UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STARBUCKS CORPORATION and CHICAGO AND MIDWEST REGIONAL JOINT BOARD, WORKERS UNITED/SEIU	Cases 14-CA-290968 et al.

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

BY ASSOCIATED BUILDERS AND CONTRACTORS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR A DEMOCRATIC WORKPLACE, INDEPENDENT ELECTRICAL CONTRACTORS, INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, AND NATIONAL RETAIL FEDERATION

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Dated: February 8, 2023

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The Associated Builders and Contractors, Chamber of Commerce of the United States of America, Coalition for a Democratic Workplace, Independent Electrical Contractors, International Foodservice Distributors Association, National Association of Wholesaler-Distributors, and National Retail Federation (hereinafter "Amici") respectfully move, consistent with the Board's practice in other cases and Section 102.46(i) of the Board's Rules and Regulations ("Rules"), that (i) the Board grant permission for the Amici to file the Amici Curiae Brief attached as Addendum A, and/or (ii) the Board to issue a notice and invitation for the public (including the Amici) to file amicus briefs addressing whether the Board should adopt the General Counsel's proposals involving "employer speech restrictions" and "mandatory union recognition," respectively, as described more fully below. In support of this motion, the Amici state as follows:

1. The Amici (on pages 4-5 of Addendum A) are associations whose members represent the interests of millions of employers and their employees in virtually every industry throughout the United States.

2. This case involves two issues (among others) that have fundamental importance to employees, unions and employers throughout the United States, including: (1) whether the Board should find that employer speech in the workplace regarding the exercise of Section 7 rights is inherently coercive and "per se unlawful" whenever the employees are "on paid time" or "performing their job duties,"[1] and (2) whether an employer violates the National Labor Relations Act ("NLRA" or Act") by declining a union's recognition demand even though the union has not established majority employee support in an NLRB-conducted election, resulting in the Board's issuance of a bargaining order unless the employer proves the employer had "good faith" reasons to believe the union lacked majority support.[2]

3. Both the first issue (referred to hereinafter as "employer speech restrictions") and the second issue (referred to below as "mandatory union recognition") involve major proposed departures from what has been settled Board law for more than 50 years. In support of the

[1] Brief in Support of Counsel for the General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge ("GC Cross-Ex. Br."), at 23, 25, 27, 29, 31. *See generally id.* at 29-39.

[2] *Id.* at 7-19.

employer speech restrictions, the General Counsel primarily relies on *Clark Bros. Co*.,[3] which the Board decided in 1946, and which pre-dated the enactment of Section 8(c) of the Act (which is commonly known as the Act's "free speech" provision). In support of mandatory union recognition, the General Counsel primarily relies on *Joy Silk Mills, Inc.*,[4] which the Board decided in 1949, and which the Board abandoned with approval that the Supreme Court expressed in *Gissel Packing*[5] (decided in 1969) and *Linden Lumber*[6] (decided in 1974).

4. In the past four years, the Board has maintained a consistent practice of inviting the public to submit amicus briefs when the Board considers substantial changes in precedent regarding important issues, examples of which include the following cases:

- In *General Motors LLC*, 368 NLRB No. 68 (Sept. 5, 2016), the Board solicited public briefs regarding the appropriate treatment of "profane language or sexually or racially offensive speech" in the workplace. Even though Chairman McFerran (then a Board member) dissented on the basis that the case "could readily be decided under extent precedent," she stated that "*seeking public input before changing precedent is better than not doing so*."[7]
- In *Thryv, Inc.*, 371 NLRB No. 37 (Nov. 10, 2021), the Board solicited public briefs on whether "consequential damages" should be available, even though the General Counsel had not specifically requested the remedy of consequential damages.[8]
- In *American Steel Construction, Inc.*, 370 NLRB No. 41 (Dec. 7, 2021), a divided Board solicited public briefs regarding what standard should govern "appropriate bargaining unit" determinations. The Board was evaluating whether it should overrule two earlier cases, *PCC Structurals*[9] and *Boeing*,[10] and the Board majority – consisting of Chairman McFerran and Members Wilcox and Prouty – implied that these earlier cases warranted review, in part, because "the Board [had] issued its decisions *without notifying the public that it was reconsidering the applicable standard, [or] inviting amicus briefs or other public input*."[11]
- In *Atlanta Opera, Inc*., 371 NLRB No. 45 (Dec. 27, 2021), the Board solicited public briefs regarding the standard governing "independent contractor" status, and the Board majority stated – in view of the Board's potential "*reconsideration of an important Board policy" – it was "appropriate to provide an opportunity for public participation*," and the Board majority – consisting of Chairman McFerran and Members Wilcox and Prouty – criticized the prior cases being reviewed because *they*

[3] 70 NLRB 802, 805 (1946), *enforced*, 163 F.2d 373 (2d Cir. 1947).
[4] 85 NLRB 1263 (1949), *enforced*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).
[5] *Gissel Packing Co. v. NLRB*, 395 U.S. 575 (1969).
[6] *Linden Lumber v. NLRB*, 419 U.S. 301 (1974).
[7] 368 NLRB No. 68, slip op. at 6 (Member McFerran, dissenting) (emphasis added).
[8] 371 NLRB No. 37, slip op. at 1.
[9] *PCC Structurals, Inc.,* 365 NLRB No. 160 (2017).
[10] *Boeing Co.*, 368 NLRB No. 67 (2019).
[11] 370 NLRB No. 41, slip op. at 2 (emphasis added).

