Statement of
Philip A. Miscimarra
Partner, Morgan Lewis & Bockius LLP
Senior Fellow, The Wharton School, University of Pennsylvania
before the
Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor and Pensions
United States House of Representatives

Hearing on "Protecting Employees' Rights: Ensuring Fair Elections at the NLRB"

May 23, 2023

Labor Law Without Boundaries?
The NLRB's Duty to Respect Congress, the Constitution and Employee Rights

Subcommittee Chairman Good, Ranking Member DeSaulnier, and other Subcommittee Members, and Committee Chairwomen Foxx and Committee Ranking Member Scott, thank you for the invitation to participate in this hearing. I am honored to be here.[1]

I am a partner in the law firm, Morgan Lewis & Bockius LLP, and I previously had the privilege of serving as Chairman of the National Labor Relations Board ("NLRB" or "Board"), in addition to being a Board Member and Acting Chairman. I was appointed to the NLRB by President Obama and most of my tenure as a Board Member occurred during the Obama administration, commencing in August 2013. My last year at the Board, ending in December 2017, occurred during the Trump administration. I am also a Senior Fellow in the Wharton Center for Human Resources at the University of Pennsylvania's Wharton School.[2] Excluding my time at the NLRB, I have been affiliated with the Wharton Center for Human Resources and have been a labor lawyer in private practice representing management for more than 35 years.

The NLRB's Overriding Responsibilities – Respecting Decisions by Congress, Protecting Constitutional Rights, and Preserving Employee Free Choice

The NLRB is charged with the "difficult and delicate responsibility" of enforcing the National Labor Relations Act ("NLRA" or "Act").[3] However, the NLRB cannot do whatever it wants when resolving the competing interests of employees, unions, employers, and the public. As I stated during my Senate confirmation hearing before serving on the Board, "labor law policy originates with Congress, not with members of the NLRB."[4]

---

[1] My testimony today reflects my personal views, which should not be attributed to Morgan Lewis & Bockius LLP or its clients, The Wharton School, the University of Pennsylvania, or any other persons or entities. I am grateful to Morgan McGreevy for his assistance.

[2] In my academic work, I have written or coauthored three books dealing with NLRB case law in addition to other publications. *See* note 6 below.

[3] *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 499 (1960), *quoting NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957). *See also NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). *Accord: NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 496-97 (1985); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1978); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

[4] Senate Committee on Health, Education, Labor, and Pensions, "Pending Nominations to the National Labor Relations Board," 113th Cong., 1st Sess., at 24 (May 16, 2013).

I respect the NLRB Chairman, other Board Members, the General Counsel, and the work done by the Agency's talented attorneys and professionals. The Board deals with many controversial issues,[5] and disagreements sometimes arise among Board Members, the General Counsel, Administrative Law Judges ("ALJs"), and the courts.[6]

However, there is no dispute about four fundamental responsibilities that the Board should satisfy in everything it does.

First, Congress draws the lines that create labor law policy, and the Board must color within those lines. Decision-making concerning our federal labor laws is the province of Congress.[7]

Second, the Board (*and* Congress) are constrained by the United States Constitution, which includes the First Amendment right to engage in free speech.[8]

Third, employee free choice is the bedrock principle that pervades the NLRA.[9] Congress gave the NLRB only two functions, one of which involves conducting secret-ballot elections,

---

[5] Nearly every NLRB case has a winner and loser, and Former NLRB Chairman John Fanning – who served on the Board for nearly 25 years – stated: "Labor relations has always been a field that arouses strong emotions – sometimes more emotion than reason" and "the *one factor every case has in common . . . is the presence of at least two people who see things completely different*." John Fanning, "The National Labor Relations Act: Its Past and Its Future," *quoted in* Matthew M. Bodah, *Congress and the National Labor Relations Board: A Review of the Recent Past*, 22 J. Lab. Res. 699, 713 (Fall 2001).

[6] I have previously written: "Even with the luxury of backward-looking analysis after the relevant events have already occurred, in many cases NLRB members have been unable to agree among themselves concerning applicable standards. In other cases, a similar tug-of-war has been evident between the NLRB, its ALJs and/or the courts of appeals." Philip A. Miscimarra, Ronald Turner, Ross H. Friedman, Shannon M. Callahan, Brandon R. Conrad, Michael E. Lignowski & Andrew Scroggins, THE NLRB AND MANAGERIAL DISCRETION: SUBCONTRACTING, RELOCATIONS, CLOSINGS, SALES, LAYOFFS, AND TECHNOLOGICAL CHANGE 568 (2d ed. 2010). I have described similar differences and disagreements in two other books dealing with NLRB case law. *See* Philip A. Miscimarra, Alan D. Berkowitz, Matthew L. Wiener & Joshua L. Ditelberg, THE NLRB AND SECONDARY BOYCOTTS (3d ed. 2002); Herbert R. Northrup & Philip A. Miscimarra, GOVERNMENT PROTECTION OF EMPLOYEES INVOLVED IN MERGERS AND ACQUISITIONS (1st ed. 1989 and 1997 supp.).

[7] The Supreme Court has stated that the NLRB is *not* vested with "general authority to define national labor policy by balancing the competing interests of labor and management." *American Ship Building Co. v. NLRB,* 380 U.S. 300, 316 (1965). *See also NLRB v. Brown*, 380 U.S. 278, 291-92 (1965) (the courts must prevent the NLRB from engaging in "the unauthorized assumption . . . of major policy decisions properly made by Congress'" when agency actions are "inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute").

The NLRA, 49 Stat. 449 (1935), 29 U.S.C. §§ 151 *et seq*., originally known as the Wagner Act, was adopted in 1935 after 18 months of work by the House and Senate. Important NLRA amendments were adopted in 1947 as part of the Labor Management Relations Act (the Taft-Hartley Act), 61 Stat. 136 (1947), 29 U.S.C. §§ 141 *et seq*. The Act was also substantially amended in 1959 as part of the Labor Management Reporting and Disclosure Act (the Landrum-Griffin Act), 73 Stat. 541 (1959), 29 U.S.C. §§ 401 *et seq*. And in 1974 the Act was amended based on the Health Care Amendments to the National Labor Relations Act, 88 Stat. 395 (1974).

[8] U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

[9] Section 7 of the NLRA states that employees "shall have the right to *self-organization*, to form, join, or assist labor organizations, to bargain collectively through representatives *of their own choosing*, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right *to refrain from any or all of such activities*. . . ." 29 U.S.C. § 157 (emphasis added).

The NLRA's other provisions give effect to Section 7's protection of employee free choice. For example, Section 9(a) establishes the dual concepts of "majority rule" and "exclusive representation" – it states that any union selected by the *majority* of employees in an appropriate bargaining unit becomes the exclusive representative of *all* employees in the unit for purposes of collective bargaining. The focus on "majority rule" places great importance on what is found to be an "appropriate" bargaining unit, because this determines what employees can *participate* in the decision

and in election cases, the statute commands that the Board "in *each case* . . . assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act."[10]

Fourth, Congress intended that the Board would resolve disputes and conduct union representation elections in an impartial, even-handed manner.[11] Indeed, the Board uses the phrase "laboratory conditions" to describe its role in election cases, which is "to provide a laboratory in which an experiment may be conducted, *under conditions as nearly ideal as possible*, to determine the uninhibited desires of the employees."[12]

Several recent NLRB developments, in my opinion, are inconsistent with these fundamental responsibilities. I will comment on three examples:

1. *Asserting that Employer Speech in the Workplace Is "Inherently" Unlawful.* In numerous cases, the NLRB General Counsel is prosecuting claims that all employer discussions in the workplace about union issues and other "statutory labor rights" are "inherently" unlawful, even when nothing stated by the employer is threatening or coercive. However, Congress adopted amendments to the NLRA in 1947 – as part of the Taft-Hartley Act – which enacted NLRA Section 8(c) to repudiate this precise argument, because any finding that employer speech is inherently unlawful violates the First Amendment. These claims in the current NLRB cases disregard the Constitution, multiple Supreme Court cases, and settled law that has existed for 75 years. *See* pages 4-12 below.

2. *Asserting that Employers Must Recognize Unions, Without Any Employee Voting in NLRB Secret Ballot Elections.* In other cases, the General Counsel contends existing law requires all employers to grant immediate union recognition – without any employee voting in an NLRB secret ballot election – whenever a union claims it has employee majority support. The only exception would be rare situations where the employer can prove a negative (i.e., that good faith reasons exist to believe the union *lacks* employee majority support). Incredibly, this means the NLRB – whose core responsibility is to *conduct* secret ballot elections that safeguard employee free choice – is now claiming it is unlawful to expect that employees should vote in an NLRB secret ballot election to determine employee sentiments about being represented. These cases – which eliminate or override the outcome of employee voting in NLRB elections for U.S. employees – are contrary to two Supreme Court cases, numerous courts of appeals decisions, Congress' adoption of the USMCA (which governs trade between the U.S., Canada and Mexico), and settled law that has existed for more than 50 years. *See* pages 12-20 below.

3. *Indifference and Lack of Transparency Regarding Election Irregularities*. The NLRB has had a long track record of conducting secret ballot elections in a way that instills great public confidence in the Board's neutrality and the integrity of every election. However, in the past 2-

---

about union representation, and what employees *are bound* by the decision. Here again, the focus is on what type of bargaining unit assures employees their "fullest freedom" in exercising this right.

[10] NLRA § 9(b), 29 U.S.C. § 159(b) (emphasis added) (describing Board bargaining unit determinations). The Board's second primary responsibility – apart from conducting elections and resolving questions concerning representation – is to decide unfair labor practice cases. *See* NLRA § 10, 29 U.S.C. § 160.

[11] The Supreme Court has held that "the Act is *not* intended to serve either party's individual interest, but *to foster in a neutral manner* a system in which the conflict between these interests may be resolved." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680-81 (1981) (emphasis added). *See also NLRB v. Great Dane Trailers, Inc.*, 388 U.S. at 33–34 (referring to the Board's "duty to strike the proper balance" regarding employer interests and "employee rights in light of the Act and its policy").

[12] *General Shoe Corp.*, 77 NLRB 124, 127 (1948) (emphasis added), *enforced*, 192 F.2d 504 (6th Cir. 1951).

1/2 years, this confidence has eroded based on cases involving significant election irregularities, some reported by an NLRB career professional (represented by former Congressman Bradley Byrne) whose disclosures have whistleblower protection.[13] The Board has responded to these problems with surprising indifference and a failure to address these issues in a transparent manner. *See* pages 20-22 below.

I will briefly address each of these topics.

