization cards provided reliable evidence of employees' views regarding unionization in *Cumberland Shoe*, concluding that "[w]e cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else." Id. at 607.

In *Linden Lumber*, the Board formally abandoned the *Joy Silk* doctrine and held that an employer does not violate Section 8(a)(5) "solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election." The Board emphasized the criticism that *Joy Silk* required the Board to enter the "'good-faith' thicket" by incorporating an assessment of the employer's subjective state of mind and relied significantly on its doubts as to "the wisdom of attempting to divine, in retrospect, the state of employer (a) knowledge and (b) intent at the time he refuses to accede to a union demand for recognition." Id. at 720.

In a 5-4 decision, the Supreme Court upheld the Board's interpretation of the Act as a permissible construction of the statute. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 309-310 (1974) ("[I]n light of the statutory scheme and the practical administrative procedural questions involved, we cannot say that the Board's decision that the union should go forward and ask for an election on the employer's refusal to recognize the authorization cards was arbitrary and capricious or an abuse of discretion.").

Following the Supreme Court's approval of the Board's decision in *Linden Lumber*, the Board permitted employers to insist on a Board-conducted election as a precondition to an

enforceable statutory bargaining obligation. See, e.g., *Churchill's Supermarkets, Inc.*, 285 NLRB 138, 142 fn. 6 (1987), enfd. 857 F.2d 1474 (6th Cir. 1988) (per curiam).

C. New standard

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We find merit in the General Counsel's argument on exception that the Board should overrule *Linden Lumber*. The Supreme Court has held that the Board's authority to fashion remedies "is a broad discretionary one." *NLRB v. J. H. Rutter-Rex Manufacturing*, 396 U.S. 258, 262-263 (1969) (quoting *Fiberboard Paper Products. v. NLRB*, 379 U.S. 203, 216 (1964)); see also *Fallbrook Hospital Corp. v. NLRB*, 785 F.3d 729, 738 (D.C. Cir. 2015) (the Board acts at the "zenith of its discretion" when fashioning remedies) (internal quotation marks omitted). Section 1 of the Act sets forth the central policies of the Act, including "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing[.]" 29 U.S.C. § 151. Because we find that the current scheme for remedying unlawful failures to recognize and bargain with employees' designated bargaining representatives is inadequate to safeguard the fundamental right to organize and bargain collectively that our statute enshrines, we hereby overrule *Linden Lumber*, supra.

Instead, "draw[ing] on enlightenment gained from experience," *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. at 346, we announce the following framework for determining when an employer has unlawfully refused to recognize and bargain with a designated majority representative of its employees.

Under the standard we adopt today, an employer violates Section 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly[139] files a petition pursuant to Section 9(c)(1)(B) of the Act (an RM petition) to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed a petition pursuant to Section 9(c)(1)(A).[140] Section 9(c)(1)(B) of the Act grants employers an avenue for testing the union's majority through a representation election if the Board, upon an investigation and hearing,

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[139] Allowing for unforeseen circumstances that may be presented in a particular case, we will normally interpret "promptly" to require an employer to file its RM petition within 2 weeks of the union's demand for recognition.

[140] Our framework does not limit an individual or labor organization's ability to file a petition seeking a Board-conducted representation election pursuant to Sec. 9(c)(1)(A). Many unions may prefer pursuing certification following a Board election, as certification confers certain benefits on unions. These include: Sec. 9(c)(3)'s 1-year nonrebuttable presumption of majority status; Sec. 8(b)(4)(C)'s prohibition against recognitional picketing by rival unions; Sec. 8(b)(4)(D)'s exception to restrictions on coercive action to protect work jurisdiction; and Sec. 8(b)(7)'s exception from restrictions on recognitional and organizational picketing. See also *Gissel*, 395 U.S. at 598-599 & fn. 14 (1969) ("A certified union has the benefit of numerous special privileges which are not accorded unions recognized voluntarily or under a bargaining order[.]").

finds that a question of representation exists. In order to reconcile the provisions of Section 8(a)(5) and Section 9(a), which require an employer to recognize and bargain with the "designated" majority representative of its employees, with the language of Section 9(c)(1)(B) granting employers an election option, we conclude that an employer confronted with a demand for recognition may, instead of agreeing to recognize the union, and without committing an 8(a)(5) violation, promptly file a petition pursuant to Section 9(c)(1)(B) to test the union's majority support and/or challenge the appropriateness of the unit or may await the processing of a petition previously filed by the union.[141]

However, if the employer commits an unfair labor practice that requires setting aside the election, the petition (whether filed by the employer or the union) will be dismissed, and the employer will be subject to a remedial bargaining order. [142] Thus, this accommodation of the Section 9(c) election right with the Section 8(a)(5) duty to recognize and bargain with the designated majority representative will only be honored if, and as long as, the employer does not frustrate the election process by its unlawful conduct. As the Supreme Court observed in *Gissel*, Section 9(c)(1)(B) was not intended to confer on employers "an absolute right to an election at any time; rather, it was intended, as the legislative history indicates, to allow them, after being asked to bargain, to test out their doubts as to a union's majority in a secret election which they would then presumably not cause to be set aside by illegal antiunion activity." 395 U.S. at 599. If the employer commits unfair labor practices that invalidate the election, then the election necessarily fails to reflect the uncoerced choice of a majority of employees. In that situation, the Board will, instead, rely on the prior designation of a representative by the majority of employees by nonelection means, as expressly permitted by Section 9(a), and will issue an order requiring the employer to recognize and bargain with the union, from the date that the union demanded recognition from the employer.

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[141] If the employer neither recognizes the union nor promptly files a petition, the union may file a Sec. 8(a)(5) charge against the employer, and, if majority support in an appropriate unit is proven, the Board will find that the employer violated Sec. 8(a)(5) by failing and refusing to recognize and bargain with the union as employees' designated collective-bargaining representative and issue a remedial bargaining order. As in other cases involving remedial bargaining orders, in such situations, the bargaining obligation attaches from the date of the union's demand for recognition. See, e.g., *Atlas Microfilming*, 267 NLRB 682, 685, 697 (1983) (finding, where the union made a majority-supported request for bargaining, the employer's bargaining obligation attached retroactively to date of that request), enfd. 753 F.2d 313 (3d Cir 1985).

[142] Under long-established Board law, an election will be set aside when an employer violates Sec. 8(a)(3) of the Act during the "critical period" between the filing of an election petition and the election. See, e.g., *Lucky Cab Co.*, 360 NLRB 271, 277 (2014) (citing *Baton Rouge Hospital*, 283 NLRB 192, 192 fn. 5 (1987)). An election will be set aside based on an employer's critical-period violation of Sec. 8(a)(1) unless the "violations . . . are so minimal or isolated that it is virtually impossible to conclude that the misconduct could have affected the election results.'" Id. at 277 (quoting *Longs Drug Stores California*, 347 NLRB 500, 502 (2006), and *Clark Equipment Co.*, 278 NLRB 498, 505 (1986)). In determining whether unlawful misconduct could affect the results of an election, the Board considers all relevant factors, including the number of violations, their severity, the extent of dissemination, the size of the unit, the closeness of the election (if one has been held), the proximity of the conduct to the election date, and the number of unit employees affected. See, e.g., *Bon Appetit*, above, 334 NLRB at 1044 (citing cases).

Our focus, then, is on the unlawful conduct of the employer that prevents a free, fair, and *timely* representation election. Given the strong statutory policy in favor of the prompt resolution of questions concerning representation, which can trigger labor disputes, we do not believe that conducting a *new* election--after the employer's unfair labor practices have been litigated and fully adjudicated - can ever be a truly adequate remedy. Nor is there a strong justification for such a delayed attempt at determining employees' free choice *again* where the Board has determined that employees had *already* properly designated the union as their majority representative, consistent with the language of the Act, before the employer's unfair labor practices frustrated the election process. Simply put, an employer cannot have it both ways. It may not insist on an election, by refusing to recognize and bargain with the designated majority representative, and then violate the Act in a way that prevents employees from exercising free choice in a timely way.

