**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| In the Matter of | ) | |
| | ) | Petition of Coalition for a Democratic |
| Proposed Rule to Overrule | ) | Workplace, Associated Builders and |
| *Cemex Construction Materials* | ) | Contractors, American Hotel & Lodging |
| *Pacific, LLC* and Restore | ) | Association, CHRO Association, FMI - |
| Pre-Existing Framework for | ) | The Food Industry Association, Independent |
| Determining When Employers Are | ) | Electrical Contractors, International |
| Required To Bargain with Unions | ) | Franchise Association, International |
| Without a Representation Election | ) | Foodservice Distributors Association, |
| | ) | National Association of |
| | ) | Wholesaler-Distributors, National |
| | ) | Federation of Independent Business, |
| | ) | National Ready Mixed |
| | ) | Concrete Association, National Retail |
| | ) | Federation, and Restaurant Law Center |

**RULEMAKING PETITION**


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TO THE HONORABLE MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD:

Petitioners respectfully submit this rulemaking petition for the National Labor Relations Board's ("Board") consideration.

## I. PETITIONERS AND THEIR STANDING

**Coalition for a Democratic Workplace** ("CDW") is a collection of hundreds of members representing the interests of millions of employers nationwide. CDW was formed to give its members a meaningful voice on labor law reform. CDW has advocated for its members on numerous issues of significance relating to the Board's policies, procedures and interpretations and applications of the National Labor Relations Act ("Act" or "NLRA").

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

**American Hotel & Lodging Association** ("AHLA") is the sole national association representing all segments of the United States lodging industry at the federal, state, and local level in government affairs, education, research, communications, and litigation. It has over 30,000 members, including the ten largest hotel companies in the U.S.

**CHRO Association** is a public policy organization that represents the most senior human resource officers in nearly 400 of the largest corporations doing business in the United States and globally. Collectively, member companies employ more than 10 million employees in the United

States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. The Association's member companies are committed to ensuring that laws and policies affecting the workplace are sound, practical, and responsive to the needs of the modern economy.

**FMI – The Food Industry Association** works with and on behalf of the entire industry to advance a safer, healthier, and more efficient consumer food supply chain. A collective of FMI's membership manufactures, distributes, and sells food and consumer goods that are found in pantries, refrigerators, medicine cabinets, and laundry rooms across the country. Our retail members, which range in size from independent operators to regional and large national and international businesses and brands, operate 45,000 grocery stores and 12,000 supermarket pharmacies. The food industry produces and supplies over 30,000 different food and consumer good products found on store shelves, employs over 6.3 million individuals, and ultimately touches the lives of more than 100 million U.S. households per week.

**Independent Electrical Contractors** ("IEC") is a nonprofit trade association federation with 54 educational campuses and affiliate local chapters across the country. IEC represents more than 4,300 member businesses and educates over 20,000 electrical apprentices each year through world-class training programs. IEC is the leading organization representing America's independent electrical and systems contractors.

**International Franchise Association** ("IFA") is the world's oldest and largest organization representing franchising worldwide. IFA represents all aspects of the franchise business model, with approximately 1,200 franchise brands and 10,000 franchise business owners in addition to approximately 600 industry suppliers who support the franchise sector. For over 60 years, IFA has worked through its government relations, public policy, media relations, and educational programs to advocate for the protection, promotion, and enhancement of

franchising and the approximately 832,000 franchise establishments that support nearly 8.8 million direct jobs, $907 billion of economic output for the U.S. economy, and almost three percent of the gross domestic product. IFA's mission is to protect, promote, and enhance franchising, including by participating in lawsuits like this one.

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

**National Association of Wholesaler-Distributors** ("NAW") is an employer and a non-profit, non-stock, incorporated trade association that represents the wholesale distribution industry—the essential link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is made up of direct-member companies and a federation of national, regional, and state associations across 19 commodity lines of trade which together include approximately 35,000 companies operating nearly 150,000 locations throughout the nation. The overwhelming majority of wholesaler-distributors are small-to-medium-size closely held businesses. As an industry, wholesale distribution generates more than $8 trillion in annual sales volume, providing stable and well-paying jobs to more than 6 million workers. NAW members are subject to a wide array of regulatory regimes overseen by numerous federal administrative agencies.

**National Federation of Independent Business** ("NFIB") is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all fifty state capitals, the interests of its members. Its membership spans the spectrum of business operations, from sole proprietorships to firms with hundreds of employees.

**National Ready Mixed Concrete Association** ("NRMCA") was founded on December 26, 1930, and today represents the ready mixed concrete industry with more than 2,250 companies and subsidiaries that employ more than 135,000 American workers who manufacture and deliver ready mixed concrete. The Association represents both national and multinational companies that operate in every congressional district in the United States. The industry includes more than 75,000 ready mixed concrete trucks and 6,500 ready mixed concrete plants. Roughly 85% of all US ready mixed concrete companies are small businesses.

