Statement of

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Chairman Good, Ranking Member DeSaulnier, and Subcommittee Members, thank you for your invitation to participate in this hearing. It is an honor to appear before you today.[1]

I am a partner in the law firm, Morgan, Lewis & Bockius LLP, where I practiced labor law for almost 30 years prior to serving on the National Labor Relations Board ("NLRB" or "Board"). I had the privilege of serving as Chairman of the NLRB from April 2018 to January 2021, and as a Board Member until the end of my term on December 16, 2022. Returning to Morgan Lewis, my law practice again focuses on management-side labor law. I am proud to have started my career in the labor field at the International Brotherhood of Teamsters Washington, D.C. headquarters. My early experience with the Teamsters offered an important perspective that has shaped my law practice, given me tremendous respect for the collective bargaining process, and informed my overall approach to the practice and understanding of labor law. Labor law works best when both sides play by the same set of rules and understand and respect each other's objectives.

Today, I am here to talk about the National Labor Relations Board, an agency I care a great deal about, and the National Labor Relations Act ("NLRA" or "Act"). The NLRA is an important and carefully crafted statute that, for nearly 90 years, has done an admirable job of balancing the interests of both labor and management. While the NLRB has largely fulfilled the Act's central objectives of promoting workplace democracy and ensuring industrial peace, I fear that today the NLRB has lost its way. Seeking to promote a particular agenda, the current Board majority and the NLRB General Counsel are attempting to administratively rewrite the Act to facilitate unionization at the expense of individual employee rights and employer interests when the Act clearly directs the Agency to be an impartial arbiter of labor matters.

[1] My testimony today reflects my own views, which should not be attributed to Morgan Lewis & Bockius, or the NLRB. I am grateful to Andrew Gniewek and David Ostern for their assistance.

Approximately eight years ago, many had similar concerns about the NLRB. The Obama-era Board had started a process of overturning years of long-standing case precedent in many areas of established Board law. It was a blatant attempt to tip the balance toward unions at the expense of individual employee rights and the legitimate interests of employers. By some estimates, the Board overturned more than 4,000 years of collective precedent in some 91 cases during that time.

During those years, the NLRB attempted to rewrite the rules of union organizing. It adopted the so-called "quickie election" rules, as well as a novel interpretation of the Act that made it easier to organize smaller groups of employees or "microunits," all designed to make it easier for unions to organize. The Obama-era Board also rewrote several fundamental labor law policies, including the joint employer and independent contractor standards, in ways that were intended to expand the reach of the Act far beyond its intended scope. That Board also adopted interpretations of the Act that inserted the NLRB into non-union workplaces where it had never been before. As an example of its overreach, the Obama-era Board embarked on a number of ill-fated efforts to test the boundaries of its statutory authority, including its conclusion that the Act prohibited mandatory arbitration agreements. This 2014 Board decision placed the NLRA squarely in conflict with the Federal Arbitration Act, and after more than five years of litigation, the U.S. Supreme Court resoundingly rejected the Board's overreach in *Epic Systems*.[2]

The Obama-era Board's unprecedented changes not only were an improper attempt to rewrite the Act, but they also came at a substantial cost to the NLRB's other important work. Pursuing its agenda, the NLRB wasted countless resources, flooded the Board's and Region's dockets and diverted the NLRB's attention from its core mission. Like the mandatory arbitration cases, the Obama-era Board's aggressive enforcement policy toward ordinary employer rules, policies, and handbooks, in particular, was an enormous distraction for the Board and caused significant delays in decisions.[3] By the time I joined the NLRB in 2018, there was a serious case backlog, with undecided Board cases having languished for as long as 10 years, and many were four or five years old. This backlog meant a large number of cases central to the Board's core mission – cases dealing with organizing and collective bargaining – idled for years while the Board focused instead on whether employer handbooks or arbitration agreements were unlawful under the Act.

At the time, many were alarmed at what was happening at the NLRB. It appeared to be not only a blatant attempt to rewrite key aspects of the Act, but also an upsetting of the carefully crafted balance between labor and management. And the Board was bogged down pursuing non-core priorities. I was very concerned, and it is one of the reasons I feel fortunate to have been nominated to the NLRB and given the opportunity to serve on the Board.

