Nos. 24-2107, 25-1060

In the United States Court of Appeals
FOR THE SIXTH CIRCUIT

BROWN-FORMAN CORPORATION, dba Woodford Reserve Distillery
Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent Cross-Petitioner

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO 651
Intervenor

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

BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR A DEMOCRATIC WORKPLACE, COUNCIL ON LABOR LAW EQUALITY, INDEPENDENT ELECTRICAL CONTRACTORS, INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AND NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF BROWN-FORMAN CORPORATION AND IN SUPPORT OF REVERSAL

STEPHANIE A. MALONEY
JORDAN L. VON BOKERN
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

JONATHAN C. FRITTS
MICHAEL E. KENNEALLY
RICHARD J. MARKS
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 739-3000

Counsel for Amici Curiae

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Sixth Circuit Rules, *amici curiae* Associated Builders and Contractors, Associated General Contractors of America, Chamber of Commerce of the United States of America, Coalition for a Democratic Workplace, Council on Labor Law Equality, Independent Electrical Contractors, International Foodservice Distributors Association, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Federation of Independent Business Small Business Legal Center, Inc., and National Retail Federation each certify that it has no parent corporation, that no publicly held corporation owns ten percent or more of its stock, that it is not a subsidiary or affiliate of a publicly held corporation, and that it is unaware of any publicly owned corporation, not a party to the appeal, that has a substantial financial interest in the outcome of the litigation.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Associated Builders and Contractors ("ABC") is a national construction industry trade association established in 1950 with 67 chapters and more than 23,000 members. Founded on the merit shop philosophy, ABC helps members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. ABC members are often targets of union organizing.

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

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

meet the needs and concerns of its members, thereby improving the quality of construction and protecting the public interest.

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

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

The **Council on Labor Law Equality** ("COLLE") is a national association of large employers with partially unionized workforces founded more than 35 years ago to monitor and comment on developments concerning the interpretation of the National Labor Relations Act ("NLRA" or "Act"). COLLE member companies

represent the broad scope of private-sector workplaces subject to the Act. COLLE members' economic success and ability to create sustainable jobs depend on a national labor policy characterized by stable, predictable and balanced interpretations of the Act.

Independent Electrical Contractors ("IEC") is the nation's premier trade association representing America's independent electrical and systems contractors with 53 educational campuses and affiliate local chapters, representing over 4,000 member companies that employ more than 80,000 electrical and systems workers throughout the United States. IEC aggressively works with the industry to promote the concept of free enterprise, open competition, and economic opportunity for all.

International Foodservice Distributors Association ("IFDA") is a leading trade association representing foodservice distributors throughout the United States. IFDA members play a crucial role in the foodservice supply chain, delivering food and related products to restaurants, K-12 schools, hospitals and care facilities, hotels and resorts, U.S. military bases and government facilities, and other operations that make meals away from home possible. The industry generates $400+ billion in sales, employs 431,000 people, and operates 17,100 distribution centers in all 50 states and the District of Columbia.

The **National Association of Manufacturers** ("NAM") is the largest manufacturing association in the United States, representing small and large

manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.93 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

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

The **National Federation of Independent Business Small Business Legal Center, Inc.** ("NFIB Legal Center") is a nonprofit, public interest law firm

established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

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

Amici and their members have a strong interest in the framework used to determine majority support for collective bargaining representatives and the duty to bargain with such representatives under the NLRA, 29 U.S.C. §§ 151 *et seq.* The approach that the National Labor Relations Board ("NLRB" or "Board") takes on these issues affects employers and employees across the country. *Amici* have grave

concerns about the unprecedented framework adopted in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023). The *Cemex* framework contravenes Supreme Court precedent, and the Board improperly created this radical new framework without a rulemaking or even soliciting other interested parties' viewpoints.

