Nos. 23-2081, 23-2302, 23-2377

In the United States Court of Appeals
FOR THE NINTH CIRCUIT

CEMEX CONSTRUCTION MATERIALS PACIFIC, LLC,
Petitioner/Cross-Respondent,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Petitioner/Intervenor.

On Petition for Review and Cross-Application for Enforcement
of an Order of the National Labor Relations Board

BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AMERICAN HOTEL & LODGING ASSOCIATION, AMERICAN TRUCKING ASSOCIATIONS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR A DEMOCRATIC WORKPLACE, COUNCIL ON LABOR LAW EQUALITY, FMI – THE FOOD INDUSTRY ASSOCIATION, HR POLICY ASSOCIATION, INDEPENDENT ELECTRICAL CONTRACTORS, INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION, INTERNATIONAL FRANCHISE ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, INC., AND NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF CEMEX CONSTRUCTION MATERIALS PACIFIC, LLC

JONATHAN C. FRITTS
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
T. 202.739.3000

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* Associated Builders and Contractors, Associated General Contractors of America, American Hotel & Lodging Association, American Trucking Associations, Inc., Chamber of Commerce of the United States of America, Coalition for a Democratic Workplace, Council on Labor Law Equality, FMI – The Food Industry Association, HR Policy Association, Independent Electrical Contractors, International Foodservice Distributors Association, International Franchise Association, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Federation of Independent Business, Inc., and National Retail Federation each certify that it has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Rules

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Associated Builders and Contractors ("ABC") is a national construction industry trade association that represents members consisting largely of firms performing work in the industrial and commercial sectors of the U.S. construction industry. ABC represents more than 22,000 members, spanning across all specialties.

Associated General Contractors of America ("AGC") is a nationwide trade association of commercial construction companies and of service providers and suppliers to such companies. Founded in 1918, AGC now has 89 chapters, including at least one in every state, and over 27,000 member firms. AGC represents both union- and open-shop contractors engaged in building, heavy, civil, industrial, utility, and other construction. The association provides a full range of services to meet the needs and concerns of its members, thereby improving the quality of construction and protecting the public interest.

The **American Hotel & Lodging Association** ("AHLA") is the national association representing all segments of the U.S. lodging industry, and members

[1] Pursuant to Fed. R. App. P. 29(a)(2) and 29(a)(4)(E), *amici curiae* state that all parties have consented to the filing of this brief and that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the brief's preparation or submission; and no other person except *amici*, their counsel, and/or their members contributed money to fund the brief's preparation or submission.

include hotel owners, real estate investment trusts, chains, franchisees, management companies, independent properties, bed & breakfasts, state hotel associations, and industry suppliers.

American Trucking Associations, Inc. ("ATA"), is the national association of the trucking industry. Its direct membership includes over 3,000 trucking companies, movers, and industry suppliers, and in conjunction with 50 affiliated state trucking organizations, ATA represents over 30,000 motor carriers of every size, type, and class of operation, who collectively haul a significant portion of the freight transported by truck in the United States. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including this Court.

The **Chamber of Commerce of the United States of America** is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The **Coalition for a Democratic Workplace** ("CDW") is a business association comprised of nearly 500 organizations representing millions of businesses that employ tens of millions of workers nationwide in nearly every industry.[2] CDW members are joined by their mutual concern over labor law issues and developments that threaten entrepreneurs, other employers, employees, and economic growth.

The **Council on Labor Law Equality** ("COLLE") is a national association of large employers with partially unionized workforces founded more than 35 years ago to monitor and comment on developments concerning the interpretation of the National Labor Relations Act ("NLRA" or "Act"). COLLE member companies represent the broad scope of private-sector workplaces subject to the Act. COLLE members' economic success and ability to create sustainable jobs depend on a national labor policy characterized by stable, predictable and balanced interpretations of the Act.

FMI – The Food Industry Association ("FMI") works with and on behalf of the entire food industry to advance a safer, healthier, and more efficient consumer food supply chain. FMI brings together a wide range of members across the value chain—from retailers that sell to consumers, to producers that supply food and other

[2] A full list of CDW's members is available at https://myprivateballot.com/about/.

products, as well as a variety of companies providing critical services—to amplify the collective work of the industry. The food industry provides a wide range of full-time, part-time, seasonal, and flexible workforce opportunities in a diverse variety of careers and serves as an essential employer in every community around the country.

The **HR Policy Association** is a public policy advocacy organization that represents the chief human resource officers of nearly 400 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States—nearly 9 percent of the private sector workforce.