An employer that refuses to bargain without filing a petition under Section 9(c)(1)(B) may still challenge the basis for its bargaining obligation in a subsequently filed unfair labor practice case. However, its refusal to bargain, and any subsequent unilateral changes it makes without first providing the employees' designated bargaining representative with notice and an opportunity to bargain, is at its peril.

In overruling *Linden Lumber* and limiting the employer's ability to insist on an election as a preliminary threshold step to a duty to bargain, we will no longer look to *Gissel* bargaining orders--that is, bargaining orders imposed based on employer unfair labor practices only where the unlikelihood of holding a future fair election is proven. Decades of experience administering the *Gissel* standard have persuaded us that *Gissel* bargaining orders are insufficient to accomplish the twin aims of "effectuating ascertainable employee free choice" and "deterring employer misbehavior" that the Supreme Court identified in that case. 395 U.S. at 614. Specifically, the *Gissel* standard's focus upon the potential impact of an employer's unfair labor practices upon a *future* rerun election creates perverse incentives to delay, which we believe can be diminished by a modified standard. Representation delayed is often representation denied. Our experience leads us to conclude that the application of the *Gissel* standard has resulted in persistent failures to enable employees to win timely representation despite having properly designated a union to represent them, and thereby satisfying the Act's requirement for recognition. In our view, the standard we announce today, by making remedial bargaining orders more readily available, will "deter[] employer misbehavior" in the period before a Board election. *Gissel*, 395 U.S. at 614. This approach has several important advantages over the current remedial framework.

First, as the facts of this case illustrate, employees are harmed by delay when they must wait for their chosen representative to be able to bargain on their behalf. Under the standard we adopt, once a majority of employees has designated a union as their bargaining representative, the employer has a duty to bargain under Section 8(a)(5), subject to its right to file an election petition. Its refusal to immediately do so - while simultaneously committing unfair labor practices that frustrate the election process - contravenes both the fundamental purpose of the Act in "encouraging the practice and procedure of collective bargaining" and "protecting the exercise by workers of . . . designation of representatives of their own choosing." 29 U.S.C. § 151. This approach better ensures that employees enjoy the ability to bargain through their designated representative.

Second, even when the employer responds to the union's bargaining demand by promptly filing a petition for an election, our standard places the Board's focus on the appropriate time period: the runup to an initial election. In *Gissel* cases, the Board focuses on "the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future." 395 U.S. at 614. Reviewing courts have sometimes disagreed with the Board's assessment of the likely continuing effects of an employer's unfair labor practices, particularly where the fair adjudication of unfair labor practice allegations has resulted in substantial delays. However, the Board has unquestioned authority to protect the integrity of its election processes. See *NLRB v. A.J. Tower Co.*, 329 U.S. at 330 ("Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees."); *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940) ("The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone."). It is our considered view that our new standard will more effectively disincentivize employers from committing unfair labor practices prior to an election. It thus protects the interests of an employer that prefers an election while protecting the election's integrity by increasing the chance that employees can participate with less chance of unlawful employer interference. Because a Board-conducted election "can serve its true purpose only if the surrounding conditions enable employes to register a free and untrammeled choice for or against a bargaining representative," this standard will advance the Board's interest in "provid[ing] a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 NLRB 124, 126-127 (1948). As the Supreme Court has recognized, it is "the duty of the Board . . . to establish the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276 (1973) (internal quotation omitted).

In contrast to current Board case law, requiring that employers who insist on an election do not frustrate a timely election by committing unfair labor practices addresses one of the greatest weaknesses of *Gissel*: under the new standard, we expect that employers seeking an election will be incentivized *not* to commit unfair labor practices in response to a union campaign, both before and after the filing of the election petition. It is our judgment that the risks to an employer of a *Gissel* bargaining order, with its emphasis on whether a future, often second (or even third) election can be fairly conducted, has not served as an adequate deterrent to employer unfair labor practices during the election period. Under current Board law, there is no effective remedy to deter an employer bent on defeating a union campaign by committing serious unfair labor practices that tend to make a free and fair election unlikely. In particular, the remedies available for violations of Section 8(a)(3) and (1) of the Act, no matter how serious, are, in many cases, incapable of rectifying the harm that can be caused to the election process by the unlawful conduct of an employer intent upon delaying or altogether avoiding its bargaining obligations under the Act. Under the new standard, by contrast, if the Board finds that an employer has committed unfair labor practices that frustrate a free, fair, and timely election, the Board will dismiss the election petition and issue a bargaining order, based on employees' prior, proper designation of a representative for the purpose of collective bargaining pursuant to Section 9(a) of the Act. This standard disincentivizes unlawful employer conduct during an election campaign because such conduct would be counterproductive for the employer. The employer who commits unlawful

conduct to dissipate support for a union that has already been designated by employees as their representative gains no ultimate advantage. Its misconduct ensures that it will be subject to a Board order requiring good-faith bargaining with the union.

Third, in response to the criticisms of reviewing courts and our recognition of relevant intervening changes in Board law, our standard does not rely on an employer's subjective "good-faith doubt" of a union's majority status. In order to invoke the Board's election machinery in response to a union's demand for bargaining, an employer will not need to prove a good-faith doubt of the union's majority status, nor will the General Counsel have to prove a lack of good-faith doubt. Rather, the employer is free to seek a Board election in which the union's majority can be tested. However, in the event of employer unfair labor practices that make a fair election unlikely, the bargaining order imposed under the revised standard appropriately focuses on the best objective evidence of a union's majority support at the time of a request for recognition - before the employer's unfair labor practices were committed. The Board has similarly abandoned the good-faith doubt standard in cases involving alleged unlawful withdrawals of recognition. See *Levitz Furniture*, above, 333 NLRB at 717. And the Supreme Court has long recognized that an employer violates Section 8(a)(2) by recognizing a minority union and that such "prohibited conduct cannot be excused by a showing of good faith." *Bernhard-Altmann*, supra, 366 U.S. at 739. By declining to examine an employer's subjective belief about a union's majority status, the standard we announce today aligns our treatment of "good faith" in this context with current law in these related areas.

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IV. RESPONSE TO THE PARTIAL DISSENT

Our dissenting colleague advances several reasons for declining to join Section III of the majority's decision. We address these each in turn.

As a threshold matter, our colleague contends that our decision to overrule *Linden Lumber* is without precedential effect because it does not change the result for the Respondent in this case. We respectfully disagree. Congress has delegated to the Board the authority to interpret the National Labor Relations Act and to set national labor policy. The Supreme Court has long recognized the Board's authority to change national labor policy through adjudication by adopting alternate permissible interpretations of the Act. Historically, the Board has modified policies through adjudication, including in cases in which the change in standard has not changed the result for the respondent in the case.

. . . .

Our dissenting colleague further contends that the Supreme Court's decision in *Linden Lumber* precludes judicial enforcement of bargaining orders issued under the new standard, and that we have provided no reasoned justification for overruling the Board's decision in *Linden Lumber*. These assertions fundamentally misapprehend both the several decisions in *Linden Lumber* and our decision today.

To review, the Board initially held in *Linden Lumber* that an employer "should not be found guilty of a violation of Section 8(a)(5) solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election," but rather, when faced with a request for bargaining by a union that may, in fact, have been designated representative by a majority of employees in an appropriate unit, could lawfully refuse either to bargain or to petition the Board for an RM election. On review of the Board's decision, the United States Court of Appeals for the District of Columbia Circuit concluded, based upon the relevant statutory language and legislative history, that "[t]hese statutory provisions plainly contemplate employer duty of recognition even in the absence of election, and give a safeguard to the employer who has doubts about majority status by assuring him the right to file his own petition for an election." The court thus found that the Board was statutorily foreclosed from excusing an employer entirely from either petitioning for an RM election or bargaining, upon request, with a union that had been designated representative by a majority of its employees in an appropriate unit under Section 9(a). The court remanded the matter for the Board to articulate a standard to govern the conditions under which a bargaining obligation would attach absent an RM petition.

