Rep. Frank Mrvan (D-IN)

1. Under current law governed by NLRB v. Gissel, if the union demonstrated majority support prior to an election but has not been certified from having won an election, the NLRB may only issue a bargaining order if the employer's behavior was so outrageous or pervasive as to make a fair rerun election impossible. My colleagues on the other side have argued that strengthening the standard for issuing bargaining orders would create an end-run around elections. Is that accurate, or would strengthening the standard actually incentivize elections to be freer and fairer?

Ms. Thompson Response

There is no question that strengthening the standard would result in freer and fairer elections. Prior to the *Gissel* decision, when the NLRB issued bargaining orders under the more reasonable *Joy Silk* standard, less than one percent of representation issues were resolved through bargaining orders on the basis of signed membership cards, meaning 99%-plus were resolved through elections. A *Joy Silk* paradigm has the added advantage of empirically discouraging employer ULPs following the filing of an election petition – in other words, employers are disincentivized from waging a scorched-earth anti-union campaign for fear of inviting a bargaining order. That dynamic enables workers to make a free and fair choice without facing intimidation and threats.

Rep. Susan Wild (D-PA)

1. Although Philip Miscimarra's testimony claims that Section 8(c) of the National Labor Relations Act (NLRA) protects the right of employers to discipline employees if they do not attend mandatory anti-union meetings held by the employer, Section 8(c) is limited to protecting speech. The protection does not extend beyond employer speech into employer actions, in this case the threat of reprisal for avoiding anti-union rhetoric. His testimony argues that Congress intended to overrule a Board decision that outlawed captive audience meetings. However, the legislative history he cited does not address the compulsory and coercive nature of captive audience meetings whatsoever. In fact, the legislative record is explicit that its goal was only to protect non-coercive speech even if it takes place during working hours. As such, Congress did not intend for Section 8(c) to provide blanket protection for threats related to that speech. How is General Counsel Abruzzo's position respecting the text and legislative history of this section?

Ms. Thompson Response

The General Counsel proposes that, if an employer wants to have a meeting on work time to share anti-union propaganda with employees, the employer can still do that. But if workers don't want to be subject to those threats and intimidation, they can feel free to leave without being punished for doing so. By doing so, the proposal is focused on protecting the free speech of employees and employers.

Additionally, I'd note that the Board has recognized for several decades that the Act protects workers' decision "to receive aid, advice, and information from others" or not on organizing. The General Counsel's position is totally consistent with that.

Furthermore, it's worth thinking about what a mandatory captive audience meeting involves: workers are lectured–often by their bosses, or even more senior corporate executives, who can discipline or fire those workers–about why they should oppose forming a union. Going against the position of an employer is extremely intimidating, especially if a worker doesn't have the protection of a collective bargaining agreement that can protect them from unjust discipline or firing. Reading the plain text of Section 8(c), as the Supreme Court has instructed we must do, it clearly does not protect threats. Likewise, coercing employees' exercise of their Section 7 rights has always been prohibited under Section 8(a)(1); General Counsel Abruzzo's position is that Section 7 rights include the right to refrain from listening to coercive, mandatory anti-union speech from management.