Independent Electrical Contractors ("IEC") is the nation's premier trade association representing America's independent electrical and systems contractors with over 50 chapters, representing 3,700 member companies that employ more than 80,000 electrical and systems workers throughout the United States. IEC aggressively works with the industry to promote the concept of free enterprise, open competition, and economic opportunity for all.

International Foodservice Distributors Association ("IFDA") is the premier trade association representing foodservice distributors throughout the United States and around the world. IFDA members play a crucial role in the foodservice supply chain, delivering food and related products to restaurants, K-12

schools, hospitals and care facilities, hotels and resorts, U.S. military bases and government facilities, and other operations that make meals away from home possible. The industry generates $382 billion in sales, employs 431,000 people, and operates 17,100 distribution centers in all 50 states and the District of Columbia.

The **International Franchise Association** ("IFA") is the world's oldest and largest organization representing franchising worldwide. IFA represents all aspects of the franchise business model, with approximately 1,200 franchise brands and 10,000 franchise business owners in addition to approximately 600 industry suppliers who support the franchise sector. For over 60 years, IFA has worked through its government relations, public policy, media relations, and educational programs to advocate for the protection, promotion and enhancement of franchising and the approximately 790,000 franchise establishments that support nearly 8.4 million direct jobs, $825.4 billion of economic output for the U.S. economy, and almost three percent of the Gross Domestic Product. IFA members include franchise companies in over 300 different industries, individual franchisees, and companies that support franchising in marketing, technology solutions, development, operations, and more. As set forth in IFA's bylaws, IFA's mission is to protect, promote, and enhance franchising. This mission includes protecting the franchise sector from harmful labor regulations and administrative and judicial decisions such as the rule that is the subject of this amicus brief.

The **National Association of Manufacturers** ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs 13 million men and women, contributes $2.85 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

National Association of Wholesaler-Distributors ("NAW") is an employer and a non-profit, non-stock, incorporated trade association that represents the wholesale distribution industry—the essential link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is made up of direct member companies and a federation of national, regional, state and local associations which together include approximately 35,000 companies operating nearly 150,000 locations throughout the nation. The overwhelming majority of wholesaler-distributors are small-to-medium-size, closely held businesses. The wholesale distribution industry generates more than $8.2 trillion in annual sales volume and provides stable and well-paying jobs to more than 6 million workers.

The **National Federation of Independent Business, Inc.** ("NFIB") is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

Established in 1911, the **National Retail Federation** ("NRF") is the world's largest retail trade association and the voice of retail worldwide. Retail is the largest private-sector employer in the United States. The NRF's membership includes retailers of all sizes, formats, and channels of distribution, spanning all industries that sell goods and services to consumers. The NRF provides courts with the perspective of the retail industry on important legal issues impacting its members. To ensure that the retail community's position is heard, the NRF often files amicus curiae briefs expressing the views of the retail industry on a variety of topics.

Amici and their members have a strong interest in the framework used to determine majority support for collective bargaining representatives and the duty to bargain with such representatives under the NLRA, 29 U.S.C. §§ 151 *et seq.* The approach that the National Labor Relations Board ("NLRB" or "Board") takes on these issues affects employers and employees across the country. *Amici* have grave concerns about the unprecedented framework adopted here without a rulemaking or even soliciting other interested parties' viewpoints. For the reasons detailed here

and in Cemex's brief, the Court should set aside and decline to enforce the Board's decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

For 50 years, two foundational principles have governed the behavior of unions and employers in union organizing campaigns. First, the NLRB's secret ballot election process is "the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support"; voluntary recognition based on authorization cards is "admittedly inferior to the election process." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602-03 (1969). Second, if an employer is unwilling to voluntarily recognize a union based on authorization cards, the burden is on the union—not the employer—to petition the NLRB to hold a secret ballot election. *Linden Lumber Div. v. NLRB*, 419 U.S. 301, 310 (1974).

Here, a divided NLRB overruled both principles and established an unprecedented framework for union representation elections. Under the framework, authorization cards are the new default way for determining union support. If a union claims to have authorization cards from a majority of employees and demands recognition from the employer, the employer must either accede to that demand or file its own petition for an NLRB election within two weeks. *Cemex*, 372 NLRB No. 130, slip op. at 25 & n.139 (Aug. 25, 2023) (citation omitted). Even if the employer demands an election and wins, the Board will overrule the election result

and order the employer to recognize the union if it finds that the employer committed a single unfair labor practice during the so-called "critical period" between the petition and the election. The message to employers is clear: save yourself a lot of trouble and just recognize the union.