"reversed precedent . . . without providing notice and an opportunity for public participation."[12]

- In *Stericycle, Inc*., 371 NLRB No. 48 (Jan. 6, 2022), the Board solicited public briefs regarding the standard applicable to facially neutral work rules, and the Board majority consisting of Chairman McFerran and Members Wilcox and Prouty criticized the prior case being reviewed – *Boeing*[13] – because it was a "*sua sponte reversal*" of then-existing precedent that the Board decided "*without ever issuing a notice and invitation to file briefs*," and Chairman McFerran and Members Wilcox and Prouty stated: "We believe *issuing this notice prior to considering any change in the law is the better course*."[14]
- In *Ralphs Grocery Co*., 371 NLRB No. 50 (Jan. 18, 2022), the Board solicited public briefs regarding whether certain arbitration agreements improperly require confidentiality or interfere with NLRB charge-filing, and the Board majority consisting of Chairman McFerran and Members Wilcox and Prouty again suggested that prior Board decisions warranted review, in part, because "*none of [them] were reached with the benefit of public participation*."[15]

5. Each issue referenced above – *i.e.*, the proposed imposition of across-the-board restrictions on employer speech and requiring mandatory union recognition without proof of employee majority support in an NLRB election – involves the "reconsideration of an important Board policy" which makes it "appropriate to provide an opportunity for public participation."[16] It is equally clear, regarding each of these two issues, that the General Counsel's arguments, if accepted, will involve "reconsidering the applicable standard"[17] and adopting a significant "reversal" and "change in the law."[18] This is clear from the General Counsel's cross-exceptions brief, which – in support of adopting the proposed restrictions on employer speech – argues "the Board should overrule *Babcock & Wilcox Co*.,"[19] decided in 1948, which means the General Counsel is advocating a change from what been settled law for more than 70 years.[20] Likewise, regarding the mandatory union recognition obligation being sought in the instant case, the General Counsel "urges the Board to overrule *Linden Lumber Div., Summer & Co.*, 190 NLRB 718 (1971)."[21] In *Linden Lumber*, the Board held that an employer is not required to extend mandatory

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[12] 371 NLRB No. 45, slip op. at 1 and n.2 (emphasis added).
[13] 365 NLRB No. 154 (2017).
[14] 371 NLRB No. 48, slip op. at 1 n.2 (emphasis added).
[15] 371 NLRB No. 50, slip op. at 2 (emphasis added).
[16] *Atlanta Opera, Inc*., 371 NLRB No. 45, slip op. at 1.
[17] *American Steel Construction*, 370 NLRB No. 41, slip op. at 2.
[18] *Stericycle, Inc*., 371 NLRB No. 48, slip op. at 1 n.2.
[19] 77 NLRB 577 (1948).
[20] *See* GC Cross-Ex. Br. at 37.
[21] *Id.* at 7, 19. The General Counsel's cross-exceptions brief cites the Board decision in *Linden Lumber*, without noting that it was appealed to the D.C. Circuit (which reversed the Board) and the Supreme Court – disagreeing with the D.C. Circuit's reversal – reinstated and unconditionally upheld the Board's decision. The

union recognition without proof that the union has majority employee support based on an NLRB secret ballot election. The General Counsel's contrary position not only would change what has been settled law for more than 50 years, the General Counsel's brief fails to acknowledge that *Linden Lumber* was appealed to the U.S. Supreme Court, and the Supreme Court upheld and endorsed the NLRB holding that General Counsel now seeks to overrule.[22] In short, arguments for adopting the employer speech restrictions and mandatory union recognition duty being sought by the General Counsel would constitute wholesale reversals from decades of well-settled law. For this reason, "the better course" is to solicit public briefs "prior to considering any change in the law."[23]

6. The overwhelming importance of the two issues referenced above – involving broad restrictions on employer speech and imposing union recognition without employee voting in NLRB-conducted elections – also warrants permitting the Amici to submit the brief attached as Addendum A and also issuing a notice and invitation for the public to file briefs. Although the Board's prior invitations sought public input regarding significant matters, those issues pale in comparison to the prospect of having the Board broadly impose content-based restrictions on employer speech in the workplace, and these types of restrictions would clearly implicate substantial First Amendment concerns,[24] in addition to raising significant issues pursuant to the Board doctrine of constitutional avoidance. *Aakash, Inc.*, 371 NLRB No. 46 (2021), *enforced*, Nos. 22-70002 et al. (9th Cir. 2023).[25] The mandatory union recognition issue raises an equally fundamental question: can the Board impose a duty of mandatory union recognition on employers with employees having no opportunity to vote in an NLRB-conducted election? This goes to the heart of employee free choice, and it is relevant that the Supreme Court has indicated – twice – that Board-conducted elections are the "preferred . . . method of ascertaining whether a union has

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complete case citation is *Linden Lumber Div*., 190 NLRB 718 (1971), *reversed*, 487 F.2d 1099 (D.C. Cir. 1973), *reversed*, 419 U.S. 301 (1974).

[22] *See* note 21 above.

[23] *Stericycle, Inc*., 371 NLRB No. 48, slip op. at 1 n.2.

[24] *Gissel Packing Co. v. NLRB,* 395 U.S. 575, 617 (1969) ("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").