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

**Restaurant Law Center** ("RLC") is the only independent public policy organization created specifically to represent the interests of the food-service industry in the courts. The industry is comprised of over one million restaurants and other foodservice outlets employing 15.7 million people—approximately ten percent of the U.S. workforce, making it the second-

largest private-sector employer in the United States. Through regular participation in amicus briefs on behalf of the industry, the Restaurant Law Center provides courts with the industry's perspective on legal issues significantly impacting its members and highlights the potential impact of pending cases like this one.

Each of the Petitioners is an interested "person" within the meaning of Section 2(1) of the Act, Section 551(2) of the Administrative Procedure Act ("APA"),[1] Section 553(e) of the APA,[2] and Section 102.124 of the Rules and Regulations of the National Labor Relations Board ("NLRB Rules"). This petition is submitted pursuant to those rules and, in particular, pursuant to Sections 102.124 and 102.125 of the NLRB Rules, which provide:

> **§ 102.124 Petitions for issuance, amendment, or repeal of rules.** Any interested person may petition the Board, in writing, for the issuance, amendment, or repeal of a rule or regulation. An original of such petition must be filed with the Board and must state the rule or regulation proposed to be issued, amended, or repealed, together with a statement of grounds in support of such petition.
>
> **§ 102.125 Action on petition.** Upon the filing of such petition, the Board will consider the same and may either grant or deny the petition in whole or in part, conduct an appropriate hearing thereon, or make other disposition of the petition. Should the petition be denied in whole or in part, prompt notice will be given of the denial, accompanied by a simple statement of the grounds unless the denial is self-explanatory.

## II. INTRODUCTION AND OVERVIEW

On August 25, 2023, the National Labor Relations Board ("Board" or "NLRB") issued its decision in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130, in which it departed from decades of precedent that provided clear guidance on union-representation

[1] *See* 5 U.S.C. § 551(2): "'[P]erson' includes an individual, partnership, corporation, association, or public or private organization other than an agency."

[2] *See* 5 U.S.C. § 553(e): "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

procedures and extraordinary bargaining remedies. Pursuant to APA Section 553(e) and Sections 102.124-.125 of the NLRB's Rules, Petitioners file this Petition for Rulemaking requesting that the Board, exercising its Section 6 authority under the NLRA,[3] promulgate a rule abrogating *Cemex* and restoring the pre-*Cemex* framework. The proposed rule would eliminate current confusion and inconsistency and specify the circumstances under which the Board may, consistent with *Gissel*, exercise its remedial discretion to issue and seek enforcement of a bargaining order, reaffirming the Act's preference for secret-ballot elections.

For over 50 years before *Cemex*, employers could reject card-based recognition demands and insist that unions resolve majority status by seeking Board-conducted secret-ballot elections. *See Linden Lumber Div., Summer & Co.*, 190 NLRB 718 (1971), rev'd sub nom. *Truck Drivers Union Local 413 v. NLRB*, 487 F.2d 1099 (D.C. Cir. 1973), aff'd, 419 U.S. 301 (1974). Although the Board occasionally issued bargaining orders based on authorization cards, it did so only rarely, and only where an employer's unfair labor practices were so serious that they made a fair election impossible and traditional remedies could not dissipate the effects of the misconduct. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614-15 (1969).

*Cemex* fundamentally alters this framework. An employer presented with a demand for recognition may no longer insist that the union seek an NLRB election; instead, the employer must petition for an election. 372 NLRB No. 130, slip op. at 25-26. Furthermore, if the employer commits *any* unfair labor practice requiring the election to be set aside, the Board will issue a bargaining order regardless of the election outcome. *Id.* at 26. This includes any single Section

[3] Section 6 of the Act provides: "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act [by subchapter II of chapter 5 of title 5], such rules and regulations as may be necessary to carry out the provisions of this Act [subchapter]."

8(a)(3) violation, or any single Section 8(a)(1) violation unless it is de minimis. *Id.* at 26 & n.142.

This new regime cannot be reconciled with *Gissel*, which limited card-based bargaining orders to misconduct so serious and pervasive that it vitiated a union's proven majority and rendered the prospect of a fair secret-ballot election impossible. Thus, *Gissel* required a balancing test to determine whether traditional remedies could not ensure a free election, and that only a bargaining order could serve to remedy the misconduct, despite its need to forego or override employee sentiment previously expressed through a democratic secret-ballot process. *Id.* at 614-15 (also acknowledging a balancing test is unnecessary for minor unfair labor practices as they cannot sustain a bargaining order). Indeed, a federal court of appeals has now struck down *Cemex* on procedural grounds – and indicated that even if it were alive on the merits, it would fail on substantive grounds too. See Part J, *infra* (discussing *Brown-Forman Corp. v. NLRB*, No. 24-2107/25-1060, 2026 LX 132604 (6th Cir. Mar. 6, 2026).