This radical new framework violates the Supreme Court's decisions in *Gissel* and *Linden Lumber* and the structure and legislative history of the NLRA. In *Gissel*, the Court held that bargaining orders are the exception, not the rule, even when the employer commits unfair labor practices during the critical period. The appropriateness of a bargaining order depends on whether the NLRB can conduct a fair rerun election. Here, the Board majority admitted that its new framework deviates from *Gissel*, but adopted it anyway.

In *Linden Lumber*, the Court surveyed the NLRA's text and history and found "no suggestion that Congress wanted to place the burden of getting a secret election on the employer." 419 U.S. at 307. The Board now thinks differently. But it has no authority to interpret the NLRA in a way that contradicts Supreme Court precedent. *See, e.g.*, *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 721 (2001); *ILWU v. NLRB*, 978 F.3d 625, 633 (9th Cir. 2020).

The Board's new framework affects workplaces across the country, yet by the Board's own assessment, it did not affect the outcome of this case. The majority ruled it would enter a bargaining order even under the *Gissel* standard. While *amici*

disagree with that case-specific determination, it underscores the impropriety of the Board's overreach. Creating a radically new standard that affects all employers covered by the NLRA, but makes no difference to the outcome of this case, is a clear example of policymaking by rule, which requires the opportunity for public participation afforded by notice-and-comment procedures.

The principles recognized in *Gissel* and *Linden Lumber* are not random policy choices that can be reversed based on the whim of a Board majority. They are rooted in the structure and legislative history of the NLRA. Selecting representatives of their own choosing—or selecting no representative—is at the core of employees' Section 7 right to self-determination under the NLRA. 29 U.S.C. § 157. And Section 8(a)(2) makes it *unlawful* for an employer to voluntarily recognize a union without an election if a majority of employees do not, in fact, want to be represented by the union. 29 U.S.C. § 158(a)(2). "There could be no clearer abridgement" of employees' rights under Section 7 than for an employer to recognize a union that has not been selected by a majority of employees. *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961). The Board should have solicited public input before so dramatically refashioning the way that labor law ascertains employees' majority support for a union. For this reason, too, its decision here was improper.

ARGUMENT

I. *Cemex* Violates *Gissel* by Dismissing the Possibility of a Rerun Election.

A. The Majority Admits to Adopting Its New Framework Based on Disagreement with *Gissel.*

Under *Cemex*, any employer unfair labor practice that would justify setting aside an election will now produce a bargaining order rather than a rerun election. *Cemex*, 372 NLRB No. 130, slip op. at 26. This makes it extremely easy for the Board to order an employer to recognize and bargain with a union even if the union loses an NLRB-supervised secret ballot election. As Member Kaplan observed, the majority "effectively implemented a zero-tolerance standard" by suggesting that "even a single unfair labor practice will result in a bargaining order." *Id.* at 51 (Kaplan, M., dissenting in part).

Such an easily violated rule is incompatible with *Gissel*. In *Gissel*, the Supreme Court explained that a bargaining order is not appropriate simply because the employer committed unfair labor practices that warrant setting aside the election. 395 U.S. at 610. The unfair labor practices must also make the possibility of a fair rerun election "slight" or entirely nonexistent. *Id.* at 614-15.

In light of this rationale, *Gissel* recognized three categories of cases in which the severity of the unfair labor practices must be weighed against the possibility of holding a fair rerun election:

- The first arises "in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices." *Id.* at 613. A bargaining order is appropriate if the unfair labor practices "are of 'such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had.'" *Id.* at 614 (citation omitted).
- The second arises "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." *Id.* In such a case, a bargaining order is appropriate only "[i]f the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies . . . is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *Id.* at 614-15.
- The third is a "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." *Id.* at 615.

The *Cemex* framework effectively eliminates these three categories of cases and reduces them to a one-size-fits-all approach in which the possibility of a fair rerun

election is ignored. Under the new approach, contrary to *Gissel*, there just are no "minor or less extensive unfair labor practices" that will warrant setting aside an election but "will not sustain a bargaining order." *Id.* *Gissel*'s third category becomes a null set under *Cemex* because *Cemex* rejects *Gissel*'s rationale for bargaining orders.

