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Dear Congressman Wilson:

On June 30 you asked me to respond to the following questions. My responses are below.

1. Ms. Abruzzo has 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—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?

(b) Given that the Supreme Court in *Gissel* expressly limited bargaining orders to case involving egregious employer conduct that undermines a fair election, how can *Cemex* be reconciled with that standard—especially when even the Ninth Circuit, hardly a conservative court, has cautioned against stretching *Gissel* too far?

There is no support, either in the text of the National Labor Relations Act or in precedent, for the notion that the Board has authority to impose bargaining orders based on the mere filing of an election petition or an employer's commission of a single, minor unfair labor practice.

Start with the statute. Section 7 of the NLRA guarantees employees an equal right to choose or reject a union. 29 U.S.C. § 157. Section 8(a)(2) makes it unlawful for an employer to recognize a union that lacks majority support. 29 U.S.C. § 158(a)(2). As the Supreme Court has made clear, "[t]here could be no clearer abridgement" of the Act than imposing exclusive representation on a majority of employees who do not want it. *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737–39 (1961).

While Section 9 of the NLRA allows an employer to voluntarily recognize a union upon a valid showing of majority support, the Supreme Court held in *Linden Lumber Div. v. NLRB*, 419 U.S. 301, 310 (1974), that if an employer declines recognition, the burden is on the union to request a Board-supervised secret-ballot election. It is not an unfair labor practice for the employer to insist on an election. Indeed, the Supreme Court in *Gissel* described elections as the "preferred" method

for determining majority support, noting that union authorization cards are "admittedly inferior." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602–03 (1969).

The *Cemex* framework defies these precedents. Under *Cemex Construction Materials Pacific*, 372 NLRB No. 130 (2023), if a union claims majority support and demands recognition, the employer must either: (1) accede, or (2) file an election petition within two weeks. If the employer fails to do either the Board will order the employer to recognize and bargain with the union. And even if the employer moves for a secret ballot election and the employees reject the union in the secret-ballot election, the Board may still impose the union on employees through a bargaining order if the agency finds that *any* unfair labor practice was committed during the election period, no matter how minor. See *Cemex*, slip op. at 25 & n.139; 51 (Kaplan, dissenting) (noting the "zero-tolerance standard").

This approach directly contradicts *Gissel*, which limited bargaining orders to exceptional cases involving "hallmark" violations that make a fair election impossible. *Cemex*, by contrast, makes bargaining orders the rule rather than the exception—even for trivial or technical violations. The *Cemex* rule also violates *Linden Lumber*, where the Court rejected placing the burden to request elections on employers. Yet under *Cemex*, an employer that fails to act within two weeks of a union demand may face a bargaining order regardless of actual employee support.

There is no way to reconcile *Cemex* with *Gissel*. Courts, even the Ninth Circuit, have called bargaining orders "extreme" remedies, *Gardner Mech. Servs., Inc. v. NLRB*, 115 F.3d 636, 642 (9th Cir. 1997), because imposing a union without an election poses a great risk of overriding the will of the majority of employees. Worse, the Board's various bars prevent employees from challenging a union's representation for up to a year—and up to four years if the parties agree to a contract in the meantime. The result is that the right to *choose* a union is elevated far above the right to *reject* one.

While the Biden Board and former General Counsel Abruzzo claim bargaining orders are necessary to deter employer misconduct, courts have consistently rejected any approach that "mechanically places deterrence above employee free choice." *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 45 n.18 (D.C. Cir. 1980). And even where an employer commits a serious unfair labor practice, the Board has a long history of competently holding re-run elections. Secret ballot elections, not *Cemex* bargaining orders, truly uphold employee free choice.

In short, *Cemex* is a radical and legally unsupported departure from the text, structure, and purpose of the NLRA. It upends employee free choice, marginalizes secret-ballot elections, and defies controlling Supreme Court precedent. It should be swiftly overturned.

/s/ Aaron Solem
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