1. NLRB Cases Claiming that Employer Speech is "Inherently" Unlawful Violate the First Amendment and NLRA Section 8(c)

In numerous cases, the NLRB General Counsel claims that employer discussions about union issues and other NLRA-protected rights are "inherently" unlawful.[14] The General Counsel contends that employer discussions with employees about the "exercise of statutory labor rights" are prohibited because such discussions "inherently involve an unlawful threat."[15]

(a) Scope of the General Counsel's Speech Prohibitions. The General Counsel prohibition of employer speech is based on claims alleging that every union-related discussion between an employer and employees on paid time is "per se unlawful."[16] This contention is justified, according to the General Counsel, by the "inequality of bargaining power" and "economic dependence" of employees on employers.[17]

Although the General Counsel uses the term "mandatory meetings" when describing these speech restrictions, the restrictions are *not* limited to "meetings" – they also apply to one-

[13] Senate Committee on Health, Education, Labor and Pensions, "Statement of the Honorable Bradley Byrne," at 2 (March 29, 2023) (hereinafter "Byrne testimony"). While serving in Congress, Representative Byrne served for seven years on the House Committee on Education and the Workforce. *Id.* at 1.

[14] The General Counsel purports to identify two situations when employer speech about union issues will be unlawful: when an employee is "performing . . . job duties" (which encompasses one-on-one conversations, which the General Counsel describes as being "cornered") *or* when the employees are "forced to convene on paid time." GC Memo 22-04, at 2. However, these descriptions encompass virtually *all* time that employees spend in the workplace. In the rest of this testimony, the term "union-related discussions" refers to employer speech during paid time which discusses any employee's Section 7 activity, where the discussion contains no unlawful threat or promise.

The General Counsel's broad prohibition of all union-related discussions by an employer is completely different from the well-established, narrow "24-hour period" ban on captive-audience meetings, which is applicable to employers *and* unions in election cases, barring speeches to "*massed assemblies* of employees within 24 hours before the scheduled time for conducting an election." *Peerless Plywood*, 107 NLRB 427, 429 (1953) (emphasis added). Significantly, speeches that violation this 24-hour captive-audience ban are *not* violations of the NLRA (*i.e.*, they are not deemed unlawful). However, speeches within this 24-hour period preceding an election are considered to be grounds for setting aside the results of the election, which will typically result in a Board-ordered rerun election. *Id.*

[15] GC Memorandum 22-04, "The Right to Refrain from Captive Audience and Other Mandatory Meetings," at 1 (April 7, 2022) (hereinafter "GC Memo 22-04").

[16] Brief in Support of General Counsel's Exceptions to the Administrative Law Judge's Decision (hereinafter "*Cemex* GC Brief"), filed in *Cemex Constr. Materials Pacific, LLC*, Cases 28-CA-230115 *et al.*, at 53 (April 11, 2022) (hereinafter "*Cemex*"); Brief in Support of Counsel for the General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge (hereinafter "*Starbucks* GC Brief"), filed in *Starbucks Corp.*, Cases 14-CA-290968 *et al.*, at 29 (Nov. 23, 2022) (hereinafter "*Starbucks*"). *See also* GC Memo 22-04, at 1 (employer speech concerning statutory labor rights "inherently" involve "an unlawful threat . . .").

[17] The General Counsel's position – that the Board can make legality turn on the "inequality of bargaining power" between individual employees and their employers, as well as employees' economic dependence on their employers" (GC Memo 22-04, at 1) – involves principles that the Supreme Court rejected in *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 490, 497 (1960), where the Court stated that federal labor policy does *not* permit the Board to create a "standard of properly 'balanced' bargaining power" nor does it "contain a charter for the [NLRB] to act at large in equalizing disparities of bargaining power between employer and union." *Id.*

on-one discussions that occur while employees are "performing their job duties."[18] And the restrictions are not limited to discussions that the employer has designated as "mandatory"– *all* union-related discussions on paid time are *deemed* "mandatory" unless preceded, in every case, by a list of "assurances" that resemble the recitation of *Miranda* rights that law enforcement officials must give to criminals being placed under arrest.[19]

(b) <u>Congress *Repudiated* Exactly the Same Speech Prohibitions, Which the NLRB had Adopted in 1946, When Congress Added Section 8(c) to the NLRA in 1947</u>. The General Counsel's attempted broad ban on an employer's union-related discussions is not new. The NLRB adopted precisely the same speech prohibition in a 1946 case – *Clark Bros. Co*.[20] – which Congress repudiated the very next year by adding Section 8(c) to the NLRA as part of the Taft-Hartley Act.

Section 8(c) states the following:

> The expressing of *any views, argument, or opinion, or the dissemination thereof*, whether in written, printed, graphic, or visual form, *shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act*, if such expression *contains* no threat of reprisal or force or promise of benefit.[21]

In *Clark Bros.*, decided the year *before* Congress added Section 8(c) to the Act, the Board stated that an employer's "superior economic power" and its "ability to control [employee] actions during working hours" meant the company was inherently "coercing its employees" by forcing them to "listen to speeches relating to their organizational activities."[22]

The Board in *Clark Bros.* explained its restrictions on employer speech using the same reasoning that has been described by the General Counsel for the cases being prosecuted by the Board now. In *Clark Bros*., the NLRB stated:

> The Board has long recognized that "the rights guaranteed to employees by the Act include the full freedom to receive aid, advice, and information from others, concerning those rights and their enjoyment." *Such freedom is meaningless, however, unless the employees are also free to determine whether or not to receive such aid, advice, and information. To force employees to receive such aid, advice, and information impairs that freedom; it is calculated to, and does, interfere with the*

---

[18] *See* note 14 above.

[19] The employer "assurances" devised by the General Counsel – required before any employer's discussion of union issues or other Section 7 rights – are *more* voluminous than the *Miranda* rights that must be given to criminals upon arrest. According to briefs filed by the General Counsel, the "assurances" to employees require employers to state the following: (1) "the purpose of the meeting," (2) "attendance is voluntary," (3) "if they attend, they will be free to leave at any time," (4) "nonattendance will not result in reprisals (including loss of pay if the meeting occurs during their regularly scheduled working hours)," (5) "attendance will not result in rewards or benefits," (6) if the employer "announces a meeting in advance," it must "reiterate the explanation and assurances set forth above at the start of the meeting," (7) the discussion "must occur in a context free from employer hostility to the exercise of Section 7 rights," and (8) if the discussion occurs while employees are performing job duties, "the employer must obtain affirmative consent to talk to the employees there" and indicate "they may end the encounter at any time without loss of pay (either by leaving or by asking the employer to stop)." *Cemex* GC Brief, at 59-60; *Starbucks* GC Brief, at 23, 25-26. *Compare Miranda v. State of Arizona*, 384 U.S. 436, 479 (1966) (requiring that a criminal suspect's post-custodial questioning must be preceded by statements that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires").

[20] 70 NLRB 802, 805 (1946), *enforced*, 163 F.2d 373 (2d Cir. 1947).

[21] 29 U.S.C. § 158(c) (emphasis added).

[22] *Clark Bros.*, 70 NLRB, at 805.

selection of a representative of the employees' choice. And this is so, wholly apart from the fact that the speech itself may be privileged under the Constitution.

. . . [W]*e must perform our function of protecting employees against that use of the employer's economic power which is inherent in his ability to control their actions during working hours. . . . We conclude, therefore, that the respondent exercised its superior economic power in coercing its employees to listen to speeches relating to their organizational activities, and thereby independently violated Section 8 (1) of the Act*.[23]

In 1947, one year *after* the Board decided *Clark Bros.*, Congress adopted the Taft-Hartley Act.[24] Both the Senate and House bills contained language directly responding to *Clark Bros*. (and similar cases) by restoring employer free speech rights that had been extinguished by the pre-1947 NLRB.[25] The Senate Report on the proposed addition of Section 8(c) stated:

The Supreme Court in *Thomas v. Collins* (323 U. S. 516) held, contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies and approved the doctrine of the *American Tube Bending* case (134 F. (2d) 993). *The Board has placed a limited construction upon these decisions by holding such speeches by employers to be coercive . . . if the speech was made in the plant on working time* (*Clark Brothers*, 70 N.L.R.B. 60). *The committee believes these decisions to be too restrictive* and, in this section, provides that if, under all the circumstances, there is *neither an expressed or implied threat of reprisal, force, or offer of benefit*, the Board *shall not predicate any finding of unfair labor practice upon the statement*.[26]

The Taft-Hartley legislative history is replete with similar indications that Section 8(c) was a direct response to repudiate the reasoning of *Clark Bros.* and other NLRB cases.[27] Indeed,

---

[23] *Id.* (emphasis added; footnotes omitted).

[24] 61 Stat. 136 (1947), 29 U.S.C. §§ 141 *et seq*.

[25] S. 1126, 80th Cong., 1st Sess. (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 ("Legis. Hist.") 114 (Senate bill as reported); H.R. 3020, 80th Cong., 1st Sess. (1947), *reprinted in* 1 Legis. Hist. 56 (House bill as reported); H.R. 3020, 80th Cong., 1st Sess. (1947), *reprinted in* 1 Legis. Hist. 183 (as passed by the House); H.R. 3020, 80th Cong., 1st Sess. (1947), *reprinted in* 1 Legis. Hist. 242 (as passed by the House).

[26] S. Rep. 80-105, at 23-24 (1947), *reprinted in* 1 Legis. Hist. 429-430 (emphasis added).