Gissel, as noted, requires an analysis of whether a fair rerun election can be held. But the *Cemex* majority declares that question irrelevant: "we do not believe that conducting a *new* election . . . can ever be a truly adequate remedy." *Cemex*, 372 NLRB No. 130, slip op. at 26 (emphasis in original). Instead, the majority's approach is driven by a desire to penalize employers who refuse to voluntarily recognize a union and then commit a single unfair labor practice—even one that had no discernible effect on the election—during the critical period. *Id.* ("[A]n employer cannot have it both ways. It may not insist on an election . . . and then violate the Act in a way that prevents employees from exercising free choice in a timely way.").

While the *Gissel* Court did not want an employer to profit from its own misconduct, that consideration alone did not justify a bargaining order. 395 U.S. at 610. The other critical consideration is that employees' support for the union should be determined, if at all possible, through an NLRB-supervised secret ballot election. That is why the *Gissel* Court was unwilling to authorize bargaining orders unless a rerun election would be unlikely "to demonstrate the employees' true, undistorted

desires." *Id.* at 611; *see also, e.g.*, *Gardner Mech. Servs., Inc. v. NLRB*, 115 F.3d 636, 643 (9th Cir. 1997) (setting aside bargaining order because there was "no finding that the unfair labor practices [were] so severe or pervasive as to make a fair election impossible").

The *Cemex* majority does not shy away from its disagreement with *Gissel*. On the contrary, it defends the new regime based on *Gissel*'s supposed "weaknesses" in disincentivizing unfair labor practices. *Cemex*, 372 NLRB No. 130, slip op. at 28; *see also id.* n.152. But the NLRB lacks authority to overturn Supreme Court precedent; only the Supreme Court can do that. *See, e.g.*, *ILWU*, 978 F.3d at 640 (reversing NLRB for adopting an analysis "incompatible with the Supreme Court's"); *Kashem v. Barr*, 941 F.3d 358, 376 (9th Cir. 2019) ("[W]e are mindful of the Supreme Court's repeated admonitions that it is that Court's 'prerogative alone to overrule one of its precedents.'" (citation omitted)).

The *Cemex* majority also expresses frustration with reversals of the Board's bargaining orders in the courts of appeals. It complains that courts "have regularly reached different conclusions about the likely impact of employers' unlawful conduct and the Board's traditional remedies upon employees' ability to exercise free choice in [a future] election." *Cemex*, 372 NLRB No. 130, slip op. at 34. Because the Board's conclusions are subject to review based on the *Gissel* standard, and not some other standard that the NLRB might prefer, "Board bargaining orders

in individual cases become increasingly less likely to issue or be enforced." *Id.* at 35.

Courts have widely recognized that "[a] bargaining order is an 'extreme remedy'" and have often disagreed with the Board's decisions to issue such an order. *Gardner Mech. Servs.*, 115 F.3d at 642. "Because of the extreme nature of a *Gissel* order, courts depart from the usual deference given to the Board's choice of remedy and require that the Board clearly articulate why a bargaining order is warranted and why other remedies are insufficient." *United Steel Workers of Am. v. NLRB*, 482 F.3d 1112, 1117 (9th Cir. 2007). Courts have required the Board to give a "full explanation . . . because of the Board's evident partiality for bargaining orders." *Avecor, Inc. v. NLRB*, 931 F.2d 924, 938 (D.C. Cir. 1991). Yet "[t]he Board continues to ignore these admonitions and, thus, has faced a string of reversals." *Skyline Distributors v. NLRB*, 99 F.3d 403, 410 (D.C. Cir. 1996).

As the majority admits, the new *Cemex* framework rests in significant part on its displeasure about Supreme Court precedent and the circuit courts' application of that precedent. But such displeasure does not authorize the Board to unilaterally rewrite long-settled law. *See, e.g.*, *NLRB v. Ashkenazy Prop. Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987). Even if the Board had such authority, for the reasons discussed next, it unreasonably exercised that authority here.

B. The Majority's Rationale for Rejecting *Gissel* Is Arbitrary and Contrary to Law.

The *Cemex* majority's desire to penalize employers who commit a single unfair labor practice is an especially inappropriate reason to rewrite *Gissel*. While unfair labor practices should not be condoned, the majority's reasoning ignores that many unfair labor practices are the product of the Board's recent invention and are enforced retroactively, so that employer conduct is held to be unlawful only in hindsight. And the Board gives remarkably short shrift to employers' constitutionally and statutorily protected right to free speech during a union organizing campaign.

