

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the matter of:	)	
	)	
ARRMAZ PRODUCTS,	)	
	)	
and	)	Case No. 12-CA-294086
	)	
INTERNATIONAL CHEMICAL WORKERS	)	
UNION OF THE UNITED FOOD AND	)	
COMMERCIAL WORKERS INTERNATIONAL	)	
UNION, AFL-CIO, CLC	)	

**MOTION BY THE COALITION FOR A DEMOCRATIC WORKPLACE, ASSOCIATED BUILDERS AND CONTRACTORS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE NATIONAL ASSOCIATION OF WHOLESALE-DISTRIBUTORS, FOR LEAVE TO FILE *AMICI* BRIEF IN OPPOSITION TO THE GENERAL COUNSEL’S MOTION FOR SUMMARY JUDGMENT SEEKING EXTRAORDINARY REMEDIES IN VIOLATION OF THE BOARD’S LONGSTANDING *EX-CELL-O* DOCTRINE**

The Coalition for a Democratic Workplace (“CDW”), together with its undersigned member associations Associated Builders and Contractors (“ABC”), The Chamber of Commerce of the United States of America (“the Chamber”), the National Association of Manufacturers (“the NAM”), and the National Association of Wholesaler-Distributors (“NAW”) (collectively the “CDW *Amici*”), hereby move for leave to file the attached *amici* brief in opposition to that portion of the General Counsel’s motion for summary judgment which seeks to overrule the Board’s longstanding precedent, *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970). The General Counsel’s motion seeks to impose an extraordinary and punitive remedy under the guise of “making the bargaining-unit employees whole for the lost opportunity to engage in collective bargaining,” unfairly penalizing the Respondent Employer for exercising its right to petition the courts to review the NLRB’s certification of the election.

As more fully set forth in the attached brief, the remedy advocated in the General Counsel's motion upends without adequate justification longstanding Board policy as expressed in *Ex-Cell-O Corp.*, which was correctly decided and was indeed compelled by the Supreme Court's holdings in *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970), and *Boire v. Greyhound Corp.*, 376 U.S. 473, 477-78 (1964). The proposed remedy violates the plain language of the Act, Supreme Court precedent, and the First Amendment, all of which protect the right of employers to petition the courts to review final NLRB decisions. Overruling *Ex-Cell-O* would also be arbitrary and capricious and thus would violate the Administrative Procedure Act (APA).

**CDW** is a broad-based coalition of hundreds of organizations representing hundreds of thousands of employers and millions of employees in various industries across the country. CDW and its members are joined by their mutual concern over regulatory overreach by the General Counsel and the Board, threatening the rights of employees and employers protected by the Act, and jeopardizing economic growth. Employers and employees alike rely on the Board to maintain labor relations stability. Such reliance interests are severely undermined, and the integrity of the Board itself is jeopardized, when longstanding and established precedents are overturned without adequate justification, as is threatened in this case.

**ABC** is a national construction industry trade association representing more than 21,000 members. ABC and its 68 chapters represent all specialties within the U.S. construction industry, comprised primarily of firms that perform work in the industrial and commercial sectors. ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, which is based on the principles of nondiscrimination due to labor affiliation and fair and open competition.

**The Chamber** is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 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 that raise issues of concern to the nation's business community.

**The NAM** is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12.8 million men and women, contributes \$2.77 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds 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.

**NAW** is an employer and a non-profit 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 comprised of direct member companies and a federation of national, regional, state and local associations which together include approximately 35,000 companies operating at more than 150,000 locations throughout the nation.

Although the Board’s rules do not specify a deadline for filing an *amicus* brief in response to a notice to show cause and motion for summary judgment, the present motion is being timely filed on the same date as the Respondent Employer’s deadline to file its own opposition.<sup>1</sup> The General Counsel is thus not prejudiced by the filing of the CDW *Amici’s* brief. In any event, the General Counsel’s motion devoting more than 50 pages to overruling one of the Board’s most established precedents constitutes an extraordinary circumstance and good cause for acceptance of this *amicus* filing.

If the Board intends to consider the General Counsel’s radical proposed remedy in deciding the present case, then the Board should grant CDW’s motion to file the attached *amicus* brief from interested stakeholders. Since the General Counsel appears to have filed the same motion in multiple “test of certification” cases, the Board should invite *amicus* briefs from all interested parties in each of those cases, as the Respondent Employer has requested here and Rule 102.46(i) expressly permits. The NLRB certainly should not move forward with the proposed overruling of longstanding precedent in this or any other case where the General Counsel has filed the same or similar motion, without hearing from the stakeholders who will be directly and significantly impacted by the General Counsel’s radical proposal.

Respectfully submitted,

Maurice Baskin

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<sup>1</sup> The Board’s rule governing *amicus* briefs, 29 C.F.R. 102.46(i), does not impose a time limit or otherwise address *amicus* filings in response to a notice to show cause following certification of a representation election. The Board has recently granted a motion for leave to file an *amicus* brief in the representation context, however, demonstrating that *amicus* filings are not limited to cases involving exceptions to ALJ decisions or court remands. *See President and Trustees of Bates College*, Case No. 01-RC-284384 (June 3, 2022 Order of the Board).

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August 26, 2022

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of CDW's Motion for leave to file an *Amicus* Brief , together with the attached brief itself, was filed today, August 26, 2022, using the NLRB's e-Filing system and was served by email upon the following:

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