Below please find Jennifer Abruzzo's response to questions for the record from Representative Joe Wilson (R-SC) relating to the Committee on Education and Workforce HELP Subcommittee hearing titled: "Restoring Balance: Ensuring Fairness and Transparency at the NLRB" Wednesday, June 11, 2025 10:15 A.M.

1. Ms. Abruzzo, you've described the Cemex framework as a lawful evolution of the National Labor Relations Board's authority under the Act, but many see it as a radical departure from precedent.

a. Can you point to where in the Act—textually or by precedent—you believe the Board finds authority to impose bargaining orders based on such minimal showings of support, effectively treating the mere filing of an RC petition as creating a near irrebuttable presumption of majority status?

You may wish to review or re-review GC Memorandum 24-01, dated April 29, 2024, which I issued in response to practitioners' inquiries regarding the application of *Cemex,* as well as the Board's *Cemex* decision and its subsequent order denying the related motion for reconsideration, all of which address this issue.

Specifically, the Board states that its *Cemex* decision is consistent with the Supreme Court precedent of *Gissel*—which makes clear the Supreme Court's view that "a 'Board election is not the only method by which an employer may satisfy itself as to the union's majority status'".

Further, as to statutory authority, it says that, in order to carry out its mandate, Congress in Section 10(a) expressly empowered the Board to prevent unfair labor practices, including, under Section 8(a)(5), employers' refusal to bargain collectively with representatives "designated" for that purpose under Section 9(a). Congress additionally expressly directed, in Section 10(c), that "[i]f . . . the Board shall be of the opinion that any person . . . has engaged in or is engaging in any such unfair labor practice, then the Board shall issue . . . an order requiring such person . . . to take such affirmative action . . . as will effectuate the policies of the Act."

Finally, it notes that the Supreme Court long ago expressly held it "too plain for anything but statement" that the Board has the statutory authority under Section 10(a) and (c) to do what it did here: "[F]oreclose the probability" that "procedural delays necessary fairly to determine charges of unfair labor practices . . . be made the occasion for further procedural delays in connection with repeated requests for elections," by "requir[ing] that an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain. See *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704-705 (1944) (citing 29 U.S.C. §§ 160(a), 160(c)),

b. Given that the Supreme Court in Gissel expressly limited bargaining orders to cases involving egregious employer conduct that undermines a fair election, how do you reconcile Cemex with that standard—especially when even the Ninth Circuit, hardly a conservative court, has cautioned against stretching Gissel too far?

As the Board explained in *Cemex*, a bargaining order will issue when an employer has satisfied the requirements for a violation of Sec. 8(a)(5) by refusing to bargain with a majority designated union in an appropriate unit (consistent with Sec. 9 of the Act) and, if an election petition has been filed, has engaged in unlawful conduct that would require a rerun of the election that otherwise would have served to determine the union's majority status. Thus, a bargaining order under *Cemex* will not be issued to remedy any unfair labor practices, no matter how minor or less extensive. Rather, the bargaining order remedies the employer's unlawful refusal to bargain with the union under Sec. 8(a)(5), and, if an election petition has been filed, the bargaining order will be issued only when the employer's separate unfair labor practices interfered with the election. This framework is entirely consistent with the Act's language and its statutory mandate to further the policy of the United States set forth in Section 1 of the Act "to encourag[e] the practice and procedure of collective bargaining" and to protect, among other things, workers' "full freedom to . . . designat[e] . . . [collective-bargaining] representatives of their own choosing."

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