A five-Justice majority of the Supreme Court subsequently reversed the District of Columbia Circuit and sustained the Board's holding based on the Court's conclusion that "[i]n light of the statutory scheme and the practical administrative procedural questions involved, we cannot say that the Board's decision that the union should go forward and ask for an election on the employer's refusal to recognize the authorization cards was arbitrary and capricious or an abuse of discretion." In other words, the Court held that in adopting the policy established in *Linden Lumber*, the Board acted within its discretion--not that the policy was mandated by the Act. Significantly, a four-Justice minority concluded that the Board's policy at issue represented an *impermissible* interpretation of the Act, and would have affirmed the judgment of the court of appeals remanding the case to the Board. The dissenting Justices examined the plain language of the Act and the legislative history of the Taft-Hartley amendments and concluded, consistent with our decision today, that, where an employer refuses, upon request, to bargain with a majority-supported union without taking any other action, "the Act clearly provides that the union may charge the employer with an unfair labor practice under [Section] 8(a)(5) for refusing to bargain collectively with the representatives of his employees[, and i]f the General Counsel issues a complaint and the Board determines that the union in fact represents a majority of the employees the Board *must issue* an order directing the employer to bargain with the union."

Given the similarity between our interpretation of the Act today and that of the dissenting Justices in *Linden Lumber*, had the Court majority there meant to foreclose our reading, it surely would have said so. But it did not. Instead, it held only that the Board's interpretation below was permissible. For the policy reasons set forth extensively above, we select a different, permissible interpretation of the Act today. We accordingly respectfully disagree with our colleague's contention that *Linden Lumber* in any way forecloses our decision.

Next our colleague contends that we present no reasoned justification for "overruling *Linden Lumber*, shifting the burden to file a representation petition from the union to the employer, and finding an 8(a)(5) violation and imposing a bargaining order if the employer fails to file that petition." This contention misapprehends the import of our decision. Contrary to our colleague, our decision places no burden on any employer beyond those imposed by the Act itself: to bargain

collectively with a representative designated or selected by its employees pursuant to Sections 8(a)(5) and 9(a), and should it choose to petition for an election, to refrain from engaging in conduct that would interfere with that election. . . . .

. . . .

The core of our dissenting colleague's disagreement with the merits of our decision to overrule *Linden Lumber* is his contention that, in all but the most extreme circumstances, requiring an employer to bargain with a "card-majority union" runs counter to the policies of the Act because it deprives employees of their "right to vote in a secret-ballot election" and predictably risks forcing unions upon nonconsenting majorities of unit employees. This contention cannot bear scrutiny in the light of the plain language of the Act and controlling Supreme Court precedent.

To begin at the heart of the Act, the plain language of Section 7 guarantees employees the "right . . . to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157. Section 9(a), in turn, defines a collective-bargaining representative as one "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." Id. § 159(a). And Section 8(a)(5) provides that it is an unfair labor practice for an employer to refuse to bargain collectively with a representative its employees have designated or selected pursuant to Section 9(a). Id. § 158(a)(5). Accordingly, to the extent that the Act ensures, as our colleague asserts, a "right to vote in a secret-ballot election," this right derives from, and is exercised in the service of, the statutory right to bargain collectively through a representative designated or selected for that purpose by a majority of the employees in an appropriate unit. What our colleague calls a "card-majority union" is simply a representative "designated," within the plain meaning of the Act, by a majority of unit employees. Thus, any true statement about a "card-majority union" should also ring true if the phrase "card-majority union" is replaced by the statutory phrase "representative designated for the purposes of collective bargaining by a majority of employees in an appropriate unit." But our dissenting colleague's core contention cannot bear such a substitution: No one could seriously argue that a Board bargaining order entered as a remedy for an employer's refusal to bargain with the representative designated for that purpose by a majority of its employees in an appropriate unit frustrates the policies of the Act, deprives employees of a distinct "right to vote in a secret-ballot election," or risks forcing a union on a nonconsenting majority of unit employees.

The key to this apparent contradiction is that, based on our colleague's partial dissent, he does not appear to accept that a "card-majority union" *could be* a representative freely designated for the purposes of collective bargaining by a majority of employees. He expresses concern that workers who truly do not want to be represented may nevertheless sign cards designating a representative to avoid offending their coworkers, or because of "group pressures," or because their employer has not yet had the opportunity to fully inform them of its views on the question of representation. In these circumstances, he posits, employees' freedom to choose for themselves is not a real freedom.

Our experience of labor relations and the administration of the Act suggests that our dissenting colleague exaggerates the inevitable impact of these concerns on the reliability of a union's card-based showing of majority support. But both our colleague's instincts about this

matter and our own are really beside the point, because, as extensively described in Section III of our decision above, the Supreme Court long ago authoritatively settled the issue as a matter of law. The *Gissel* Court addressed the specific question of whether authorization cards are such inherently unreliable indicators of employee desire that they may not establish a union's majority status and an enforceable bargaining obligation. The Court expressly rejected the several contentions underlying our dissenting colleague's position, that:

> [A]s contrasted with the election procedure, the cards cannot accurately reflect an employee's wishes, either because an employer has not had a chance to present his views and thus a chance to insure that the employee choice was an informed one, or because the choice was the result of group pressures and not individual decision made in the privacy of a voting booth; and . . . that quite apart from the election comparison, the cards are too often obtained through misrepresentation and coercion which compound the cards' inherent inferiority to the election process.

The Court noted that "[t]he Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory--indeed the preferred--method of ascertaining whether a union has majority support," but concluded that "[t]he acknowledged superiority of the election process . . . does not mean that cards are thereby rendered totally invalid, for where an employer engages in conduct disruptive of the election process, cards may be the most effective--perhaps the only--way of assuring employee choice." The Court went on to hold that "[a]s for misrepresentation, in any specific case of alleged irregularity in the solicitation of the cards, the proper course is to apply the Board's customary standards . . . and rule that there was no majority if the standards were not satisfied. It does not follow that because there are some instances of irregularity, the cards can never be used; otherwise, an employer could put off his bargaining obligation indefinitely through continuing interference with elections."

The standard that we announce today is fully consistent with the *Gissel* Court's recognition that a free and fair election is the preferred method of ascertaining whether a union has majority support, as well as with its recognition that, where an employer engages in conduct disruptive of the election process, authorization cards or other nonelection evidence of majority status "may be the most effective--perhaps the only--way of assuring employee choice." Under this standard, an employer faced with a request for recognition is always free, without reference to its subjective belief about the validity of a union's claim of majority status, to test the union's claim by petitioning the Board for an RM election. Whether or not the employer chooses to petition for an election rather than recognizing the union, it is fully free, either after recognizing the union or prior to any election, consistent with Section 8(c), to express to its employees its views, arguments, or opinions on the question of representation, so long as such expressions contain no threat of reprisal or force or promise of benefit. The employer is also fully free to contest the union's claim by presenting evidence in a hearing conducted pursuant to Section 9(c)(1)(B) that the union's showing of majority support is deficient because of irregularities in the procurement of cards or otherwise, or that the unit claimed by the union is inappropriate. In those circumstances, employees will have a genuine opportunity "to register a free and untrammeled choice for or against a bargaining representative." What the employer is not free to do, however, is to "put off [its] bargaining obligation indefinitely through continuing interference with elections." If an employer, having

petitioned for an election, proceeds to undermine the validity of that election as a showing of the true preferences of unit employees, the Board may, consistent with *Gissel*, rely on a prior nonelection showing such as authorization cards as "the most effective--perhaps the only--way of assuring employee choice." The authorities cited by our dissenting colleague affirming that elections are the "preferred" method of determining employees' preference are based on a fundamental premise: that an election will be untainted by the employer's unlawful misconduct. As the Court in *Gissel* recognized, where that premise does not hold, elections may not adequately assure employee choice.

Because the new standard meets an employer's interference with a free and fair election by imposing a bargaining order based on its employees' objectively demonstrable current preferences, it properly focuses the analysis on the union's current majority status, rather than depending--as under the prior standard--upon speculation about the impact of the employer's coercive conduct on the free choices of some future contingent of employees. In this way, the new standard safeguards the freely expressed choice of a majority of current employees while minimizing the risk of imposing a union on a future majority whose support for the union has predictably eroded or been undermined during delays caused by the employer's unlawful conduct. By guarding against interference with employee free choice both at the time of card solicitation and in the runup to an election, the standard announced today thus preserves, rather than undermines employees' fundamental statutory right to bargain collectively through representatives of their own choosing.