The Board should adopt a rule abrogating *Cemex* and restoring the pre-*Cemex* framework that prioritizes secret-ballot elections and confines bargaining orders to *Gissel's* established standards. The U.S. Supreme Court has recognized the Board's discretion to proceed by rulemaking rather than adjudication. *See, e.g.*, *American Hospital Assn.* v. *NLRB,* 499 U.S. 606 (1991) (upholding Board's rulemaking on appropriate bargaining units in the healthcare industry); *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion."). Consistent with that authority and practice, the Board should promulgate a rule withdrawing *Cemex's* precedential effect to eliminate arbitrary and inconsistent application, restore sensible Board procedures, promote remedial clarity and consistency, preserve employee free choice, and

effectuate the Act's clear preference for secret-ballot elections. As detailed below, *Cemex* lacks clear standards, conflicts with *Gissel* and circuit court precedent, chills lawful employer speech, undermines employee free choice, and exceeds the Board's remedial authority – defects that rulemaking is well-suited to correct.

## III. SUGGESTED PROPOSED RULE

The Petitioners respectfully petition the Board to promulgate and issue the following rule, pursuant to its authority granted by Sections 6 and 9 of the Act:

Code of Federal Regulations, Title 29 - Labor, Subtitle B - Regulations Relating to Labor, Chapter I - National Labor Relations Board, Part 103 - Other Rules, Subpart [X] - Abrogation of *Cemex* Precedent.

§ 103.[XX] Abrogation of *Cemex Construction Materials Pacific, LLC* as Precedent.

(a) *General Rule and Prospective Application*. The decision of the National Labor Relations Board ("Board") in *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (Aug. 25, 2023) ("*Cemex*") is abrogated as precedent and shall have no precedential effect in any proceeding before the Board or its agents, including all cases pending before the Board or its agents in which a final order of the Board has not issued as of the effective date of this rule.

(b) *Effect on Prior Final Orders*. This section does not disturb any final order of the Board issued before the effective date of this rule.

(c) *Proof of Majority Status*. No bargaining order may issue unless predicated on clear proof that, prior to the election, a majority of employees in an appropriate unit designated the union as their exclusive bargaining representative. The Board must further find that each employee's designation was intentional, fully informed, free from coercion, and has not been withdrawn.

(d) *Articulation of Findings*. In determining whether a remedial bargaining order is appropriate, the Board must conduct a case-specific inquiry into the extensiveness of the employer's unfair labor practices, their effect on election conditions, and the likelihood of their recurrence. The Board must fully articulate why traditional remedies are inadequate and why a secret-ballot election cannot reflect employees' free choice. The order must also explain why factors such as the passage of time, employee or managerial turnover, and operational changes have not rendered a free and fair election possible.

(e) *Employer Response to Recognition Demands*. Upon receiving a demand for recognition, an employer may reject the demand and insist upon a Board-supervised secret-ballot election to determine majority status. The responsibility then falls to the union claiming majority status to invoke the Board's representation case processes by filing a petition for an election.

## IV. STATEMENT OF GROUNDS IN SUPPORT OF PETITION

### A. The Board's Authority to Proceed by Rulemaking under Section 6 of the NLRA and the APA, as Confirmed by Supreme Court Precedent.

Section 6 of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. 156, provides that "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act [by subchapter II of chapter 5 of title 5], such rules and regulations as may be necessary to carry out the provisions of this Act [subchapter]." The Board has consistently and without contravention interpreted Section 6 as authorizing it to engage in substantive rulemaking. This interpretation has been affirmed by the Supreme Court. *See, e.g.*, *American Hospital Assn.* v. *NLRB,* 499 U.S. 606 (1991) (upholding Board's rulemaking on appropriate bargaining units in the healthcare industry); *see also NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and

adjudication lies in the first instance within the Board's discretion."). The Board, therefore, has authority to use rulemaking to overrule *Cemex*.

The Board's rulemaking authority is only limited to it having a quorum. Section 3(b) of the Act specifies that "*three members* . . . shall, at all times, *constitute a quorum,*"[4] and the Board may "delegate to any group of three or more members *any or all of the powers which it may itself exercise*."[5] The Act also clarifies that vacancies "shall *not* impair the right of the remaining members to exercise *all of the powers of the Board*,"[6] and any delegated group of three or more members is likewise given authority to wield "*any or all of the powers which [the Board] may itself exercise*."[7] In relation to rulemaking, the relevant "powers of the Board" – established in Section 6 – involve authority "to make, amend, and rescind . . . such rules and regulations *as may be necessary* to carry out the provisions of this Act,"[8] which Congress intended to be governed exclusively "by the Administrative Procedure Act."[9] This language does not differentiate between possible Board majorities consisting of two, three, or more members, nor is this a reasonable basis for determining what rulemaking is "necessary" for carrying out the

[4] 29 U.S.C. §153(b) (emphasis added). Section 3(b) contains an exception regarding the three-member quorum requirement, which states that, if the Board delegates its authority to three or more members (which is separately permitted in Section 3(b)), then "two members shall constitute a quorum of any [such] group." *Id*.