[25] In *Aakash*, the Board majority consisting of Chairman McFerran and Members Wilcox and Prouty stated that "[t]he 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." 371 NLRB No. 46, slip op. at 2 n.4.

majority support," which has "acknowledged superiority" and union authorization cards are "admittedly inferior to the election process."[26]

7. At this juncture, the Amici do not raise these issues to argue the merits. Rather, based on the same standards that have governed the Board's prior notices and invitations to file briefs, the Amici merely seek what the Board has afforded in these other cases, which is "an opportunity for public participation" before the Board gives "reconsideration" to important changes.[27] The two issues raised above – employer speech restrictions and mandatory union recognition – are at least as consequential (in the Amici's view, much more so) than the issues presented in past cases in which the Board has invited public briefs. Here, as Chairman McFerran stated in *General Motors LLC*, "seeking public input before changing precedent *is better than not doing so*."[28]

8. The Amici acknowledge that the Board's Rules provide that amicus curiae briefs must be filed within 42 days after the filing of cross-exceptions, but the Rules also indicate this time limit applies "[u]nless the Board *directs otherwise*."[29] The Amici respectfully submit that several considerations warrant, first, permitting the Amici to file the brief attached as Addendum A, and/or second, issuing a notice and invitation for the public (including the Amici) to file briefs regarding the employer speech restrictions and mandatory union recognition issues:

(a) It appears clear that the Board has dozens or hundreds of charges and complaints involving these important issues, and this makes it impossible for interested amicus parties to know which of these cases will be considered by the Board at what time, and in what cases those parties should seek to file an amicus brief, absent issuance of a Board notice and invitation to file briefs.[30]

(b) The Board's practice in recent years of soliciting public briefs "prior to considering any change in the law"[31] has created an expectation that – regarding the employer speech

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[26] *Gissel*, 395 U.S. at 602-603 (emphasis added). *See also Linden Lumber*, 419 U.S. at 304, 307 (same).
[27] *Atlanta Opera, Inc*., 371 NLRB No. 45, slip op. at 1 and n.2.
[28] 368 NLRB No. 68, slip op. at 6 (Member McFerran, dissenting) (emphasis added).
[29] Rules & Regulations, § 102.46(i), 102.46(i)(2) (emphasis added).
[30] As an example, one of the earliest cases pending at the level of the Board – in which the General Counsel briefed the employer speech restrictions and the mandatory union recognition issues – seems to be CEMEX Constr. Materials, Cases 28-CA-230115 et al., in which these two issues were addressed in a General Counsel's exceptions brief filed on April 11, 2022. However, these issues were not previously briefed to the ALJ; the employer on May 3, 2022 filed a motion to strike the General Counsel's brief (in response to which the Board issued a notice to show cause), making it unclear whether the employer speech restrictions and mandatory union recognition issues would remain in the case. To seek guidance and the opportunity to provide input to the Board, several amicus parties (including some of the Amici who join in this motion) filed a motion requesting the Board to solicit public input regarding these two issues. On August 2, 2022, the Board's Office of the Executive Secretary issued an order denying the amicus parties' motion.
[31] *Stericycle, Inc*., 371 NLRB No. 48, slip op. at 1 n.2.

restrictions and mandatory union recognition issues – the Board would issue a notice and invitation to file briefs given the enormous importance of these issues, and the fact that their acceptance would constitute the reversal of principles that have been well-settled for decades (see paragraphs 5 and 6 above).

(c) Although the Board has not issued a public notice and solicitation to file briefs, the Amici learned that, on January 25, 2023, the Board issued an order relating to an amicus brief filed in the instant case by the Mid-Atlantic Regional Organizing Coalition of the Laborers' Int'l Union of North America ("LIUNA") and the Board's order stated that any party could file a responsive brief by the close of business on February 8, 2023.

(d) Because the Amici's current motion (and the brief attached as Addendum A) have been filed by the February 8, 2023 deadline, the Board's consideration of the Amici's brief will not delay or adversely affect the Board's consideration of the instant case.

(e) The Amici also point out that their brief attached as Addendum A "will be of benefit to the Board in deciding the matters at issue" (Rules § 102.46(i)) because the Amici's brief deals with matters not addressed by other parties which, among other things, includes:

- Extensive detail regarding the legislative history underlying the 1947 amendments to the NLRA that were adopted as part of the Taft-Hartley Act, including Section 8(c), which Congress adopted to repudiate employer speech restrictions adopted by the Board in *Clark Bros. Co*.,[32] relied upon by the General Counsel in the instant case. *See* Addendum A, pp. 5-10.

- Analysis of the General Counsel's position that employees have a protected right "to refrain from listening" in the workplace, and the General Counsel's contention that employer speech must be preconditioned on giving employees certain "assurances." *See* Addendum A, pp. 10-15.

- Arguments regarding the General Counsel's employer speech restrictions not only discuss the Supreme Court decisions in *Gissel* and *Linden Lumber*, but also include significant information regarding other attempts to legislate mandatory union recognition (none of which have succeeded), and indications in the United States-Mexico-Canada Agreement ("USMCA") that demonstrates that Congress believes a "secret ballot vote" is indispensable to protect employee free choice when determining whether a majority of employees supports having a union. *See* Addendum A, pp. 15-24.

CONCLUSION

For the reasons described above, the Amici respectfully request that the Board grant permission for the Amici to file the Amici Curiae Brief attached as Addendum A, and/or for the Board to issue a notice and invitation for the public (including the Amici) to file amicus briefs

[32] 70 NLRB 802, 805 (1946), *enforced*, 163 F.2d 373 (2d Cir. 1947).

addressing whether the Board should adopt the General Counsel's proposals involving employer speech restrictions and mandatory union recognition.