First, the *Cemex* majority's deterrence rationale is particularly concerning given the many new unfair labor practices that the Board has attempted to recognize in recent years and enforced retroactively. *See, e.g.*, *Tesla, Inc. v. NLRB*, 86 F.4th 640, 644 (5th Cir. 2023) (reversing NLRB's decision that a nondiscriminatory workplace uniform requirement was an unlawful policy).[3] Courts and the Board often disagree over whether certain conduct violates the Act—and the Board's members often disagree among themselves. *Cemex*, 372 NLRB No. 130, slip op. at 41 n.4 (Kaplan, M., dissenting in part). But an employer will get no leniency under

[3] The standard established by the NLRB in *Tesla* was applied retroactively. *Tesla, Inc.*, 371 NLRB No. 131, slip op. at 17-18 (Aug. 29, 2022).

the *Cemex* approach for failing to anticipate a Board majority's retroactive enforcement of a new unfair labor practice.

Second, the *Cemex* majority fails to address the many unfair labor practices that are of a technical nature and do not involve any intent to violate employees' rights. The Board has long insisted that an employer's violation of Section 8(a)(1) does not require a subjectively wrongful mental state, but only an objective tendency to coerce employees. *See, e.g.*, *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1362 (D.C. Cir. 1997) ("[A]n unlawful interference with § 7 rights does not [always] turn on the malevolence or innocence of the employer's *intent*[.]").

As one example, the majority's new standard would support a bargaining order "where employers are found to have violated the Act solely by continuing to maintain a facially neutral work rule implemented long before the critical period began." *Cemex*, 372 NLRB No. 130, slip op. at 51 (Kaplan, M., dissenting in part).[4] The Board has set aside elections based on an employer's "mere maintenance of objectionable rules" even if "none of the rules were actually enforced against employees during the election" and even if "there is no evidence that any employees

[4] The Board's current standard for judging an employer's work rules is another example of a new standard that is being applied retroactively. *Stericycle, Inc.*, 372 NLRB No. 113, slip op. at 13 (Aug. 2, 2023).

were actually deterred from engaging in campaign activity" based on those rules. *Jurys Boston Hotel*, 356 NLRB 927, 929 (2011).

Imposing bargaining orders to deter unfair labor practices can easily "cross the line from a permissible remedy . . . to an impermissible punitive measure," particularly when the "initial violation was marginal and apparently committed in good faith." *Peoples Gas Sys., Inc. v. NLRB*, 629 F.2d 35, 50 (D.C. Cir. 1980); *see also Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940) ("[I]t is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act.").

The *Cemex* majority also disregards the negative effect that its new approach has on employers' free speech rights, which are protected by the First Amendment and Section 8(c) of the NLRA. *See, e.g.*, 29 U.S.C. § 158(c); *Thomas v. Collins*, 323 U.S. 516, 537 (1945) ("[E]mployers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty."). Historically, the Board has often been accused of treating employer speech with disfavor. *See, e.g.*, *Chamber of Com. of U.S. v. Brown*, 554 U.S. 60, 66-67 (2008); *NLRB v. Golub Corp.*, 388 F.2d 921, 926-29 (2d Cir. 1967).

The majority's new zero-tolerance standard will inevitably have a chilling effect on lawful employer speech. As the Supreme Court recently explained, the

First Amendment disfavors speech restrictions that "have the potential to chill, or deter, speech outside their boundaries":

> A speaker may be unsure about the side of a line on which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not. Or he may simply be concerned about the expense of becoming entangled in the legal system. The result is "self-censorship" of speech that could not be proscribed—a "cautious and restrictive exercise" of First Amendment freedoms.

Counterman v. Colorado, 600 U.S. 66, 75 (2023).

The majority's facile conclusion that deterrence justifies the new regime—without acknowledging employers' constitutionally protected interests and the comparative ease with which a well-intentioned employer may cross a wavy and shifting line drawn by the Board—is arbitrary and capricious. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem[.]").

II. *Cemex* Contravenes Congressional Intent and Decades of Precedent Upholding the Primacy of the NLRB's Secret Ballot Election Process.

A. The Majority Purports to Make a Policy Choice That Congress Rejected.

In addition to contradicting *Gissel*, the majority overrules longstanding precedent holding that if an employer is unwilling to voluntarily recognize a union based on authorization cards, the burden is on the union—not the employer—to

petition the NLRB for a secret ballot election. *Linden Lumber*, 419 U.S. at 310 ("Unless an employer has engaged in an unfair labor practice that impairs the electoral process, a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the Board's election procedure.").

