Statement of

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Hearing on "NLRB Overreach: Trampling on Workers' Rights and Fostering Unfairness"

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Subcommittee Chair Good, Ranking Member DeSaulnier, and other Subcommittee Members, thank you for the invitation to participate in this hearing and testify before the Subcommittee. I am honored to be here.[1]

I am Of Counsel in the law firm of Bond Schoeneck &King, PLLC. Previously, I had the privilege of serving as Associate General Counsel (June 2018-August 2019), Deputy General Counsel (August 2019-January 20, 2021), and General Counsel (January 20-21, 2021) of the National Labor Relations Board ("NLRB" or "Board"). I was appointed as Associate General Counsel and Deputy General Counsel of the NLRB by former General Counsel Peter B. Robb. Prior to my appointment to the NLRB, I was a labor and employment lawyer in private practice representing primarily employers for 30 years.[2]

My role as Deputy General Counsel of the NLRB was to serve as senior legal advisor to the General Counsel, to represent that office regarding, among other things, legal policy issues under the National Labor Relations Act ("NLRA"), legislative issues, litigation, including appellate and Supreme Court litigation, and to direct the operations of all divisions within the NLRB's Office of the General Counsel and its 26 regional offices, including Operations, Ethics, Special Counsel, Advice, Appeals, Appellate and Supreme Court litigation, and the Agency's administrative, financial, human resources, equal employment opportunity and labor relations functions. I therefore have experience with the General Counsel-side of the NLRB's internal case processing functions as well how its budgeting and staffing process works. I was Deputy General Counsel when the COVID-19 pandemic hit and was intimately involved with the

[1] My testimony today reflects my personal views, which should not be attributed to Bond Schoeneck & King, PLLC or its clients, or any other persons or entities. I am grateful for and acknowledge the assistance of Beth Tursell, former Associate to the General Counsel and Head of the Division of Operations of the National Labor Relations Board, currently working with BT Consulting, LLC and Michael Kratochvil, Esq., in the preparation of this testimony.

[2] I am a graduate of Yale University and Harvard Law School. My professional experience and affiliations include serving as an associate with Proskauer Rose Goetz & Mendelsohn (1986-1991) and Whitman & Ransom (which became Whitman Breed Abbot (1991-1995), counsel and partner with Reid & Priest (which became Thelen Reid & Priest)(1995-2006), partner with Lowenstein Sandler (2006-2010), and partner with Pryor Cashman (2010-2018).

contingencies that the NLRB put in place to address COVID-19-related operational issues, including the conduct of elections.

Summary of Testimony

I have been asked to testify on the performance of the NLRB as currently led by Board Chair Lauren McFerran and General Counsel Jennifer Abruzzo concerning its adherence to the principles of the NLRA, including respect for the rights of workers and the fairness of its decision-making and policies. To assess the Board's performance, one must understand the core purposes of the NLRA and its mission and analyze whether the actions of the current Board are consistent with those purposes and further the NLRA's mission. As discussed in detail below, in my opinion, the decisions, policies and conduct of the operations of this Board are inconsistent with, and contrary to, the mission and core principles of the NLRA. Indeed, the current Board agenda subverts the aims of the NLRA and impedes its utility and efficacy as a constructive contributing component of our nation's labor stability. Further, the NLRB's policies exhibit such disregard for balance, fairness and the rights of employees and employers that it has undermined its credibility as an impartial administrator of the NLRA and guardian of workers' rights.

Since its enactment in 1935, the NLRA has been an important driving force in the growth and stability of our nation's economy. The NLRA and the Taft-Hartley Act amendments of 1947 were enacted in the wake of, and in response to, violent strikes of the 1930s and 1940s that crippled certain industrial sectors and regional economies.[3] The core purpose of the NLRA, as promulgated in the Wagner Act, and refined by the Taft-Hartley Act in 1947 and the Landrum-Griffin Act in 1959, was to create a mechanism for the prevention of industrial strife—i.e., strikes—which were obstructing the free flow of commerce and impeding economic recovery and growth—through the encouragement of collective bargaining for resolution of labor disputes.[4]

To achieve this policy, the NLRA established rules (1) to protect employee free choice in the selection of their collective bargaining representatives, (2) to provide a road map for parties to resolve labor disputes themselves through collective bargaining, and (3) if the parties were unable to resolve such disputes themselves, neutrally resolve the disputes through NLRB adjudication.[5] While the NLRA promotes collective bargaining as an alternative to the strikes

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[3] *See, e.g.*, HOUSE REPORT 116-347, *supra* note 1, at 113; G. William Domhoff, *The Rise and Fall of Labor Unions in the U.S.*, WHO RULES AM. (2023), https://whorulesamerica.ucsc.edu/power/history_of_labor_unions.html [https://perma.cc/KH47-XY27]; THE DEVELOPING LABOR LAW chs. 2.II, 3.I.A (2022).

[4] According to section 1, Findings and Policy, of the NLRA:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstruction to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and the designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151.

[5] *See id.* §§ 151, 153, 157, 158, 159.

and violence that prevent the free flow of commerce, it did not intend to, nor was meant to, promote or favor the election of collective bargaining representatives, or to impose upon employees collective bargaining representatives not of their own choosing. The NLRB's duty, therefore, is to administer the NLRA neutrally, fairly and efficiently.

Thus, the NLRB's two functions in administering the NLRA are:

1. To conduct secret ballot elections in a manner that ensures employees their "*fullest freedom* in exercising the rights guaranteed by [the] Act."[6] This means to conduct union representation elections in a neutral and even-handed manner, which favors neither unions nor employers. This means conducting elections in a manner which extends the exercise of such free choice – voting participation -- to the largest number of eligible employees and in an environment free of intimidation and coercion. Since its inception, the NLRB has utilized the in-person secret ballot election to achieve this part of its mission.

2. To investigate and resolve labor disputes as alleged in unfair labor practice charges. The Board resolves such disputes either through settlement or a Board decision on the case.

In performing these two functions, the Board must adhere to the following principles:

1. Its decisions must conform to the U.S. Constitution, including the First Amendment right to free speech, and applicable U.S. Supreme Court holdings.
2. In its adjudications, the Board must adhere to the core principles of the NLRA and may not make new law or attempt or change the NLRA's provisions through decision-making. Rather, the Board must "color within the lines" of the NLRA drawn by Congress, whose province it is to change federal labor law.
3. In all of its actions and decisions, the NLRB must act in a neutral, impartial and even-handed manner and not favor employers or unions. With respect to protecting employee's Section 7 rights to organize and in the selection of a bargaining representative, the Board must ensure freedom of employees from intimidation and coercion from employers and unions, may not engage in actions favoring employers or unions, or make decisions that would disenfranchise employees in their selection of a bargaining representative or impose unelected bargaining representatives on employees.

The decisions and policies of this Board do not hew to these cardinal principles. Indeed, the current Board is pursuing an agenda that is not neutral or fair – an agenda which clearly favors unions and tramples the rights of workers and employers. In order to achieve this biased agenda, the Board has acted lawlessly by issuing rulings that violate constitutional principles, usurp the powers of Congress, contradict U.S. Supreme Court holdings, lay waste to the rules of administrative procedure, and trample the substantive and procedural due process rights of employees and employers.

In sum, the policy agenda and decision-making of this Board and General Counsel ("GC") gravely endanger the utility and effectiveness of the NLRA as a source of labor stability

[6] NLRA §9(b), 29 U.S.C. §159(b) (emphasis added).

and a pillar of economic growth and undermine the Board's credibility and authority as a neutral and fair arbiter and administrator of the NLRA. Although there are other major substantive areas of concern, I will address the following three areas of grave concern with the current Board:

1. Decision-making: The Board's decisions exhibit a troubling disregard for the core principles of the NLRA, including protecting employee free choice, for its obligation to follow applicable U.S. Supreme Court precedent, for the rights of employers and employees, and for substantive and procedural due process. In its adjudications, the Board has not "colored within the lines" of the law and congressional intent, but instead has attempted to radically change the law.
2. Election Process Policies: This Board continues to mishandle mail ballot elections and over-use this flawed election process. More troubling, there is no evidence that the Board has taken steps to investigate, correct and root out improper conduct by NLRB staff in the handling of mail ballot elections. These Board actions have had the effect of disenfranchising large numbers of voters, thus depriving employees of the right to vote.
3. Mismanagement in Case Processing: There has been a troubling increase in case processing times and case backlogs at all levels of the NLRB. Analysis of NLRB statistics show a decrease rather than an increase in case filings through FY2022 and a small increase in FY2023 as compared to pre-pandemic case filing levels. Given these statistics, the backlogs and land case processing times cannot be attributed to increased case filing or understaffing, but rather to a failure of proper case management by Agency officials.