While I was Chairman, I was pleased to have been able to restore the Board's historic balance. We reestablished much of the decades-old precedent that had been changed during the Obama era and returned many of the standards to what they had been for decades. This includes the joint employment standard, independent contractor standard and the rules governing union

[2] *Epic Systems Corp. v. Lewis*, 584 U.S. 497 (2018).
[3] *See Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

election procedures. We reinstated many established, foundational precedents, including the Board's enforcement of employer policies, employer property rights and other workplace practices. In many cases, we aligned our precedent to the standard set by prior court decisions to ensure consistent enforcement, including rules governing interpretations of collective bargaining agreements, arbitration agreements and voluntary union recognition. And in decisions such as those relating to offensive workplace conduct and internal employer investigations, we adopted commonsense standards consistent with the Act. Importantly, our decisions removed conflicts with existing EEO requirements created by Obama-era standards.

In addition to restoring the Board's historic balance, we immediately initiated efforts to reduce the appalling case backlog. While we instituted a series of management case processing changes, a big part of our success in reducing the backlog was putting an end to the prior Board's pursuit of issues that were outside the core mission or involved dubious statutory interpretations, which resulted in lengthy, unsuccessful litigation. In the end, we were able to reduce the median age of all cases pending before the Board from 233 days in FY 2018 down to 85 days in FY 2020. At the end of FY 2020, the number of cases pending before the Board was at its lowest level in over 40 years.[4]

After the Obama-era Board, we thought we had seen the worst of the NLRB. Unfortunately, the current Board majority appears to be reverting to, and in fact doubling down on, the old game plan. Today, we find ourselves in a back-to-the-future moment, although what is happening now appears to be far worse. From the outset of their time in office, the new Board majority and General Counsel have made no secret of their intent to undertake a wholesale rewriting of the Act. They immediately targeted precedent we had restored, called for expansion of many interpretations of the Act, and are now working steadily to remake the NLRA into something the drafters never intended nor could have imagined. In doing so, both the Board and General Counsel are again pursuing issues that are either outside the core mission or involve suspect statutory interpretations that will result in litigation unlikely to prevail. The Obama-era Board pales in comparison to the agenda being pursued by the current NLRB.

No one should doubt the sincerity or intensions of the current Board majority or the General Counsel. As each has made clear, they believe the Act should be reimagined more expansively to promote unionization and collective bargaining. This is their strongly held conviction, and I have no doubt that each believes what they are doing is in the best interest of the country. We can debate the merits of their positions, but two things are not open to debate: first, Congress – not the NLRB or its General Counsel – has responsibility for drafting the federal labor laws; and second, the NLRA does not provide for what the current NLRB majority and General Counsel says it does. The Act, among other things, simply does not:

- Provide for compulsory unionization simply because a union says it represents a majority of employees and demands recognition;

[4] NLRB Press Release: NLRB Closes Out FY 2020 With Favorable Case Processing Results, https://www.nlrb.gov/news-outreach/news-story/nlrb-closes-out-fy-2020-with-favorable-case-processing-results (Oct. 30, 2020); NLRB Press Release: NLRB Closes Out FY 2019 With Positive Case Processing Results, https://www.nlrb.gov/news-outreach/news-story/nlrb-closes-out-fy-2019-with-positive-case-processing-results (Oct. 7, 2019).

- Impose unionization on employees based on the conduct of the employees' employer, regardless of the election outcome;
- Require card-check recognition rather than a secret ballot election conducted by the NLRB;
- Prohibit employers' right to express opinions and provide information to employees regarding unionization;
- Define joint employment based on the *potential* of control by one employer over the another's employees;
- Define independent contractors based on something other than the common law test;
- Prohibit employer dress codes and uniform policies;
- Regulate mandatory arbitration agreements; or
- Provide for expanded, consequential damages in Board remedial orders.