For the reasons detailed here and in Petitioner's brief, the Court should set aside and decline to enforce the Board's decision in this case because it rests entirely on the fatally flawed and invalid *Cemex* standard.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Board in this case applied its 2023 decision in *Cemex*, which improperly reverses fundamental policy choices made by Congress and ratified by the Supreme Court. To start, *Cemex* overruled longstanding precedent holding that if an employer is unwilling to voluntarily recognize a union based on authorization cards, the burden is on the union—not the employer—to petition the NLRB for a secret ballot election. A half century before *Cemex*, the Supreme Court recognized that "[u]nless 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." *Linden Lumber Div. v. NLRB*, 419 U.S. 301, 310 (1974). The NLRA's strong preference for secret ballot elections was, until

Cemex, firmly settled. And repeated unsuccessful attempts to enact legislation overturning *Linden Lumber*, such as the Employee Free Choice Act,[2] the so-called Workplace Democracy Act,[3] and the Protecting the Right to Organize Act,[4] are persuasive evidence that *Linden Lumber* reflects Congress's understanding of the NLRA. *See NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 275

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[2] Employee Free Choice Act, H.R. 3619, 108th Cong. (2003) (https://www.congress.gov/bill/108th-congress/house-bill/3619); Employee Free Choice Act, S. 1925, 108th Cong. (2003) (https://www.congress.gov/bill/108th-congress/senate-bill/1925); Employee Free Choice Act, H.R. 1696, 109th Cong. (2005) (https://www.congress.gov/bill/109th-congress/house-bill/1696); Employee Free Choice Act, S. 842, 109th Cong. (2005) (https://www.congress.gov/bill/109th-congress/senate-bill/842); Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (2007) (https://www.congress.gov/bill/110th-congress/house-bill/800); Employee Free Choice Act of 2007, S. 1041, 110th Cong. (2007) (https://www.congress.gov/bill/110th-congress/senate-bill/1041); Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009) (https://www.congress.gov/bill/111th-congress/house-bill/1409); Employee Free Choice Act of 2009, S. 560, 111th Cong. (2009) (https://www.congress.gov/bill/111th-congress/senate-bill/560); Employee Free Choice Act of 2016, H.R. 5000, 114th Cong. (2016) (https://www.congress.gov/bill/114th-congress/house-bill/5000).

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

[4] Protecting the Right to Organize Act, H.R. 2474, 116th Cong. (2019) (https://www.congress.gov/bill/116th-congress/house-bill/2474); Protecting the Right to Organize Act, H.R. 842, 117th Cong. (2021) (https://www.congress.gov/bill/117th-congress/house-bill/842/text); Protecting the Right to Organize Act, H.R. 20, 118th Cong. (2023) (https://www.congress.gov/bill/118th-congress/house-bill/20/text).

(1974) ("congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress").

More relevant than the burden-shifting on filing an election petition, however, is *Cemex*'s radical new standard for ordering an employer to bargain with a union even if an election is held and the employees vote against union representation. The Board's new standard is flatly incompatible with established Supreme Court precedent. Over 50 years ago, the Court made clear that a bargaining order is the exception, not the rule, even when the employer commits unfair labor practices during the period between the filing of a representation petition and an NLRB election—referred to as the "critical period." *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

But in *Cemex*, the Board turned the *Gissel* standard on its head. *Cemex* makes bargaining orders the rule. Even if employees vote overwhelmingly against union representation, as the employees did in this case by a more than 3-to-1 margin, the Board will now routinely overrule the election result and order the employer to bargain based on authorization cards collected before the election.

This radical new framework violates the Supreme Court's decision in *Gissel* and the structure and legislative history of the NLRA. The appropriateness of a bargaining order depends on an analysis of whether the NLRB can conduct a fair

rerun election. The Board in *Cemex* knowingly adopted a new standard which eliminates that analysis.

Cemex improperly relies on authorization cards and bargaining orders as the default method for designating a union as the exclusive bargaining representative for a group of employees. Although the *Gissel* Court conceded that authorization cards are not "inherently unreliable," the Court nonetheless found them "admittedly inferior to the election process" and affirmed the fundamental principle that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *Gissel*, 395 U.S. at 602-03. The Court, in other words, found that reliance on authorization cards should be the exception, not the rule, and only when the possibility of holding a fair election is "slight." *Id.* at 614. The *Cemex* majority's attempt to flip that presumption and make secret ballot elections the exception rather than the rule contravenes both *Gissel* and *Linden Lumber.*

Cemex further stands as a clear example of inappropriate policymaking by case adjudication instead of rulemaking, which requires the opportunity for public participation afforded by notice-and-comment procedures. The principles recognized in *Gissel* are not random policy choices that can be reversed based on the whim of a Board majority. They are rooted in the structure and legislative history of the NLRA. Selecting representatives of their own choosing—or selecting no

representative—is at the core of employees' Section 7 right to self-determination under the NLRA. 29 U.S.C. § 157.