   The Chair and GC of the NLRB have requested ever higher appropriations from Congress to hire additional staff to handle a purportedly larger case load and in order to reduce lengthening case processing times and growing case backlogs. But the case filing statistics do not justify such increases. Further, the additional moneys that the NLRB received in its FY2023 appropriation for hiring staffing should have reduced case backlogs and improved case processing times. The persistence of case backlogs, notwithstanding the increase appropriation, warrants inquiry into the management practices of NLRB leadership.

I. NLRB Decisions Trample Workers Rights and Violate Due Process

The core purposes of the NLRB in its administration of the NLRA are to protect employee free choice in the selection or non-selection of a bargaining representative and to be a neutral arbiter of labor disputes. The policy decisions of this General Counsel and rulings of this Board are doing the opposite. This Board's rulings and handling of the election process have and are, practically speaking, disenfranchising large numbers of workers and deliberately depriving workers of their right to vote in a secret ballot election, and, contrary to NLRA principles, imposing on employees unelected collective bargaining representatives that do not enjoy majority support. In its decision in *Cemex,* the Board has effectively eliminated the right of employees to engage in the democratic process of voting in a secret ballot election.

This Board, under Chair McFerran's leadership, is pursuing a legislative agenda to amend the NLRA under the guise of the adjudicative process. Because "Protecting the Right to

Organize Act of 2021,"[7] known as the PRO Act, has not become law, the Board has issued these decisions as an end-run around Congressional authority to achieve the same legislative results through adjudication. In this activity, the NLRB has clearly overreached its authority. Substantively, the agenda is to eliminate secret ballot elections, thus depriving employees of their right to free choice in the selection of a bargaining representative, and to narrow or eliminate employer free speech and property rights.[8] Clearly, these decisions trample the rights of workers and employers guaranteed under the NLRA and other laws.

The current Board has moved further and further away from its core principles in favor of results-based reasoning. We see this most clearly through a number of Board decisions over the past few years, which have contravened existing law and raised significant due process issues to allow the Board to obtain its desired results.

The Board decisions discussed in this paper do not promote the purposes of the NLRA and, indeed, operate against them, particularly the containment of labor disputes to prevent the obstruction of the free flow of commerce. In its recent decisions, the Board has baldly ignored existing controlling law and due process rights to arrive at its desired results. The decisions discussed below illustrate these aspects of the current Board's adjudications, but do not represent all instances of such adjudication.

A. The Board's Elimination of Secret Ballot Elections

On August 25, 2023, the Board majority, over the dissent of Member Kaplan, issued a most hypocritical, damaging and anti-democratic decision in *Cemex Construction Materials Pacific, LLC and IBT*.[9] The effect of this decision is to eliminate secret ballot elections in favor of authorization cards thereby depriving workers of their right to vote in a secret ballot election and imposing on them unelected (and likely minority-supported) bargaining representatives. This decision exposes employees to the very intimidation and coercion that the NLRA was supposed to protect them from. It is an egregious example of the lengths to which this Board will go in trampling worker rights if they conflict with union interests.

Enshrined as a core principle of the NLRA and, indeed, of our democracy itself is the selection of a representative through a secret ballot election. The idea of the secret ballot election is considered "the gold standard" method of selecting a representative that is vigorously protected within our own country and promoted by our country to others as a means of ensuring a fair and democratic election through the privacy of the voting booth.

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[7] "Protecting the Right to Organize Act of 2021" passed the House in March 2021, and was reintroduced in the Senate as "The Richard L. Trumka Protecting the Right to Organize Act," on February 28, 2023.

[8] *See* for example, *Cemex Construction Materials Pacific, LLC,* 343 N.L.R.B. No. 130 (Aug. 25, 2023); ("*Cemex*"); *Tesla, Inc*., 371 N.L.R.B. No. 131 (Aug. 29, 2022) ("*Tesla*"); GC Memo 22-04, "The Right to Refrain from Captive Audience and other Mandatory Meetings" (April 7, 2022).

[9] *Cemex,* 372 N.L.R.B. No. 130.

Under the NLRA, secret ballot elections have been the primary means of selecting a bargaining representative since 1935.[10] Such elections have been deemed the most accurate and preferred method of gauging employee preference free from improper influence, interference, and coercion.[11] Authorization cards have long been suspect as true indicators of employee preference because of the context in which they are frequently signed.[12]

Indeed, the United States Supreme Court, in the pivotal case of *NLRB v. Gissel Packing Co.*, acknowledged that the secret ballot election is the norm: "The 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." [13]

Other courts have noted a preference for secret ballot elections, as well. In *NLRB v. Flomatic Corp.*, the Second Circuit wrote: "[I]t is beyond dispute that secret election is a more accurate reflection of the employees' true desires than a check of authorization cards collected at the behest of a union organizer."[14] Similarly, the Sixth Circuit noted in *United Services for the Handicapped v. NLRB*, "[a]n election is the preferred method of determining the choice by employees of a collective bargaining representative."[15]

Secret ballot elections alleviate the concerns about coercion, duress, and outside pressure which can be placed on employees by unions and union supporters.[16] Authorization cards are not as reliable for gaining a true understanding of employee support, or lack thereof, of union representation.[17] As aptly put by the Seventh Circuit in *NLRB v. Village IX, Inc.*:

> 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,

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[10] THE DEVELOPING LABOR LAW, *supra* note 11, chs. 10, 12.

[11] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969) ("Gissel"); *NLRB v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965); *see also*, James Sherk, *Unions Know that Card Check Does Not Reveal Employees' Free Choice*, Heritage Found. (Mar. 6, 2009), https://www.heritage.org/jobs-and-labor/report/unions-know-card-check-does-not-reveal-employees-free-choice [https://perma.cc/837J-VY2Z]; Brief for Charging Parties and the AFL-CIO at 13, *Levitz Furniture Company of the Pacific, Inc.*, 333 N.L.R.B. 717 (2001) (No. 20-CA-26596) ("A representation election is a solemn . . . occasion, conducted under safeguards to voluntary choice . . . . other means of decision making are not comparable to the privacy and independence of the voting booth.").

[12] *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983).

[13] *Gissel*, 395 U.S. at 602.

[14] *Flomatic Corp.*, 347 F.2d at 78.

[15] *United Servs. for the Handicapped v. NLRB*, 678 F.2d 661, 664 (6th Cir. 1982).

[16] *Village IX, Inc.*, 723 F.2d at 1371.

[17] *Id.*; *see also Gissel*., 395 U.S. at 604.

> since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election).[18]

The *Gissel* Court also recognized the problems with authorization cards as a true indicator of employee sentiment:

> We would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue.[19]

Accordingly, the *Gissel* Court held that a secret ballot election should not be set aside and supplanted by other means of selecting a bargaining representative, except in the most extraordinary and egregious circumstances.[20] Indeed, if an election were deemed to have been unfair, the proper remedy was to schedule a re-rerun election -- not to impose a different result—i.e., the recognition of a union and a bargaining order—unless the unlawful activity that occurred actually would affect the results of a re-run election.