. . . .

Our dissenting colleague further contends that our decision today is unenforceable in the federal courts of appeals because it contemplates that bargaining orders may issue based on employer misconduct that the *Gissel* Court held would not sustain a bargaining order. This is incorrect, because bargaining orders under the new standard rest upon a fundamentally different rationale than those under *Gissel*.

The Court in *Gissel* held that the Board should issue a bargaining order if it concluded (1) that a future reliable election could not be held because of an employer's "outrageous" and "pervasive" conduct whose impact could not be eliminated by the Board's traditional remedies; or (2) that the possibility of conducting a future reliable election was slight because of the continuing impact of an employer's "less pervasive" misconduct; but that a third category (3) of "minor or less extensive unfair labor practices," would not sustain a bargaining order because they would not prevent the Board's traditional remedies from assuring a free and fair election at some undefined future date. As discussed above, the Board and reviewing courts of appeals have regularly reached different conclusions about the likely impact of employers' unlawful conduct and the Board's traditional remedies upon employees' ability to exercise free choice in an election at an undefined future date--that is, whether particular misconduct supports a bargaining order under the *Gissel* framework's first or second categories, or falls short, in the third category. The inability of the Board and the courts to reach common ground on the line between conduct that will or will not sustain a bargaining order under the forward-looking *Gissel* framework has had the predictable, and unfortunate, result that Board bargaining orders in individual cases become increasingly less likely to issue or be enforced the longer litigation over unfair labor practices persists, creating obvious perverse incentives to prolong litigation, as discussed above.

The standard we adopt today addresses this persistent problem by replacing the *Gissel* standard's necessary speculation about the likely continuing impact of an employer's misconduct over some unpredictable span of time with an appropriate focus on the best currently existing objective evidence of a union's current majority status. Thus, as described above, the Board may find a current bargaining obligation based on nonelection evidence where an employer's misconduct has rendered a recent or pending election a less reliable indicator of current employee sentiment. Contrary to our dissenting colleague, then, a bargaining order under the new standard could not issue as a remedy for such "minor or less extensive unfair labor practices" as the Court found would not sustain a bargaining order under the *Gissel* rationale, but only as a remedy for an employer's violation of Section 8(a)(5) by refusal to bargain with a union whose status as a current majority-designated bargaining representative--within the plain meaning of Section 9(a)--has been established by the most reliable available means.

Our dissenting colleague relatedly contends that, under the standard announced today, in combination with the Board's recent revision to its framework for evaluating the lawfulness of employer work rules in *Stericycle, Inc.*, 372 N.L.R.B. No. 113 (2023), "it is virtually impossible for an employer *not* to commit a critical-period unfair labor practice that would require setting aside the results of an election, which means it is virtually impossible for an employer's RM petition *not* to be dismissed, for the employer *not* to be found to have violated Section 8(a)(5), and for a bargaining order *not* to issue." Again, we respectfully disagree. First, our colleague's conclusion depends upon an attenuated chain of speculative and exaggerated suppositions about how the Board will apply this and other standards going forward. Our colleague's speculation is without basis in this or any other Board decision. Unlike our colleague, we do not doubt employers' ability to refrain from unlawful conduct--most manage to do so most of the time. Moreover, while it is true that our standard provides for a bargaining order to remedy an employer's refusal to bargain with a union that has been designated representative by a majority of its employees in an appropriate unit while committing unfair labor practices that would require setting aside an election, it does not, contrary to our colleague, require a bargaining order as "the first and only option" whenever an employer commits any unfair labor practice during the critical period prior to an election, no matter how attenuated the impact of the employer's conduct upon the validity of the election.

Rather, as we have explained, the new standard, consistent with *Gissel*, appropriately focuses on the question of whether an employer's unlawful coercive misconduct has so undermined the reliability of the election as an indicator of employees' free choice that a prior nonelection showing becomes the more reliable indicator. As also explained above, the applicable standard does not require concluding that any unfair-labor-practice conduct at all is disruptive of the election process, but rather requires consideration of all relevant factors, including the number of violations, their severity, the extent of dissemination, the size of the unit, the closeness of the election (if one is held), the proximity of the misconduct to the election date, and the number of unit employees affected.

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MEMBER KAPLAN, dissenting in part:

Dicta is language in an opinion "that is unnecessary to the decision in the case and therefore not precedential."[1] Here, what would otherwise be the most consequential part of my colleagues' decision is unquestionably dicta; it concerns facts that are neither present in the case before us nor necessary in order to decide the case before us.

In Section III of their decision, the majority purports to hold that the commission of just one critical-period violation of Section 8(a)(1) or (3) may result in an order requiring the employer to recognize and bargain with a card-majority union. Indeed, they would hold that an employer may be ordered to bargain with a card-majority union without having committed any violation of Section 8(a)(1) or (3) at all. But the Respondent in this case did not commit zero unfair labor practices or just one. My colleagues find that it committed no fewer than 28 unfair labor practices. . . . . Based on these unfair labor practice findings and their further finding that the Respondent "would likely meet a renewed union campaign with further misconduct," my colleagues issue, among other remedies, an affirmative bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

. . . .

After finding that the Respondent committed 28 unfair labor practices, and after concluding that a bargaining order is warranted under *Gissel*, the majority adds a further section to their decision--Section III--in which they announce dramatic changes in Board law. They purport to overrule *Linden Lumber*, a decision upheld by the Supreme Court that has been the governing precedent for 52 years. That case holds that when a union requests voluntary recognition as the bargaining representative of a unit of employees, the employer may lawfully decline the request, and it is up to the union to take the next step by filing a petition for a Board-conducted election. Instead of following that precedent, however, my colleagues declare that an employer presented with a request for recognition from a card-majority union must either grant the request or "promptly" file an election petition under Section 9(c)(1)(B), i.e., an RM petition, and that if the employer fails to do one or the other, its employees will lose the right to vote in a secret-ballot election, and the employer will be found to have violated Section 8(a)(5) and will be ordered to recognize and bargain with the union. They further say that even if the employer promptly files an RM petition, the petition will be dismissed, the employees will lose the right to vote in a secret-ballot election, and the employer will be found to have violated Section 8(a)(5) and ordered to recognize and bargain with the union if it commits a critical-period violation of Section 8(a)(1) or (3)--just one is all it takes--that would warrant setting aside the results of an election.

None of these purported departures from long-standing precedent makes the slightest difference to any of the majority's unfair labor practice findings, and none of them affects the remedy and order in any way. Indeed, my colleagues concede as much. They acknowledge that "the application of the revised standard in this case results in neither finding any additional violation of the Act nor any additional remedial obligation," and they admit that "the same violation and remedy would lie under either the prior standard or the standard [they] announce today."

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[1] *Black's Law Dictionary* 1100 (7th ed. 1999).

More importantly, none of the changes in Board law set forth in Section III of the majority's opinion is necessary to the decision in this case insofar as Section III attempts to address scenarios involving facts not present in this case. Specifically, because this case involves a Respondent that, as they have found, committed numerous unfair labor practices, the majority's musings regarding what the law should be in cases where respondents *have not* committed numerous unfair labor practices is unquestionably dicta, devoid of precedential effect.

. . . .

A. The majority's new standard undermines employees' statutory rights.

The changes my colleagues either propose (my view) or implement (their view) will predictably result in many more card-based bargaining orders and far fewer representation elections. Indeed, under the majority's new standard, where the results of an election are set aside based on unfair labor practices, there is no longer any such thing as a rerun election. As I will show, the new standard conflicts with Supreme Court and circuit court precedent, and my colleagues fail to articulate a persuasive reasoned analysis--or, with respect to the first step of their standard, *any* reasoned analysis--in support of making these changes in Board law. First, however, it is important to remind ourselves that, whatever interests the majority seeks to advance in the instant case, it is the rights of employees that Congress placed at the heart of the Act, and those rights are better served by Board-conducted secret-ballot elections than by union-authorization cards.