[5] *Id*. (emphasis added).

[6] 29 U.S.C. §153(b) (emphasis added).

[7] *Id*. (emphasis added).

[8] 29 U.S.C. §156 (emphasis added).

[9] *Id*.

Act's provisions.[10] The Board in its current form with a three-member quorum has the authority to issue a new rulemaking to rescind *Cemex.*[11]

[10] In 2011, Chairman Pearce and Member Becker issued a rule governing multiple revisions to the Board's Representation Case procedures. *See Representation–Case Procedures*, 76 Fed. Reg. 80138, 80146 (Dec. 22, 2011). This extensive overhaul of Board policy and procedure was undertaken with the affirmative support of only two Board Members of a then three-member Board. The Board, in that instance, found no impediment to enacting a sweeping rulemaking on the basis of two affirmative votes to do so. Although the rulemaking was subsequently invalidated by the courts the grounds for doing so were *not* that the rule was enacted by two Members. The infirmity was that third Member was not provided an adequate opportunity, and thus, did not participate in the *vote* to adopt the rule. Thus, the problem was simply a voting quorum, not the power or propriety of two members enacting a rule. Indeed, had the third member been accorded a reasonable opportunity to appear and vote there would have been no infirmity in the process. *Chamber of Com. of U.S. v. NLRB*, 879 F. Supp. 2d 18, 26-30 (D.D.C. 2012).

[11] Board members have often adhered to a tradition that a two-member Board majority will not by subsequent adjudication overrule precedent unless and until three members vote in support of doing so. This tradition has no statutory basis, is a self-imposed constraint and, as noted in footnote 10 not been applied to Board rulemaking procedures. *See, e.g., Chicago Truck Drivers Local 101 (Bake-Line Products)*, 329 NLRB 247, 254 (1999) ("it is not the Board's usual practice to overrule prior cases by the votes of two of a three-member panel"). We also note that, the landscape in which the Board has applied its "three-votes-to-overrule" principle has dramatically changed, based on the Supreme Court's elimination of broad agency deference in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024). In *Loper Bright*, the Court held that every court, when reviewing agency interpretations, must determine the statute's "*single, best meaning*" using "*all relevant interpretive tools*." *Loper Bright*, 603 U.S. at 400 (emphasis added). The Court's position in *Loper Bright* makes it impermissible for a two-member Board majority to issue decisions or adopt legal interpretations differently than what the two Board members believe to be correct, this is particularly the case where Board members believe the prior precedent is contrary to the Constitution or Supreme Court rulings (all Board members take an oath of office to support, defend and bear faith and allegiance to the Constitution and faithfully discharge the duties of the office, see 5 U.S.C. § 3331).

### B. *Linden Lumber* Placed the Burden on the Union to Invoke the Election Process; *Cemex* Improperly Reverses That Allocation.

Fifty years ago, the NLRB overruled *Joy Silk*, 85 NLRB 1263 (1949), and made clear that an employer, when confronted by a demand for recognition, had every right to reject such demand and to insist that the union making the demand file an RC petition with the NLRB to initiate the Board's representation case machinery. *Linden Lumber*, 190 NLRB 718 (1971). That position was subsequently affirmed by the Supreme Court. *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301 (1974). The Court made clear that an employer was free to reject a demand for recognition, and, if it did so, it became the union's responsibility to invoke the Board's representation case processes by filing an RC petition. *Id.* at 310. This procedure, specifically endorsed by the Supreme Court, continued without deviation for more than fifty years.[12] During this period, the employer, or RM petition, was utilized for its plainly intended purpose of resolving a claim by either an individual or a non-incumbent union that an incumbent union no longer enjoyed majority status. In *Cemex*, however, the majority sought to disregard over a half century of Supreme Court sanctioned law and practice by turning well-settled law and procedure on its head.