Under *Gissel*, before an election can be overturned, the NLRB General Counsel must prove that the union had majority support and that the employer's unfair labor practices eroded that majority support such that the holding of a fair election or rerun election is unlikely.[21] Under this standard, before an election is overturned and a bargaining order issued, the General Counsel must prove that the unfair labor practices actually affected the prior election outcome "by undermining [union] majority strength" and are likely to "impede the election process" of a new election.[22] Bargaining orders are not warranted where the unfair labor practices are not of the type, pervasiveness, or severity that would influence employees in their election decision or where the employees were unaware of them.[23]

Gissel bargaining orders are rare because setting aside an election or deciding not to run or re-run an election are extraordinary and serious remedies that must be based on causal evidence that the violations of the law are of the type that would affect the ability to hold a fair

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[18] *Village IX, Inc.,* 723 F.2d at 1371.

[19] *Gissel*, 395 U.S. at 604.

[20] *Id.* at 615 ("minor or less extensive unfair labor practices" because of their minimal impact on and election "will not sustain a bargaining order").

[21] *Gissel*, 395 U.S. at 614 ("The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior.").

[22] *Id.*

[23] *Gissel*, 395 U.S. at 615; *Aaron Bros. Co. of Cal.*, 158 N.L.R.B. at 1079.

election and that the evidence demonstrates that they would cause such effect. Thus, the standard for setting aside an election is a high one, which requires a showing that the unfair labor practices affected the election sought to be set aside and are likely to adversely affect employees in a potential rerun election.[24]

In *Cemex,* the Board held that (1) whenever a union requests recognition based on asserted majority bargaining unit support, the employer must either bargain with the union or file an election petition within two weeks of the union's bargaining demand (assuming the union has not already filed an election petition), (2) if the employer refuses to accede to a demand for recognition and no election petition is filed, the employer will be found to have refused to bargain and a bargaining order will be issued without an election, and (3) if the employer commits any unfair labor practice during the "critical period" leading up to an election, the election petition (whether filed by the employer or the union) will be dismissed and the employer will be ordered to recognize and bargain with the union without any election.[25]

This decision is completely at odds with the core principles of the NLRA and U.S. Supreme Court directives in *Gissel*.[26] According to the Supreme Court in *Gissel*, orders to bargain with an unelected union are to be issued only in rare and extreme circumstances where the election atmosphere has been tainted by an employer's unfair labor practices, to a point where a fair rerun election is unlikely.[27] Under *Cemex*, however, a single unfair labor practice can result in dismissal of an election petition and issuance of a bargaining order. Thus, while *Gissel* requires a high threshold of employer misconduct, and a showing that the misconduct has affected or will affect the election as a prerequisite for the dire remedies of not running an election and issuing a bargaining order, the threshold for issuing a bargaining order in *Cemex* is minimal to infinitesimal.[28]

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[24] *Gissel*, 395 U.S. at 615 ("We emphasize that under the Board's remedial power there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order."); *Aaron Bros. Co. of Cal.,* 158 N.L.R.B. 1077, 1079 (1966) (not "any employer conduct found violative of Section 8(a)(1) of the Act, regardless of its nature and gravity, will necessarily support a refusal-to-bargain finding" . . . "where an employer's unfair labor practices are not of such a character as to reflect a purpose to evade an obligation to bargain, the Board will not draw an inference of bad faith").

[25] *Cemex*, 372 NLRB No. 130, at 25 (Aug. 25, 2023) ("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 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)")(footnotes omitted).

[26] *Gissel*, 395 U.S. 575 (1969); *see also Linden Lumber Division, Summer & Co.*, 419 U.S. 301 (Dec. 23, 1974) ("*Linden Lumber*"). As stated by Member Kaplan in his dissent, the Board cannot issue a rule and decision that directly conflicts with Supreme Court precedent. *Cemex, LLC*, 372 NLRB No. 130, at 44-48.

[27] *Gissel*, 395 U.S. at, 613-614.

[28] *Cemex*, 372 NLRB No. 130, at 25, fn. 142 (holding that bargaining orders will be issued for unfair labor practices committed during the "critical period" leading up to an election "unless the 'violations . . . are so minimal or isolated that it is virtually impossible to conclude that the misconduct could have affected the election results.'").

The Supreme Court purposely set a high evidentiary threshold for a bargaining order because bargaining orders were meant to be a remedy of last resort. *Cemex* reverses the equation and because even a single, minor unfair labor practice can result in the dismissal of an election petition, makes issuance of a bargaining order a remedy of first resort. The *Cemex* decision also obliterates the opportunity for large numbers of employees to cast votes in secret ballot elections.

The *Cemex* decision is anti-democratic, inconsistent with *Gissel*, and contravenes the principles of the NLRA, which guarantee employee free choice in the selection of a bargaining representative. The intended effects of the decision are to deprive employees of their Section 7 right to choose whether or not to unionize and to impose on them an unelected (and, likely, minority-supported) bargaining representative.

B. The Board's Decisions Violate Constitutional Principles and Due Process

Many of the holdings of this Board are really *ultra vires* attempts to change the text and meaning of the NLRA, contrary to congressional intent and inconsistent with U.S. Supreme Court rulings. In these decisions, the Board has made rulings inconsistent with the U.S. Constitution and beyond its authority under the NLRA and major questions law doctrine, usurping Congress's exclusive authority to change the text of the NLRA. Further, in the Board majority's efforts to reach a particular result, it has blatantly disregarded the due process rights of litigants and employers by, among other things, creating new standards and applying them retroactively, while claiming that no new standards are being created.

While many of this Board's orders are currently pending appellate review, only a few federal appellate court decisions have yet issued. However, what is particularly remarkable and notable about those appellate decisions is the high rate at which this Board's decisions have been vacated and the frequent use of scathing language by those appellate courts in describing the reasoning and holdings of this Board. For example, in vacating the Board's decisions, the federal appeals courts for the Fifth Circuit and the District of Columbia have called the Board's reasoning and holdings "illogical", "irrational", "arbitrary" and "nonsense."

Specifically, many Board decisions violate basic adjudicative principles and requirements governing administrative agency decision-making and exhibit a disregard for due process.

- The decisions take away or grant rights to litigants that are not authorized by the NLRA or the U.S. Constitution.
- The decisions ignore U.S. Supreme Court precedent.
- The decisions trigger the major questions doctrine, which prohibits federal administrative agencies from issuing rules and rulings beyond the scope of the statute it administers.
- The decisions violate the Administrative Procedures Act ("APA") rule-making requirements by issuing new standards and rules through adjudicative proceedings, rather than the required notice-and-comment rule-making process.
- The decisions violate the parties' due process rights by applying new standards retroactively and engaging in sand-bagging tactics that deprive parties of the opportunity to address these issues.

The Board's *Cemex* decision is an exemplar of a Board decision that contains all of the grave flaws described above, and which is why the decision should be vacated and the principles articulated in them reversed. First, as described above, its holding deprives workers of rights guaranteed under the NLRA. Second, its holding departs from U.S. Supreme Court precedent under *Gissel* and *Linden Lumber*, and "disregards established law."[29]

Third, by creating a new rule that effectively eliminates the secret ballot election, the Board has essentially amended the text of the NLRA so as to trigger the major questions doctrine. Under the major questions doctrine, an agency may not, by adjudication or rule-making, issue a new standard or rule that is, contrary to, or beyond the scope of, the statute, but may only "color within the lines" of the statute. Only Congress has the authority to make the type of change to the NLRA that this Board made in *Cemex*.

Fourth, in *Cemex*, the Board holding was really an act of rule-making, rather than of adjudication of facts that were before it, in violation of APA rule-making procedures. In *Cemex*, the Board created a new process and procedure to be followed where a union makes a demand for recognition on an employer. However, those facts were not before the Board in *Cemex*. In *Cemex*, the union made no demand for recognition or claim of majority support to the employer, but instead filed an election petition, and lost the election.[30] In other words, the Board created a new standard based on facts that were not before it – but a different hypothetical situation. This is classic rule-making – it is not adjudication. Under the APA, the Board should have gone through the required rule-making procedures before setting these new standards.[31] Further, the Board provided no reasoned basis for changing an existing rule on facts not before it.[32] The Board's decision based on hypothetical facts is thus impermissible rulemaking.