[27] *See* 3 Cong. Rec. 4261 (1947), *reprinted in* 2 Legis. Hist. 1066 (statement of Sen. Ellender) ("[M]any abuses arose from Board procedure and practice during the early period of administration of the Wagner Act. . . . *Even recently the Board has held that if an employer made a speech during working hours, although the employer did not use any coercive language, yet the fact that he spoke to the employees while they were at work constituted coercion*, and, therefore, the Board declared such activity to be an unfair labor practice.") (emphasis added); 93 Cong. Rec. 7002 (1947), *reprinted in* 2 Legis. Hist. 1624 (supplemental analysis of H.R. 3020 as passed) ("The purpose of the conferees . . . was to make it clear that *the Board is not to construe utterances containing neither threats nor promises of benefit as an unfair labor practice standing alone* or as making some act which would otherwise be legal an unfair labor practice. *The conferees had in mind a number of Board decisions in which because of the fact that an employer has at some time committed an unfair labor practice a speech by him, innocuous in itself, has been held not to be privileged*.") (emphasis added); H.R. Rep. 80-245, 80th Cong., 1st Sess. at 8 (1947), *reprinted in* 1 Legis. Hist. 299 (1947) ("Although the old Labor Board protests it does not limit free speech, *it is apparent from decisions of the Board itself that what persons say in the exercise of their right of free speech has been used against them*") (emphasis added); H.R. Rep. 80-245, 80th Cong., 1st Sess. at 33 (1947), *reprinted in* 1 Legis. Hist. 324 (1947) ("Although the Labor Board says it does not limit free speech, *its decisions show that it uses against people what the Constitution says they can say freely*") (emphasis added); H.R. Rep. 80-549, at 45 (1947), *reprinted in* 1 Legis. Hist. 505 (1947) ("*The practice which the Board has had in the past* of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose *gave rise to the necessity for this change in the law*.") (emphasis added); 93 Cong. Rec. A1296 (1947), *reprinted in* 1 Legis. Hist. 584 (statement of Rep. Landis) ("Employers and employees must be assured the right of free speech. *There was no intention of Congress to deny the right of free speech to anyone under the NLRA*. The right of free speech is guaranteed to all citizens in the first amendment of the Constitution."); 93 Cong. Rec. 3559 (1947), *reprinted in* 1 Legis. Hist. 658 (statement of Rep. Buck) ("The first

opponents of the Taft-Hartley legislation – including freshman House member John F. Kennedy – agreed that Congress needed to restore the employer free speech rights that the NLRB had limited or ignored in pre-1947 cases.[28]

Although President Harry Truman vetoed the Taft-Hartley amendments (which were enacted when two-thirds' majorities in the House and Senate voted to override the veto),[29] President Truman recognized that Section 8(c) means exactly what it says: an employer's expression of "views, argument, or opinion" could be deemed unlawful only if it "contains" an unlawful threat or promise. To this effect, President Truman's veto message criticized Section

---

amendment to the Constitution of the United States of America guarantees the right of free speech to all Americans. *Yet, the National Labor Relations Board, over a period of 7 years, denied that right to an American who happened to be an employer.*") (emphasis added); 93 Cong. Rec. 1911 (1947), *reprinted in* 2 Legis. Hist. 984 (statement of Sen. Morse) ("It is . . . self-evident that neither the Board nor the courts can impair the right of free speech guaranteed in the Constitution"); 93 Cong. Rec. 3953 (1947), *reprinted in* 2 Legis. Hist. 1011 (statement of Sen. Taft) ("[T]he bill contains a provision guaranteeing free speech to employers. . . . *It freezes that rule into the law itself, rather than to leave employers dependent upon future [NLRB] decisions. That is one of the matters which has been most widely discussed. . . .*") (emphasis added); 93 Cong. Rec. 4560 (1947), *reprinted in* 2 Legis. Hist. 1201-1202 (statement of Sen. Ball) ("in the past *the NLRB has stretched its authority virtually to deprive employers of any freedom of speech or any right to discuss affairs of mutual interest with their employees*") (emphasis added); 93 Cong. Rec. 5094 (1947), *reprinted in* 2 Legis. Hist. 1433 (statement of Sen. McClellan) ("The language of the [NLRA] *has been so distorted by court decisions and by administrative decisions that freedom of speech has definitely been abridged and denied to many of our citizens*") (emphasis added).

[28] The House Committee report on H.R. 3020 included minority views which – though otherwise opposing the Taft-Hartley legislation – agreed that "[t]he right to express an opinion *is a constitutional one*" and acknowledged that "*the first amendment protects an employer's expressions of noncoercive opinion* to his employees *respecting union organization.*" H.R. Rep. 80-245, 80th Cong., 1st Sess. at 84-85 (1947), *reprinted in* 1 Legis. Hist. 375-76 (1947) (emphasis added). Significantly, then Representative John F. Kennedy authored a "Supplemental Minority Report" in which he stated that "*employers* must be guaranteed *the same rights of freedom of expression*" that the Board had previously recognized only for unions. H.R. Rep. 80-245, 80th Cong., 1st Sess. at 113-114 (1947), *reprinted in* 1 Legis. Hist. 404-405 (1947) (emphasis added). Likewise, the Senate Committee report contained minority views which, otherwise opposing the Taft-Hartley legislation, stated: "We *agree* with the *excellent protection of the right of free speech accorded to section 8(c).*" S. Rep. 80-105, at 41 (1947), *reprinted in* 1 Legis. Hist. 503 (1947) (emphasis added). To the same effect, Senator Taft indicated the "freedom of speech" provision had "general approval" and he stated: "Even Mr. William Green, *president of the American Federation of Labor, was in favor of a free-speech provision for employers.*" 3 Cong. Rec. 6603 (1947), *reprinted in* 2 Legis. Hist. 1544 (statement of Sen. Taft) (emphasis added). *See also* 93 Cong. Rec. 5117 (1947), *reprinted in* 2 Legis. Hist. 1460 (statement of Senator Murray) ("I believe that an employer has no more right to try to influence his employees in associating themselves together in a labor union than he has to intimidate them from joining a church. . . . *But in view of the misunderstanding of the Wagner Act and the decisions of the National Labor Relations Board . . . that employers do not possess that privilege today, we have tried to make it clear that the employer has the right and privilege of free speech, provided it is fair free speech*") (emphasis added); 93 Cong. Rec. A2012 (1947), *reprinted in* 1 Legis. Hist. 869 (statement of Rep. Meade) ("With free speech guaranteed to every American citizen under the Constitution, *it seems unfortunate that this section should have been necessary in any legislation*") (emphasis added); 93 Cong. Rec. 4261 (1947), *reprinted in* 2 Legis. Hist. 1066 (statement of Sen. Murray) (indicating that "minority members of the committee . . . think that *employers in dealing with their employees are entitled to liberty of speech, which does not under the circumstances contain any threat of reprisal or force or offer of benefit*") (emphasis added); 93 Cong. Rec. 5105 (1947), *reprinted in* 2 Legis. Hist. 1452 (statement of Senator Murray) ("*we wholeheartedly endorse the excellent protection afforded by S. 1126 to the right of employers* to freedom of speech in matters of employee relations so long as the circumstances do not present elements of coercion") (emphasis added); 93 Cong. Rec. A3233 (1947), *reprinted in* 2 Legis. Hist. 1627 (radio address by Sen. Taft) (noting that, although President Truman's veto message criticized the "provision giving freedom of speech to employers," the need for the provision *was the one thing admitted even by labor union leaders*") (emphasis added).

[29] 93 Cong. Rec. 7504, *reprinted in* 1 Legis. Hist. 922-923 (331-83 House override vote, with 15 not voting); 93 Cong. Rec. 7692 (1947), *reprinted in* 2 Legis. Hist. 1657 (68-25 Senate override vote, with 2 not voting).

8(c) because an "antiunion statement by an employer . . . could not be considered as evidence of [unlawful] motive, unless it *contained* an explicit threat . . . or promise of benefit."[30]

After Section 8(c)'s enactment, the Board in *Babcock & Wilcox Co*., 77 NLRB 577 (1948), recognized that Section 8(c) protects the right of employers to have union-related discussions in the workplace even when employees are paid and attendance is compulsory. To this effect, the Board in *Babcock* reasoned:

> With respect to *the "compulsory audience" aspect of the speeches*, the Trial Examiner concluded from all the evidence that the notices of the meetings as well as the oral instructions given to the employees concerning these meetings *removed the element of choice* from the employees and, in effect, *compelled them to attend* in violation of the Act. In reaching this conclusion, the Trial Examiner relied upon the "compulsory audience" doctrine enunciated in *Matter of Clark Bros. Co., Inc*. However, *the language of Section 8(c) of the amended Act, and its legislative history, make it clear that the doctrine of the Clark Bros. case no longer exists as a basis for finding unfair labor practices* in circumstances such as this record discloses. Even assuming, therefore, without deciding, that the respondent required its employees to attend and listen to the speeches, we conclude that it did not thereby violate the Act.[31]

---

[30] 93 Cong. Rec. 7500, 7502 (1947), *reprinted in* 1 Legis. Hist. 915, 918 (emphasis added). *See also* H.R. Rep. 80-245, 80th Cong., 1st Sess. at 33 (1947), *reprinted in* 1 Legis. Hist. 324 (1947) ("The bill . . . provid[es] that nothing that anyone says shall constitute or be evidence of an unfair labor practice unless it, *by its own express terms, threatens force or economic reprisal*. This means that a statement may not be used against the person making it *unless it, standing alone, is unfair* within the express terms of sections 7 and 8 of the amended [A]ct.") (emphasis added); H.R. Rep. 80-510, at 45 (1947), *reprinted in* 1 Legis. Hist. 549 (1947) ("The purpose is to protect the right of free speech *when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination*.") (emphasis added); 93 Cong. Rec. A2012 (1947), *reprinted in* 1 Legis. Hist. 869 (statement of Rep. Meade) ("It would be specifically permissible for an employer to express his own views or opinion, either in written or printed form, if that expression "*does not by its own terms* threaten force or economic reprisal.") (emphasis added); 93 Cong. Rec. 6604 (1947), *reprinted in* 2 Legis. Hist. 1546 (statement of Sen. Pepper) (stating that, regarding a "speech *which in itself contained no threat express or implied*," the Conference Committee bill "*deliberately excludes* statements of that sort, *unless the statement contains an actual threat*"); 93 Cong. Rec. 6656 (1947), *reprinted in* 2 Legis. Hist. 1567 (statement of Sen. Murray) (although the minority members agreed that the employer free speech provision in the Senate bill was "sound and workable," they opposed the Conference bill because it indicated that expressing views shall not "constitute or be evidence of" any ULP "*unless it contains a threat or promise of benefit*") (emphasis added); 93 Cong. Rec. 6673-74 (1947), *reprinted in* 2 Legis. Hist. 1590 (statement of Sen. Pepper) (opposing the Conference bill because it provides that "what a man says or writes or prints cannot even be put in evidence *unless the statement itself is complete with a threat*") (emphasis added); 93 Cong. Rec. A3233 (1947), *reprinted in* 2 Legis. Hist. 1627 (radio address by Sen. Taft) (the bill provides that "that views, argument, or opinion shall not be evidence of an unfair labor practice *unless they contain in themselves a threat of coercion or a promise of benefit*") (emphasis added).

[31] *Id.* at 578 (emphasis added; footnote omitted). Subsequent court and Board cases uniformly agree that Section 8(c) repudiated arguments that an employer's union-related discussions in the workplace are inherently coercive when attendance is mandatory or they occur on paid time. *See, e.g., Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640, 646 (2d Cir. 1952) ("It is clear from the legislative history, which criticized as too restrictive the decision in *Clark Brothers* . . . that Congress intended the employer to have the right to address his employees on company time and property"); *NLRB v. Prescott Indus. Products Co.*, 500 F.2d 6, 10 n.13 (8th Cir. 1974) ("The legislative history of § 8(c) . . . makes it clear that its purpose was to effectuate employers' first amendment rights as a response, in part, to the restrictions placed by the Board on captive audience speeches"). *See also Beverly Enterprises-Hawaii, Inc.*, 326 NLRB 335, 344 (1998); *Livingston Shirt Corp*., 107 NLRB 400, 406-407 (1953); *Cayey Mfg. Co., Inc.*, 100 NLRB 494, 503 (1952); *S&S Corrugated Paper Machinery Co., Inc.*, 89 NLRB 1363, 1364 (1950).