Not only was the attempt by the *Cemex* majority to overturn long-established precedent and process and to ignore the Supreme Court remarkable, that it would attempt to do so with no articulated rationale, and in contravention of typical procedure and its own processes is even more indefensible. As to the latter it should first be noted that the *Cemex* "procedure" may be the only one in all jurisprudence in which the party seeking an outcome through administrative or judicial process, in this case certification, is not the moving party. Rather, the obligation to

[12] It bears noting that between its attempt to administratively "overrule" the decisions in both *Gissel* and *Linden Lumber* the majority in *Cemex* effectively sought to nullify decades of Supreme Court law – a stunning example of impermissible bureaucratic overreach.

proceed rests with the counterparty. It is analogous to requiring a plaintiff to first file an opposition to a motion to dismiss before the defendant files the motion in chief. The *Cemex* "procedure" not only runs counter to general judicial and administrative practice, it also cannot be squared with the current description and continued relevance of the RC petition. If every recognitional demand compels an employer to file an RM petition; and the failure to do so results in a bargaining order, it begs the question as to the continued purpose or use of an RC petition. Since no prudent employer would court a bargaining order by failing to file an RM when confronted by a demand the entire RC process is superfluous. Agencies and courts do not retain procedures that are of no practical value, and yet, the *Cemex* majority says nothing about eliminating the nearly century-old RC petition process. Such silence is no accident since eliminating the RC petition would likely require a rulemaking, not a decision. Accordingly, the *Cemex* majority sought to dramatically change its procedural rules without the safeguards attendant to rulemaking.

### C. *Cemex* Bargaining Orders Lack Clear Standards, Creating Confusion and Unpredictability for Employees and Employers.

The *Cemex* scheme operates to completely nullify employees' choice as expressed in a Board-supervised secret-ballot election and does so with no clearly articulated or rational standard for doing so. Under *Cemex*, if an employer commits any unfair labor practice that would warrant setting aside an election, it must bargain based on a card majority alone. *Cemex*, 372 NLRB No. 130, slip op. at 26. Although the election-set-aside "test" does mention some factors such as number and severity of violations, proximity to the election, unit size and vote margin, and extent of dissemination, those factors have no fixed weights, thresholds, or objective requirements. *Id.* at 26 n. 142. Thus, there is no ascertainable or objective standard for determining the two most fundamental questions: Did the misconduct change the result of the

election; and, most importantly, has the misconduct rendered a fair election *impossible*, even considering such additional factors as the imposition of traditional remedies, the passage of time, employee turnover, or intervening operational or managerial changes? This level of vagueness and imprecision might be acceptable in determining the propriety of a rerun election since that resolution preserves the right of employees to a secret-ballot election. However, it is not tolerable when the consequence of a single violation that clears some wholly indeterminate and subjective threshold is the complete elimination of an employee's right to a secret-ballot election. In short, *Cemex* grafts an extraordinary new remedy onto a legally and logically infirm standard never designed to bear that weight. Worse still is that the "price" of this misbegotten policy is the loss of employees' fundamental right to choice by secret ballot.

The practical and draconian consequences of these multiple failings also fall on employers who must make quick, high-stakes decisions when they receive a recognition demand. As Member Kaplan warns, under *Cemex*: "just one is all it takes" – a single critical-period violation that would set aside an election is now enough to trigger a bargaining order. *Cemex*, 372 NLRB No. 130, slip op. at 41 & n.4 (Kaplan, dissenting). Yet "Board members may, and often do, reasonably disagree whether conduct alleged to violate the Act in fact does so." *Id.*, slip op. at 41 n.4. If the decision-makers themselves cannot agree on what constitutes a violation, management labor counsel, let alone a front-line supervisor, cannot confidently know whether a particular workplace rule or campaign statement will be deemed election-defeating. Under the majority's standard, "employers must avoid all actions that *could* be viewed as violations of the Act" – a speculative standard no employer can reliably satisfy. *Id.* (emphasis in original). This is a particularly acute problem in light of the Board's recent spate of highly questionable unfair labor practice determinations ranging from the misnamed "captive audience" meeting to

handbook "civility" rules and much in between. The predictable, and perhaps *intended,* result is to chill Constitutionally and statutorily protected employer speech and to ensure a flood of litigation - exactly the kind of consequences that a clear rule could prevent.

### D. *Cemex* Is Not Aligned with Controlling Precedent, Including *Gissel's* Limits on Bargaining Orders and Balancing Requirement.

In *Gissel*, supra, the Supreme Court made clear that even when a union has demonstrated majority support through authorization cards and it is undisputed the employer committed critical-period unfair labor practices, a bargaining order remains extraordinary, a remedy of last resort, subject to a demanding standard. The Court held that a bargaining order may issue when "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight," but only after the Board conducts a case-specific inquiry into "the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future." 395 U.S. at 614-15. That standard requires an inquiry into the extensiveness of the misconduct, its actual effect on election conditions, the likelihood of recurrence, and whether traditional remedies could ensure a fair election, not merely whether misconduct could have affected the outcome. It also implicates the need for the Board to examine and assess additional intervening circumstances such as the passage of time between the underlying misconduct and any potential re-run election, the numerical magnitude of employee and/or management turnover between the two events as well as other mitigating factors. These are additional requirements routinely mandated by a host of post-*Gissel* decisions by reviewing federal courts.[13] *Gissel* itself

[13] *See Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996) ("all but one of [the circuit courts] that have considered the issue agree that changed circumstances, such as the passage of time or turnover in the work force, are relevant to the Board's decision to

also makes clear that "minor or less extensive unfair labor practices" with relatively less "impact on the election machinery, will not sustain a bargaining order." *Id.* at 615. In other words, the Supreme Court drew firm lines around when a bargaining order may legitimately issue.