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One reason union-authorization cards are inferior to a secret-ballot election is that signing an authorization card is an observable and, often, an observed act, and employees may sign a union card not because they want the union as their bargaining representative but because they feel pressured by their coworkers to sign. Courts have cited the public nature of card signing as a reason why authorization cards provide a less reliable means of ascertaining the will of employees than a secret-ballot election. See *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983) ("Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election)."); *NLRB v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383 (2d Cir. 1973) ("There is no doubt but that an election supervised by the Board which is conducted secretly and presumably after the employees have had the opportunity for thoughtful consideration, provides a more reliable basis for determining employee sentiment than an informal card designation procedure where group pressures may induce an otherwise recalcitrant employee, to go along with his fellow workers.").

Relying on union-authorization cards rather than a Board-conducted election to ascertain the will of the majority also runs the risk that employees will make a less than fully informed choice. The Board has long recognized the importance of ensuring that employees have "an effective opportunity to hear the arguments concerning representation." *Excelsior Underwear Inc.*, 156 NLRB 1236, 1240 (1966). In *Excelsior*, the Board observed that among the factors "that prevent or impede a free and reasoned choice" is "a lack of information with respect to one of the

choices available. . . . [A]n employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice." Id. However, a card-signing campaign may be conducted outside an employer's awareness. Where that is the case, it is less likely that employees will have the opportunity to learn of, and consider, arguments against representation. Under those circumstances, employees' freedom to *choose for themselves* whether or not to be represented by a union will not be a real freedom, but rather a circumscribed freedom based on partial information.

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For all these reasons, courts have emphasized that means other than a secret-ballot election for determining employees' wishes regarding representation carry a risk of forcing unionization on a nonconsenting majority. See, e.g., *Skyline Distributors v. NLRB*, 99 F.3d at 411 (observing that "courts have been strict in requiring the Board to justify *Gissel* bargaining orders . . . because employees lose the *final say* over whether to endorse or reject unionization with the issuance of a bargaining order," and that the right to have that final say by means of a secret-ballot election "is a core right under the NLRA"); *NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 230 (2d Cir. 1983) ("This preference [for an election] reflects the important policy that employees not have union representation forced upon them when, by exercise of their free will, they might choose otherwise."); *Rapid Manufacturing Co. v. NLRB*, 612 F.2d 144, 150 (3d Cir. 1979) ("[T]he large scale disenfranchisement which would flow from the indiscriminate and ready imposition of bargaining orders would be in express contradiction to the preference for elections which inheres in our labor law.").

Because the right to vote by secret ballot in a representation election is at the very heart of workplace democracy, and a secret-ballot election is the best means of determining the will of the majority, the Board has emphasized, repeatedly and for decades, that when an employer's unfair labor practices require the results of an election to be set aside, the "preferred route is to provide traditional remedies for the unfair labor practices and to hold an election, once the atmosphere has been cleansed by those remedies." *Aqua Cool*, 332 NLRB 95, 97 (2000); *accord Intermet Stevensville*, 350 NLRB 1349, 1359 (2007); *Hialeah Hospital*, 343 NLRB 391, 395 (2004); see also *EMR Photoelectric*, 273 NLRB 256, 257 (1984) (Before issuing a bargaining order, the Board must consider "the principle that generally a secret-ballot Board-conducted election is the preferred method of ascertaining employee choice."). The Board has consistently held that a bargaining order is "to be used only in circumstances where it is unlikely that the atmosphere can be cleansed by traditional remedies." *Aqua Cool*, 332 NLRB at 97. The courts agree. See, e.g., *Novelis Corp. v. NLRB*, 885 F.3d 100, 108 (2d Cir. 2018) ("We have recognized the superiority of, and our preference for, secret ballot elections over bargaining orders."); *St. Agnes Medical Center v. NLRB*, 871 F.2d 137, 147 (D.C. Cir. 1989) ("A bargaining order is an extreme remedy that is only appropriate . . . if a fair rerun election cannot be held."). In sum, the Board and the courts have long regarded the bargaining order as a disfavored and last option.

Under my colleagues' purported new standard, however, when a union has a card majority and the employer commits a critical-period unfair labor practice that would require the results of an election to be set aside, a bargaining order is the first and only option. If the election has not yet been held, it will not be held; if it has, there will be no rerun election. Instead, the Board will issue

bargaining orders in all such cases, based on less reliable methods of ascertaining employees' wishes, depriving employees of a final say in a secret-ballot election and increasing the likelihood that union representation will be forced on employees against the will of the unit majority. The new standard will thus have "the primary effect of negating the rights of current employees rather than furthering them" and therefore "defeats, rather than effectuates, the policies of the [Act]." *NLRB v. Ship Shape Maintenance Co.*, 474 F.2d 434, 443 (D.C. Cir. 1972). [9]

B. Step one of the majority's new standard conflicts with the Supreme Court's decision in Linden Lumber v. NLRB.

With these overarching principles in mind, I turn now to a more focused analysis of the specific changes the majority would make in Board law. At the first step of their new standard, they overrule *Linden Lumber* and require that an employer presented with a request for recognition from a card-majority union either grant the request or promptly file an RM petition. If it fails to do one or the other, it will be found to have violated Section 8(a)(5) of the Act and ordered to recognize and bargain.

In *Linden Lumber*, the Board held that an employer does not violate Section 8(a)(5) of the Act "solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election." 190 NLRB at 721. As the Supreme Court observed, implicit in this holding was the proposition that an employer that refuses to recognize a card-majority union has no duty to file an RM petition. See *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301, 310 (1974) (sustaining the Board's holding that "a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the Board's election procedure").

Obviously, *Linden Lumber* stands in the way of the changes in Board law my colleagues purport to announce in Section III of their opinion. To make those changes, then, the majority must overrule *Linden Lumber*. But any attempt to do so must confront the fact that the Supreme Court upheld the Board's decision. It did so over the contrary decision of the District of Columbia Circuit, in which the circuit court held--as my colleagues purport to hold today--that an employer that refuses a request for recognition from a card-majority union must file an RM petition. See *Truck Drivers Union Local No. 413 v. NLRB*, 487 F.2d 1099, 1111 (D.C. Cir. 1973) ("[W]hile . . . cards alone . . . do not necessarily provide such convincing evidence of majority support so as to require a bargaining order, they certainly create a sufficient probability of majority support as to require

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[9] The majority mischaracterizes my position when they say that I do not accept that a card-majority union--a term my colleagues make a todo over but that I use merely for the sake of convenience--could enjoy majority support. Neither do I say that union-authorization cards are "inherently unreliable" or "cannot accurately reflect an employee's wishes" regarding representation. My point is simply that there are good reasons to prefer secret-ballot elections, and every time the Board issues a *Gissel* bargaining order--or, after today, a *Cemex* bargaining order--the "most satisfactory" and "preferred" means (the Supreme Court's words, not mine) of ascertaining employees' wishes is sacrificed. In rare cases, it is appropriately sacrificed. With today's decision, it will always be sacrificed.

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the employer . . . to resolve the possibility through a petition for an election . . . .") (internal quotation marks omitted). The Supreme Court considered the reasons the D.C. Circuit advanced for its holding and rejected them. See *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. at 307-309 (finding, contrary to the D.C. Circuit, that the legislative history of Taft-Hartley does not support putting the onus on the employer to file an RM petition, and disagreeing with the circuit court's belief that requiring the employer to file an election petition would promote efficiency by narrowing "the litigable issues").

My colleagues say that certain language in the Supreme Court's opinion demonstrates that the Board's decision in *Linden Lumber* "represents a permissible, but not mandatory, construction of the Act." I do not dispute the point, but that is not the end of the matter. Even if the holding of *Linden Lumber* is not statutorily compelled, the Supreme Court sustained that holding on its merits. Moreover, in doing so, the Court had before it the contrary holding of the D.C. Circuit, which was all but identical to the first step of the standard my colleagues announce today--i.e., that an employer violates Section 8(a)(5) if it refuses to recognize a card-majority union without filing an RM petition--and which the Supreme Court rejected. The Court majority also had before it the opinion of the justices in the minority that the Board's decision in *Linden Lumber* represented an impermissible interpretation of the Act, and the Court rejected that position as well. Accordingly, the first step of the majority's standard conflicts with Supreme Court precedent, and decisions and orders that rest on the application of that step must remain unenforceable unless and until the Supreme Court overrules its decision in *Linden Lumber v. NLRB*.