(c) Section 8(c) Directly Contradicts Arguments That Employer Speech About Union Issues Is Inherently Coercive. The plain language in Section 8(c) indicates that – when an employer expresses union-related "views, argument, or opinion" – the Board can find a violation *only* if the expression itself "*contains*" a "threat of reprisal or force or promise of benefit." The word "contains" means "to have within."[32] The General Counsel's reading of Section 8(c) does precisely what Section 8(c) was enacted to prevent: employer speech is deemed unlawful when the message does *not* "contain" any type of threat or promise. Instead, the Board is urged to find that employer speech – *regardless* of what it "contains" – violates the Act based entirely on other impermissible factors: the "economic dependence" of employees, and a so-called "right to refrain from listening" which likewise has no basis in the Act.[33]

The Board is bound by the "fundamental principle" that any statute's meaning primarily depends on "the language of the statute itself," which must be given "conclusive weight" absent evidence of "contrary" legislative intent.[34] Section 8(c)'s language is clear, and there is no contrary legislative intent.[35] Section 8(c) precludes finding that an employer's "views, argument, or opinion" violates the law when the expression "contains" no improper threat or promise.

---

[32] Merriam-Webster Dictionary, contain (available at https://www.merriam-webster.com/dictionary/contain) (downloaded Feb. 4, 2023). Similarly, the Collins English Dictionary states: "If writing, speech, or film contains particular information, ideas, or images, it includes them." Collins, contain (available at https://www.collinsdictionary.com/us/dictionary/english/contain) (downloaded Feb. 4, 2023). The Board has also found that the word "contains" is a term of limitation, which is clear from the Board's holding that a midterm unilateral change affecting matters addressed by a labor contract do not violate Section 8(d) unless the change involves a "specific term '*contained* in' the contract. *Milwaukee Spring Div*., 268 NLRB 601, 602 (1984), *enforced sub nom. Int'l Union, UAW v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985) (emphasis added).

[33] Although the General Counsel argues that an employer's union-related workplace discussions violate an employee's right to "refrain from listening" (GC Memo 22-04, at 2, *citing Clark Bros*.), the Act does not protect an employee who goes to work and then refuses "to listen" when an employer has discussions with the employee. Although employees have a protected right to strike (which entails a group refusal to work), this involves the "*quitting* of work," and it is clearly *unprotected* to remain in place while refusing to listen to what the employer has to say. *NLRB v. Fansteel Metallurgical Corp*., 306 U.S. 240, 256 (1939) (emphasis added). As indicated in *Litton Systems, Inc*.,[33] "[a]n employee *has no statutorily protected right to leave a meeting* which the employees were required by management to attend on company time and property *to listen* to management's noncoercive antiunion speech designed to influence the outcome of a union election." *Id.* at 1030-31 (emphasis added) (Trial Examiner's opinion). *See also Ridgewood Mgmt. Co*., 171 NLRB 148, 151 (1968) ("the fact that employees have no choice but to listen does not of itself make remarks otherwise protected by Section 8(c) of the Act illegal") (Trial Examiner's opinion).

Contrary to the General Counsel's view (that employees have a protected right to "refrain from listening" to an employer while working), it constitutes "cause" for discipline if an employee *goes* to work and then *refuses "to listen"* when the employer is giving direction or engaging in protected speech. *See, e.g*., *Detroit Hosp*., 249 NLRB 449, 450 (1980) (employee lawfully disciplined for "refusal to listen and by his leaving the meeting" which constituted "grounds for regarding him as insubordinate, and the reason for his discharge was not protected by the Act"); *Gen. Elec. Co*., 240 NLRB 479 (1979) (employee lawfully disciplined for insubordination after "walking away" from foreman and stating he "was not going to listen"); *Southwest Custom Trim Products*, 255 NLRB 787, 793 (1981) (ALJ opinion) (no violation where an employee received discipline after an employee's "refusal to listen" to supervisor); *Sys-T-Mation, Inc*., 198 NLRB 863, 864 (1972) (employee lawfully discharged for insubordination after "refusal to listen" and "abruptly" leaving during discussion with company executive). *See generally NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 45 (1937) ("the Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them").

[34] *Lewis v. U.S*., 445 U.S. 55, 60 (1980); *IBEW Local 474 v. NLRB*, 814 F.2d 697, 710 (D.C. Cir. 1987).

[35] As explained above, President Truman vetoed the Taft-Hartley Act because, among other things, Section 8(c) protected all employer speech unless it "*contained* an explicit threat . . . or promise of benefit," which Congress clearly understood when enacting Section 8(d) as part of the Taft-Hartley amendments.

(d) <u>The Board Cases Prosecuting Employer Speech Violate the First Amendment</u>. Starting in 1941, the Supreme Court decided a series of cases holding that the First Amendment, which states "Congress shall make no law . . . abridging the freedom of speech,"[36] broadly applies to employer speech regarding union issues.

In *NLRB v. Virginia Electric & Power Co.*,[37] the Supreme Court recognized that employers have a First Amendment right to "take any side it may choose" regarding union issues, and the Court remanded a Board finding of unlawful coercion that focused on an employer bulletin and employee meetings, the adequacy of which the Court stated was "doubtful" to prove unlawful coercive conduct. In *Thomas v. Collins*,[38] the Court stated that "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty," which would be lost only when "*other things* are added which bring about coercion, or give it that character."

During the Taft-Hartley debates, these First Amendment concerns produced a bipartisan consensus[39] that Congress needed to reverse the NLRB's disregard for employer speech rights, which prompted Congress to enact Section 8(c).[40] Significantly, the version of Section 8(c) that passed the Senate stated the Board could evaluate whether an employer's views or arguments contained a threat or reprisal "under all the circumstances."[41] In Conference Committee, the House members objected to the "under all the circumstances" language, and it was eliminated, which was explained as follows:

> The House conferees were of the opinion that *the phrase "under all the circumstances" in the Senate amendment was ambiguous and might be susceptible of being construed as approving certain Board decisions which have attempted to circumscribe the right of free speech where there were also findings of unfair labor practices*. Since this was certainly contrary to the intent of the Senate . . . *the Senate conferees acceded to the wish of the House group that the intent of this section be clarified*.[42]

In *Chamber of Commerce v. Brown*,[43] the Supreme Court explained that from "one vantage," Section 8(c) "merely implements the First Amendment . . . in that it responded to particular constitutional rulings of the NLRB."[44] The Court continued:

> But its enactment also manifested a "congressional intent to encourage free debate on issues dividing labor and management." . . . It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA *rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis*. We have characterized this policy judgment, *which suffuses the NLRA as a whole*, as "favoring *uninhibited, robust, and wide-*

---

[36] U.S. Const. amend. I.

[37] 314 U.S. 469, 477-79 (1941)

[38] 323 U.S. 516, 537-38 (1945) (emphasis added; footnotes and citations omitted).

[39] See notes 25-30 and accompanying text above.

[40] *Id*.

[41] H.R. 3020, 80th Cong., 1st Sess. (1947), *reprinted in* 1 Legis. Hist. 226 (Senate-passed bill stated in part that the Board could not base any ULP finding "upon any statement of views or arguments, either written or oral, if such statement contains under all the circumstances no threat, express or implied, of reprisal or force, or offer, express or implied, of benefit").

[42] 93 Cong. Rec. 6601 (1947), *reprinted in* 2 Legis. Hist. 1541 (emphasis added).

[43] 554 U.S. 60 (2008).

[44] *Id.* at 67.

open debate in labor disputes," stressing that "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB."[45]

The NLRB cases – alleging it is inherently unlawful for employers to engage in union-related discussions – also violate black letter standards governing First Amendment free speech guarantees. The General Counsel's proposed restrictions are discriminatory in relation to content, viewpoint, and the type of speakers (employers), and the restrictions clearly are not narrowly tailored to advance a "compelling interest."[46] To the contrary, the Supreme Court in *Gissel* stated: "[A]n employer's free speech right *to communicate his views to his employees* is firmly established and *cannot be infringed by a union or the Board*."[47] The Board has also repeatedly acknowledged the constraints imposed by the First Amendment. In *Eliason & Knuth*, for example, the Board stated that "nonviolent speech . . . implicates the core protections of the First Amendment," and the doctrine of "constitutional avoidance" requires the Board not to interpret the Act in a way that raises "serious constitutional questions," where an "alternative interpretation is possible" and "not contrary to the intent of Congress."[48] Each of these elements is clearly present here, which warrants rejecting the restrictions on employer speech urged by the General Counsel.

(e) <u>The Board Has No Authority to Require "Assurances" Before An Employer Discusses Union Issues</u>. For several reasons, the Board has no authority to require the "assurances" mandated by the General Counsel as a pre-condition to an employer's union-related discussions during paid working time or while employees are engaged in work.

First, because the First Amendment and NLRA Section 8(c) affirmatively *protect* an employer's union-related discussions in the workplace (provided they contain no unlawful threats or promises), the Board cannot impose *restrictions* on the exercise of these rights, and the

---

[45] *Id.* at 67-68 (emphasis added; citations omitted). *See also NLRB v. Gissel Packing, Co.*, 395 U.S. 575, 618 (1969) ("an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit'").

[46] Each of the deficits referenced in the text would render unconstitutional the speech restrictions advocated by the General Counsel. *See, e.g., Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015) (holding that "regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter"); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1995) ("[L]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference"); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010) (restrictions on speech must be "narrowly tailored" to achieve a "compelling interest"); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2430 (2022) ("[L]earning how to tolerate speech … of all kinds is part of learning how to live in a pluralistic society," even if "some will take offense to certain forms of speech … they are sure to encounter in a society where those activities enjoy such robust constitutional protection."); *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 509 (1969) (government has no compelling interest in "avoid[ing] the discomfort and unpleasantness that always accompany an unpopular viewpoint").

[47] *Gissel*, 395 U.S. at 617 (emphasis added) (referring to NLRA Section 8(c)).

[48] *United Brotherhood of Carpenters (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797, 807-808 (2010). *See also Aakash, Inc.*, 371 NLRB No. 46, slip op. at 2 n.4 (2021), *enforced*, Nos. 22-70002 et al. (9th Cir. 2023) ("The doctrine of constitutional avoidance requires the Board and the courts not to interpret the Act in a way that would raise a constitutional question, unless no other interpretation is reasonably possible"). *Accord: NLRB v. Catholic Bishop*, 440 U.S. 490, 501 (1979); *Int'l Union of Operating Engineers (Lippert Components, Inc.)*, 371 NLRB No. 8, slip op. at 2 (2021) (Chairman McFerran, dissenting).