*Cemex* disregards those lines. Under *Cemex*, the Board will dismiss an employer's RM petition and issue a bargaining order for any single Section 8(a)(3) violation regardless of its severity or impact on the election. 372 NLRB No. 130, slip op. at 26 n.142. For any single Section 8(a)(1) violation, a bargaining order issues unless the Board concludes it is "virtually impossible" that the misconduct affected the results, an extremely narrow exception. *Id.* Indeed, it is an exception that effectively swallows the rule as articulated by the Court in *Gissel.* For Section 8(a)(3) violations, *Cemex* does not even purport to analyze extensiveness or actual effect on the election. And for both Section 8(a)(3) and 8(a)(1) violations, the Board fails to conduct *Gissel's* required inquiry into likelihood of recurrence or whether traditional remedies could ensure a fair rerun vote or any other mitigating factors. *Cemex* thus arguably permits bargaining orders based on the very "minor or less extensive unfair labor practices" that *Gissel* held can never sustain such an order and indisputably dispenses with the rigorous balancing test *Gissel* requires, improperly prioritizing the remedy over employee free choice.

As Member Kaplan's dissent explains, the hair-trigger *Cemex* framework "cannot be reconciled with the Supreme Court's decision in *NLRB v. Gissel Packing* or circuit court decisions applying it." *Cemex*, 372 NLRB No. 130, slip op. at 47-48 (Kaplan, dissenting). The federal courts of appeals have consistently required the Board to provide specific justifications for each bargaining order, including by explaining why traditional remedies would fail to

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issue a bargaining order."), *citing NLRB v. Cell Agr. Mfg. Co.*, 41 F.3d 389, 398 (8th Cir. 1994) (which cites cases in the 1st, 3rd, 4th, 5th, 6th, 7th, 11th, and D.C. Circuits that have so held).

dissipate the effects of the employer's unfair labor practices. For example, the D.C. Circuit has refused enforcement, explaining: "We emphasize once again that a bargaining order is not a snake-oil cure for whatever ails the workplace; it is an 'extreme remedy' that must be applied with commensurate care. By requiring specific findings, the courts try to keep the Board from overprescribing." *Avecor, Inc. v. NLRB*, 931 F.2d 924, 938-39 (D.C. Cir. 1991). The Second Circuit has emphasized that "[t]he issuance of a bargaining order is a rare remedy warranted only when it is clearly established that traditional remedies cannot eliminate the effects of the employer's past unfair labor practices." *J.L.M., Inc. v. NLRB*, 31 F.3d 79, 83 (2d Cir. 1994). The Seventh Circuit has "consistently held that *Gissel* contemplates that the Board must make specific findings as to the immediate and residual impact of the unfair labor practices on the election process and that the Board must make a detailed analysis assessing the possibility of holding a fair election in terms of any continuing effect of misconduct, the likelihood of recurring misconduct, and the potential effectiveness of ordinary remedies." *Peerless of Am., Inc. v. NLRB*, 484 F.2d 1108, 1118 (7th Cir. 1973) (internal quotations omitted). Other circuits have reasoned likewise. *See Cemex*, 372 NLRB No. 130, slip op. at 47 (Kaplan, dissenting) (listing such case citations). *Cemex* abandons this rigorous *Gissel* standard in favor of a far less demanding threshold. As this precedent makes clear, bargaining orders issued under *Cemex* are unlikely to survive appellate review.

### E. *Cemex* Impermissibly Chills Lawful Employer Speech, Limiting Robust Debate and Depriving Employees of a Fully Informed Choice.

*Cemex* predictably deters lawful, noncoercive employer speech protected by Section 8(c) of the Act. Faced with the prospect that a single critical-period misstep could trigger a bargaining order, employers focused on legal compliance will curtail even permissible communications – campaign meetings with employees, Q&A and legal education sessions, and other ordinary

campaign statements – during the period when employees most need balanced information. That is directly at odds with the Act's policy "favoring uninhibited, robust, and wide-open debate in labor disputes," as recognized by the Supreme Court. *Chamber of Com. of U.S. v. Brown*, 554 U.S. 60, 68 (2008). It is "simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign," and curtailing opportunities for speech at the very time the choice is imminent does just that. *Republican Party of Minnesota v. White*, 536 U.S. 765, 782 (2002).