Respectfully submitted,

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ADDENDUM A

BRIEF OF AMICI CURIAE
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COALITION FOR A DEMOCRATIC WORKPLACE, INDEPENDENT ELECTRICAL
CONTRACTORS, INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION,
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I. SUMMARY

This case involves two untenable arguments that the Board should summarily reject. First, the General Counsel argues the National Labor Relations Act ("NLRA" or "Act") broadly prohibits otherwise lawful employer speech if it occurs during paid time; and second, the General Counsel and other parties argue that employers must recognize a union based on authorization cards, without an NLRB election, except in the rare case where the employer can prove a negative: that it believes in good faith that the union *lacks* employee majority support. Both arguments are indefensible because they are contrary to the Act's plain language, its legislative history and controlling Supreme Court precedent.

1. *Employer Speech During Paid Time Does Not "Per Se" Violate the Act*. The claim that the NLRA prohibits an employer's union-related conversations during paid working time is contrary to NLRA Section 8(c) and the First Amendment. Section 8(c) affirmatively *protects* the expression of union-related "views, argument, or opinion," and the Supreme Court has held Section 8(c) "implements the First Amendment" and reflects a "policy judgment, which suffuses the NLRA as a whole, . . . 'favoring uninhibited robust, and wide-open debate in labor disputes.'"[1] Congress adopted Section 8(c) to repudiate precisely what the General Counsel argues in this case. In *Clark Bros. Co*.,[2] decided in 1946, the Board held that (i) 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," and (ii) the speeches infringed on an employee right "to determine whether or not to receive such aid, advice, and information." In 1947, the Senate adopted Section 8(c) to invalidate *Clark Bros*. (and other cases),[3] and even Democratic *opponents* of the Taft-Hartley amendments agreed with adopting Section 8(c) to reverse the Board's imbalanced treatment of employer free speech. In 1948, the Board in *Babcock & Wilcox Co*., 77 NLRB 577,

[1] *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008) (citation omitted).
[2] 70 NLRB 802, 805 (1946), *enforced*, 163 F.2d 373 (2d Cir. 1947).
[3] *See, e.g.*, S. Rep. 80-105, at 23-24 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947 ("Legis. Hist.") 429-430, which stated Section 8(c) was warranted because the Board had "placed a limited construction" of employer First Amendment free speech rights "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)." (emphasis added). *See also* text accompanying notes 17-28 below.

578 (1948), acknowledged an irrefutable fact: the "compulsory audience" theory – finding that non-coercive employer speech was a per se violation if attendance was mandatory or employees were being paid – "no longer exists as a basis for finding unfair labor practices" ("ULPs").

Moreover, because employer speech is protected by the First Amendment and Section 8(c), absent a "threat of reprisal or force or promise of benefit," the Board has no authority to mandate the preconditions that the General Counsel would impose on all employers who wish to engage in such speech (*i.e.*, disclaimers that attendance is voluntary, employees are free to leave, employees will still be paid if they leave and refuse to attend).[4] In short, the Board must reject the discredited argument that employer discussions during paid working time regarding the exercise of Section 7 rights "are per se unlawful." Congress and the Supreme Court have conclusively spoken, and rejected such claims based on the First Amendment and Section 8(c).

2. *Employers Can Lawfully Condition Union Recognition on Employee Voting in an NLRB Secret-Ballot Election*. Equally meritless are arguments by the General Counsel and other parties[5] that would eliminate employee voting in NLRB secret-ballot elections whenever a union demands recognition, and would substitute an NLRB bargaining order requiring union recognition based on a claimed authorization card majority, except in the rare case where the employer can prove it has good faith reasons to believe the union *lacks* employee majority support. Although the General Counsel advocates this approach based on *Joy Silk Mills, Inc.*,[6] another case decided in the 1940s, multiple considerations prevent the Board from making authorization cards – and years of litigation in ULP proceedings – the primary means by which union representation is imposed on employees and employers. First, the Supreme Court twice – in *Gissel Packing*[7] and *Linden Lumber*[8] – rejected mandatory union recognition based on authorization cards (absent "outrageous," "pervasive" or other unlawful conduct that would "seriously impede" holding a fair

[4] *See* text accompanying notes 55-58 below.

[5] The other parties include Chicago and Midwest Regional Joint Board, Workers United/SEIU (hereinafter "WU/SEIU") and the Mid-Atlantic Regional Organizing Coalition of the Laborers' Int'l Union of North America" (hereinafter "LIUNA"). The WU/SEIU cross exceptions brief is referenced as "WU/SEIU Cross-Ex. Br.," LIUNA's amicus brief is referenced as "LIUNA Br.," and WU/SEIU and LIUNA are jointly referred to as "Unions."

[6] 85 NLRB 1263 (1949), *enforced*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

[7] *Gissel Packing Co. v. NLRB*, 395 U.S. 575 (1969).

[8] *Linden Lumber v. NLRB*, 419 U.S. 301 (1974).

election).[9] Second, the Supreme Court and the courts of appeals have consistently held that authorization cards are "admittedly inferior" to elections, they are subject to "abuses" and "misrepresentations," and employers "concededly may have valid objections to recognizing a union on that basis."[10] Third, Congress has repeatedly considered amendments to the NLRA which, if enacted, would have required union recognition based on authorization cards; the failure to enact these proposals is compelling evidence that Congress disapproves mandating card-check recognition.[11] The United States-Mexico-Canada Agreement ("USMCA") further demonstrates that Congress believes a "secret ballot vote" is indispensable to protect employee free choice when determining whether a majority of employees supports having a union.[12] Fourth, as a matter of labor relations policy, the Board should continue relying on secret-ballot elections, without requiring mandatory recognition.