Section 8(a)(2) of the NLRA makes it *unlawful* for an employer to voluntarily recognize a union without an election if a majority of employees do not, in fact, want to be represented by the union. 29 U.S.C. § 158(a)(2). "There could be no clearer abridgement" of employees' rights under Section 7 than for an employer to recognize a union that has not been selected by a majority of employees. *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961). *Cemex* enables just that result.

The Board should have solicited public input before so dramatically refashioning the way that labor law ascertains employees' majority support for a union. For this reason, too, its decision in *Cemex* was improper, and the Board's decision in this case cannot stand because it rests entirely on the flawed and invalid *Cemex* standard.

ARGUMENT

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

A. *Cemex* Is Incompatible with *Gissel*.

Under *Cemex*, any employer unfair labor practice that would justify setting aside an election will now produce a bargaining order rather than a rerun election. 372 NLRB No. 130, slip op. at 26. This change makes it extremely easy for the

Board to order an employer to recognize, and bargain with, a union—even if the union overwhelmingly loses an NLRB-supervised secret ballot election, as happened here. As Chairman Kaplan observed, the *Cemex* majority "effectively implemented a zero-tolerance standard" by suggesting that "even a single unfair labor practice will result in a bargaining order." *Id.* at 51 (Kaplan, M., dissenting in part).

Cemex's zero-tolerance standard contradicts *Gissel*. There, the Supreme Court explained that a bargaining order is not appropriate simply because the employer committed unfair labor practices that warrant setting aside the election. 395 U.S. at 610. To warrant a bargaining order, the unfair labor practices must also make the possibility of a fair rerun election "slight" or nonexistent. *Id.* at 614-15.

As a result, *Gissel* recognized three categories of cases based on the severity of the unfair labor practices and the likelihood of holding a fair rerun election:

- The first arises "in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices." *Id.* at 613. A bargaining order is appropriate if these unfair labor practices "are of 'such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had.'" *Id.* at 614 (citation omitted).

- The second arises "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." *Id.* In such a case, a bargaining order is appropriate only "[i]f the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies . . . is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *Id.* at 614-15.
- The third is a "category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery will not sustain a bargaining order." *Id.* at 615.

The *Cemex* framework eliminates these three categories and reduces them to a one-size-fits-all approach that ignores the likelihood of a fair rerun election. Under the new approach, contrary to *Gissel*, there are no "minor or less extensive unfair labor practices" that warrant setting aside an election but "will not sustain a bargaining order." *Id.* *Gissel*'s third category becomes a null set.

And that is not surprising, because *Cemex* rejects *Gissel*'s rationale for bargaining orders. *Gissel* requires asking whether a fair rerun election can be held. *Cemex* boldly declares that question irrelevant: "we do not believe that conducting

a *new* election . . . can ever be a truly adequate remedy." *Cemex*, 372 NLRB No. 130, slip op. at 26 (emphasis in original). That pronouncement runs roughshod over the Supreme Court's decision.

To be sure, *Gissel* recognized that an employer's unfair labor practices must be remedied. 395 U.S. at 610. But that consideration alone does not justify the severe remedy of a bargaining order. At least as important as deterring unfair labor practices is "effectuating ascertainable employee free choice." *Id.* at 614. Thus, employees' support for the union should be determined, if at all possible, through an NLRB-supervised secret ballot election. The Court recognized that authorization cards are "inferior to the election process," while "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *Id.* at 602-03.[5] That explains why the *Gissel* Court was

[5] Circuit courts have similarly recognized that secret ballot elections are superior to authorization cards, noting that employees may be pressured to sign authorization cards. *See NLRB v. Vill. IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983) ("Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back[.]"); *NLRB v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383 (2d Cir. 1973) ("There is no doubt but that an election supervised by the Board which is conducted secretly and presumably after the employees have had the opportunity for thoughtful consideration, provides a more reliable basis for determining employee sentiment than an informal card designation procedure where group pressures may induce an otherwise recalcitrant employee, to go along with his fellow workers.").

unwilling to authorize bargaining orders unless a rerun election would be unlikely "to demonstrate the employees' true, undistorted desires." *Id.* at 611.