Board is foreclosed from finding that these discussions are "inherently" unlawful, which is directly contrary to Section 8(c).[49]

Second, the Board lacks authority under the NLRA to implement, at the Board's own initiative, across-the-board employer notice requirements, and the mandatory "assurances" sought by the General Counsel are similar to the notice requirements adopted by the Board through rulemaking in 2011 which were invalidated by the courts.[50]

Third, mandating these "assurances" not only infringes on free speech rights regarding the content of messages that an employer wishes to convey in union-related discussions, the "assurances" themselves constitute unconstitutional "compelled speech" which independently violates the First Amendment and NLRA Section 8(c).[51]

2. The Duty to Protect Employee Free Choice Precludes Imposing Union Recognition <u>While Eliminating (and Overriding) Employee Voting in NLRB Secret-Ballot Elections</u>

The duty to protect employee free choice – and the right of employees to vote in secret ballot elections regarding union representation – is a bedrock principle that pervades the NLRA. This makes it hard to believe that the NLRB, which is the agency charged by Congress for *conducting* secret ballot elections, is now prosecuting cases based on a position that employers violate the Act unless they impose union representation on employees *without* having an NLRB secret ballot election.

In this area, the General Counsel relies on another case decided in the 1940s – *Joy Silk Mills, Inc.*[52] However, the Board abandoned the *Joy Silk* approach more than 50 years ago, and the General Counsel's position is contrary to two Supreme Court cases – *Gissel Packing Co. v. NLRB*,[53] and *Linden Lumber v. NLRB*[54] – in addition to disregarding numerous decisions by courts of appeals which held that authorization cards are inherently unreliable for purposes of determining employee sentiments regarding union representation.

---

[49] *See, e.g., Livingston Shirt Corp.*, 107 NLRB 400 (1953), where the Board held Section 8(c) precluded imposing on employers an obligation to give unions equal access to the employer's premises. The Board stated: "A basic principle directly affecting any consideration of this question is that Section 8(c) . . . specifically prohibits us from finding that an uncoerced speech, whenever delivered by the employer, constitutes an unfair labor practice. . . . *If the privilege of free speech is to be given real meaning, it cannot be qualified by grafting upon it conditions which are tantamount to negation*." *Id.* at 405-406 (emphasis added). Because an employer's union-related discussions are lawful under Section 8(c) and protected by the First Amendment, the Board has no reasonable basis for devising "safeguards" similar to those required pursuant to *Johnnie's Poultry Co.*, 146 NLRB 770, 774 (1964), *enf't denied*, 344 F.2d 617 (8th Cir. 1965) (applicable when an employer's agents question bargaining unit members in preparation for a Board hearing) or *Struksnes Construction Co.*, 165 NLRB 1062, 1062 (1967) (applicable when an employer engages in employee polling regarding whether they support having union representation).

[50] *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013) (finding that Board lacked authority to promulgate a rule imposing notice requirements on employers, at the Board's initiative, regarding NLRA rights). The notice-posting rule was also invalidated by the D.C. Circuit. *See* note 51 below.

[51] *Nat'l Ass'n of Manufacturers v. NLRB*, 717 F.3d 947, 956 (D.C. Cir. 2013) (finding that the Board's creation of a notice-posting requirement applicable to all employers constituted "compelled" speech because "the Board's rule requires employers to disseminate such information, upon pain of being held to have committed an unfair labor practice" and "[t]he right to disseminate another's speech necessarily includes the right to decide *not* to disseminate it") (emphasis added).

[52] 85 NLRB 1263 (1949), *enforced*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951). *See generally Cemex* General Counsel's Brief, at 36-45; *Starbucks* General Counsel's Brief, at 7-19.

[53] 395 U.S. 575 (1969).

[54] 419 U.S. 301 (1974).

The General Counsel argues that, when any employer receives a union recognition demand – based on a *claim* that a majority of employees has signed "authorization cards" stating the employees want union representation, and even if no unlawful employer conduct has occurred – the employer must extend mandatory recognition, *without* having any employee voting in an NLRB-conducted election, except in rare situations where the employer can prove it has "good faith" reasons for believing that the union does not have majority support.[55]

These cases do not merely dispense with permitting employee voting in an NLRB secret ballot election. In instances where the Board has processed an election petition, the Board may override the election's outcome – if the union loses – based on a finding that, when the union first demanded recognition, the employer should have recognized the union immediately.[56]

Claims that union recognition is mandatory under the NLRA, without employee voting in a secret ballot election, is also contradicted by Congress' adoption of the United States-Mexico-Canada Agreement ("USMCA") – in which overwhelming bipartisan majorities in Congress reaffirmed the importance of having union representation issues resolved "through a secret ballot vote" – and by Congress' repeated failure to enact legislation that would require union recognition based on "authorization cards."[57]

(a) <u>The Supreme Court Has Twice Rejected the Imposition of Mandatory Union Recognition Based on Union Authorization Cards</u>. In *Joy Silk*,[58] which the Board decided in 1949, the Board held that, when a union claimed to have authorization cards reflecting employee majority support, "an employer *may* in good faith *insist on a Board election* as proof of the Union's majority."[59] Yet, the Board also held that an employer violates the Act where its refusal is based on "a rejection of the collective bargaining principle or by a desire to

---

[55] *See, e.g., Cemex* General Counsel's Brief, at 36-45; *Starbucks* General Counsel's Brief, at 7-19. It is important to recognize that what the General Counsel proposes is *mandatory recognition – not* "card-check" recognition – which is much more expansive in two ways than what *Joy Silk* involved. First, "card-check" recognition involves an arrangement where union recognition extended only after the employer can *verify* in some way that the union obtained authentic authorization cards from a majority of employees (thus, the union in *Joy Silk* offered to permit a "cross-check" of the union's authorization cards). 85 NLRB at 1274-77 (Trial Examiner opinion). In contrast, the General Counsel argues that employers, after receiving a union demand, must extend *mandatory recognition without* any arrangement "to prove majority status" and, potentially, without even an "express" union recognition demand or a "bona fide request" for bargaining. *See, e.g., Starbucks* General Counsel's Brief, at 11-13. Second, the Board in *Joy Silk* indicated that "unlawful conduct" was central to the appropriateness of a bargaining order. In fact, the Trial Examiner in *Joy Silk* found that, when the union demanded recognition, the employer lawfully expressed a preference for an NLRB election ("to let the Board handle it"), and the violation findings by the Trial Examiner and the Board were predicated on unlawful conduct (separate from the employer's refusal to extend immediate recognition). 85 NLRB at 1265 n.5 (Board opinion), 1272, 1277 (Trial Examiner opinion). In contrast, the General Counsel argues for a mandatory recognition requirement even "where the employer *has committed no unfair labor practices*," and the Board will still potentially find the employer was required to extend mandatory recognition by assessing "good faith" based on other "surrounding circumstances" (all of them lawful). *See, e.g., Starbucks* General Counsel's Brief, at 9.

[56] If a union files an unfair labor practice ("ULP") charge (claiming that the employer's failure to grant immediate recognition was unlawful) in addition to an election petition, the Region may defer holding any election if the current Board reinstates the "blocking charge" doctrine. *See* 87 Fed. Reg. 66890 (Nov. 4, 2022) (proposed rule regarding representation case procedures relating to election bars and proof of majority status in construction industry relationships).

[57] The USMCA, which governs trade between the U.S., Canada and Mexico, was signed into law on January 29, 2020, with overwhelming bipartisan support in the House (by a vote of 385-41 on December 19, 2019) and the Senate (by a vote of 89-10 on January 16, 2020). *See* USMCA Implementation Act, Pub. L. No. 116-113, 134 Stat. 15 (2020).

[58] *Supra* note 52.

[59] 85 NLRB at 1264.

gain time within which to undermine the union," and the difference between lawful and unlawful insistence on an election depended on "all relevant facts," which – as listed by the Board – focused on an employer's "unlawful conduct."[60]

Based on the reliability of NLRB-conducted secret ballot elections, the Board abandoned reliance on "authorization cards" as a basis for requiring union recognition, except in cases where the employer has engaged in serious unfair labor practices that prevent a fair election from being conducted.

This approach was embraced and approved by the Supreme Court in *Gissel*, where the Supreme Court endorsed the Board's "retreat" from any insistence on mandatory union recognition based on authorization cards, rather than an NLRB election, absent serious unlawful conduct by the employer.[61] However, the Court in *Gissel* went further, and stated: "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,"[62] and elections had "acknowledged superiority" over authorization cards, which the Court stated were "admittedly inferior."[63]

The union in *Gissel* urged the Court to require all employers, following any refusal of a union recognition demand, to "make an affirmative showing of his reasons" for doubting that the union had employee majority support.[64] This was *not* adopted, and the Court imposed no obligation on employers to articulate "affirmative" reasons justifying denial of a union representation demand. Therefore, consistent with "the Board's current practice," the Supreme Court in *Gissel* stated that "an employer *is not obligated to accept a card check as proof of majority status* . . . and he is *not required to justify his insistence on an election* by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status."[65]

The Supreme Court in *Gissel* also indicated that a contrary standard would raise significant First Amendment issues. After observing that "[w]here an employer's antiunion efforts consist of speech alone . . . the difficulties are not so easily resolved," after which the Court stated:

> *The Board has eliminated some of the problem areas by no longer requiring an employer to show affirmative reasons for insisting on an election* and by permitting him to make reasonable inquiries. We do not decide, of course, whether these allowances are mandatory. But we do

---

[60] *Id.* The three elements described by the Board as being included in "all relevant facts," were "any *unlawful conduct* of the employer, the *sequence* of events, and the *time lapse* between the refusal and the *unlawful conduct*." *Id.* (emphasis added). All three factors center around "unlawful conduct," and the employer in *Joy Silk* – whose refusal was unlawful – was likewise found to have engaged in multiple "unfair labor practices during the preelection period." *Id.*

[61] *Gissel*, 395 U.S. at 594 (indicating that the Board "had virtually abandoned the *Joy Silk* doctrine altogether"). *See also Linden Lumber*, 419 U.S. at 306 ("An employer concededly may have valid objections" and "may have rational, good-faith grounds for distrusting authorization cards in a given situation. . . . These factors make difficult an examination of the employer's motive to ascertain whether it was in good faith. To enter that domain is to reject the approval by *Gissel* of the retreat which the Board took from its 'good faith' inquiries.")

[62] *Id.* at 602 (emphasis added).