The Board's decision in *Amazon.com Services LLC*, 373 NLRB No. 136 (Nov. 13, 2024), further restricts employer communication by prohibiting mandatory meetings about unionization. *Amazon* limits how employers may communicate; *Cemex* chills what they say by making the commission of a single, inadvertent, or technical mistake, or any statement later deemed coercive, dispositive with respect to all parties' representational rights and obligations. Together, these decisions impermissibly burden employers' statutory and constitutional free speech rights and improperly inhibit precisely the free and fair discussion and debate which the Supreme Court has endorsed, and that national labor policy has continuously maintained. The wholly predictable result is to force employers to simply abandon the exercise of their rights.

### F. *Cemex* Is Antithetical to Employee Free Choice and the Act's Preference for Secret Ballot Elections.

The Supreme Court has long recognized that Board-conducted secret-ballot elections are the preferred method for determining employee sentiment on union representation. In *Gissel*, the Court acknowledged that authorization cards are "admittedly inferior to the election process." 395 U.S. at 603. The Court explained that "secret elections are generally the most satisfactory – indeed the preferred – means of ascertaining whether a union has majority support." *Id.* at 602. Cards suffer from inherent deficiencies: an employee may sign before hearing the employer's

perspective, under peer pressure, or after being misled or coerced. And if no election is held, that employee has never had the opportunity to change his or her mind in the confidential setting of the voting booth. *See id.* at 602-04. This is precisely why *Gissel* treated bargaining orders based on cards as an extraordinary remedy available only when employer misconduct is so severe that a fair election cannot be held, not as a routine substitute for secret ballots whenever any violation occurs. *Id.* at 614-15.

*Cemex* inverts this preference. By triggering bargaining orders based on card majorities whenever an employer commits a single critical-period violation that would warrant setting aside an election, *Cemex* systematically substitutes the "admittedly inferior" card-check process for the Act's preferred secret-ballot mechanism. Employees who voted "no" in an election or who never had the chance to vote at all may find themselves represented by a union based solely on cards signed weeks or months earlier, potentially before hearing the full debate on unionization. Under *Cemex*, employees may lose their statutory right to a secret-ballot election altogether based on employer conduct they did not cause and cannot control. That outcome cannot be reconciled with the Act's design, which treats elections as the gold standard for measuring majority support. *Gissel* permits card-based bargaining orders only where the possibility of a fair election is "slight"; *Cemex* imposes them unless a single violation almost certainly had no effect at all.

### G. *Cemex* Exceeds the Board's Remedial Authority by Effectively Imposing Categorical Bargaining Orders Untethered to *Gissel's* Constraints.

The Board's remedial authority under Section 10(c) is not unlimited. The Supreme Court has long recognized that the Board's "authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board is of the

opinion that the policies of the Act might be effectuated by such an order." *Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197, 235-36 (1938). Put simply, "the power to command affirmative action is remedial, not punitive." *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940). A bargaining order that "would not be remedial, but rather only punitive," exceeds the Board's authority and cannot be enforced. *NLRB v. Ship Shape Maint. Co.*, 474 F.2d 434, 444 (D.C. Cir. 1972).

*Cemex* crosses this line. Under *Cemex*, a single unfair labor practice, even a minor or inadvertent one, can result in a bargaining order. While, like any existential or draconian penalty, the prospect of a bargaining order may act as a deterrent, deterrence alone cannot justify a remedy untethered to the circumstances of each case. The D.C. Circuit has held that maximizing deterrence regardless of the circumstances "cross[es] the line from a permissible remedy designed to deter future violations to an impermissible punitive measure" beyond the Board's authority. *Peoples Gas Sys., Inc. v. NLRB*, 629 F.2d 35, 50 (D.C. Cir. 1980). Under *Cemex*, the same extraordinary remedy issues whether the employer engaged in pervasive misconduct or committed a single violation. That is automatic punishment, not a tailored remedy. A rule restoring *Gissel's* requirements would ensure bargaining orders issue only when truly necessary to protect, rather than eliminate, employee free choice.

### H. Rulemaking Provides a Practical Path to Abrogate *Cemex*

*Cemex* should be abrogated, but the Board may face practical obstacles to doing so by decision. The tradition of requiring three members to support precedent-shifting decisions may cause the Board to feel constrained from overruling *Cemex* by decision and order, even though, as discussed in Section A.1, that view is entirely incorrect. However, if that "tradition" was nonetheless mistakenly honored, *Cemex* will remain the governing standard, and the Board will continue issuing bargaining orders that, as shown above, circuit courts are likely to refuse to

enforce. That mismatch between Board orders and judicial enforcement could persist for years, wasting limited agency resources. Rulemaking avoids these problems.