This Court has long adhered to the *Gissel* framework. Indeed, it has unequivocally recognized that "[i]n reaching its determination to issue a bargaining order, the Board *must* make factual findings and *must* support its conclusion that there is a *causal* connection between the unfair labor practices and the probability that no fair election could be held." *M.P.C. Plating, Inc. v. NLRB*, 912 F.2d 883, 888 (6th Cir. 1990) (emphasis in original) (denying enforcement of bargaining order). "[E]lections are preferred to bargaining orders," so "'minor or less extensive unfair labor practices[] . . . will not support an order to bargain." *DTR Indus., Inc. v. NLRB*, 39 F.3d 106, 112, 115 (6th Cir. 1994) (quoting *Gissel*, 395 U.S. at 615) (denying enforcement of bargaining order).

The Board majority in *Cemex* disregarded *Gissel*'s focus on the possibility of a fair rerun election and instead attacked *Gissel*'s supposed "weaknesses" in disincentivizing unfair labor practices. *Cemex*, 372 NLRB No. 130, slip op. at 28; *see also id.* at 28 n.152. But the NLRB lacks authority to overturn Supreme Court precedent; only the Supreme Court can do that. *See, e.g.*, *Kaminski v. Coulter*, 865 F.3d 339, 347 (6th Cir. 2017) ("[I]t is the Supreme Court's prerogative alone to overrule one of its precedents." (citation and brackets omitted)); *ILWU v. NLRB*, 978 F.3d 625, 640 (9th Cir. 2020) (reversing NLRB for adopting an analysis

"incompatible with the Supreme Court's"); *cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024) ("[I]t is emphatically the province and duty of the judicial department to say what the law is." (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

The *Cemex* majority expressed frustration that courts of appeals have often reversed the Board's bargaining orders under the *Gissel* standard. It complained that courts "have regularly reached different conclusions about the likely impact of employers' unlawful conduct and the Board's traditional remedies upon employees' ability to exercise free choice in [a future] election." *Cemex*, 372 NLRB No. 130, slip op. at 34. When the courts of appeals adhere to the *Gissel* framework, instead of some other standard that the NLRB might prefer, "Board bargaining orders in individual cases become increasingly less likely to issue or be enforced." *Id.* at 35.

It is true that courts, including this Court, have widely recognized that "the issuance of a bargaining order is a severe remedy" and have often disagreed with the Board's decisions to issue such an order. *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1487 (6th Cir. 1993) (quoting *NLRB v. Arrow Molded Plastics, Inc.*, 653 F.2d 280, 284 (6th Cir. 1981)). Because of the severity of a bargaining order, courts require that the Board clearly articulate why a bargaining order is warranted and why other remedies are insufficient. *NLRB v. Rexair, Inc.*, 646 F.2d 249, 250 (6th Cir. 1981). Courts have recognized that "[i]t is equally inappropriate to enforce bargaining

orders where the Board's rationale for the order was conclusory." *Arrow Molded Plastics*, 653 F.2d at 284; *see also Donn Prods., Inc. v. NLRB*, 613 F.2d 162, 166 (6th Cir. 1980) ("[C]ourts are not required to enforce bargaining orders based on conclusory statements unsupported by sufficient facts.") (collecting cases). Yet, "[t]he Board continues to ignore these admonitions and, thus, has faced a string of reversals." *Skyline Distribs. v. NLRB*, 99 F.3d 403, 410 (D.C. Cir. 1996).

The *Cemex* majority's displeasure with Supreme Court precedent and courts' application of that precedent does not authorize the Board to unilaterally rewrite settled law. The Board's imposition of a bargaining order on Brown-Forman—based on a new standard that contradicts *Gissel*—must be vacated.

B. *Cemex*'s Rejection of *Gissel* Is Arbitrary and Contrary to Law.

The *Cemex* majority's desire to penalize employers who commit any unfair labor practice, regardless of its severity or potential impact on a rerun election, is an especially inappropriate reason to rewrite *Gissel*. While unfair labor practices should not be condoned, *Cemex* ignores that many unfair labor practices are invented by the Board in individual cases and then enforced retroactively. Only in hindsight is employer conduct held to be unlawful. And the Board gives remarkably short shrift to employers' constitutional and statutory rights, including the right to free speech during a union organizing campaign.