We know that these things are not part of the NLRA, and that the current Board's efforts to implement them cannot be squared with the Act. First, if these provisions were already in the NLRA, there wouldn't be a need for legislation to add them. Yet, many of these same provisions have been proposed as legislation to amend the NLRA in one form or another, including most recently, the Protecting the Right to Organize Act ("PRO Act"). Introduced in every Congress over the last 10 years, the PRO Act has failed to pass each time, including when both houses of Congress and the White House were controlled by the same party. Thus, attempting to adopt the same reforms that have been repeatedly rejected on a bipartisan basis by Congress, the NLRB is acting well outside its statutory authority.

In addition, we know the NLRB is acting outside its statutory mandate, because the courts keep saying so. Indeed, in the last few years, numerous courts have rejected Board decisions and refused to enforce its orders. For example, the Fifth Circuit recently rejected the NLRB's prohibition on workplace dress codes and apparel standards. The Board held that such a rule violates the NLRA unless the employer can provide the Board with a satisfactory reason for it. Noting that the NLRB had "exceeded its statutory authority in crafting the rule," the court explained, "Congress likely would not have intended to permit such a major decision without clearer statutory indication. … The Board has not 'balanced the conflicting legitimate interests' – instead, it has elevated employee interests at the expense of legitimate employer interests."[5]

In another example, the D.C. Circuit recently rejected the Board's attempt to expand the definition of surveillance in finding a violation against an employer for routine monitoring of employee conduct.[6] Calling the Board's explanation of the violation "nonsense," the court concluded that "the Board's errors reveal just how far it strayed from its statutory mandate." The D.C. Circuit similarly criticized the Board recently for ignoring evidence, saying, "[t]he Board

[5] *Tesla, Inc. v. National Labor Relations Board*, 86 F.4th 640, 651 (5th Cir. 2023) (rejecting Board's new "extremely broad rule would make all Company uniforms presumptively unlawful, whether for white-collar workers or blue").
[6] *Stern Produce Co. v. National Labor Relations Board*, 97 F.4th 1, 5-11 (D.C. Cir. 2024) ("The Board's misguided attempt to find a labor-law violation in one text message is 'the product of a familiar phenomenon': years ago the Board took an expansive view of the scope of the Act and then, over time, it 'press[ed] the rationale of that expansion to the limits of its logic.'").

cannot ground its decisions in a skewed or 'clipped view' of the record. … Its finding [] has no anchor in the full record and cannot be sustained."[7]

On March 8, 2024, the NLRB's attempt to rewrite the joint employer standard was struck down by a U.S. District Court in Texas.[8] The NLRB's joint employer rule abandoned the common law requirement for actual control and would deem an employer a joint employer where it possesses "reserved" yet unexercised or "indirect" control over another company's employees.[9] The court concluded that the reach of the Board's final rule "exceeds the bounds of the common law and is thus contrary to law." As a result, the court vacated the rule on similar grounds that that D.C. Circuit had rejected prior attempts by the Obama-era Board to implement a similarly overbroad standard.[10]

Some of the current NLRB's recent decisions have not yet been subject to judicial scrutiny but are clearly antithetical to the fundamental underpinnings of the Act. The most egregious of these actions is the Board's *Cemex* decision, which discarded well-established precedent – and Supreme Court jurisprudence – by abandoning secret ballot elections in favor of a standard the affords union *claims* of majority support dispositive weight. Indeed, the Supreme Court has twice rejected mandatory union recognition based on authorization cards (absent "outrageous," "pervasive" or other unlawful conduct that would "seriously impede" holding a fair election).[11] Moreover, 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."

Similarly, the Board's decision to impose direct or foreseeable damages beyond the NLRB's statutorily authorized make-whole remedy almost assuredly violates the Seventh Amendment of the U.S. Constitution and decades of Board precedent.[12] As noted in Member Kaplan and my dissent in the case, remedies that are more akin to tort remedies, such as consequential damages, run afoul of the Seventh Amendment. Although the remedies aspect of that decision has not yet been reviewed by the courts, the Fifth Circuit recently called the Board's remedy "a novel, consequential-damages-like labor law remedy."[13]