The Board should recognize 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."[13] A similar sentiment was expressed by former President John F. Kennedy in 1947, while working on the Taft-Hartley Act amendments during his first year in Congress. He stated: "Responsibility entails self-restraint in the exercise of power," and he opposed the Taft-Hartley amendments, except he *agreed* it was necessary to enact changes so "e*mployers [would] be guaranteed the same rights of freedom of expression*" that the pre-1947 Board recognized only for unions.[14] In 1959, as a Senator working on the Landrum-Griffin amendments, former President Kennedy focused heavily on the procedures governing NLRB secret-ballot elections,[15] and he

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[9] *Gissel Packing Co. v. NLRB*, 395 U.S. 575, 600, 613-14 (1969); *Linden Lumber v. NLRB*, 419 U.S. 301, 303-304 (1974).

[10] *Gissel*, 395 U.S. at 603-604; *Linden Lumber*, 419 U.S. at 306. *See also* text accompanying notes 78-86 below.

[11] *See* text accompanying notes 87-92 below.

[12] *See* text accompanying notes 93-96 below.

[13] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680-81 (1981).

[14] 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).

[15] Former President Kennedy, as a Senator, chaired the Conference Committee that approved the Landrum-Griffin Act amendments to the NLRA. *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

stated it was essential to have election campaigns "in which *both parties* can present their viewpoints."[16] The General Counsel's contentions regarding employer speech and card-check union recognition would leave these sentiments in ruin.

For these reasons, as explained more fully below, the Board lacks authority to find it is "per se unlawful" for employers to engage in union-related speech during paid working time. The Board should also reject the claim that – when a union demands recognition – employers must extend mandatory recognition, with no right to have an NLRB secret ballot election unless the employer can prove it has good faith reasons to believe the union lacks majority support.

II. INTERESTS OF THE AMICI CURIAE

The Amici Curiae ("Amici") represent a multitude of businesses involving millions of employees throughout the United States who have a vital interest in the free speech rights guaranteed by the U.S. Constitution and NLRA Section 8(c), and in having NLRB secret-ballot elections continue to establish whether a majority of employees supports union representation.

- *Associated Builders and Contractors* is a national construction industry trade association representing more than 22,000 members, founded on the merit shop philosophy, representing all specialties comprised primarily of firms working in the industrial and commercial sectors.
- The *Chamber of Commerce of the United States of America* is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than 3 million companies and professional organizations of every size and every industry sector from every region of the country.
- The *Coalition for a Democratic Workplace* represents employers and associations and the interests of their employees, including nearly 500 member organizations and businesses of all sizes, the majority of which are covered by or represent organizations covered by the NLRA.
- *Independent Electrical Contractors* is the nation's premier trade association representing America's independent electrical and systems contractors with over 50 chapters, representing 3,400 member companies that employ more than 80,000 U.S. electrical and systems workers.
- The *International Foodservice Distributors Association* is a national trade association representing foodservice distributors throughout the United States and internationally, which employ 350,000 workers at more than 15,000 facilities and $300 billion in U.S. annual sales.

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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).

[16] 105 Cong. Rec. 5770 (1959), *reprinted in* 2 LMRDA Hist." 1085 (statement of Sen. Kennedy).

- The *National Association of Wholesaler-Distributors* is an employer and nonprofit association representing the wholesale distribution industry, including roughly 35,000 companies operating more than 150,000 U.S. locations employing more than 5.9 million employees.
- The *National Retail Federation* is the world's largest retail trade association, and the voice of retail worldwide, representing retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the U.S. and more than 45 countries abroad.

III. ARGUMENT

A. Employer Speech About Union Issues During Paid Time Is Completely Lawful and Protected By NLRA Section 8(c) and the First Amendment

1. The General Counsel's Arguments Are Identical to The Board's Holding in *Clark Bros.*, Which Congress Specifically Repudiated When Enacting NLRA Section 8(c)

Starting with the claim that employees in the workplace have a Section 7 right "to refrain from listening,"[17] the General Counsel argues that, even when an employer's discussions about union issues contain no unlawful threat or promise, they are "per se unlawful" and "inherently a threat," because a "threat of reprisal is unmistakably present whenever an employer requires employees to listen to its message concerning Section 7 activity."[18]

These arguments are not new. Precisely the same arguments were adopted by the Board more than 70 years ago in *Clark Bros. Co.*,[19] where the Board held 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." The Board in *Clark Bros.* explained its reasoning as follows:

> 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*

[17] Brief in Support of Counsel for the General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge ("GC Cross-Ex. Br."), at 23, 25-26 (Nov. 23, 2022)

[18] *Id.* at 29. *See also* GC Memorandum 22-04, The Right to Refrain from Captive Audience and Other Mandatory Meetings (April 7, 2022): "Forcing employees to listen to such employer speech under threat of discipline – directly leveraging the employees' dependence on their jobs – plainly chills employees' protected right to refrain from listening to this speech in violation of Section 8(a)(1)." The General Counsel purports to identify two situations when employer speech about union issues will be unlawful (either when employers are "convened on paid time," or "cornered while performing their job duties"). *Id.* However, these descriptions encompass virtually *all* time that employees spend in the workplace, unlike the time-limited restriction – which applies equally 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). The rest of this brief, in the interest of brevity, the phrases "union-related speech" and "employer speech" mean the type of speech that the General Counsel deems unlawful: employer discussion regarding any exercise of Section 7 activity during paid working time where the discussion contains no unlawful threat or promise.

[19] 70 NLRB 802, 805 (1946), *enforced*, 163 F.2d 373 (2d Cir. 1947).