[63] *Id.* at 602-603. *See also Linden Lumber*, 419 U.S. at 304. The Court in *Linden Lumber*¸ 419 U.S. at 307, likewise stated "the policy of encouraging secret elections under the Act is favored."

[64] *Gissel*, 395 U.S. at 595.

[65] *Id.* at 609 (citation omitted).

note that *an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board*.[66]

The NLRB bargaining orders in *Gissel* were all based on "the fact that the employers had committed substantial unfair labor practices during their antiunion campaign efforts to resist recognition."[67] Only in this context – where an employer engaged in "outrageous," "pervasive" or other unlawful conduct that was "likely to destroy the union's majority," "seriously impede the election" and "render a fair election improbable" – did the Court uphold bargaining orders requiring employers to extend union recognition without an election.[68]

In *Linden Lumber*, Supreme Court revisited these issues after the Court of Appeals for the D.C. Circuit held that an employer unlawfully declined a union representation demand "without rhyme or reason."[69] The Supreme Court rejected the D.C. Circuit's analysis, and upheld the right of employers to deny union recognition demands *without* any requirement that the employer articulate a reason for the refusal. According to the Court, "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*."[70]

(b) <u>The Supreme Court and Courts of Appeals Have Held that Authorization Cards Are "Admittedly Inferior" and Subject to "Abuses</u>." The Supreme Court in *Gissel* emphasized that the NLRB bargaining orders were appropriate without an election *only* where the employers engaged in substantial unfair labor practices that made it "improbable" that a fair election could be held.[71]

Nothing in *Gissel* suggests that the Board can routinely impose a mandatory recognition obligation on employers based on authorization cards. To the contrary, the Supreme Court in *Gissel* indicated that an employer *had no general duty* to accept a "card check as proof of majority status," and the Court in *Linden Lumber* – in the absence of unlawful employer conduct – *upheld* the employer's refusal to grant a union's request for recognition, even though the employer provided no explanation other than stating "it doubted the union's claimed majority status" and the employer suggested that "the union petition the Board for an election."[72]

The *Gissel* and *Linden Lumber* decisions also make clear the Supreme Court was acutely aware that authorization cards have inherent unreliability, especially in comparison to employee voting in an NLRB secret ballot election, and were susceptible to "abuses" and "misrepresentations." To this effect, the Court in *Gissel* stated:

> We would be closing our eyes to obvious difficulties … 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

---

[66] *Id.* at 617 (emphasis added).

[67] 395 U.S. at 582-83 (emphasis added).

[68] *Gissel*, 395 U.S. at 591, 600, 613-15. *See also Maramont Corp.*, 317 NLRB 1035, 1047 (1995) (summarizing *Gissel*).

[69] *Truck Drivers Union Local 413 v. NLRB*, 487 F.2d 1099, 1111-13 (D.C. Cir. 1973), *reversed sub nom. Linden Lumber Div. v. NLRB*, 419 U.S. 301 (1974).

[70] 419 U.S. at 310.

[71] *Gissel*, 395 U.S. at 591.

[72] *Linden Lumber*, 419 U.S. at 302.

for collective bargaining purposes or merely to authorize it to seek an election to determine that issue."[73]

The Court in *Linden Lumber* similarly noted that employers "concededly may have valid objections to recognizing a union" and "may have a rational, good faith ground for distrusting authorization cards in a given situation," which – as the Court in *Linden Lumber* explained – is the reason *Gissel* approved the Board's "retreat" from attempting to make the "difficult" inquiry into whether an employer's preference for an election was in "good faith."[74]

Similar to *Gissel* and *Linden Lumber*, numerous courts of appeals have focused on the substantial deficiencies that prevent authorization cards from being the basis for any routine mandatory recognition duty for employers. For example, in *NLRB v. S.S. Logan Packing Co.*,[75] the Court of Appeals for the Fourth Circuit stated that "a card check is *not a reliable indication* of the employees' wishes,"[76] and the court reasoned:

> *It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check*,' unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks. . . .
>
> * * *
>
> The unsupervised solicitation of authorization cards by unions is subject to all of the criticisms of open employer polls. It is well known that many people, solicited alone and in private, will sign a petition and, later, solicited alone and in private, will sign an opposing petition, in each instance, out of concern for the feelings of the solicitors and the difficulty of saying 'No.' *This inclination to be agreeable is greatly aggravated in the context of a union organizational campaign when the opinion of fellow-employees and of potentially powerful union organizers may weigh heavily in the balance*.
>
> * * *
>
> As the affidavits tendered by the employer in this case indicate, *unsupervised solicitation of cards may also be accompanied by threats which the union has the apparent power to execute*. Few employees would be immune from a frightened concern when threatened with job loss when the union obtained recognition unless the card was signed. Whether or not the organizers could ever obtain the power to procure the discharge of uncooperative employees is beside the point as long as they claim the power and the employee is without a basis for a firm disbelief of it. . . .[77]

Numerous other courts have made similar observations, as reflected in the following examples:

---

[73] *Gissel*, 395 U.S. at 604. *See also Cumberland Shoe Corp.*, 144 NLRB 1268 (1963). Although the Court in *Gissel* upheld the limited use of authorization cards, this was only when the employer engaged in serious unlawful conduct making it likely that a fair election could never occur. Even in this limited context, the *Gissel* opinion emphasized the low threshold of reliability being applied by the Court when evaluating authorization cards. For example, the Court stated it was evaluating whether authorization cards were "such *inherently unreliable* indicators of employee desires" which warranted finding that they "may *never* be used . . . to support an order to bargain." 395 U.S. at 601 (emphasis added). After acknowledging that cards were "admittedly inferior to the election process," the Court stated this did not mean cards were "thereby rendered *totally invalid*." *Id.* at 602 (emphasis added). Indeed, the Court in *Gissel* did *not* decide that authorization cards were "a freely interchangeable substitute for elections. . . ." *Id*. at 601 n.18 (emphasis added). Instead, only when the severity of an employer's unlawful conduct meant "a fair election probably could not have been held, or where an election . . . [was] set aside," the Court in *Gissel* indicated that cards were "*reliable enough* to support a bargaining order." *Id.* (emphasis added).

[74] *Linden Lumber*, 419 U.S. at 306.

[75] 386 F.2d 562 (4th Cir. 1967).

[76] *Id.* at 566.

[77] *Id*. at 565-66 (emphasis added; footnotes omitted).

- *First Circuit.* In *NLRB v. Hannaford Bros. Co.*, 261 F.2d 638 (1st Cir. 1958), the court reversed the Board's finding that an employer unlawfully refused to grant card-check recognition, recognizing "a vast difference between . . . a secret ballot, and . . . the introduction into evidence of signed cards." *Id.* at 640-41.
- *Second Circuit.* In *NLRB v. Flomatic Corp.*, 347 F.2d 74 (2d Cir. 1965), the court stated that "it 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." *Id.* at 78 (holding a card majority could support a bargaining order only "where the employer's conduct has been so flagrantly hostile to the organizing efforts of a union that a secret election has undoubtedly been corrupted as a result").
- *Fourth Circuit.* When *Gissel* was decided by the Fourth Circuit, the court held that "authorization cards are such unreliable indicators of the desires of the employees that an employer confronted with a demand for recognition based solely upon them is justified in withholding recognition pending the result of a certification election." *NLRB v. Gissel Packing Co.*, 398 F.2d 336, 337 (4th Cir. 1968), *reversed*, 395 U.S. 575 (1969). *See also NLRB v. S.S. Logan Packing*, 386 F.2d 562, 566 (4th Cir. 1967) (quoted above).
- *Fifth Circuit.* In *NLRB v. Southland Paint Co.*, 394 F.2d 717 (5th Cir. 1968), the court described as "persuasive" the arguments against requiring union recognition "based on cards alone." *Id.* at 732. And in *NLRB v. Great Atlantic & Pacific Tea Co.*, 346 F.2d 936 (5th Cir. 1965), the court stated that "the offer of a cross-check of authorization cards does not impose a duty upon the company to submit to the check or suffer the consequences of a refusal-to-bargain charge." *Id.* at 942 (citation omitted).
- *Sixth Circuit.* In *NLRB v. Ben Duthler, Inc.*, 395 F.2d 28 (6th Cir. 1968), the court denied enforcement of the Board's bargaining order and ordered an election in part because authorization cards were "notoriously unreliable," and the "bargaining interests of a union are protectable only insofar as those interests coincide with the interests of the employees," which depends on "a majority of the employees clearly express[ing] their desire that the union be their bargaining representative." *Id.* at 34.
- *Seventh Circuit.* In *NLRB v. Village IX, Inc.*, 723 F.2d 1360 (7th Cir. 1983), the court stated that the existence of a "card majority[] by itself [] has little significance," since "[w]orkers 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." *Id.* at 1371.
- *Eighth Circuit.* In *NLRB v. Arkansas Grain Corp.*, 390 F.3d 824 (8th Cir. 1968), the court explained that "authorization cards may be a totally unreliable indication of majority status and constitute a sufficient basis for the employer to entertain a good faith doubt as to that status." *Id.* at 828 n.4.

Because of the deficiencies associated with union recognition cards – combined with the Supreme Court's decisions in *Gissel* and *Linden Lumber* and observations by numerous courts of appeals – the Board should retain its current practice, approved by the Court in *Gissel*, which makes NLRB elections the "preferred" and "favored" method of determining whether a union has employee majority support.[78] However, in the absence of serious unfair labor practices that warrant a conventional *Gissel* bargaining order, the Board should find that the inherent unreliability and risk of authorization card "abuses" and "misrepresentations"[79] give rise to a "good faith doubt" in *every* case sufficient to permit an employer to decline union recognition demands, absent proof of an employee majority based on a secret ballot election.

[78] *Gissel*, 395 U.S. at 602; *Linden Lumber*, 419 U.S. at 307.

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

(c) <u>Congress Has Clearly Indicated that NLRB Elections – Not Authorization Cards – Should Be the Primary Way to Resolve Union Representation Questions</u>. As indicated above, federal labor law reflects fundamental choices by Congress that are binding on the Board,[80] and the Board must also recognize that Congress has *never* enacted a law requiring union recognition based on authorization cards.[81] This is relevant because, as indicated above, Congress devoted significant attention to union representation procedures in 1935, 1947 and 1959 (when enacting the original Wagner Act, as well as the Taft-Hartley Act and Landrum-Griffin Act amendments), without imposing any mandatory recognition obligation on employers. More recently, there have been repeated card-check and related proposals in Congress, none of which have been enacted. This is relevant because "Congress' refusal to enact language which would have established unequivocally" a claimed right "is strong evidence that Congress did not intend the Board to have the power to confer that right on its own."[82] *See also Kay v. FCC*, 443 F.2d 638 (D.C. Cir. 1970) ("A consistent administrative interpretation of a statute, shown already to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence the interpretation has congressional approval.").