The Current NLRB's Extreme Policy Agenda

Despite rebuke from reviewing courts and without regard to decades of well-established precedent, the Board has embarked on a determined effort to reimagine and rewrite the Act in a number of important policy areas. These changes not only undermine the balance required by the

[7] *Absolute Healthcare v. National Labor Relations Board*, 2024 WL 2789317 (D.C. Cir. May 31, 2024).
[8] *Chamber of Commerce v. NLRB*, No. 6:23-CV-00553, 2024 WL 1161125 (E.D. Tex. Mar. 18, 2024).
[9] 88 FR 73946, 73983 (Oct. 27, 2023).
[10] *Browning-Ferris Indus. of Ca., Inc.*, 362 NLRB 1599 (2015), *aff'd in part and remanded,* 911 F.3d 1195 (D.C. Cir. 2018), *supp. decision* 369 NLRB No. 139 (2020), *vacated and remanded sub nom. Sanitary Truck Drivers & Helpers Local 350 v. NLRB*, 45 F.4th 38 (D.C. Cir. 2022).
[11] *Gissel Packing Co. v. NLRB*, 395 U.S. 575 (1969); *Linden Lumber v. NLRB*, 419 U.S. 301 (1974).
[12] *Thryv, Inc. v. NLRB*, No. 23-60132 (5th Cir. 2024).
[13] *Id.*, slip op. at 9.

Act, but they also create instability and unpredictability in our labor law. The most egregious policy oscillations include the following areas:

- ***Union Organizing*** – The current Board has completely rewritten the Act with respect to the way unions organize in three fundamental ways.

  First, as noted above, it has eliminated the requirement for an NLRB-conducted secret ballot election as part of the Board's representation process. While the Board has traditionally required unions to seek an election, which allows employees to decide whether they want a union, the Board's recent *Cemex* decision now allows unions to demand recognition solely based on a claim of majority employee support.[14] Under this new *Cemex* framework, there will be an election only if the *employer* asks for it to test the union's claim of majority support. Notwithstanding clear Congressional intent that employees should have the opportunity to vote in an NLRB-conducted election, the current Board majority has made it much easier for unions to organize without an election and in a way that denies individual employees the right to express their choice without coercion or other pressure.

  Second, the Board reestablished Obama-era precedent that allows unions to avoid organizing an entire workplace or facility and instead organize small subsets of workers such as in a single department or within a specific job description.[15] For example, unions may now seek to represent only the men's clothing department of a larger department store or only the maintenance employees at a production facility. In effect, the decision allows unions to define a bargaining unit based on the extent of its organizing, making union-proposed units immune from attack in all but the rarest of cases.

  Third, the current Board majority has reinstituted Obama-era election procedures (known as the "Quickie Election Rule"), which greatly accelerate the time between when a union (or now, also an employer) petitions the NLRB for an election and when one actually

[14] *Cemex Constr. Materials Pacific*, 372 NLRB No. 130 (2023). In *Cemex*, if a union makes a claim of majority support, the employer must (1) immediately grant recognition without any NLRB election, or (2) file its own NLRB petition seeking an election. If the employer fails to take either step, the NLRB will order mandatory union recognition (with no NLRB election) unless the employer – in a later unfair labor practice ("ULP") proceeding – proves that the union did not have majority support or that the claimed bargaining unit was inappropriate. Additionally, the Board will now issue a mandatory "bargaining order" based on *any* unlawful conduct that sets aside an election, which dramatically changes the much higher threshold (embraced by the Supreme Court of the United States) that validated the NLRB's issuance of "bargaining orders" only when unlawful conduct made it "improbable" that a "fair election" could be held (i.e., there were egregious violations of labor law). *See NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[15] *American Steel Constr.*, *Inc.*, 372 NLRB No. 23 (2022). In *Specialty Healthcare*, 357 NLRB 934 (2011), the Board adopted a heightened standard in which an employer challenging the scope of a petitioned-for unit must demonstrate that the excluded employees share an "overwhelming community of interest" with those that are included. In *PCC Structurals*, 365 NLRB No. 160 (2017), the Board returned to its "traditional test" in determining the appropriateness of a petitioned-for unit, which considered employee interaction within the proposed unit, as well as the interests of those who were excluded from the petitioned-for unit. In other words, in *PCC Structurals*, the Board rejected the "overwhelming community of interest" standard that promoted smaller bargaining units.