> *calculated to, and does, interfere with the 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.
>
> The *compulsory audience* was not, as the record shows, the only avenue available to the respondent for conveying to the employees its opinion on self-organization. It was not an inseparable part of the speech, any more than might be the act of a speaker in holding physically the person whom he addresses in order to assure his attention. The law may and does prevent such a use of force without denying the right to speak. Similarly *we 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*. Such use of his power is an independent circumstance, the nature and effect of which are to be independently appraised. *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*.[20]

This decision was short-lived. In 1947, one year after *Clark Bros.* was decided, Congress adopted significant amendments to the NLRA as part of the Taft-Hartley Act.[21] Both the Senate and House bills contained language directly responding to *Clark Bros*. (and other cases that limited or improperly used non-coercive employer speech to establish unlawful motivation in ULP cases) by restoring employer free speech rights that were extinguished by the pre-1947 NLRB.[22] 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 restrictiv*e 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*.[23]

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.[24] Indeed,

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

[21] 61 Stat. 136 (1947), 29 U.S.C. §§ 141 *et seq*.

[22] S. 1126, 80th Cong., 1st Sess. (1947), *reprinted in* 1 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).

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

[24] *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*

opponents of the Taft-Hartley legislation – including freshman House member John F. Kennedy, as noted above – agreed that Congress needed to restore the free speech rights of employers which the NLRB had limited or ignored in pre-1947 cases.[25]

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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 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).

[25] 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). As stated earlier, then Representative John F. Kennedy authored a "Supplemental Minority Report" in which he stated that labor had insisted on "special privilege and unfair advantage," and he agreed that the collective bargaining processes needed a "readjustment" which meant "*employers* must be guaranteed *the same rights of freedom of expression* now given to 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.*

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),[26] 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 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."[27]

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. Thus, 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*

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).

[26] 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).

[27] 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).

> *8(c) of the amended Act, and its legislative history, make it clear that the doctrine of the Clarke 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.[28]

2. Section 8(c)'s Plain Language Contradicts the Argument That Employer Speech About Union Issues During An Employer's Paid Time 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."[29] 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 factors: the "economic dependence" of employees, a so-called "right to refrain from listening" (which likewise has no basis in the Act)[30] and whether the speech is conveyed to employees "on paid time" or "while performing their job duties."[31]

The General Counsel's brief makes the same discredited "compulsory audience" arguments that had been embraced by the Board in *Clark Bros*. Even more incredibly, the General Counsel argues that *Clark Bros*. somehow remains good law,[32] which ignores what Section 8(c) says. The

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[28] *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).

[29] 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).

[30] *See* notes 48-51 and accompanying text below.

[31] GC Cross-Ex. Br. at 23, 25, 27, 29, 31.

[32] *See, e.g.,* GC Cross-Ex. Br. 37-39 (insisting that Section 8(c) "permitted the compulsion that the Board had previously found unlawful," criticizing *Babcock*, because it did not "specify the legislative history on which it relied," and implying that only "some legislators expressed disapproval of *Clark Brothers*").

above progression – which traces the Board's attempted curtailment of employer speech in *Clark Bros*., followed by the bipartisan repudiation of *Clark Bros*. by Congress – precludes any Board finding that an employer's union-related speech in the workplace is "per se unlawful."[33]

The Board must apply 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.

3. The First Amendment Protects Employer Speech About Union Issues During An Employee's Paid Time

After the Board in 1946 adopted its across-the-board restrictions on employer speech in *Clark Bros*., it is no surprise why Congress immediately repudiated those restrictions by adopting Section 8(c): those restrictions plainly conflict with employer First Amendment rights.

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."

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[33] *See* text accompanying notes 17-27 above.

[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).

[3535] Indeed, 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. See note 27 and accompanying text above.

[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).

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]

The Supreme Court in *Chamber of Commerce v. Brown*, 554 U.S. at 67, explained that from "one vantage," Section 8(c) "merely implements the First Amendment . . . in that it responded to particular constitutional rulings of the NLRB." 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-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*."[43]

Thus, the General Counsel's suggested treatment of employer speech is directly foreclosed by Section 8(c)'s plain language (see Part 1 above), and this is more self-evident from Section 8(c)'s extensive legislative history (see Part 2 above).

Yet, even more devastating to the speech restrictions urged by the General Counsel are the First Amendment rights of employers. The General Counsel's proposed restrictions are

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[39] See note 25 and accompanying text above.

[40] See notes 22-24 and accompanying text above.

[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] *Id.* at 67-68 (emphasis added; citations omitted). *See also Gissel*, 395 U.S. at 618 ("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'").

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."[44] 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*."[45] 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."[46] Each of these elements is clearly present here, which warrants rejecting the restrictions on employer speech urged by the General Counsel.

4. Employees Have No Protected Right "To Refrain From Listening" to Employer Union-Related Discussions in the Workplace

A central erroneous premise underlying the employer speech restrictions advocated by the General Counsel involves the claim that employees have a protected right to "refrain from listening" to an employer's union-related discussions in the workplace. Regarding this purported right, the General Counsel makes passing reference to NLRA Section 7 – which lists four types of

[44] 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").

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

[46] *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).

protected *employee* activities[47] – and the General Counsel then proceeds to invent a new purported "right" which involves something entirely different: *going* to work and then "refrain[ing] from listening" to what *the employer* chooses to discuss.[48]

The employee conduct described by the General Counsel is not "protected" activity. Rather, when employees accept employment, this necessarily entails *having the employee "listen"* to what the employer says, and employees are subject to discipline for any "refusal" to listen.[49] As indicated in *Litton Systems, Inc*.,[50] "[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."[51] *See also Ridgewood Mgmt. Co*., 171 NLRB 148, 151 (1968) ("the

[47] Section 7 protects, among other things, the right of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . the right to refrain from any or all of *such activities*" (emphasis added). The Supreme Court has narrowly interpreted the types of activities that are protected by Section 7. *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018) (class action claims not protected).