Fifth, the Board violated the due process rights of Cemex and its employees by setting a new standard and applying it retroactively. In *Cemex*, the Administrative Law Judge ("ALJ") refused to overturn the election and issue a bargaining order because the employer's unfair labor practices were not of the type or severity that had influenced the election or would influence a new election. In other words, the election results were not affected by the employer's actions, and accordingly the rejection of the union by a majority of Cemex's employees should have been honored by the Board. Instead, by applying *Cemex* retroactively, the Board is attempting to impose on Cemex's employees a collective bargaining representative that they have not chosen.

The *ultra vires* actions of this Board continue in the aftermath of *Cemex*. In November 2023 and revised in April 2024, GC Abruzzo issued memoranda concerning the *Cemex* decision. These memoranda contain directives to Regional Directors concerning the election process.[33]

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[29] *Cemex,* 372 NLRB No. 130 at 53.

[30] *Cemex*, 372 NLRB No. 130, at 2-3, 26, fn. 141.

[31] Brief in Support of Cemex's Motion for Reconsideration of the Board's August 23, 2023, Decision and Order (hereinafter "Cemex Motion for Reconsideration Brief") at 1, 11-16, filed on September 21, 2023.

[32] Cemex Motion for Reconsideration Brief at 12-16.

[33] GC 24-01 (Revised), Guidance in Response to Inquiries about the Board's Decision in Cemex Construction Materials Pacific, LLC (Apr. 29, 2024).

These directives are outside of the authority of the General Counsel to issue. The Board and the Regional Directors possess exclusive legal authority concerning the process and substance of elections. The NLRB General Counsel has no legal authority over elections and therefore may not issue directives to Regional Directors concerning representation cases whether substantively or procedurally.[34] Further, the memo contains statements and directives that are contrary to existing law, including whether a union is obligated to show evidence of majority support,[35] and the requirements of unit descriptions within Section 5 of RM Petitions.[36] It is apparent that overreach has permeated the entire NLRB structure.

C. Appellate Court Recognition of Board Overreach

The Board's unlawful overreach in its *Cemex* decision is not an isolated incident. The following is a listing and description of other overreaching Board decisions which have been vacated by the federal circuit courts of appeal as being fundamentally unsound and ultra vires. As discussed below, the federal courts of appeal are now operating as the last line of defense against these irrational, illogical, nonsensical, and notably unlawful, Board decisions.

1. *Tesla, Inc.*, 371 NLRB No. 131 (Aug. 29, 2022)

In its *Tesla*[37] decision, the Board altered long-standing rules concerning employer policies requiring employees to wear uniforms. Under its new rule, a dress code or uniform policy that could interfere *in any way* with its employees right to display union insignia is unlawful. Thus, all facially neutral non-discriminatory uniform policies, even if they provide employees a meaningful opportunity to display union insignia, are now presumptively unlawful.[38] Upon review, the U.S. Court of Appeals for the Fifth Circuit vacated the Board's decision and reinstated the Board's *Walmart* decision, finding that "[t]he NLRA does not give the NLRB the authority to make all company uniforms presumptively unlawful."[39]

Specifically, the Fifth Circuit found that the Board had exceeded its authority in issuing its new rule and had gone beyond filling in "the interstices of the [NLRA's] board statutory provisions."[40] The Board had engaged in an unauthorized assumption of a major policy decision properly made by Congress. In addition, the Board failed, as required by the NLRA and U.S.

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[34] GC 24-01, at 2-5.

[35] GC 24-01, at 2, fn. 9.

[36] GC 24-01, at 3, fn. 19.

[37] *Tesla,* 371 NLRB No. 131.

[38] *See generally Tesla,* 371 NLRB No. 131. To find Tesla's uniform policy unlawful, the Board overruled the *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (Dec. 16, 2019) ("*Walmart*"), which held that a where an employer maintains a facially neutral non-discriminatory uniform or apparel policy that has the effect of limiting the size or appearance of union buttons or insignia, but does not prohibit them, the presumption that the policy is illegal is not justified and therefore the employer need not prove that special circumstances justified the policy.

[39] *Tesla, Inc. v. NLRB*, 86 F.4th 640 (5th Cir. Nov. 14, 2023).

[40] Id,. 86 F.4th at 647 (*quoting Beth Israel Hospital v. NLRB*, 437 U.S. 483, 502 (1978)).

Supreme Court precedent to "balance properly the competing interests of 'self-organization' and the 'right of employers to maintain discipline in their establishments.'"[41] In fact, the Board gave no weight to employer interests. In its opinion, the Fifth Circuit described various aspects of the Board's reasoning and decision as follows: "the Board [] irrationally imposed its new rule;" "the NLRB's line-drawing [] is 'illogical [and] arbitrary,'"; "the Board's refusal to [address one of arguments made by the dissent] is demonstrative of the Board's ruling's irrationality;" and "the Board's ruling "rest[s] on erroneous legal foundations" . . .Thus, the rule is irrational."

The question now is whether the Board will conform to the Fifth Circuit's ruling and apply the reinstated *Walmart* principles to uniform policy cases only in the Fifth Circuit or throughout the nation. Given the evidence of its current propensities, it is very unlikely that this Board will pursue the latter policy.

2. *Stern Produce Co.*, 372 NLRB No. 74 (Apr. 11, 2023)

In *Stern Produce Co.*, 372 NLRB No. 74 (Apr. 11, 2023) ("*Stern Produce*"), the Board reversed the ALJ's rulings and held that Stern Produce had violated the NLRA by (1) creating an impression of unlawful surveillance by sending an employee truck driver a text, when he had covered a camera with his jacket, stating that covering cameras inside its trucks was against company policy; and (2) issuing a written warning to another pro-union employee for violating its policy against the use of disparaging or abusive words, phrases, slurs and negative stereotyping toward co-workers.[42] The ALJ found that the message to the first employee did not create an impression of surveillance, since the supervisor had engaged in "mere observation" in line with "longstanding company policies" about truck cameras.[43] For the second employee, the ALJ again agreed with the employer that the warning had not been motivated by the employee's pro-union activities.[44]

The Board reversed the ALJ on both issues, holding that the surveillance was out of the ordinary, and that the supervisor's "sudden and unusual interest" in viewing the employee's camera created an unlawful impression of surveillance[45] and that the written warning was motivated by anti-union animus. It based these decisions upon the employer's knowledge of the employees' involvement in union organizing, the employer's prior unproven unfair labor practice violations, the timing between reinstatement and warning, and alleged disparity in treatment.[46]

On review of this decision, the Court of Appeals for the D.C. Circuit vacated the Board's decision on both counts, calling the Board's explanation for its decision on each count,

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[41] Id. 86 F.4th at 651.

[42] *Stern Produce Co.*, 372 NLRB No. 74, at 1 (Apr. 11, 2023).

[43] *Stern Produce Co.*, 28-CA-282577, at 7-8 (N.L.R.B. Div. of Judges 2022).

[44] *Stern Produce Co.*, 28-CA-282577, at 6-7.

[45] *Stern*, 372 NLRB No. 74, at 2-3.

[46] *Stern*, 372 NLRB No. 74, at 3-6.

"'nonsense.'"[47] The D.C. Circuit Court found numerous errors in the Board's reasoning and rulings:

> At bottom, the Board's errors reveal just how far it strayed from its statutory mandate. Its finding of a Section 8(a)(1) violation cannot be squared with any reasonable understanding of that provision's prohibition on practices that "coerce employees in the exercise of the rights guaranteed" by the Act.[48]

Further, its drawing of negative inferences against the employer based on unsupported and unproven prior unfair labor practice allegations, as the Board did, was "irrational and unsupported by precedent."[49] According to the DC Circuit, on both counts, the Board and the General Counsel in *Stern* had expanded violations under Section 8(a)(1), 8(a)(3), and 8(a)(4) of the NLRA past their intended limits, in "[nonsensical]" fashion and in defiance of the text and the purposes of the NLRA.[50]

3. *Thryv, Inc.*, 372 NLRB No. 22 (Dec. 13, 2022).