As noted, Section 8(a)(2) prohibits employers from voluntarily recognizing a union without an election if a majority of employees do not want the union's representation. 29 U.S.C. § 158(a)(2). The risk of recognizing a union without an NLRB-supervised secret ballot election is a matter of strict liability for the employer. Even if an employer "mistakenly" believes that the union has majority support, the employer nonetheless violates the NLRA by granting recognition. *Int'l Ladies' Garment Workers' Union*, 366 U.S. at 739 ("that prohibited conduct cannot be excused by a showing of good faith"). According to the Supreme Court, the solution for the employer is to withhold recognition until a "Board-conducted election results in majority selection of a representative." *Id.*

Not only does an employer have this right to insist on a secret ballot election, an employer also has the right not to be coerced, through picketing, into recognizing a union without an election. One of the "major aims" of the 1959 amendments to the NLRA was to limit "top-down" union organizing campaigns, in which unions used picketing to coerce recognition "where employees had not been given a chance

to vote on the question of representation." *NVE Constructors, Inc. v. NLRB*, 934 F.2d 1084, 1088 (9th Cir. 1991) (citations omitted). Congress therefore amended the NLRA to include a new provision, Section 8(b)(7)(C), which outlaws so-called recognitional picketing if it continues beyond "a reasonable period of time not to exceed thirty days from the commencement of such picketing." 29 U.S.C. § 158(b)(7)(C). A union "may not picket beyond this time without filing a petition for a representation election." *NVE Constructors*, 934 F.2d at 1086.

The 1959 amendments clearly indicate Congress's preference for secret ballot elections conducted by the NLRB. "Section 8(b)(7)(C) is intended 'to encourage prompt resort to the Board's election machinery, rather than protracted picketing, as the method for resolving questions concerning representation.'" *Id.* at 1090 (citations omitted). Although Congress gave employers the right to file a petition with the NLRB, Congress placed the burden on the union to file the election petition rather than demand voluntary recognition based on authorization cards. As the Supreme Court found in *Linden Lumber*, "[t]here is no suggestion that Congress wanted to place the burden of getting a secret election on the employer." 419 U.S. at 307.

Without grappling with this legislative history, *Cemex* reverses both of the fundamental policy choices made by Congress and recognized by the Supreme Court. First, *Cemex* makes secret ballot elections the exception, not the rule. Unless

an election petition is "promptly" filed—which the *Cemex* majority defines to mean two weeks after the union's demand for recognition—the employer will be obligated to recognize the union without an election. *Cemex*, 372 NLRB No. 130, slip op. at 25 & n. 139. Second, *Cemex* places the burden on the employer, not the union, to file an election petition with the NLRB. *Id.* at 31-32.

These are major policy choices with sweeping implications for workplaces across the country. As such, they are for Congress to make, not the Board. *See, e.g.*, *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) ("We have . . . parted company with the Board's interpretation where it was 'fundamentally inconsistent with the structure of the Act' and an attempt to usurp 'major policy decisions properly made by Congress.'" (citation omitted)); *West Virginia v. EPA*, 597 U.S. 697, 723-24 (2022) (under the "major questions doctrine," agencies must identify "clear congressional authorization" when they "assert[] highly consequential power beyond what Congress could reasonably be understood to have granted").

In the decades since the 1959 amendments, Congress has often considered—but never passed—legislation that would make card check recognition mandatory for employers. For instance, the Employee Free Choice Act ("EFCA"), which was considered by Congress in multiple bills over a six-year period from 2003 to 2009,[5]

[5] Employee Free Choice Act, H.R. 3619, 108th Cong. (2003) (https://www.congress.gov/bill/108th-congress/house-bill/3619); Employee Free Choice Act, S. 1925, 108th Cong. (2003) (https://www.congress.gov/bill/108th-

would have required an employer to recognize a union, without an election, if a majority of employees signed authorization cards. There was vigorous debate over that legislation, but it never passed. Then, similar legislation (the so-called Workplace Democracy Act) was introduced in 2015,[6] and EFCA was re-introduced in 2016.[7] Those bills were not successful either.

This history of failed efforts to enact legislation requiring employers to recognize a union based on authorization cards, rather than an NLRB election, is a repudiation of the policy choice that the *Cemex* majority ventured to make when it reversed its decision in *Linden Lumber*, 190 NLRB 718 (1971). That decision, which the Supreme Court affirmed, held that an employer should not be found guilty of an unfair labor practice "solely upon the basis of its refusal to accept evidence of

---

congress/senate-bill/1925); Employee Free Choice Act, H.R. 1696, 109th Cong. (2005) (https://www.congress.gov/bill/109th-congress/house-bill/1696); Employee Free Choice Act, S. 842, 109th Cong. (2005) (https://www.congress.gov/bill/109th-congress/senate-bill/842); Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (2007) (https://www.congress.gov/bill/110th-congress/house-bill/800); Employee Free Choice Act of 2007, S. 1041, 110th Cong. (2007) (https://www.congress.gov/bill/110th-congress/senate-bill/1041); Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009) (https://www.congress.gov/bill/111th-congress/house-bill/1409); Employee Free Choice Act of 2009, S. 560, 111th Cong. (2009) (https://www.congress.gov/bill/111th-congress/senate-bill/560).