[48] The protection afforded by Section 7 relates to designated types of *employee* activities, and this protection does not spontaneously arise from what an *employer* lawfully says. 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). In some circumstances, a decision by two or more employees to *leave* workplace can be protected under Section 7, but only if this is "concerted" and occurs for the "purpose" of "mutual aid or protection" regarding wages, hours or other terms and conditions of employment. Moreover, when employees engage in a strike, the employer has the right to discontinue pay and benefits, and it has the right to hire temporary or permanent replacements, among other things. *Ace Tank & Heater Co*., 167 NLRB 663, 664 (1967) ("an employer is not required to finance a strike by paying wages for work not performed").

[49] *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"); *SouthwestCustom 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").

[50] 173 NLRB 1024 (1968).

[51] *Id.* at 1030-31 (emphasis added) (Trial Examiner's opinion). In support of the claimed "right" to refrain from listening described in the General Counsel's brief (GC Cross-Ex. Br. at 26), there are selective quotations from two Supreme Court cases, neither of which supports the General Counsel's position. In *Hill v. Colorado*, 530 U.S. 703, 734 (2000), the Court stated that citizens have "the power to decide for themselves what they wish to read, and within limits, what oral messages they want to consider," but the Court in this case upheld a Colorado state statute protecting patrons of abortion clinics (and other healthcare facilities) from having unwanted protesters from being closer than 8 feet from them while entering the clinics. Unlike *Hill*, which involved a statute protected the rights of the *patrons* who were on public property outside abortion clinics, Section 8(c) affirmatively protects the *employer* right to express "views, argument, and opinion" in private workplaces that the employers own or operate, and where employees *choose* to be present because of their employment, and the Supreme Court in *Hill* stated the "privacy interest in avoiding unwanted communication varies widely in different settings." *Id.* at 716. In *Rowan v U.S. Post Office Dept.*, 397 U.S. 728, 737 (1970), the Court held that a federal statute permitting homeowners to provide a notice that would prevent the Post Office from sending certain types of mass mailings from did not infringe on the First Amendment rights of 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). Even if employees are "economically dependent" on their jobs,[52] this does *not* mean they can go to work and do whatever they want. In *Republic Aviation v. NLRB*,[53] the Supreme Court recognized "the undisputed right of employers to maintain discipline in their establishments." Congress also understood this when enacting NLRA Section 10(c), which divests the Board of authority to require reinstatement or backpay for any employee who is "suspended or discharged for cause." Unquestionably, 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.[54] Moreover, the General Counsel argues for an unworkable double-standard standard where employees have the protected right, in discussions with their employer, to advocate for changes in workplace conditions, and the employer has no right to discuss the same matters.

Nothing in the Act creates a "protected right" for employees to *remain* at work while refusing "to listen" to what the employer has to say. In this situation, the *employer* is the party that has a protected right under the First Amendment and NLRA Section 8(c), which is to "express any views, argument, or opinion," so long as the expression "contains" no unlawful threat or promise.

5. The Board Has No Authority to Require Employer "Assurances" to Employees Before Discussing Union-Related Issues

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.[55] First, because the First Amendment and

mass-mailing companies, and the Court stated that the Constitution did not compel homeowners "to listen to or view any unwanted communication, whatever its merit." However, the Court in *Rowan* emphasized that the case involved a person's right, at home, to avoid receiving unwanted mail, and the Court invoked the "ancient concept that 'a man's home is his castle." *Id.* at 737. Moreover, the Court stated, "we are often 'captives' *outside the sanctuary of the home* and *subject* to objectionable speech and other sound." *Id.* at 738. Neither *Hill* nor *Rowan* has any relevant to the workplace, and neither confers on employees an unqualified right to "refrain from listening" to employers whose workplaces they voluntarily enter and with whom they sought and voluntarily accepted employment.

[52] GC Cross-Ex. Br. at 29.

[53] 324 U.S. 793, 797–798 (1945).

[54] *See* cases cited in note 49 above.

[55] GC Cross-Ex. Br. at 34-35 (requiring, among other things, up-front disclaimers that "attendance is voluntary," "if they attend, they will be free to leave at any time," "nonattendance will not result in reprisals . . . including loss of pay if the meeting occurs during the regularly scheduled working hours," and "attendance will not result in rewards or benefits).

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 affirmative restrictions that interfere with these rights, and the Board is foreclosed from imposing additional conditions that do not exist in Section 8(c).[56] 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.[57] 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).[58]

B. Employers Can Lawfully Condition Union Recognition on Employee Voting in an NLRB Secret-Ballot Election

The Board should also reject arguments by the General Counsel and the Unions, based on an expansion of another 1940s case, *Joy Silk Mills*,[59] seeking that the Board require employers to grant immediate union recognition – without giving employees the opportunity to vote in secret-ballot elections – except in the rare case where an employer can prove it has "good faith" reasons to believe the union lacks employee majority support. As explained below, these arguments misconstrue the Supreme Court decisions in *Gissel* and *Linden Lumber*, which preclude the Board

[56] *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, wheneer delivered by the employer, constitutes an unfair labor practice. . . . I*f 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).

[57] *Chamber of Commerce of the United States 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 58 below.

[58] *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).

[59] *Supra* note 6.

from treating authorization cards as the primary means of resolving questions concerning representation. Requiring immediate union recognition without an election would also be contrary to the legislative decisions made by Congress, in addition to producing enormous instability that would undermine the Act's cornerstone values.