In *Thryv, Inc.*, 372 NLRB No. 22 (Dec. 13, 2022) ("*Thryv*"), the Board majority again acted beyond its authority by expanding the categories of "make whole" damages beyond its remedial authority. In *Thryv*, the Board has altered the standard for make whole relief to "all direct or foreseeable pecuniary harms suffered as a result of the respondent's unfair labor practice."[51] This contemplates damages for things such as: (a) credit card interest or late fees to cover living expenses; (b) penalties for premature withdrawals from retirement accounts; (c) loss of a home or car due to inability to keep up on loan payments; (d) compensation for a lowered credit rating, for liquidation of a savings or investment account, and fees or training for loss of a license; (e) health insurance and expenses; (f) moving expenses for reinstatement.[52] Although the General Counsel described these remedies as "consequential damages," the Board majority declined to do so, claiming that consequential damages was a term of art reserved for tort law.[53] In reality, Congress did not authorize consequential damages under the NLRA, only actual make whole damages.[54] As Board members John Ring and Marvin Kaplan highlighted in their dissent, the *Thryv* decision opens "the door to awards of speculative damages that go beyond the Board's remedial authority."[55] Indeed,

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[47] *Stern Produce Company, Inc. v. NLRB*, 97 F.4th 1, 9, and 14 (D.C. Cir. Mar. 26, 2024).

[48] *Id.*, 97 F.4th at 10.

[49] *Id*, 97 F.4th at 14.

[50] *Id.*, 97 F.4th 1, 9, 14.

[51] *Thryv*, 372 NLRB No. 22, at 6, 9, 13.

[52] *Thryv*, 372 NLRB No. 22, at 9-10, 12.

[53] *Thryv*, 372 NLRB No. 22, at 9-10.

[54] *Thryv*, 372 NLRB No. 22, at 8-9, 18-19.

[55] *Thryv*, 372 NLRB No. 22, at 16.

The Fifth Circuit has subsequently vacated the Board's ruling that Thryv had violated the NLRA by failing to bargain in good faith and laying off six employees, which was the part of the Board's decision that was the predicate for its expansion of remedies holding. Agreeing with the ALJ and disagreeing with the Board, the Fifth Circuit concluded that no violation by Thryv occurred with respect to the layoffs, but only on the failures to provide information to the union.

Given that it had vacated the unlawful layoff order and thus the damages award, it was unnecessary for the Fifth Circuit to make a ruling on the damages awards the Board had ordered for those violations.[56] Nevertheless, in its opinion, the Fifth Circuit wrote that the Board had "ordered Thryv to take draconian steps to remedy the alleged [unfair labor practice] violations."[57]

The question now is whether the Board will continue to apply its expanded remedies policy contained in its *Thryv* decision, even though the Fifth Circuit's vacation of the underlying violation should have rendered it mere dictum and thus null and void.

D. The Board's Lack of Neutrality and Violation of Due Process

In its zeal to push its legal policy agenda and re-write the text of the NLRA, this Board has ignored the bedrock concepts of our legal system -- fairness and due process. Judicial restraint and making judgments based on record evidence are not concepts within its purview. In addition to the flaws described previously, this Board has acted unfairly and violated the due process rights of litigants and the public by (1) deliberately misreading or ignoring record evidence in order to find legal violations where none exist; (2) issuing decisions without providing parties with the opportunity to respond; and (3) applying new standards retroactively.

1. The Board's Manipulation of Facts

In a number of recent opinions, the federal circuit courts have criticized the Board for ignoring record evidence or completely misreading record evidence. For instance, in *Absolute Health Care v. NLRB,*[58] the DC Circuit vacated the Board's unfair labor practice finding as not supported by the record, scolding the Board as follows:

> The Board simply ignored all of this evidence. That will not do. The Board cannot ground its decisions on a skewed of "clipped view" of the record. . . . . Its finding of disparate treatment has no anchor in the full record and cannot be sustained. . . . .the Board's reading of the record is not "reasonably defensible."[59]

Other examples of Board decisions based on manipulated and skewed reading of the record in order to find a legal violation as a platform for issuing new law include *Cemex*, *Tesla*, *Thryv*, and *Stern Produce*. In *Cemex*, the Board's holding created a new process and procedure

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[56] *Thryv., Inc. v. NLRB*, No. 23-60132, at 1, 9, 30 (5th Cir. May 24, 2024).

[57] *Thryv., Inc. v. NLRB*, No. 23-60132, at 1.

[58] *Absolute Healthcare v. NLRB*, No. 22-1320 (D.C. Cir. May 31, 2024).

[59] *Absolute Healthcare v. NLRB*, No. 22-1320, at 17.

when a union makes a demand for recognition from an employer on a record in which there was no demand for recognition.

In *Tesla*, the Board simply ignored and failed to address the reasons Tesla gave for its particular uniform policy. The result was the Fifth Circuit's harsh, but merited judgment that the Board's decision was irrational.[60]

In *Thryv,* both the ALJ and the Fifth Circuit concluded, contrary to the Board, that the record established that Thryv had not violated the law by laying off the employees – and that there was "no evidentiary support for its finding."[61] There was also no evidence in the record that the "draconian" remedies awarded by the Board would have been warranted had Thryv's actions been unlawful.

In *Stern Produce*, the ALJ and the D.C. Circuit also concluded, contrary to the Board, that there was no violation of the Act.[62] The D.C. Circuit viewed the Board's holdings to be so strained and unconnected to the record as to be "nonsense."

2. Denials of Due Process

An indispensable aspect of a litigant's due process rights includes an opportunity to be heard on the relevant issues in a case. The Board has used its processes to deny litigants that right. In a particularly egregious instance of a bait-and-switch, the Board infringed upon this right by using a circuit court remand as a vehicle to overturn current precedent, without giving the respondent an opportunity to brief the new issue.[63]

In May 2020, the Board issued a decision, holding that Lion Elastomers had unlawfully disciplined an employee for engaging in aggressive, and abusive conduct during a workplace safety meeting under its *Atlantic Steel* test.[64] Lion Elastomers appealed that decision to the Fifth Circuit. However, a few months later, the Board overturned the *Atlantic Steel* test in *General Motors*, 369 NLRB No. 127 (July 21, 2020). Since *Lion Elastomers* was on appeal before the Fifth Circuit under prior precedent, the current Board requested that the Fifth Circuit remand the case back to the Board so that the Board could consider how application of the *General Motors*

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[60] *Tesla, Inc. v. NLRB*, 86 F.4th 640, 644, 650-653.

[61] Thryv, at 23.

[62] *Stern Produce Co.*, 28-CA-282577, at 5-8 (N.L.R.B. Div. of Judges Jun. 22, 2022).

[63] *Lion Elastomers LLC II*, 372 NLRB No. 83 (May 1, 2023) ("*Lion Elastomers II*")

[64] *Lion Elastomers LLC*, 369 NLRB No. 88 (May 29, 2020) ("*Lion Elastomers I*"). The test in *Atlantic Steel*, 245 NLRB 814, 816 (1979) has been utilized in situations where an employee's abusive conduct occurs in the course of otherwise-protected discussions with employers in the workplace. Specifically, the test examines: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." *See General Motors,* 369 NLRB No. 127, at 1 (July 21, 2020).

test might affect its original 2020 *Lion Elastomers* decision.[65] The Fifth Circuit granted the Board's remand request for this limited purpose.

Lion Elastomers then filed with this Board a post-remand position statement applying the *General Motors* decision. Thereafter, the NLRB General Counsel filed a position-statement requesting that *General Motors* be overturned.[66] The Board did *not* allow Lion Elastomers to reply to or oppose the General Counsel's request,[67] and proceeded to overturn the *General Motors* decision, reinstitute the *Atlantic Steel* test, and re-apply that test to Lion Elastomers for a second time.[68]

Lion Elastomers appealed this second Board decision against it to the Fifth Circuit, correctly claiming that it was denied due process by the Board's duplicitous request for a remand and then by the Board's refusals to allow it to file a brief in response to the General Counsel's request to overturn *General Motors.* As stated in Lion Elastomers' brief before the Fifth Circuit, the Board in *Lion Elastomers II* "specifically denied Lion Elastomers due process to simply be heard on the propriety of the very issue upon which it based its decision in *Lion Elastomers II*."[69] And, the Board did so without providing Lion Elastomers "any indication that it would argue to overturn General Motors."[70] Regardless of whether Lion Elastomers had the opportunity to brief *Atlantic Steel* in *Lion Elastomers I*, in reversing *General Motors* without opposition, "[t]he Board denied Lion Elastomers the chance to persuade it otherwise and address the viability of *General Motors*."[71]

During oral argument before the Fifth Circuit on April 29, 2024, the federal appeals court judges castigated the Board for its actions, "accusing the agency of 'sandbagging' the company involved and 'deliberately' denying it due process."[72] The Board's conduct toward Lion Elastomers and to the Fifth Circuit was improper and unfair. It reeks of bias and an improper collusion with the General Counsel concerning a litigated matter.