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

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

As one example, the *Cemex* standard would support a bargaining order "where employers are found to have violated the Act solely by continuing to maintain a facially neutral work rule implemented long before the critical period began."

Cemex, 372 NLRB No. 130, slip op. at 51 (Kaplan, M., dissenting in part).[6] Although not directly at issue in this case, the Board has set aside elections based on an employer's "mere maintenance of objectionable rules" even if "none of the rules were actually enforced against employees during the election" and even if "there is no evidence that any employees were actually deterred from engaging in campaign activity" based on those rules. *Jurys Boston Hotel*, 356 NLRB 927, 929 (2011).

Second, the *Cemex* majority's deterrence rationale is particularly concerning given the many new unfair labor practices that the Board has attempted to recognize in recent years and enforced retroactively. *See, e.g.*, *Tesla, Inc. v. NLRB*, 86 F.4th 640, 644 (5th Cir. 2023) (reversing NLRB's decision that a nondiscriminatory workplace uniform requirement was an unlawful policy).[7] Courts and the Board often disagree over whether certain conduct violates the Act—and the Board's members often disagree among themselves. *Cemex*, 372 NLRB No. 130, slip op. at 41 n.4 (Kaplan, M., dissenting in part). But an employer will get no leniency under the *Cemex* approach for failing to anticipate a Board majority's retroactive enforcement of a newly recognized unfair labor practice.

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

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

Cemex also disregards the negative effect that its new approach has on employers' free speech rights, which are protected by the First Amendment and Section 8(c) of the NLRA. *See, e.g.*, 29 U.S.C. § 158(c); *Thomas v. Collins*, 323 U.S. 516, 537 (1945) ("[E]mployers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty."). Historically, the Board has often been accused of treating employer speech with disfavor. *See, e.g.*, *Chamber of Com. of U.S. v. Brown*, 554 U.S. 60, 66-67 (2008); *NLRB v. Golub Corp.*, 388 F.2d 921, 926-29 (2d Cir. 1967). More recently, in November 2024, the Board issued two decisions limiting how employers may speak to employees and what employers may say—overturning a combined 115 years of established precedent and further demonstrating its hostility toward employer speech. *See Amazon.com Servs. LLC*, 373 NLRB No. 136 (2024) (overturning *Babcock & Wilcox Co.*, 77 NLRB 577 (1948), and holding mandatory meetings where employer discusses union-related issues are unlawful); *Siren Retail Corp d/b/a Starbucks*, 373 NLRB No. 135 (2024) (overturning *Tri-Cast, Inc.*, 274 NLRB 377 (1985), and restricting employer's ability to explain to employees that unionization may impact direct relationship between employer and employees).

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

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

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

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

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

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

The Board unlawfully adopted this radical new standard within the confines of a single case adjudication and continues to apply it in that setting. The Supreme Court has recognized "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act." *Bell*

Aerospace, 416 U.S. at 294. The Board has rulemaking authority but chose not to exercise it. *See* 29 U.S.C. § 156. This rulemaking authority was "designed to assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion). A rulemaking requires publishing the proposed rule in the Federal Register and allowing all interested parties an opportunity to submit comments on the proposed rule. *Id.* at 764-65; *see* 5 U.S.C. § 553.

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

Cemex announced entirely new standards and procedures in an adjudicative proceeding, even though they made no difference to the outcome there: the *Cemex* majority expressly found that a bargaining order was warranted even under the *Gissel* standard. *Cemex*, 372 NLRB No. 130, slip op. at 12-19. So *Cemex*'s real significance is for cases like this one, rather than *Cemex* itself. Issuing a major change to the NLRB's standards in a way that has prospective effect only is a classic example of improper rulemaking in the guise of adjudication. "An agency cannot

avoid the requirement of notice-and-comment rulemaking simply by characterizing its decision as an adjudication." *Yesler Terrace*, 37 F.3d at 449 (citing *Wyman-Gordon*, 394 U.S. at 764). Substance controls over form. Issuing a quasi-legislative revision to federal labor law in a case where it has no effect on the outcome is a textbook example of a rulemaking in an adjudication's clothing. Because the *Cemex* framework is, in substance, a rule issued without notice-and-comment rulemaking, the Court should find that *Cemex* bargaining orders are invalid and set aside the bargaining order in this case. *Id.* at 449; *see also Safari Club Int'l v. Zinke*, 878 F.3d 316, 320-21 (D.C. Cir. 2017).