takes place.[16] This acceleration, which is designed to limit the time for a campaign in which employees can educate themselves about unionization, defers the resolution of important issues, including voter eligibility and supervisory status, until after the election has been conducted. Running an election in such an abbreviated timeframe deprives employees of the ability to learn more about whether to unionize. It also limits employers' ability to express their views on unionization, which is a right enshrined within the NLRA.[17]

- ***Bargaining Orders*** – The NLRB has also changed the election framework so that, if an election is held, the union may be imposed on employees based solely on the employer's conduct regardless of the election outcome. For nearly 50 years, the NLRA has been interpreted – with Supreme Court approval[18] – to require elections to be rerun in the event of employer unfair labor practices during a union campaign. Only in the most egregious cases, where it was determined that a fair rerun election was impossible, would the Board forgo a rerun election and simply impose the union on the employees. Now, any single unfair labor practice by an employer during a campaign, the Board has said, will almost *always* require the issuance of a bargaining order.[19]

- ***Protection of Offensive Speech in the Workplace*** – In one of its most controversial decisions, the current NLRB majority has adopted an interpretation of the Act that creates a direct conflict with Title VII and allows blatantly discriminatory or harassing language in the workplace if the comments are made in the context of union or labor activity. Holding that the NLRA protects profane, harassing and other speech or conduct that would be considered a hostile work environment under Title VII, the Board has held that the EEOC's antidiscrimination requirements must yield to the NLRA because employees sometimes need to be offensive while engaging in activity protected by the Act.[20] This

[16] Representation-Case Procedures, Direct Final Rule, 88 Fed. Reg. 58,076 (Aug. 25, 2023) (to be codified at 29 C.F.R. pt. 102). The Final Rule reimplements the following major changes from the 2014 rule: (i) elections shall be ordered for the "earliest date practicable" after the issuance of a decision by the NLRB's Regional Director; (ii) the pre-election hearing will be scheduled for eight calendar days from when the employer receives the Notice of Hearing, which is down from the old 14-business-day standard; (iii) employers have limited ability to raise issues regarding certain employees' eligible to vote or be included in the petitioned-for bargaining unit; (iv) less time for the employer to prepare for a pre-election hearing; (v) limiting instances in which a party may ask for the pre-election hearing to be rescheduled; and (vi) requiring an employer to seek leave of the Regional Director in order to be able to submit a post-election hearing brief and expand on the issues argued at hearing.

[17] 29 U.S.C. § 158(c).

[18] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613-14 (1969).

[19] *See generally Cemex Constr. Materials Pacific*, 372 NLRB No. 130 (2023).

[20] *Lion Elastomers LLC II*, 372 NLRB No. 83 (2023). The Board's decision restored the four-part *Atlantic Steel* test and reimplemented earlier precedent applying the setting-specific standards. Under the prior (now current) standard, if an employee's misconduct occurs during ordinary work and not in connection with Section 7 activity, the discipline is assessed based on the Board's *Wright Line* mixed-motive test. If the employee's misconduct occurs in connection with Section 7 activities, one of three tests will apply: (i) if the employee's Section 7 misconduct toward management occurs in the workplace, the test from *Atlantic Steel Co*., 245 NLRB 814 (1979), applies; (ii) if the employee's Section 7 misconduct occurs on social media, the test from *Pier Sixty, LLC*, 362 NLRB 505 (2015), applies; and (iii) if the employee's Section 7 misconduct occurs on a picket line, the test from *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984), applies.

decision overturns an important case issued when I was Chairman that reconciled the conflict with EEO requirements. It used the NLRB's standard mixed-motive test for determining violations rather than giving leniency to unacceptable workplace conduct solely because it is done in the context of union- or labor-related activities.[21] Overturning this case, the current Board majority revived the outdated standards that allow racial and ethnic slurs and sexually demeaning comments. This returns the Board to its standard that protects abhorrent, racially charged statements such as "I smell fried chicken and watermelon" and "Go back to Africa, you bunch of f------ losers,"[22] and calling your boss a "f------ mother f-----," a "f------ crook," and an "a--hole."[23]