3. Retroactive Application of New Law

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[65] *Lion Elastomers LLC II*, 372 NLRB No. 83, at 2 (May 1, 2023) ("[f]ollowing the issuance of *General Motors*, the Board filed an unopposed motion with the Fifth Circuit, asking the court to 'remand the instant case to determine whether General Motors affects the Board's analysis in this case.'").

[66] *Lion Elastomers LLC II*, 372 NLRB No. 83, at 19.

[67] *Lion Elastomers LLC II*, 372 NLRB No. 83, at 19.

[68] *See generally Lion Elastomers LLC II*, 372 NLRB No. 83.

[69] Brief On Petition for Review and Cross-Application for Enforcement of a Decision and Order of the National Labor Relations Board (hereinafter "Lion Elastomers Fifth Circuit Brief"), filed in *Lion Elastomers LLC v. NLRB*, 23-60270, at 28 (5th Cir. Sept. 8, 2023).

[70] Lion Elastomers Fifth Circuit Brief at 33.

[71] Lion Elastomers Fifth Circuit Brief at 35.

[72] "Fifth Circuit Blasts NLRB in Protected Worker Misconduct Case," Daily Labor Report (April 29, 2024).

Traditionally, when the NLRB changes a standard of law that makes previously lawful conduct unlawful, the Board does not apply it retroactively so as to avoid hardship to the parties and the public. The Board continues to make major changes to existing law and applying it retroactively, flippantly denying that there should be any hardship in doing so. In its decisions, the Board continues to disingenuously claim that its new standards are not new and just an extension of existing law to justify its retroactive applications of new law. The Board issued new standards in *Cemex*, *Tesla*, *Thryv* and other decisions – all of which contained major changes to extant law – and applied the new standards to those employers.

In *Cemex*, the Board instituted a new standard for responding to demands for recognition and issuing bargaining orders and applied it to Cemex, even though the ALJ ruled that a bargaining order was not warranted.[73] In *Tesla*, the Board created a new standard for uniform policies, replacing a many-decades-old standard, and applied it retroactively to Tesla.[74] In *Thryv*, the Board expanded the scope of damages it would award, and then awarded these "draconian" new damages against Thryv, even though there was no record of unlawful or egregious conduct.

In issuing these decisions, and finding employers liable for violations under new standards, the Board has deliberately moved the goalposts on employers attempting to comply with the law. The employer in *Cemex* could not have known that a minor unfair labor practice charge leading up to an election would lead to a bargaining order, yet that is exactly what occurred.[75] Tesla could not have known that a facially neutral uniform policy would be considered unlawful.[76] In arguably the most egregious case, *Thryv* could not have known that it would incur a consequential damage award after engaging in an unremarkable layoff that was defensible both under the NLRA and its collective bargaining agreement.[77]

In sum, the Board's rulings and process have shown a "lack of balance"[78] and little regard for the due process rights of litigants, particularly of employers and employees. Indeed, there is no pretense of fairness.

4. Conclusion

Although the federal appellate courts have started vacating some of the Board's more egregious decisions, the appellate court decisions cannot correct and reverse the damage already done to employees and employers and ongoing damage to employees and employers because of the Board's view that appellate court opinions are not binding on the Board generally, but only with respect to the case before the appellate court. The Board views as binding on it only U.S. Supreme Court precedent – although this Board has also even ignored the U.S. Supreme Court in

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[73] *Cemex*, 372 NLRB No. 130, at 25-26.

[74] *Tesla, Inc. v. NLRB*, 86 F.4th 640, 644 (5th Cir. Nov. 14, 2023).

[75] *Cemex*, 372 NLRB No. 130, at 25-26.

[76] *Tesla*, 371 NLRB No. 131, at 1, 23-24.

[77] *Thryv*, 372 NLRB No. 22, at 9-13.

[78] *Telsa, Inc. v. NLRB*, at 14 ("we base our ruling primarily on the lack of balance shown by the NLRB's new rule").

its *Cemex* decision.[79] This means, for instance, that the Board cannot enforce its new uniform policy standard against Tesla because the Fifth Circuit vacated the Board's *Tesla* decision, but may, can, and is likely to, apply it to other employers. This means that unless the U.S. Supreme Court squarely addresses this issue and rules against the Board, the Board will continue to apply this new test that the Fifth Circuit has called "illogical," "irrational," and "arbitrary."

Thus, in spite of these appellate court decisions, employers and employees will still be subject to this Board's overreaching policies and will only be vindicated and able to obtain relief if the employer possesses the stamina and financial resources to re-litigate all of these issues up to the appellate circuit courts. Most small- and medium-size and non-profit employers do not have the financial resources to litigate these matters even up to the Board level and are forced to settle complaints issued by the General Counsel based on these overreaching and unconstitutional legal theories. Of the unfair labor practice charges found to be "meritorious," over 90% are settled. Of these, the vast majority are settled not necessarily because the respondents believe they are at fault but because they did not have the unlimited resources of the federal government to challenge the validity of the charges.

In addition, the regional offices, as directed by the General Counsel, routinely demand in settlement damages and remedies not authorized by the Act or Board law. For instance, in settlement discussions, the General Counsel has demanded front pay to settle unfair labor practice charges, even though front pay damages are not authorized.

Simply put, the actions of this Board, as led by Chair McFerran and General Counsel Abruzzo, are lawless.

II. The Board's Mismanagement of and Misconduct in Election Processing

This Board has grossly mismanaged and mishandled the representation election process by pursuing election policies and procedures that are well-known to be flawed and unfair. Specifically, the Board has over-used the mail ballot election process over the manual in-person secret ballot election process, even though mail ballot elections result in reduced voter participation, increased invalidation of ballots, and greater employee exposure to union coercion, intimidation and misconduct. More troubling, there is now abundant evidence, and findings, of widespread mishandling and "gross mismanagement" of mail ballot elections and improper and biased conduct by NLRB staff members in mail ballot elections, which has been documented in two reports by the NLRB Office of the Inspector General and in a report by the House Committee on Education & the Workforce.[80] And, most troubling, even though NLRB Chair McFerran and General Counsel Abruzzo knew about these mismanagement and misconduct issues in August 15, 2022, through a letter to them from Starbucks's counsel, it is clear this Board has taken no action to assure the public that the widespread election misconduct by NLRB

[79] See Member Kaplan's dissent in *Cemex.*

[80] NLRB OIG Report of Investigation – OIG-I-159 (July 8, 2023) ('OIG Investigation") (Exhibit A); NLRB OIG "Mail Ballot Elections," Report No. OIG-AMR-1010-24-03 (June 6, 2024) ("OIG Audit") (Exhibit B); and "NLRB Mail Ballot Report," Committee Staff Report of the Committee on Education & the Workforce (2024) ("Committee Report") (Exhibit C).

employees has been thoroughly investigated and corrective actions has been taken to ensure such election mismanagement, bias and misconduct will not recur.

Since the inception of the NLRA, the manual in-person secret ballot election has been the norm and considered to be the "gold standard" election process. And, the NLRB has handled manual in-person elections for decades without controversy or complaint about the process.