[The dissent went on to argue that even if the Board's or the Supreme Court's decisions in *Linden Lumber* didn't preclude step one of the new standard, the majority did not provide a reasoned explanation for overruling *Linden Lumber*.]

D. Step two of the majority's new standard conflicts with NLRB v. Gissel Packing and decades of circuit court precedent applying that decision.

In *NLRB v. Gissel Packing*, the Supreme Court approved the Board's use of bargaining orders in two categories of cases. The first category consists of "exceptional" cases marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, rendering a fair election impossible. 395 U.S. at 613-614. The second category consists of "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." Id. at 614. The Court approved the use of bargaining orders in cases coming within this second category *if* (a) the union had majority support at one time, and (b) the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight," and "employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." Id. In making this determination, the Court held that the Board must conduct a case-by-case analysis, "tak[ing] into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future." Id. at 614-615.

The *Gissel* Court left undecided "whether a bargaining order is ever appropriate in cases where there is no interference with the election processes"--i.e., "whether, absent election

interference by an employer's unfair labor practices, [the employer] may obtain an election only if he petitions for one himself[, and] whether, if he does not, he must bargain with a card majority if the Union chooses not to seek an election." Id. at 594-595; 601 fn. 18. As discussed above, the Board answered those questions in the negative in *Linden Lumber*, and the Supreme Court sustained the Board's holding over the contrary holding of the District of Columbia Circuit. But the *Gissel* Court did answer a different question: whether there is a threshold beneath which the commission of unfair labor practices that interfere with an election would fail to support the issuance of a bargaining order. The Court found that such a threshold exists. After discussing the two categories of cases in which unfair labor practices do warrant a bargaining order, the Court referred to a third category of cases, involving "minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, *will not sustain a bargaining order*." Id. at 615 (emphasis added).

The circuit courts have long recognized that *Gissel* limits the circumstances under which the Board may issue a bargaining order on the basis that unfair labor practices interfered or would interfere with an election. . . .

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The second step of the majority's announced standard cannot be reconciled with the Supreme Court's decision in *NLRB v. Gissel Packing* or circuit court decisions applying it. My colleagues purport to hold that if an employer satisfies step one of their standard by filing an RM petition in response to a request for recognition from a card-majority union, the petition will be dismissed, employees will lose the right to vote in a secret-ballot election, and the employer will be found to have violated Section 8(a)(5) and ordered to recognize and bargain with the union, if it commits *a single violation* of Section 8(a)(1) or (3) after filing its petition. To warrant dismissal of the petition, the unfair labor practice must be such as would require the results of an election to be set aside, but this would amount to little more than a speed bump for the Board, if even that, given the state of Board law. The Board has recognized both that "[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election," *Dal-Tex Optical Co., Inc.*, 137 NLRB 1782, 1786-1787 (1962), and that an unfair labor practice committed during the critical period requires the setting aside of an election unless it is "virtually impossible to conclude that [the violation] could have affected the results of the election," *Super Thrift Markets, Inc.*, 233 NLRB 409, 409 (1977).

Plainly, the second step of the majority's new standard will result in the issuance of bargaining orders in cases that come within the third category identified by the *Gissel* Court--cases in which the employer's "minor or less extensive unfair labor practices . . . will not sustain a bargaining order." *NLRB v. Gissel Packing*, 395 U.S. at 615. This is especially clear in light of the Board's work-rules precedent. The Board has held that the mere maintenance of an unlawful work rule during the critical period requires the results of an election to be set aside. *IRIS U.S.A., Inc.*, 336 NLRB 1013, 1013 (2001). And my colleagues' recent decision in *Stericycle, Inc.*, 372 N.L.R.B. No. 113 (2023), made it extraordinarily easy for the General Counsel to establish that a work rule is unlawful. . . .

My colleagues contend that their new standard does not conflict with *Gissel* because, they say, bargaining orders under the new standard "rest upon a fundamentally different rationale than those under *Gissel*"--namely, that under the new standard, a bargaining order "could not issue as a remedy for . . . 'minor or less extensive unfair labor practices' . . . but only as a remedy for an employer's violation of Section 8(a)(5)." But bargaining orders under *Gissel* also are issued only to remedy a violation of Section 8(a)(5). They are *not* issued as a remedy for other unfair labor practices--i.e., violations of Section 8(a)(1) and (3)--whether those violations are minor, major, or off the charts. Violations of Section 8(a)(1) and (3) are remedied by the Board's traditional remedies--cease-and-desist orders, reinstatement, back-pay, notice posting, and so forth--plus any extraordinary remedies deemed warranted (such as notice reading). But under the *Gissel* standard, the majority's new standard, or any other conceivable standard, a bargaining order issues and can only issue as a remedy for a failure or refusal to bargain in violation of Section 8(a)(5). And the fact of the matter is, should the Board use the new standard to issue bargaining orders under circumstances where they are precluded from issuing under *Gissel*, such orders will not be enforced by reviewing courts unless and until the Supreme Court overrules *Gissel*. Given that we have no reason to believe that the Supreme Court is going to overrule *Gissel*, my colleagues today are establishing a new standard that, in many cases, is going to result in lengthy litigation over an alleged violation that will never survive judicial review.

[The dissent goes on to argue that even if the Supreme Court's decisions in *Gissel* didn't preclude the second step, the majority did not provide an adequate explanation for that step. The dissent also would not have applied the new standard retroactively, and would have affirmed the ALJ's decision that the conduct in the case did not warrant a *Gissel* bargaining order.]

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Note.

In *Cemex*, the Board concluded that *Gissel* bargaining orders were insufficient to accomplish the goals of effectuating employee free choice of bargaining representative and deterring employer unfair labor practices. Indeed, *Gissel's* focus on the potential impact of employer unfair labor practices on a future election created perverse incentives for employers to delay or disrupt election processes and thus delay or avoid an obligation to bargain with the union. Focusing instead on the current time period—when the union is soliciting cards and preparing for an initial election—the Board developed a new framework designed to incentivize employers not to commit unfair labor practices in response to a union campaign both before and after the filing of an election petition. Under *Cemex*, when an employer is confronted with a demand for recognition, it may 1) agree to recognize the union, 2) file an RM petition to test the union's majority support or challenge the unit within two weeks of the union's demand, or 3) await the processing of an RC petition previously filed. If the employer fails to recognize the union or file an RM petition and no RC petition is pending, the union may file a section 8(a)(5) charge. The remedy for such a violation is a remedial order to bargain. Further, if an election petition is filed by either the employer or the union and the employer commits unfair labor practices that disrupt or interfere with a free and fair election during the "critical period"— the period from the date of

the demand until the election—the Board will dismiss the election petition and issue a remedial bargaining order.

As the Board majority observed, the effect of the *Cemex* framework is that the Board may well find an unlawful refusal to recognize and bargain with a union based upon authorization cards even where the employer commits only one unfair labor practice and/or less serious (non-"hallmark") violations of the Act. Although the standards applicable to determining whether the unfair labor practices have undermined the possibility for a free and fair election have not changed, a remedial bargaining order may issue even where there are non-"hallmark" violations.