For example, in 1977 and 1978, Congress considered the Labor Law Reform Act, which called for an expedited election procedure after the filing of an election petition.[83] Likewise, the Employee Free Choice Act, introduced first in 2003, would have required union certification without an election if an individual or union received signed authorization cards from a majority of unit employees.[84] And the Protecting the Right to Organize Act ("PRO Act"), introduced in 2019, 2021 and 2023, would have allowed the Board to certify a bargaining order without an election in which the union prevailed in certain circumstances if the union received signed authorization cards from a majority of unit employees.[85] The failure to enact any of these proposals is strong evidence that Congress intends that NLRB-conducted elections, and not mandatory recognition, should be the means by which union demands for representation are resolved.

Most recently, the United States-Mexico-Canada Agreement ("USMCA"),[86] governing trade between the U.S., Canada, and Mexico, was enacted to create a "level playing field" between labor laws in the United States and Mexico.[87] Significantly, regarding questions about

---

[80] The Board is not vested with "general authority to define national labor policy by balancing the competing interests of labor and management." *American Ship Bldg. Co. v. NLRB,* 380 U.S. 300, 316 (1965). *See also Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("an agency's power is no greater than that delegated to it by Congress").

[81] The original version of the NLRA provided that the Board could certify unions based on "a secret ballot of employees or any other suitable method." 49 Stat. 449, § 9(c) (1935). However, based on the Taft-Hartley Act amendments adopted in 1947, the reference to "any other suitable method" was dropped, and the current language states that the Board "*shall direct an election by secret ballot*." 61 Stat. 136, Title I, Sec. 101, §9(c) (1947); 29 U.S.C. § 159(c) (emphasis added). Indeed, the term "shall" is "mandatory" and thus "normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

[82] *Railway Labor Executives' Ass'n v. NMB*, 29 F.3d 655, 667 (D.C. Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1032 (1995)

[83] H.R. 8410, 95th Cong. (1977) (https://www.congress.gov/bill/95th-congress/house-bill/8410).

[84] H.R. 3619, 108th Cong. (2003) (https://www.congress.gov/bill/108th-congress/house-bill/3619); H.R. 5000, 114th Cong. (2016) (https://www.congress.gov/bill/114th-congress/house-bill/5000).

[85] *See, e.g.,* H.R. 2474, 116th Cong. § 4(d) (2019) (https:// www.congress.gov/ bill/116th-congress/housebill/2474).

[86] *See* USMCA Implementation Act, Pub. L. No. 116-113, 134 Stat. 15 (2020).

[87] *See, e.g., Hearing on Mexico's Labor Reform: Opportunities and Challenges for an Improved NAFTA, Hearing Before the House Ways and Means Subcommittee on Trade*, 116th Cong. 5 (2019) (USMCA would help "level the playing field"

whether a union has employee majority support, the USMCA requires that Mexico "[p]rovide in its labor laws that *union representation challenges* are carried out . . . *through a secret ballot vote*."[88] The USMCA likewise requires Mexico to adopt legislation requiring that labor contracts have "majority support" among employees, with the requirement of verification that "a majority of workers . . . demonstrated support . . . through a *personal, free, and secret vote*."[89]

I have the privilege of serving on the independent expert board that Congress created,[90] when approving the USMCA, which is charged with monitoring the progress being made in Mexico with the protection for employees in Mexico – chief among them the requirement that union representation issues be addressed "through a secret ballot vote" among the affected employees.[91] So right now, U.S. law (the USMCA) requires that *employees in Mexico* get the protection of a "secret ballot vote" and a "personal, free, and secret vote" – when determining whether a majority of employees supports union representation and negotiated labor contracts. – it is unthinkable that the NLRB is prosecuting cases *extinguishing* these same guarantees for *U.S. employees*, except in the rare case when an employer could prove it had "good faith" reasons for denying a union recognition demand.

(d) <u>Policy Considerations Warrant Continued NLRB Reliance on Secret-Ballot Elections, Without Requiring Mandatory Recognition in Response to Union Demands</u>. In comparison to existing law, which permits voluntary recognition, but where questions concerning representation are otherwise governed by the outcome of NLRB-conducted secret ballot elections, requiring employers to respond to union representation demands by extending immediate union recognition, without an election, would produce enormous instability, in addition to undermining the Act's cornerstone values.

The claim that employers must grant immediate mandatory union recognition without employee voting in an NLRB secret ballot election – unless the employer can prove it has "good faith" reasons to believe the union lacks majority support – would produce enormous instability while subverting employee free choice. As indicated above, union demands for recognition have increasingly resulted in *two* NLRB proceedings, involving (i) a *charge* claiming the employer was required to grant immediate card-check union recognition (because it lacked a "good faith" doubt about employee support), and (ii) a *petition* seeking an NLRB election (which, for good reasons under existing law, is the primary way to prove employee support).

For employees, this new two-track arrangement will be a "heads I win, tails you lose" proposition. If the employer *grants* immediate recognition (which the General Counsel and the Unions claim is legally required), employees will be denied the opportunity to vote in any secret-ballot election. Conversely, if the employer *declines* to grant immediate recognition, the subsequent NLRB election will be a meaningless exercise. This is because, if the majority of employees votes *against* the union, the Board will disregard the outcome and is likely to impose

---

between U.S. and Mexican employees) (statement of Rep. Vern Buchanan). Consistent with the NLRA, the USMCA reflects a commitment to "freedom of association and the effective recognition of the right to collective bargaining." USMCA Chapter 23, Art. 23.3(1)(a).

[88] USMCA Chapter 23, Annex 23-A, § 2(d) (emphasis added).

[89] *Id.* § 2(e)(ii)(C).

[90] I serve on the Independent Mexico Labor Expert Board ("IMLEB"), created by the USMCA Implementation Act, *supra* note 86, Section 731, 19 U.S.C. § 4671 (establishing the Independent Mexico Labor Expert Board, which is "responsible for monitoring and evaluating the implementation of Mexico's labor reform and compliance with its labor obligations").

[91] USMCA Chapter 23, Annex 23-A, § 2(d).

union representation anyway, based on years of litigation over whether the employer's actions were taken in "good faith."

What gets lost in such an arrangement – ironically – are the three things that the Act makes most important: (i) the Board's duty to ensure employees have "the *fullest freedom* in exercising the rights guaranteed by [the] Act," (ii) the importance of determining what the "majority" of employees *actually desire*, and (iii) fostering labor relations stability.[92]

For more than 85 years, the primary manner of "exercising" employee rights under the Act has been the opportunity to vote in an NLRB-conducted secret ballot election, and the election's *outcome* determines whether employees have union representation. By comparison, if the Board adopts the arrangement sought by the General Counsel and the Unions, employees will be *denied* the opportunity to vote in any election (because the Board will find in the overwhelming majority of cases that the employer had been required to grant immediate recognition based on the union's claimed authorization card majority). Alternatively, the election will be an empty formality because, even if the union loses, its representative status will be dictated entirely by how the employer "good faith" question is later resolved.

These problems can be avoided entirely based on a simple solution, which involves continuing to treat secret ballot elections as the primary means to resolve whether or not a majority of employees favor union representation. This properly emphasizes the interests of employees and has been repeatedly reviewed, refined, and approved by the Supreme Court and Congress.

3. The NLRB Has Responded With Surprising Indifference and a Lack of Transparency Regarding Election Irregularities in Recent Board Elections.

Throughout its history, the NLRB has maintained an enviable track record of conducting secret ballot elections in a manner that instills great public confidence in Agency neutrality and the election's integrity. However, this confidence has eroded based on evidence of election irregularities to which the Board appears to have responded with surprising indifference and a lack of transparency.

These issues have become more important based on a significant increase in NLRB representation elections. Last month, the Board reported that the number of representation petitions increased in the first six months of fiscal year 2023 (up to 1,200 from 1,174 in the prior year); and in fiscal year 2022, a total of 2,510 union representation petitions were filed, representing a 53 percent increase from fiscal year 2021(when 1,638 petitions were filed).[93]

---

[92] *See* NLRA §§ 9(a), 9(b) (emphasis added); *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362-363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.") (citations omitted); *NLRB v. Appleton Elec. Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (A "basic policy of the Act [is] to achieve stability of labor relations.") (citation omitted).

[93] NLRB, "Unfair Labor Practices Charge Filings Up 16%, Union Petitions Remain Up in Fiscal Year 2023" (April 7, 2023) (available at https://www.nlrb.gov/news-outreach/news-story/unfair-labor-practices-charge-filings-up-16-union-petitions-remain-up-in). *See also* NLRB, "Election Petitions Up 53%, Board Continues to Reduce Case Processing Time in FY22" (Oct. 6, 2022) (available at https://www.nlrb.gov/news-outreach/news-story/election-petitions-up-53-board-continues-to-reduce-case-processing-time-in); NLRB, "Union Election Petitions Increase 57% In First Half of Fiscal Year 2022" (April 6, 2022) (available at https://www.nlrb.gov/news-outreach/news-story/union-election-petitions-increase-57-in-first-half-of-fiscal-year-2022).

The NLRB has been public about its increasing caseload. However, the Agency has provided no appreciable information regarding the extent or number of election problems, beyond what has been publicly available from other sources.

At a Senate hearing held two months ago, former Congressman Bradley Byrne testified that he represents an NLRB career professional who, acting with whistleblower protection, reportedly provided information about Starbucks election irregularities. Former Congressman Byrne described his client as a "consummate professional who doesn't care about the outcome of an election and . . . has no position as to whether Starbucks employees should or should not vote to be represented by the union."[94] However, Congressman Byrne stated that his client "has knowledge of specific instances where NLRB personnel violated their neutrality obligations during this particular representation election and has brought that information to the Inspector General for the NLRB."[95]

Other details about NLRB election irregularities were described in a U.S. Chamber of Commerce report, entitled "Maligned Mail Ballots and Whistleblowers: the NLRB's Credibility Comes into Question,"[96] which described the Board's extensive use of mail ballot elections (favored by many unions),[97] and the report described the following examples of election irregularities (among others) that surfaced in multiple Starbucks elections:

- "Board agents made secret arrangements with union representatives to allow certain employees—who were hand-picked by the union—to cast their votes in person at the Region's office, in violation of the election agreement mandating an all-mail-ballot election."
- "Board agents provided voters additional ballots at the request of the union in contravention of the election agreement (which instructed that additional ballots would only be provided upon request by an 'eligible voter')."
- "Board agents disclosed non-public, real-time information to the union concerning (1) when certain employees' ballots were received by the Board, (2) how many ballots in total had been received by the Board, which enabled the union to determine (1) who had already voted, and (2) who had not yet voted, thus enabling the union to target specific employees in an effort to (1) influence their vote in favor of the union, and, if successful (2) convince the employees to transmit a vote."
- "Board agents mishandled employees' ballots, including by (1) losing ballots on multiple occasions during the same day, only to later discover the lost ballots; (2) marking ballots as received on wrong dates and at the wrong times; and (3) taking seven unopened, uncounted ballots into a back room, outside the view of the parties, for a period of 15 minutes, during which time all manner of improper conduct could have occurred."
- "Board agents failed to account for seven timely mail-ballots—the agents simply ignored the ballots when tallying the elections votes, which resulted in a union victory (eight votes in favor of the union, 7 votes opposing the union). Starbucks objected, and a different Board Region, Region 10, investigated whether Region 3 engaged in

[94] Byrne testimony, at 2.