Not only did the Board's change return the Board to approving conduct that would not otherwise be permitted in any workplace, but the current NLRB also expressly abdicates any responsibility for the statutory conflict with Title VII. Quoting the U.S. Supreme Court's decision in *Epic Systems Corp. v. Lewis*: "[T]he 'reconciliation' of distinct statutory regimes 'is a matter for the courts,' not agencies."[24] The practical effect is that attempts to maintain civility, cooperation, antidiscrimination, or antiharassment policies in the workplace can lead to unfair labor practice charges alleging such policies or disciplinary action taken to enforce them are unlawful restrictions on employees' rights to protest terms or conditions of employment or to engage in union organizing or collective bargaining.

- ***Prohibiting Confidentiality in Workplace Investigations*** – Creating a similar statutory conflict with Title VII, the Board's recent decision prohibiting employers from requiring confidentiality in workplace investigations is an aggressive expansion of the NLRA's reach.[25] Despite EEOC and OSHA requirements mandating confidentiality in certain investigations, the Board has held that it is an unfair labor practice for employers – with or without a union – to require employees to maintain confidentiality without specific reasons for doing so. Nothing in the NLRA requires such an approach, and the Board's interpretation affords expansive protections that fail to recognize employers' interests in conducting investigations or the importance of such fair and complete investigations for everyone in the workplace. This recent Board decision overturns a 2019 case that reconciled the competing statutory demands by permitting confidentiality during the pendency of the investigation.[26]

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[21] *General Motors LLC*, 369 NLRB No. 127 (2020).
[22] *Cooper Tire & Rubber Co.*, 363 NLRB 1952, 1954 (2016).
[23] *Plaza Auto Center, Inc.*, 360 NLRB 972 (2014).
[24] *Id.* at 8 n.38. The *Lion Elastomers* Board also opined that state antidiscrimination laws would "very likely" be preempted by the NLRA. *Id.* at 8 n.39.
[25] *Stericycle, Inc.*, 372 NLRB No. 113 (2023).
[26] *See Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019). In this decision, the Board expressly overruled *Banner Estrella*, 362 NLRB 1108 (2015), holding that the case (i) did not properly balance the employer's legitimate interest in conducting confidential investigations; (ii) failed to consider the impact of conducting confidential investigations on the employer and employees; and (iii) was inconsistent with guidance from other federal agencies – particularly the EEOC, which released a report in 2016 finding that the NLRB needed to harmonize its approach to workplace investigations with the EEOC. At present, confidential investigation rules are presumptively

- ***Severance and Settlement Agreements*** – Last year, the NLRB issued a decision that asserted the Board's authority over every private sector severance and settlement agreement used by both unionized and non-union employers.[27] For decades, many employers have offered terminating employees severance agreements that provide the employee a monetary payment in return for a commitment that the employee will maintain confidentiality and not disparage the employer in the future. Similar agreements are used to settle litigation or the threat of litigation. Despite the NLRB never before scrutinizing these agreements other than in a unionized setting or in the presence of other, independent unfair labor practices, the Board has now declared that the inclusion of general confidentiality (beyond proprietary information or trade secrets) and non-disparagement provisions are violations of the NLRA. In subsequent guidance, the NLRB General Counsel has indicated that other common provisions in employment agreements, including noncompete, non-solicitation, and no-poaching clauses should similarly be subject to challenge,[28] and the General Counsel has started charging employers consistent with this guidance.

- ***Employer Handbooks, Rules and Policies*** – Readopting the Obama-era approach to employer handbooks, rules and policies, the current Board majority has assumed the role of the federal inspector of all private sector employer handbooks.[29] Under the NLRB's new standard, which applies in unionized and non-union settings, every employer rule or policy that *could* be read by the Board as interfering with the rights of employees under the Act is presumptively unlawful. All that is required for a potential violation is the NLRB General Counsel showing that a rule or policy "has a reasonable tendency to chill employees from exercising their Section 7 rights."[30] As long as the General Counsel can meet this extremely low test, the burden is on the employer to show that it has a legitimate reason for the rule and that the employer could not have drafted it more narrowly. As a result of this extreme interpretation of the Act, every employer's

lawful, provided that they are (1) limited to the duration of the investigation and (2) only cover what was discussed during the investigation, not the underlying facts or events.