The NLRB's General Counsel has provided guidance in applying the *Cemex* framework. *See* Memorandum GC 24-01 (Rev., April 29, 2024). First, per the Board's usual practice, the *Cemex* framework is retroactively applicable to nearly all cases pending before the Board. *Id.* at 1 n.2. Second, unfair labor practices that occur prior to the filing of an election petition as well as those that occur during the critical period are relevant in determining whether a valid election is feasible. Thus, employers will be incentivized not to commit unfair labor practices in response to initiation of a union campaign both before and after the filing of the election petition. *Id.* at 2. Questions also arose as to what constitutes a demand for recognition. According to the General Counsel, the demand can be verbal or written, should indicate a desire to bargain with the employer on behalf of employees, and should clearly state the unit for which the union claims majority support. The demand need not be made on any particular person, as long as the person is acting as an agent of an employer. *Id.* at 2 n.7. Further, even a filing of an RC petition by the union would qualify as a bargaining demand if the union checks the "request for recognition" box on the form and notes that the petition serves as its demand. *Id.* at 2 n.8. While the employer may ask to see evidence of the union's majority support, the union is not obligated to produce it. Instead, the employer may engage a neutral third party to review the evidence, but this card check procedure does not toll the employer's two-week deadline for filing an RM petition. *Id.* at 2 n.9. Finally, the employer may challenge the bargaining unit proposed by the union, but it must use the union's proposed description of the bargaining unit to file the RM petition, indicate that it does not agree, and explain why it does not agree. *Id.* at 4 n.19.

Section III: Duration of the Duty to Bargain

Page 304. End of Note 4—Successor Employers.

In *Hosp. Menonita de Guayama, Inc*., 371 N.L.R.B. No. 108 (2022), the Biden Board rejected a challenge to the successor bar doctrine established in *St. Elizabeth Manor, Inc.,* 329 NLRB 341 (1999). Even where the employer claims it has objective evidence that the union has lost majority support, incumbent unions maintain an irrebuttable presumption of majority status for a reasonable period of time sufficient to allow the collective bargaining relationship "a fair chance to succeed," typically defined as at least six months after a change in employer ownership. The Board reasoned that the expansion over the last decade of mergers and acquisitions leading to changes in ownership in the U.S. economy provides further justification for rules like the successor bar doctrine that facilitate smooth transitions and avoid unnecessary disruptions in the labor

market. Accordingly, the Board reaffirmed the Obama Board's decision in *UGL-UNICCO Service Co.*, 257 NLRB 801 (2011).

Part Four

Union Collective Action

Section VII: National Labor Relations Act Preemption

A. *Garmon* Preemption

Page 480. End of Note 2—State Common Law Tort Claims

In *Glacier Northwest, Inc. v. Teamsters Local No. 174*, 598 U.S. 771 (2023), the Court considered whether the NLRA preempts an employer's state tort claim against a union for property damage stemming from workers' failure to take reasonable precautions to protect the employer's property from harm as the result of a strike. Glacier sold concrete and delivered it in ready-mix trucks with rotating drums that prevent the concrete from hardening during transport. Concrete is perishable in the sense that if not promptly poured it will harden and damage the vehicles in which it is stored as well as rendering the concrete itself unusable. The union called a strike on a morning that it knew the company was mixing batches of concrete and pouring it into trucks for delivery, telling drivers of already-loaded trucks to ignore the employer's instructions to finish the deliveries; 16 drivers returned fully loaded trucks. Although Glacier took steps to keep the vehicles from significant damage, all of the concrete mixed that day hardened and became useless. Glacier filed tort claims in state court for common law conversion and trespass to chattels, arguing that the union had intentionally destroyed its property during the labor dispute. The union sought to dismiss the claims as preempted, citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and asserting that the question was "arguably subject to the NLRA" and thus within the primary jurisdiction of the NLRB. The union also filed unfair labor practice charges with the NLRB asserting that Glacier had punished striking drivers for protected concerted activity by disciplining drivers for striking and by filing the lawsuit in state court; the Board's General Counsel subsequently issued a complaint on these charges and proceedings before the Board ensued.

The Court ruled that the NLRA did not preempt the employer's state law tort claims. The Court reasoned that although the right to strike is protected, the NLRA does not shield strikers who fail to take "reasonable precautions" to protect their employer's property from foreseeable, aggravated, and imminent danger due to the sudden cessation of work. Glacier's tort claims alleged that the union took affirmative steps to endanger its property rather than making reasonable attempts to mitigate damage. Where the union fails to mitigate, as it did here—and indeed, executes the strike in a manner designed to destroy the employer's property--the NLRA does not "arguably protect" the strike, and thus there is no *Garmon* preemption. Concurring Justices Thomas and Gorsuch advocated reconsidering *Garmon's* "unusual" preemption regime in a future case, worrying that the Board's constantly waxing and waning precedents in developing its "carefully insulated common law of labor relations" could leave many issues "arguable," divesting state courts of jurisdiction over state claims. Justice Jackson filed a strong dissent, observing that the Board's General Counsel had filed a complaint with the Board after a thorough factual investigation alleging that the NLRA protects the strike conduct at the center of the state tort claim.

Under *Garmon*, it should be clear on this basis alone that the strike conduct was arguably protected under the NLRA and thus that the NLRB should have primary jurisdiction over the case in the first instance. This does not ultimately preclude the state tort suit, she explained; it simply "requires state courts to take a 'jurisdictional hiatus' while the Board considers the dispute in the first instance."

Part Five

Collective Bargaining

Section III: Union Representation and Antidiscrimination Law

D. Areas of Tension Between Labor law and Antidiscrimination Law

Page 567, add new section.

3. Individual Requests for Accommodation of Religious Freedom Under Title VII

Tension between majority rights and individual rights protected by Title VII has also arisen in the context of requests for religious accommodations where rights protected under a collective bargaining agreement conflict with an individual's Title VII right to accommodation to observe religious holidays. Title VII prohibits discrimination because of religion, and the EEOC interpreted that to mean that employers are required to accommodate the reasonable religious needs of employees whenever that accommodation would not work an "undue hardship on the conduct of the employer's business." 29 C.F.R. § 1605.1(a)(2) (1967); 29 C.F.R. § 1605.1 (1968). In 1972, Congress adopted that language, providing that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employees' religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j) (1970 ed., Supp. II).

In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the Court ruled that Title VII did not require a collectively bargained seniority system to yield to a junior employee's religious practices. *Id*. at 83 & n. 14. In that case, the plaintiff's religious faith required him to observe the Sabbath by not working from sunset on Friday until sunset on Saturday, but this conflicted with his work schedule and he lacked sufficient seniority under the collective bargaining agreement to avoid work during the Sabbath. Noting that Title VII expressly provides special protection for "bona fide seniority . . . system[s]," *id.* at 81-82, the Court concluded that the statute does not require an accommodation that involuntarily deprives other employees of seniority rights. *Id.* at 80. Since Hardison's co-workers were not willing to take his shift voluntarily, the Court found that compelling them to do so would have violated their seniority rights. And leaving Hardison's department short-handed would have adversely affected TWA's essential mission. *Id.* Although the Court briefly considered other accommodations, it found them not feasible, although it did not determine at what point the increased costs associated with them might rise to level of an undue hardship. Instead, it concluded simply that "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." Id. at 84. Lower courts subsequently took this statement literally and tended to deny even requests for minor accommodations.

In *Groff v. DeJoy,* 600 U.S. 447 (2023), a unanimous Court reaffirmed its ruling in *Hardison* but clarified the standard for a showing of undue hardship, rejecting the *de minimis* cost

standard and offering a more flexible contextual standard that should make accommodations easier to obtain. Gerald Groff, an Evangelical Christian who believed that Sunday should be devoted to worship and rest, found himself required to work on Sundays on a rotating basis as a result of an agreement between his employer, the US Postal Service, and Amazon in which the US Postal Service undertook to facilitate deliveries on Sundays. The US Postal Service redistributed Groff's work to other employees, some of whom complained and at least one of whom filed a grievance under the collective bargaining agreement, which provided that Sunday work would be assigned on a rotating basis. *Id.* at n.1. The Postal Service progressively disciplined Groff for refusing to work on Sundays and he eventually resigned. The Court reviewed its decision in *Hardison*, including the language suggesting that anything more than a *de minimis* cost would relieve the employer of the obligation to accommodate the employee's religious needs. Brushing aside this earlier statement, the Court clarified that "undue hardship" requires an employer to show that "the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." This fact-specific inquiry should take into account "all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, 'size and operating cost of [an] employer.'" (quoting Brief for the United States). Coworker impacts that affect the conduct of the business are relevant, although a coworker's dislike of or animosity toward a particular religion or religious practices cannot in and of itself be considered "undue." The Court remanded the case for further proceedings consistent with this clarification.