[95] *Id.*

[96] U.S. Chamber of Commerce, "Maligned Mail Ballots and Whistleblowers: the NLRB's Credibility Comes into Question" (2023) (hereinafter "U.S. Chamber report").

[97] *Id.* at 9-10.

misconduct. Region 10 found that Region 3 did engage in misconduct, but rather than directing Region 3 to hold a new election, Region 10 directed Region 3 to hold a second ballot count before the parties to count all ballots received in the election (including the seven previously uncounted ballots). Region 3 held the second ballot count and, when all votes had been counted, the results were a 10 to 10 tie, rather than a union victory. Then, and only then, did Region 10 direct Region 3 to hold a new election."[98]

In August 2022, published reports indicated that Starbucks gave information to the NLRB (contained in a letter dated August 15, 2022) about election irregularities in Starbucks elections, including the above examples, and requested that the NLRB suspend elections "until the agency investigates the company's claims and reports the results to the public."[99]

On a case-by-case basis, these irregularities have been documented in Board proceedings. On February 24, 2023, based on some of the examples described above, a Hearing Officer recommended that the Board set aside the election involving a Starbucks store in Overland Park, Kansas, based on "inequities" that "cast doubt on validity [and] on the fairness of the election."[100] Likewise, on April 12, 2022, the Regional Director for NLRB Region 10 determined – regarding the Region 3 case described above – that the Board's vote count failed to include "seven ballot envelopes [that] were received by the Region 3 Office," and the file contained "no reason as to why the seven ballots that arrived on February 25 were not processed at the March 9 count."[101] On May 18, 2022, the Regional Director agreed with Starbucks' objection that the "Region 3 personnel's action in their handling of the ballot count *casts doubt on whether all valid ballots were counted, and undermines the integrity of the election*. . . ."[102]

To date, there has been no indication that the Board has undertaken any investigation into these issues (apart from those that have been uncovered on a case-by-case basis), and the Board has released no details regarding the extent to which these types of problems have affected additional elections involving other employers, unions and employees. In the meantime, by the Board's own accounting, more than 1,200 *new* election petitions have been filed since August 2022, which is when the Board was informed of the above election problems.

More transparency and much greater self-critical analysis – which the Board should make available to the public – which would permit the Board to reaffirm its commitment to handle representation elections in a neutral manner. This would benefit everybody, especially the Board itself, by restoring public confidence in the integrity of Board elections, to which the Board has been committed throughout its long history.

---

[98] *Id.* at 17-18 (footnotes omitted).

[99] Robert Iafolla, "Starbucks Dials Up Anti-Union Heat by Accusing NLRB of Collusion," BLOOMBERG LAW (Aug. 16, 2022) (hereinafter "BLOOMBERG") (available at https://news.bloomberglaw.com/daily-labor-report/starbucks-dials-up-anti-union-heat-by-accusing-nlrb-of-collusion). The Starbucks letter, which was released by Bloomberg Law, was addressed to NLRB Chairman Lauren McFerran and General Counsel Jennifer Abruzzo, with copies directed to Board Members John Ring, Marvin Kaplan, Gwynne Wilcox and David Prouty. *Id.* A copy of the letter was also directed to NLRB Inspector General David P. Berry, who reportedly was asked to undertake his own investigation and audit of alleged election misconduct involving Starbucks elections. *Id.*

[100] *Starbucks Corp.*, Case No. 14-RC-289926, at 10 (Feb. 24, 2023) (Hearing Officer's Report and Recommendations on Objections).

[101] *Starbucks Corp.*, Case No. 3-RC-285929, at 2 (April 12, 2022) (Regional Director's Administrative Review Decision and Order on Objection).

[102] *Starbucks Corp.*, Case No. 3-RC-285929, at 3 (May 18, 2022) (Regional Director's Administrative Review Decision and Order on Objection) (emphasis added).

Conclusion

This Committee – and the rest of the House and the Senate – worked for 18 months to produce the original National Labor Relations Act in 1935. Then in 1947, Congress did more work resulting in the Taft-Hartley amendments, and another 12 years later, Congress adopted other amendments in the Landrum-Griffin Act.[103]

John F. Kennedy in 1947 was serving his first year in Congress. As a House Member – on this Committee – he worked on the Taft-Hartley amendments, and he wrote his own Supplemental Minority Report, which stated: "Responsibility entails self-restraint in the exercise of power," and Member Kennedy opposed the Taft-Hartley amendments. But – just like other Taft-Hartley opponents – he stated that he *supported* the NLRA amendments which restored to "e*mployers the same rights of freedom of expression"* that the NLRB (the preceding year) had taken away.[104]

By 1959, John F. Kennedy had become a Senator, and he chaired the Conference Committee that produced the Landrum-Griffin Act amendments to the NLRA.[105] Senator Kennedy devoted significant time to NLRB secret ballot elections, and he said meaningful election campaigns – by unions *and* employers – were necessary so "*both parties* can present their viewpoints,"[106] as a necessary "*safeguard* against *rushing employees into an election where they are unfamiliar with the issues*."[107]

These statements – defending "freedom of expression" *for "employers"* and emphasizing *NLRB elections* in which "*both parties* can present their viewpoints" – were made by one of the country's most passionate union and employee advocates (who, by the way, also became President of the United States). It is hard to believe that the NLRB – applying the same statute – is now claiming that employer discussions about labor rights are "*per se unlawful*," and that NLRB secret ballot elections *should not even be conducted*, except in extremely rare situations.

---

[103] For details regarding work by Congress on the original NLRA (known as the "Wagner Act"), amendments adopted as part of the Taft-Hartley Act and the Landrum-Griffin Act, plus additional healthcare amendments adopted in 1974, see note 7 above.

[104] H.R. Rep. 80-245, 80th Cong., 1st Sess. at 113-114 (1947), *reprinted in* 1 Legis. Hist. 404-405 (1947) (Supplemental Minority Report by Hon. John F. Kennedy) (emphasis added).

[105] *See* 105 Cong. Rec. 16263 (1959), *reprinted in* 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act ("LMRDA Hist.") 1397 (statement of Sen. Dirksen, identifying Senator Kennedy as the "distinguished chairman of the conference committee"). Changes to the NLRA that were considered or adopted as part of the Landrum-Griffin Act, 73 Stat. 541, 29 U.S.C. §§ 401 *et seq*. (1959), focused heavily on NLRB secret-ballot elections, including questions about whether "pre-hearing elections" were permissible, the appropriate length of time for NLRB election campaigns, and new language permitting the Board's authority in representation cases to be delegated to Regional Directors, among other things. *See, e.g*., H.R. Rep. 86-741, at 24-25 (1959), *reprinted in* 1 LMRDA Hist. 782-83; S. 1555, 86th Cong. § 705 (1959), *reprinted in* 1 LMRDA Hist. 395-96; S. Rep. 86-10, at 3 (1959), *reprinted in* 1 LMRDA Hist. 82; S. 1555, 86th Cong. § 705 (1959), *reprinted in* 1 LMRDA Hist. 581. *See also* 105 Cong. Rec. 5361 (1959), *reprinted in* 2 LMRDA Hist. 1024 (statement of Sen. Kennedy) (advocating at least 30 days between petition-filing and the election as a "safeguard against rushing employees into an election where they are unfamiliar with the issues"); 105 Cong. Rec. 16629 (1959), *reprinted in* 2 LMRDA Hist. 1714 (statement of Rep. Barden) (explaining that the "right to a formal hearing before an election . . . is preserved without limitation or qualification"); 2 LMRDA Hist. 1862-1889 (showing the Landrum-Griffin Act changes to the NLRA).

[106] 105 Cong. Rec. 5770 (1959), *reprinted in* 2 LMRDA Hist." 1085 (statement of Sen. Kennedy).

[107] 105 Cong. Rec. 5361 (1959), *reprinted in* 2 LMRDA Hist. 1024 (statement of Sen. Kennedy) (advocating NLRB secret ballot elections, with at least 30 days between petition-filing and the election, as a "safeguard against rushing employees into an election where they are unfamiliar with the issues").

The NLRB cases involving these issues are departures, in my view, from what Congress decided in the National Labor Relations Act. These departures adversely affect everyone – employees, employers and unions – and they are not helpful to the Board. Two recent Supreme Court cases suggest these may be perilous times for federal agencies. On April 14, 2023, the Supreme Court held – unanimously – that parties can obtain immediate relief in federal district courts from agency proceedings that potentially infringe on constitutional rights,[108] and on May 1, 2023, the Supreme Court granted review in a case that may eliminate all deference to administrative agencies.[109]

How can the Board address problems that have occurred in NLRB elections? For starters, the Board could take two steps backward, encourage all Board personnel who have relevant information about election problems to come forward, and make that information public.[110] As a second step, it would help to announce and reaffirm – inside and outside the Agency – a commitment to treating all elections in an even-handed manner, without favoring any party and without suggesting any preference about the outcome.

My friends and former colleagues at the NLRB have important work to do. But Congress makes the rules, and everyone else – including the NLRB – must follow them.

This concludes my prepared testimony. I have provided an extended version of my remarks for the record, and I look forward to any questions.

PHILIP A. MISCIMARRA

[5/21A/2023]

[108] *See, e.g.*, *Axon Enterprise, Inc. v. Federal Trade Commission*, 143 S. Ct. 890, 905 (April 14, 2023) (citation omitted).

[109] *Loper Bright Enterprises v. Raimondo*, No. 22-451 (U.S. Sup. Ct. May 1, 2023) (granting review of a question raising whether the Court should overrule *Chevron* deference to administrative agencies that has traditionally been applied pursuant to *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

[110] Last November, the Board issued a Notice of Proposed Rulemaking suggesting changes in certain election procedures. *See* 87 Fed. Reg. 66890 (Nov. 4, 2022) (proposed rule regarding representation case procedures relating to election bars and proof of majority status in construction industry relationships).