1. The Supreme Court Has Twice Rejected the Imposition of Mandatory Union Recognition Based on Union Authorization Cards

In *Joy Silk*,[60] 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."[61] However, 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 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."[62] 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).[63] In contrast, the General Counsel here 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.[64]

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

[60] *Supra* note 6.
[61] 85 NLRB at 1264.
[62] *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.*
[63] *Id.* at 1274-77 (Trial Examiner opinion).
[64] GC Cross-Ex. Br. at 11-13 (citations omitted).

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).[65] 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).[66]

In *Gissel*, the Supreme Court indicated, with approval, that the Board had abandoned *Joy Silk* and no longer conducted a subjective inquiry into an employer's motives for denying union representation demands, and the Court endorsed this "retreat."[67] The Court in *Gissel* also 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,"[68] and elections had "acknowledged superiority" over authorization cards, which the Court stated were "admittedly inferior."[69] The Court in *Linden Lumber* likewise stated "the policy of encouraging secret elections under the Act is favored."[70]

Significantly, 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.[71] 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 Court stated that "an employer *is not obligated to accept a card check as proof of majority status* . . . and he is

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[65] 85 NLRB at 1265 n.5 (Board opinion), 1272, 1277 (Trial Examiner opinion).

[66] GC Cross-Ex. Br. at 9 (citations omitted).

[67] *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.")

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

[69] *Id.* at 602-603. *See also Linden Lumber*, 419 U.S. at 304.

[70] *Id.* at 307.

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

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."[72]

The 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 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.*[73]

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."[74] 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.[75]

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."[76] 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*."[77]

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[72] *Id.* at 609 (citation omitted).
[73] *Id.* at 617 (emphasis added).
[74] 395 U.S. at 582-83 (emphasis added).
[75] *Gissel*, 395 U.S. at 591, 600, 613-15. *See also Maramont Corp.*, 317 NLRB 1035, 1047 (1995) (summarizing *Gissel*).
[76] *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).
[77] 419 U.S. at 310.

2. The Supreme Court and Courts of Appeals Have Held that Authorization Cards Are "Admittedly Inferior" and Subject to "Abuses"

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.[78] 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."[79]

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 for collective bargaining purposes or merely to authorize it to seek an election to determine that issue."[80]

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

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

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

[80] *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).

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."[81]

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*.,[82] the Court of Appeals for the Fourth Circuit stated that "a card check is *not a reliable indication* of the employees' wishes,"[83] and the court reasoned as follows:

> *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. . . .
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> * * *
>
> 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*.
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> * * *
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> 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. . . .[84]

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

- *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

[81] *Linden Lumber*, 419 U.S. at 306.
[82] 386 F.2d 562 (4th Cir. 1967).
[83] *Id.* at 566.
[84] *Id*. at 565-66 (emphasis added; footnotes omitted).

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.[85] 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"[86] 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.

3. Congress Has Clearly Indicated that NLRB Elections – Not Authorization Cards – Should Be the Primary Way to Resolve Union Representation Questions

Federal labor law reflects fundamental choices by Congress that are binding on the Board,[87] and the Board must also recognize that Congress has *never* enacted a law requiring union

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

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

[87] 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").

recognition based on authorization cards.[88] 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 clearly 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."[89] *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.[90] 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.[91] And the Protecting the Right to Organize Act ("PRO Act"), introduced in 2019 and 2021, 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.[92] 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.

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[88] 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).

[89] *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)

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

[91] 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).

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

Most recently, the United States-Mexico-Canada Agreement ("USMCA"),[93] 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.[94] Significantly, regarding questions about 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*."[95] 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*."[96] Given that U.S. law (the USMCA) requires that employees *in Mexico* be afforded 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 would extinguish 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.

The Board is charged with applying the Act in a manner consistent with the legislative choices made by Congress. As indicated above, Congress clearly intended that questions concerning union representation should be resolved based on employee voting in secret ballot elections, and not based on mandatory employer recognition without an election.

4. As a Matter of Labor Law Policy, the Board Should Continue Relying on Secret-Ballot Elections, Without Requiring Mandatory Recognition in Response to Union Demands

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. In this regard, the arguments for mandatory

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

[94] *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" 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).

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

[96] *Id.* §§ 2(e)(ii)(C).

recognition, based on authorization cards, involve a solution in search of a problem. The Board has devoted more attention to enhancing and refining its representation election procedures, in the past 12 years, than at any other time in the Board's 87-year history.

The arrangements urged by the General Counsel and the Unions – rather than constituting a solution – would produce enormous instability while subverting employee free choice. Requiring employers to grant mandatory recognition (unless the employer can prove it has "good faith" reasons to believe the union lacks majority support) would effectively produce two NLRB proceedings based on every union demand, 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 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.[97]

For the past 87 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

[97] *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).

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.

IV. CONCLUSION

For the reasons described above, there is no merit in the General Counsel's argument that the Act broadly prohibits employer speech regarding union issues and other Section 7 activities during an employee's paid time. Equally meritless is the contention that employers are required to grant immediate union recognition without any opportunity for employee voting in a secret ballot election, whenever a union claims to have an authorization card majority, except when the employer can prove it has good faith reasons to believe the union lacks employee majority support.

Respectfully submitted,

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Dated: February 8, 2023

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing MOTION TO FILE AMICI CURIAE BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR A DEMOCRATIC WORKPLACE, INDEPENDENT ELECTRICAL CONTRACTORS, INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, AND NATIONAL RETAIL FEDERATION, was filed today, February 8, 2023, using the NLRB's e-Filing system and were served by email upon the following parties' counsel:

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