Pre-COVID-19, mail ballot elections were rare, and were utilized only in extremely rare circumstances where manual elections were not feasible and would result in diminished voter participation:[81]

> The manual election lies at the heart of our system of workplace democracy. It is the cornerstone of [the Board's] contribution to the successful workings of that democracy. Because of this, the [Board's] historic practice has been to hold manual elections except in rare circumstances where such elections are not feasible.[82]

Mail ballot elections were rare because they are considered to be inferior to manual in-person elections for a number of reasons, but primarily they do not effectuate the purposes of the NLRA as well as in-person elections. In person elections are superior in effectuating the purposes of the NLRA because they maximize voter enfranchisement and thus better promote and effectuate democracy in the workplace. First, in-person elections result in much higher voter participation than mail ballot elections. Mail-ballot elections generally result in 15-20% lower voter participation. For instance, in the six-month period pre-pandemic, voter participation was 30% higher in in-person elections and during the COVID-19 pandemic in-person voter participation was 20% higher than mail ballot elections.[83] In-person elections thus result in a truer and more accurate gage of voter sentiment and choice.

Second, because the Board directly supervises in-person elections, it can maintain the "laboratory conditions" of the voting process to ensure voter privacy and security and prevent the improper influencing of employee voters by employers and unions. Mail ballot elections are more vulnerable to the destruction of "laboratory conditions" because the Board is unable to supervise the actual voting process and cannot know if the parties have engaged in prohibited conduct such as helping employees complete the ballot and collecting employees' completed ballots. In short, in mail ballot elections, it is difficult, if not impossible, for the NLRB to ensure ballot privacy and security and to avoid elections interference.[84]

Third, the mail ballot election process is more fraught with logistical problems and irregularities -- ballots get lost in the mail, ballots get misplaced, ballots arrive late, ballots are submitted incorrectly without signatures or on union-provided sample ballots rather than real

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[81] "Maligned Mail Ballots and Whistleblowers: The NLRB's Credibility Comes into Question," Employment Policy Division, U.S. Chamber of Commerce at p. 7 (2023) ("U.S. Chamber of Commerce Mail Ballot Election Report").

[82] *San Diego Gas and Elec.*, 325 NLRB 1143, 1153 (1998) (Members Hurtgen and Brame, dissenting).

[83] U.S. Chamber of Commerce Mail Ballot Election Report at p. 8.

[84] U.S. Chamber of Commerce Mail Ballot Election Report at 8.

ballots.[85] These problems result in a higher rate of invalidated or voided ballots than the in-person elections.[86]

In sum, in-person elections result in greater voter participation and a greater chance that each person's vote will be counted. Coupled with greater voter participation and vote validity, because in-person elections provide greater privacy and secrecy and a better protection from interference, they therefore increase the chance that the election result actually represents the preference of a majority of employees.

At the beginning of the COVID-19 pandemic, the Board suspended all elections from March 19 to April 1, 2020 to determine next steps. Thereafter, it directed Regional Directors to continue to hold elections whether in-person or by mail consistent with safety considerations and protocols. During the remainder of 2020, 2021 and even 2022, the Board continued to direct primarily mail ballot elections,[87] even though there was guidance by July 2020 on how to conduct in-person elections safely, most private sector employees had gone back to in-person work by 2021 and even though President Biden announced that "the pandemic is over" in September 2022.[88]

Thus, the Board was (and is) routinely directing mail ballot elections in situations where the employees in the proposed bargaining unit were going to workplaces each day in which they were working side-by-side with other employees and interacting in person with customers, clients and patients in closer proximity and far longer than they would have during an in-person election using the July 2020 distancing and safety protocols.[89] Exactly whom and what were (and are) being protected by holding mail ballot elections instead of in-person elections in these circumstances?

Further, given the statistics gathered by the Board, it was well aware of the negative consequences of the expanded use of mail ballot elections. The Board knows that voter participation has substantially decreased and that ballot invalidation has substantially increased.[90] Nevertheless it has continued to impose this inferior process on employees.

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[85] U.S. Chamber of Commerce Mail Ballot Election Report at 8-9

[86] In its study, the U.S. Chamber of Commerce found that 2.8% of mail ballot ballots were invalidated as opposed to .4% for in-person elections. U.S. Chamber of Commerce Mail Ballot Election Report at 16.

[87] During the first four months of FY2022, of the 378 elections conducted, 308 were held by mail ballot. See Committee Report at 12. From January 2022 to August 15, 2022, the Board held 97.11% of Starbucks elections by mail and 8.89% in-person. See U.S. Chamber of Commerce Mail Ballot Election Report at 23.

[88] On July 6, 2020, former General Counsel Peter Robb issued a memorandum that suggested protocols for conducting in-person elections safely during the COVID-19 pandemic; and in November 2020, the Board issued guidance on factors to consider when determining whether to direct an in-person or mail ballot election in *Aspirus Keenaw*, 370 NLRB No. 45, slip op. at 3 (2020),

[89] Consider, for instance, Starbucks workers stand behind a counter together and who serve customers across a counter, or hospital workers who regularly work close to each other and touch patients. See, e.g., U.S. Chamber of Commerce Mail Ballot Election Report at 23.

[90] Committee Report at 1, 12-13.

Compounding these negative effects of the mail ballot elections is the mismanagement and misconduct of these elections that this Board has permitted. The House Committee and the NLRB IG have identified "widespread mismanagement, misconduct, and procedural irregularities in the NLRB's administration of mail ballot elections."[91]

Specifically, misconduct was identified in 15 NLRB regions, revealing numerous failures to follow NLRB procedures or breaches of stipulated election agreements, and "irregularities that displayed procedural ineptitude rising to the level of misconduct in the NLRB's administration of mail ballot elections."[92] The "NLRB regions across the country were woefully careless in ensuring that the proper procedures for mail ballot elections were followed."[93] Contrary to proper procedure and election agreements, NLRB officials communicated with union and employer representatives (and without the other party's knowledge) who requested duplicate ballots for employees, responded to union and employer representatives requests about the status of a ballot, and sent ballots at the request of non-employee parties.[94] This conduct compromised employees' anonymity, potentially allowed non-parties to manipulate elections and made the NLRB complicit in such manipulation. An OIG Investigation completed in July 2023 confirmed this "gross mismanagement" by NLRB employees who conducted an election at a Starbucks store in Region 14 and deficient record-keeping in the election's case file.[95]

The OIG Audit issued on June 6, 2024 reviewed mail ballot election procedures for FY2022 and concluded that the NLRB regional offices have not properly handled mail ballots, have inconsistently complied with mail ballot procedures, and that the Board has failed to establish a system of internal controls for the proper management of the mail ballot process.[96] The OIG Audit found many disturbing problems with NLRB procedures and practices with respect to the mail ballot elections. Many of the problems were failures of documentation of its decisions and actions as required by internal case handling manuals. As a result, the OIG could not reach conclusions concerning some substantive issues. For instance, files were missing documentation concerning the Regional Director's basis for directing a mail ballot election.[97] There have been widespread failures to follow the Casehandling Manual requirement that challenged and impounded ballots must be stored in an office safe and a log for the ballots should be maintained by the custodian and also stored in the safe. Only 15 of 26 regions were able to provide documentation that they had complied with this requirement, and only 3 of those 15 regions had collected all of the information required by the Casehandling Manual.[98] This

[91] Committee Report at 1.

[92] Committee Report at 2, 4.

[93] Committee Report at 4.

[94] Committee Report at 4-9.

[95] Committee Report at 10; OIG Investigation.

[96] OIG Audit at 1, 5.

[97] OIG Audit at 7-9.

[98] OIG Audit at 16-17.

means that in most of the NLRB regions there is no proof that chain of custody requirements have been followed and that ballots have not been tampered with. Given the other issues such as improper communication with parties by NLRB staff, this issue puts the credibility of many elections in doubt.

Another very telling chart in the OIG Audit concerns the number of objections made by parties to NLRB actions in the conduct of mail ballot elections in FY2022. There were a large number of objections -- 153 objections -- relating to various categories of objectionable conduct concerning the manner in which the NLRB conducted the mail ballot election. These categories of objectionable conduct included ballots collected by parties or assisting in the voting (12 objections), communication about voting and picking up/hand delivering ballots (10 objections), tampering with ballots/coercion and misstatements regarding procedures (12 objections), ballot counting, void ballots and timing (43 objections), not following election procedures not otherwise categorized (19 objections), the appropriateness of a mail ballot election (12 objections), and low voter turnout (12 objections).[99] These are very damning statistics.