[6] Workplace Democracy Act, H.R. 3690, 114th Cong. (2015) (https://www.congress.gov/bill/114th-congress/house-bill/3690); Workplace Democracy Act, S. 2142, 114th Cong. (2015) (https://www.congress.gov/bill/114th-congress/senate-bill/2142).

[7] Employee Free Choice Act of 2016, H.R. 5000, 114th Cong. (2016) (https://www.congress.gov/bill/114th-congress/house-bill/5000).

majority status other than the results of a Board election." *Id.* at 721. That holding was not conditioned on the employer promptly filing an election petition, much less within the arbitrary two-week deadline set by the *Cemex* majority. *Id.*

Congress's repeated failure to enact legislation overturning *Linden Lumber* is persuasive evidence that *Linden Lumber* reflects Congress's intended interpretation of the NLRA. *See NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 275 (1974) ("congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress").

B. *Cemex* Arbitrarily Disregards the Clear Preference for Secret Ballot Elections as the Method for Determining a Union's Majority Status.

The new *Cemex* regime relies on authorization cards and bargaining orders as the default method for designating a union as the exclusive bargaining representative for a group of employees. Unions no longer have any obligation to petition the NLRB for a secret ballot election, although unions may choose to do so if it suits their interests. *See Cemex*, 372 NLRB No. 130, slip op. at 25 n.140.

Instead of requiring a union to put its claim of majority status to the test of a secret ballot election, *Cemex* gives the union the option of demanding recognition in a way that will confound the employer's ability to file an election petition within a brief, two-week window after the demand. The union can arbitrarily choose when and how to present the demand to the employer. According to the NLRB's General

Counsel, the demand can take "many forms" and may be "verbal or written." Office of the General Counsel, Memorandum GC 24-01 at 2 n.8 (Nov. 2, 2023), https://www.nlrb.gov/guidance/key-reference-materials/GC-resources-Cemex.

Furthermore, the demand "does not need to be made on any particular officer or registered agent of an employer." *Id.* at 2 n.7. It can be made on any person who is "acting as an agent of an employer" even if that person has no understanding of the legal significance of the demand or authority to respond to it. *Id.*

Even if the demand for recognition is made on a knowledgeable agent of the employer who asks the union to provide evidence of majority support, the union "is not obligated to show it." *Id.* at 2 n.9. The employer may engage a neutral third party to review the evidence of majority support—if the union chooses to provide it—but the process of obtaining the evidence and engaging a third party to review it "will not toll the employer's two-week deadline for filing an RM petition." *Id.* Thus, the NLRB is applying *Cemex* in a way that makes the two-week timeframe for filing an election petition even shorter, as a practical matter, which further diminishes the possibility of an election.

The narrow window for filing an election petition under *Cemex*, coupled with the drastically reduced standard for issuing a bargaining order even if the union loses the election, means that union representation will in most cases be established based on authorization cards rather than an election. The *Cemex* majority dismissed the

many reasons why the Board and the courts historically have been unwilling to rely on authorization cards in this way.

1. Peer Pressure

"[E]mployees may sign a union card not because they want the union as their bargaining representative but because they feel pressured by their coworkers to sign." *Cemex*, 372 NLRB No. 130, slip op. at 42 (Kaplan, M., dissenting in part). This is a prime reason why courts have found authorization cards to be less reliable than a secret ballot election. *Id.* (citing *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983); *NLRB v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383 (2d Cir. 1973)).

2. Lack of Information

Authorization cards may reflect "a less than fully informed choice." *Cemex*, 372 NLRB No. 130, slip op. at 42 (Kaplan, M., dissenting in part). As Member Kaplan correctly observed, a card-signing campaign may be, and often is, "conducted outside an employer's awareness." *Id.* As a result, employees may sign authorization cards based on one-sided and misleading information presented by the union. This is contrary to what the NLRB has "long recognized" as an important goal of the election process: "ensuring that employees have 'an effective opportunity to hear the arguments concerning representation.'" *Id.* (citing *Excelsior Underwear Inc.*, 156 NLRB 1236, 1240 (1966)).