## I. Executive Order 14219 Compels the Board to Rescind the Unlawful Cemex Framework

The Board's decision in *Cemex* goes well beyond an individual adjudication. It purports to establish new substantive remediation standards and entirely new representation case procedures that will be uniformly applied in all future cases. This is precisely what agency rulemaking does. It is clear the majority in *Cemex* engaged in rulemaking without affording stakeholders any of the safeguards that attend the rule-making process. The public was offered no opportunity for comment or input with respect to the significant changes in both substance and procedure which *Cemex* has mandated for all future cases. It was thus an exercise in rulemaking by another name, and a particularly faulty attempt at rulemaking to boot.

As an extant rule, the decision in *Cemex* is subject to Executive Order 14219[14] that requires agencies to identify and repeal all rules that are contrary to law or to the Constitution. As set forth in detail, *supra,* the remedial and procedural rules contained in the *Cemex* decision unquestionably meet these repeal criteria. Thus, they contravene multiple controlling Supreme Court decisions, including, *inter alia, Gissel, supra,* and *Linden Lumber, supra,* and plainly trench upon an employer's rights of free speech and free expression. See, above for fuller discussion.

The requirements of the E.O. are clear and direct. There is no exception for agency "traditions". While the Board was excused from the scope when it lacked a quorum, it is not excused from acting because it only has three members. If two of those members believe that the

[14] Executive Order 14219 of February 19, 2025 - *Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative*, 90 Fed. Reg. 10583 **(**Feb. 25, 2025)**.**

rules in *Cemex* are contrary to law or the Constitution, E.O. 14219 *requires*[15] them to act and promptly[16] abrogate rules contained in the *Cemex* decision.

### J. A Federal Court of Appeals Has Held *Cemex* Unenforceable, Confirming the Need for This Rulemaking.

Recently, the Sixth Circuit issued its decision in *Brown-Forman Corporation v. NLRB*, holding *Cemex* unenforceable and supporting the arguments advanced in this Petition.[17] The court held that "the *Cemex* standard was improperly promulgated, so it cannot serve as the basis for future orders."[18] *Cemex* was "not derived from the case-specific facts"[19] of the underlying adjudication and "was not created to resolve the parties' dispute,"[20] but instead constituted a "rule of general applicability"[21] aimed at deterring "hypothetical, future conduct"[22] – the type of policy requiring notice-and-comment rulemaking, not adjudication.[23]

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[15] Indeed, in addition to the Executive Order Board members are also bound by their oath of office that compels them to uphold the law and Constitution. That obligation cannot be avoided by reference to some "institutional purpose" or "tradition".

[16] As the Order makes clear, rulemaking in these circumstance does *not* require notice and comment. *See Presidential Actions Directing the Repeal of Unlawful Regulations* (Presidential Memoranda *Apr. 9, 2025*). Equally clear is the fact that E.O. 14192 does not apply to any rule enacted to *rescind* a prior rule.

[17] *Brown-Forman Corp. v. NLRB*, No. 24-2107/25-1060, 2026 LX 132604 (6th Cir. Mar. 6, 2026).

[18] *Id.* at *20.

[19] *Id.* at *19.

[20] *Id.* at *38.

[21] *Id.* at *41.

[22] *Id.* at *37 n.7.

[23] *Id.* at *52.

Beyond this procedural defect – which means *Cemex* "has no precedential value"[24] – the court expressly cast doubt on Cemex's substantive validity. Invoking *Loper Bright's, supra*, standard than an agency interpretation must be "the best" reading of the statute, not merely a "permissible" one, the court questioned "whether the *Cemex* standard is consistent with the longstanding preference for elections to measure union support"[25] recognized in *Gissel* and emphasizing that secret-ballot elections are "the most satisfactory – indeed the preferred – method"[26] of ascertaining employee sentiment.

The Board cannot ignore this unmistakable signal. *Brown-Forman* demonstrates that *Cemex*-based orders face nonenforcement – and continued reliance on a judicially invalidated standard will only produce further remands, wasting resources and prolonging uncertainty. By granting this Petition, the Board can correct course and recommit to the Act's foundational preference for employee free choice as expressed through secret-ballot elections.

## V. CONCLUSION

For the foregoing reasons, Petitioners respectfully requests that the Board institute a rulemaking proceeding to abrogate *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), and restore the pre-*Cemex* framework consistent with *Gissel* and its federal court progeny. The proposed rule would promote predictability, protect employee free choice, and confine bargaining orders to their proper remedial function. The Board should grant this Petition.

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[24] *Id.* at *53.

[25] *Id.* at *49 n.11.

[26] *Id.* at *16.

Respectfully submitted this 12th day of March 2026.

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