From a labor standpoint, one of the most interesting aspects of the case was the question whether hardship imposed on coworkers as a result of a religious accommodation could by itself constitute undue hardship on the conduct of the employer's business—particularly where the accommodation conflicts with the terms of a collective bargaining agreement. In a concurring opinion, Justices Sotomayor and Jackson suggested that it could. The collective bargaining agreement in this case assigned work on the basis of rotation rather than seniority, however, which distinguished the case from *Hardison* and eliminated the *Hardison* rationale regarding the statutory significance of seniority systems under Title VII. Will lower courts interpret the majority's silence on this point to mean that individual requests for accommodation could trump collectively bargained rights other than those based upon seniority systems, or will they agree with the concurrence?

Section IV. The Nature of the Duty to Bargain

B. Bargaining Remedies

Page 632, Note 4—Extraordinary Remedies for Pervasive Unfair Labor Practices.

The Board has flexed its muscle in cases of pervasive employer unfair labor practices during collective bargaining, authorizing an array of remedies in its effort to make the union and the workers whole. In *Noah's Ark Processors*, 372 N.L.R.B. No. 80 (2023), the ALJ concluded that the employer had bargained in bad faith during a series of contract negotiations, including engaging in regressive bargaining, repeatedly refusing to consider even the smallest concessions

to the union; implementing its final offer before the parties reached overall impasse; and threatening, interrogating, and discharging workers in response to protected concerted activity. Worse, the employer had defied a previous federal court injunction related to previous bad faith bargaining and other unfair labor practice allegations. The Board upheld the ALJ's determination that bad faith bargaining had occurred and the remedies awarded, including bargaining costs, reading of a notice and explanation of rights to employees by the CEO or a Board agent in the CEO's presence. The Board then took the opportunity to announce a non-exhaustive list of potential remedies that the Board will henceforth consider in cases where employers have "shown a proclivity to violate the Act" or "have engaged in egregious or widespread misconduct" like that at issue in this case. The remedies include (1) an explanation of rights and notice to employees of the violation, which the Board may require a corporate official or other high-ranking member of management to read aloud to a group of employees, potentially with a Board agent or union representative present; (2) physical distribution of copies of the notice to employees present before the reading; (3) requiring supervisors to attend the reading and confirm their presence via a sign-in sheet; (4) requiring employers to mail the notice and explanation of rights to employees, both current and former; (5) requiring the employer to publish the notice in local publications of broad circulation; (6) requiring the employer to post the notice at the employer's facility for longer than the usual 60-day posting period; (7) requiring representatives of the union and management to sign the notice; and (8) visitation and inspection of the employer's facilities by a Board agent to assess compliance. The Eighth Circuit enforced the Board's order. *NLRB v. Noah's Ark Processors, LLC*, 98 F.4th 896 (8th Cir. 2024). In *Columbus Elec. Coop., Inc.*, 372 N.L.R.B. No. 89 (2023), the Board subsequently ordered another employer that had demonstrated recalcitrance during bargaining and violated section 8(a)(5) to submit written progress reports every 30 days to the NLRB compliance officer for the region until the parties either reached agreement or came to impasse, ordered a 12-month extension of the union's certification year, and awarded make-whole compensation for backpay to employee negotiators for any earnings lost as well as reimbursement of bargaining expenses to the union.

Page 633, End of Note 5—Awards of Costs and Attorneys' Fees to Unions and the Labor Board.

In *NLRB v. Ampersand Publ'g*, 43 F.4th 1233 (9th Cir. 2022), the Ninth Circuit enforced an NLRB order requiring the employer to reimburse the union for legal fees incurred by the union in collective bargaining as a result of the employer's unfair labor practices. The Board had found unusually aggravated misconduct by the employer sufficient to warrant more than a traditional remedy, including unilateral discontinuance of a merit pay raise program, transfer of bargaining unit work to nonunion temporary employees without notice, discharge of two employees, and bad faith bargaining. Accordingly, the Board ordered the employer to reimburse the union for costs and expenses incurred during the collective bargaining sessions, including legal fees for consultation with outside counsel during contract negotiations. The employer argued that D.C. Circuit precedent, specifically *HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016) [discussed in Note 5 at Page 633] establishes that the NLRB lacks authority to order reimbursement of legal fees. The court rejected this argument, finding those cases distinguishable because they dealt with awards of attorneys' fees in the litigation context rather than in the bargaining context. While awards of litigation expenses are punitive in nature, awards of bargaining expenses—including attorneys'

fees incurred in connection with bargaining—are compensatory, "'designed to restore the economic status quo that would have obtained but for the Companies' wrongful acts,'" and thus lie within the NLRB's remedial power under section 10(c). 43 F.4th at 1237 (quoting an earlier decision drawing the same distinction, *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1094-95 (D.C. Cir. 2016)). This award was appropriate even though the parties were contemporaneously involved in ongoing litigation before the Board over the company's unfair labor practices during the union organizing campaign, and additional charges were filed during bargaining. *Id.* at 1239. The bargaining itself and the legal services rendered in connection with it were independent of those adjudication processes (even though the same lawyer and law firm represented the union in litigation before the NLRB). The court emphasized that the NLRB General Counsel prosecuted the pending NLRB charges, not the union, and the NLRB was not involved in the bargaining sessions. *Id.*

C. Unilateral Action

Page 644, End of Note 7—Unilateral Changes against a Backdrop of Past Practice.

The Board overruled *Raytheon Network Centric Systems* in *Wendt Corp.*, 372 N.L.R.B. No. 135 (2023), as inconsistent with *Katz*, and reaffirmed the principle that an employer may never rely on an asserted past practice of making unilateral changes before the employees were represented by a union. The Board also overruled a different aspect of *Raytheon* in *Tecnocap, LLC*, 372 N.L.R.B. No. 136 (2023), where it found that an employer's past practice of unilateral changes developed under a management-rights clause cannot authorize unilateral changes after the agreement expires and bargaining for a new contract.

Page 645, End of Note 9—Changes in Mandatory Subjects of Bargaining After Contract Expires.

The NLRB's flip-flopping on the issue of the post-CBA expiration of dues checkoff clauses continues. The Biden Board reversed the Trump Board's decision in *Valley Hosp. Med. Ctr., Inc.*, 368 N.L.R.B. No. 139 (2019) (*Valley Hosp. I*), that dues checkoff clauses were creatures of contract akin to no-strike, arbitration, and management-rights clauses and thus did not survive the expiration of the collective agreement. On reconsideration following remand from the Ninth Circuit with direction to explain the Trump Board's departure from the Obama Board precedents, the Biden Board ruled 3-2 that dues checkoff clauses do survive the expiration of the collective agreement. *Valley Hosp. Med. Ctr., Inc*., 371 N.L.R.B. No. 160 (2022) (*Valley Hosp. II*), citing *NLRB v. Katz*, 369 U.S. 736 (1962) (holding that employers may not unilaterally alter employees' wages, hour, and terms and conditions of employment without first giving the union an opportunity to bargain over them). The Biden Board explained that dues checkoff clauses differ from other exceptions to the *Katz* rule: unlike union security clauses, dues checkoff arrangements do not require an agreement between an employer and the union, but instead rest upon an agreement between the employer and the employee; and unlike no-strike clauses, dues checkoff clauses do not involve a waiver of employee rights which is necessarily limited to the duration of the agreement. Further, dues checkoff clauses are similar to other provisions that survive contract expiration, including voluntary payroll deductions for union benefits funds—they are matters of

administrative convenience and are subject to individual employee authorization and revocation. The Biden Board's ruling helps unions by ensuring that employers cannot starve them of resources during collective bargaining after the contract expires, and reduces the incentive for employers to delay negotiations until the contract expires. The Ninth Circuit enforced the Board's rulings in *Valley Hosp. Med. Ctr., Inc. v. NLRB*, 93 F.4th 1120 (9th Cir.), *amended by* 100 F.4th 994 (9th Cir. 2024). .