As discussed above, employers have the right, under Section 8(c) of the NLRA and the First Amendment, to communicate information to employees about union representation. Without any information from the employer, employees' freedom to choose whether to be represented by a union "will not be a real freedom, but rather a circumscribed freedom based on partial information." *Id.* at 42-43.

3. Misrepresentation or Coercion

Authorization cards do not reflect employees' true desires if the union misrepresented the nature or purpose of the card. *See Gissel*, 395 U.S. at 604 (recognizing "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").

The *Cemex* majority attempts to justify its disregard for these concerns by pointing to the *Gissel* Court's statement that authorization cards are not "such inherently unreliable indicators of employee desire that they may not establish a union's majority status and an enforceable bargaining obligation." *Cemex*, 372 NLRB No. 130, slip op. at 33 (citing *Gissel*, 395 U.S. at 601, 607). But this statement does not support the *Cemex* majority's extraordinary leap to make authorization cards the default method for establishing union representation.

Although the *Gissel* Court conceded that authorization cards are not "inherently unreliable," the Court nonetheless found them "admittedly inferior to the election process" and affirmed the fundamental principle that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *Gissel*, 395 U.S. at 602-03. The Court, in other words, found that reliance on authorization cards should be the exception, not the rule, and only when the possibility of holding a fair election is "slight." *Id.* at 614.

The *Cemex* majority's attempt to flip that presumption and make secret ballot elections the exception rather than the rule is clearly contrary to *Gissel* and *Linden Lumber.* The Board's interpretations of Supreme Court precedent receive no deference, *e.g.*, *N.Y. N.Y., LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002), and this one should be easily rejected.

III. *Cemex*'s Reinvention of the Framework for Representation Elections Violates Basic Principles of Administrative Law.

One of the most striking things about the *Cemex* majority's new framework is that it is wholly unnecessary in this case. While the Administrative Law Judge found that a bargaining order was unwarranted under the *Gissel* standard, the majority disagreed. *Cemex*, 372 NLRB No. 130, slip op. at 12-19. Given the majority's ruling under the *Gissel* standard, the new approach had no impact on the outcome of this case, as the majority admitted. *Id.* at 30.

Particularly because it was unnecessary to the outcome, the majority acted unlawfully in adopting a radical new standard within the confines of a single case adjudication. The Board has rulemaking authority but chose not to exercise it. *See* 29 U.S.C. § 156. This rulemaking authority was "designed to assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion). A rulemaking requires publishing the proposed rule in the Federal Register and allowing all interested parties an opportunity to submit comments on the proposed rule. *Id.* at 764-65; *see* 5 U.S.C. § 553. The Supreme Court has acknowledged "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act." *Bell Aerospace*, 416 U.S. at 294.

This case presents such a situation. By definition, "adjudications resolve disputes among specific individuals in specific cases" and "have an immediate effect on . . . those involved in the dispute," while "rulemaking affects the rights of broad classes of unspecified individuals," "is prospective, and has a definitive effect on individuals only after the rule subsequently is applied." *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994).

Here, the *Cemex* majority announced entirely new standards and procedures in an adjudicative proceeding, even though they made no difference to the outcome here. But "[a]n agency cannot avoid the requirement of notice-and-comment

rulemaking simply by characterizing its decision as an adjudication." *Id.* at 449 (citing *Wyman-Gordon*, 394 U.S. at 764). Substance controls over form. Issuing a quasi-legislative revision to federal labor law in a case where it has no effect on the outcome is a textbook example of a rulemaking in an adjudication's clothing. Because the new framework is, in substance, a rule issued without notice-and-comment rulemaking, the Court should set aside that part of the NLRB's decision. *Id.* at 449; *see also Safari Club Int'l v. Zinke*, 878 F.3d 316, 320-21 (D.C. Cir. 2017).

CONCLUSION

For these reasons, the Court should set aside and decline to enforce the Board's order.

Dated: February 9, 2024

Respectfully submitted,

/s/ Jonathan C. Fritts

JONATHAN C. FRITTS
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
T. 202.739.3000
jonathan.fritts@morganlewis.com
Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 23-2081, 23-2302, 23-2377

I am the attorney or self-represented party.

This brief contains 6,782 **words,** including _____ words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[**x**] is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties.
- [ ] a party or parties are filing a single brief in response to multiple briefs.
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Jonathan C. Fritts **Date** February 9, 2024
*(use "*s/[typed name]*" to sign electronically-filed documents)*