D. The Board's Framework in *Cemex* Is Not Entitled to Deference Under *Loper Bright*

Under *Loper Bright*, courts may only defer to executive branch rules and interpretations that are persuasive under factors identified in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); namely, "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Loper Bright*, 603 U.S. at 370 (citing *Skidmore*, 323 U.S. at 140).

The Board's decision in *Cemex* is not entitled to deference under the *Skidmore* factors. The Board failed to thoroughly consider its radical new interpretation of the Act or its consequences. Not only did the Board fail to solicit public comments through rulemaking; the Board did not even seek public input through a request for

amicus briefs. Just the opposite, the Board rejected a motion by several of the *amici* joining this brief, which asked the Board to solicit *amicus* briefs in *Cemex*.[8] And as discussed above, the Board's reasoning in *Cemex* is invalid and contrary to nearly 60 years of precedent, including Supreme Court precedent that the Board has no authority to change. For all of these reasons, *Cemex* does not deserve deference.

II. The Board's Decision in this Case Must Be Reversed Because It Rests Entirely on the Flawed and Invalid *Cemex* Standard.

The Board placed the entire weight of its decision in this case on *Cemex*'s new "zero-tolerance standard," although Chairman Kaplan reiterated his view that a *Cemex* bargaining order is not an appropriate remedy. *Brown-Forman*, 373 NLRB No. 145, slip op. at 1 n.4 (2024). After employees voted overwhelmingly against union representation, the Administrative Law Judge ("ALJ") imposed a *Cemex* bargaining order based on objectionable conduct that occurred during the "critical period" before the election. *Id*. at 4, 14. But the ALJ, in a footnote, concluded that a bargaining order would also be appropriate under *Gissel*. *Id.* at n.22.

In affirming the ALJ's decision, however, the Board disavowed the ALJ's alternative conclusion based on *Gissel*. The Board found that *Cemex* rendered any analysis under *Gissel* irrelevant, holding that "[b]ecause we are adopting the judge's recommended issuance of a remedial bargaining order under [*Cemex*], we do not

[8] *See* https://apps.nlrb.gov/link/document.aspx/09031d458381bfef; https://apps.nlrb.gov/link/document.aspx/09031d458375d27f (last visited April 21, 2025).

rely on the judge's conclusion that a bargaining order is also warranted under the separate framework set forth in [*Gissel*]." *Id*. at 1, n.4.

The Board, therefore, issued a bargaining order without any analysis, or even discussion, of whether the unfair labor practices fell into one of the three categories established in *Gissel*. *See Gissel*, 395 U.S. at 613-15. Indeed, the Board made no effort to assess whether "outrageous" or "pervasive" unfair labor practices occurred that would render a free and fair rerun election impossible or if the likelihood of erasing the effects of the unlawful conduct was slight—as required under *Gissel*. *Brown-Forman*, 373 NLRB No. 145, slip op. at 1, n.4.

Because the Board expressly disavowed any analysis under *Gissel*, and relied exclusively on the contrary *Cemex* standard, the Board's decision in this case cannot stand.

CONCLUSION

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

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Respectfully submitted,

/s/ Michael E. Kenneally
JONATHAN C. FRITTS
MICHAEL E. KENNEALLY
RICHARD J. MARKS
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
T. 202.739.3000
michael.kenneally@morganlewis.com

Counsel for Amici Curiae

STEPHANIE A. MALONEY
JORDAN L. VON BOKERN
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because it contains 5,497 words, excluding the parts of the brief exempted by Rule 32(f) and 6th Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: April 23, 2025

/s/ Michael E. Kenneally
MICHAEL E. KENNEALLY

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2025, a copy of the foregoing was filed electronically through this Court's CM/ECF system, which sent a notice of electronic filing to counsel of record.

Dated: April 23, 2025

/s/ Michael E. Kenneally
MICHAEL E. KENNEALLY

Counsel for Amici Curiae