The conclusions of these reports place a cloud on the integrity of the Board-conducted mail ballot elections of the last several years and on the Board as a neutral arbiter and administrator of the NLRA. Board elections have been conducted by mail ballot election far longer than COVID-19 restrictions required. Chair McFerran has long been an advocate for alternatives to in-person manual elections, even though the alternatives are highly problematic and clearly inferior. Why would this Board pursue an election procedure that diminishes voter enfranchisement and impedes democratic participation? Is the imposition of mail ballot, instead of in-person, elections, like the decision in *Cemex*, part of the Board's policy to disenfranchise workers?

Mail ballot elections only favor unions – they don't favor employees. Unions tend to win mail ballot elections more frequently because of lower voter turnout and the ability of unions to "assist" employees in completing their mail ballots. Does the Board insist on continuing to pursue alternatives to in-person elections and to favor mail ballot elections because they benefit unions?

The damning conclusions of the Committee and OIG reports coupled with the Board's inexplicable pursuit of inferior election processes invites questions concerning the integrity of this NLRB and undermines its credibility as a fair administrator of elections.

III. The Board's Mismanagement of Case Processing

NLRB statistics show a dramatic increase in its case backlog under the current Board. The Board's failure to process cases promptly thwarts the NLRB's mission of resolving labor disputes so as to avoid disruptions to economic activity and commerce.

A key component of the Board's mission to protect workers' rights and foster fairness, rather than unfairness, is the fair and efficient investigation and resolution of unfair labor practice charges. It is a truism that "justice delayed is justice denied." Accordingly, when cases are not

[99] OIG Audit at 24-26.

investigated and resolved promptly and case backlogs grow, the parties are unfairly kept in a holding pattern without resolution for long periods of time and wronged parties are denied justice. The statistics show that case backlogs have dramatically increased under this Board and that it is not properly managing its caseload.

The Board led by former Chair John Ring and former General Counsel Peter Robb made reducing case backlogs a priority, starting in FY2019. In FY2018, the case backlog had soared to 10,873 cases. The backlog was reduced to 10,130 in FY2019 and 9,167 in FY2020. Under the current General Counsel, the backlog increased to 9,435 in FY2021,[100] 13,513 in FY2022 and 17,682 in FY2023. In FY2021 and FY2022, case intake was lower than at any time during the pre-pandemic period.

As shown in the attached chart, titled "National Labor Relations Board Unfair Labor Practice and Union Representation Filings 1936-2023," for decades since the 1980s, total NLRB case filings have decreased each year at a 2-3% average rate until FY2019.[101] In FY2019 -- the last pre-pandemic year -- filings were 20,647 – which was the lowest in NLRB history since at least the 1980s. Due to the COVID-19 pandemic, total case filings in FY2020 dropped to 17,633, a 14% decrease, and in FY2021, dropped to 16,719, a 19% decrease compared to FY2019. In FY2022, total reported case filings reached 20,509, just under the number of total case filings in FY2019. Given these flat numbers, the Agency should have been able to process cases in FY2022 at the same rate as in FY2019. Accordingly, case intake numbers do not and cannot explain this backlog increase.[102]

Although, in FY2023, the NLRB reported total case intake of 22,462, an increase of approximately 1,800 filings over FY2019, this increase in filings in FY2023 may not be as large an increase in actual new cases and workload as it might seem because of "duplicate or multiple" filings. The NLRB charge filing statistics treat separate charges filed against the same employer at the same location on a single day as multiple cases, even though the multiple charges should be treated as a single case because they are based on single set of facts. For instance, in FY2022, there were 3,808 multiple charges filed against the same employer at the same location on the same day. Had the charges been filed in a single charge containing multiple allegations, the number of *cases* would be reduced to 1,598 cases. So although there were 3,808 (2,210 extra unfair labor practice charges) charges filed in FY2022, this yielded only 1,598 new cases. Similarly, in FY2023, there were 3,153 multiple charges filed against the same employer at the same location on the same day. Had these charges been filed in a single charge containing multiple allegations, the number of cases would be reduced to 1,307. So although there were 3,153 (1,846 extra unfair labor practice charges) unfair labor practice charges filed in FY2023, this yielded only 1,307 new cases.

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[100] It should be noted that the in first part of FY2021 to January 20, 2021, the NLRB was led by Chair Ring and GC Robb, which may account for why the increased backlog was so small that year.

[101] See National Labor Relations Board Unfair Labor Practice and Union Representation Filings, 1936 to 2023 ("NLRB Filings Chart") (Exhibit E).

[102] See NLRB Filings Chart.

For staffing purposes, the NLRB consolidates duplicate and multiple charges into a single case and calculates staffing needs per case, not per charge. As explained in the NLRB's Office of Inspector General report on "Performance Based Staffing," OIG-AMR-102-24-02 (March 22, 2024), the NLRB calculates staffing needs as one Board Agent for every 45 *cases,* not charges.[103]

In addition, the OIG Staffing Report found that from FY2014 to FY2022, "despite a decline in case intake, the time to issue complaints from the filing of a charge increased."[104] The report also found that the NLRB's methodology used to assign field staff did not meet "Governmentwide guidance," and "lack[ed] an appropriate system of internal controls." And, "[a]s a result, the Agency is at risk of not allocating FTEs to the Field Offices in a manner that would ensure that it meets its goals and objectives."[105] Thus, as confirmed by the OIG Staffing Report, the increase in case processing times and backlogs are due to the Board's failure to properly manage its caseload.

In sum, analysis of NLRB statistics and the OIG Staffing Report shows that comparing pre-pandemic and post-pandemic case filings and workload, there was *no increase* in NLRB case filings through FY2022, yet case processing and backlogs increased and that there were deficiencies in its system of allocating field office personnel.

With respect to FY2023, when properly analyzed, the unfair labor practice charge filing increase was relatively small and should not have resulted in the dramatic case processing and backlog increase that it did. Further, in December 2022, Congress gave the NLRB an appropriation increase of $25 million from $274.2 million to $299.2 million for FY2023 to hire more staff. This appropriation increase should have been more than enough to hire additional field investigators to address the purported caseload increase and should not have resulted in further deterioration in case processing times and increase in case backlog.

With proper caseload management, the NLRB should have been able to reverse these trends. Nevertheless, the NLRB is now requesting a further $20.8 million appropriation increase to $320 million to hire additional staff. Since the Board already received an appropriation to hire additional staff for the regions for this purported caseload increase, it should be able to manage its case load and improve its performance under its current budget. There is thus no justification for such further appropriation increase based on the current or projected caseload.

IV. Conclusion

The policy agenda and decision-making of this Board are aimed at changing the NLRA into a law that denies employees' free choice by eliminating elections and actively assists unions in becoming collective bargaining representatives of employees without achieving a majority vote. This subverts the purposes of the NLRA and endangers its utility and the effectiveness of the NLRA as a source of labor stability and a pillar of economic growth.

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[103] "Performance Based Staffing, OIG-AMR-102-24-02, at 6 (March 22, 2024) ("OIG Staffing Report") (Exhibit F).

[104] OIG Staffing Report at 5.

[105] OIG Staffing Report at 5.

The current Board Chairman's decisions and legal positions and mismanagement of elections and internal NLRB operations negatively impact the effectiveness of the NLRB, affect its credibility as a neutral arbiter of labor disputes and ultimately undermine respect and its legal authority. Particularly troubling is the silence by the Board concerning its mail ballot election misconduct. This failure goes to the very heart of the function of the NLRB to hold and to assure the public that it is holding fair and unbiased representation elections.

As shown above, this Board's actions and decisions aim to reduce or eliminate secret ballot elections generally, and, when conducting elections, aim to use inferior election processes that disenfranchise workers and which are riddled with improprieties. These actions of disenfranchising workers and running flawed elections run counter to the democratic principles underlying the NLRA and, indeed, to the democratic principles upon which our nation is based.