[27] *McLaren Macomb*, 372 NLRB No. 58 (2023). In *McLaren*, the Board held that an employer violates Section 8(a)(1) of the NLRA if it merely proffers employees a severance agreement with terms that would restrict employees' rights to, among other things, assist co-workers or former co-workers with workplace issues and communicate with others about their employment. *See McLaren*, slip op. at 4, 7. The Board also found that the employer's non-disparagement provision interfered with Section 7 rights because statements by employees about the workplace are central to the exercise of rights under the Act. *See id.* at 8.

[28] GC Memo. 23-05 (Mar. 22, 2023).

[29] *Stericycle, Inc.*, 372 NLRB No. 113 (2023). In *Stericycle*, the Board reestablished the test set forth in *Lutheran Heritage Village-Livonia*, which found rules facially unlawful if an employee could reasonably interpret a work rule to restrict Section 7 activity, and without general consideration of employer interests for the rule. *Lutheran Heritage* was overturned by the Board's decision in *The Boeing Co.*, 365 NLRB No. 154 (2017). *Boeing* established a "categorization" approach to assessing the facial lawfulness of work rules. In *Boeing*, the Board analyzed the lawfulness of work rules through a balancing test that considered the potential impact on both the employee's Section 7 rights and the employer's legitimate justifications associated with the rule.

[30] *Id.*, slip op. at 2.

handbook is subject to NLRB scrutiny, and the Board's position is so extreme that it is nearly impossible for an employer to draft an acceptable handbook. For example, the NLRB regions are taking the position that provisions requiring employees to act professionally in the workplace or to be polite to fellow workers and customers are a violation of the Act, because employees may need to act unprofessionally or less than politely when engaging in union-related activity.

- ***Dress Codes and Uniform Standards*** – In one of the first cases as a newly-constituted majority in 2022, the Board held that the maintenance of a dress code or uniform policy violates the NLRA unless the employer shows "special circumstances" justifying the potential restriction.[31] Under this decision, a typical policy requiring an employer uniform, for example, with a certain color and employer logo will be considered presumptively unlawful unless the employer can justify the policy based on some strong business reason, such as safety, product damage, employee dissension, and/or customer or public image.

- ***No Recording Policies Preempting State Law*** – Among the many employer policies found to violate the Act are those that prohibit employees from recording in the workplace. While the Board's position regarding no recording policies is not surprising in light of its ongoing efforts to expand its interpretations of the Act, the Board's conclusion regarding preemption of state law is notable. In a recent decision, the Board held – without briefing and in a matter of two sentences – that its prohibition preempts all state laws that require two-party consent to record.[32] With that, the current NLRB has created conflicts with the recording statutes in 15 states, many with criminal penalties, in order to advance its expansive reinterpretation of protections under the Act.

In addition to these significant changes, the NLRB General Counsel is urging the Board to make other radical changes in well-established precedent. Among other things, the General Counsel has proposed extreme ideological interpretations of the Act that are not only at plain odds with established precedent but are unworkable in practice. The General Counsel seems to take particular issue with employer communications to employees over matters protected by the First Amendment and Section 8(c) of the Act – a position that, like many others adopted by the General Counsel, has no chance of surviving judicial scrutiny. For example, the General Counsel is urging the Board to bar employers from convening employees on working time to communicate about union representation, opining in an April 2022 memo that such meetings violate the NLRA.[33] This despite such employer communications having been deemed lawful by the NLRB dating back more than 50 years.[34] Acknowledging that its view runs counter to well-established NLRB precedent, the General Counsel nevertheless maintains that such meetings are now "at odds with fundamental labor-law principals," statutory language, and congressional

[31] *Tesla, Inc.*, 370 NLRB No. 131, slip op. at 18 (2022).
[32] *Starbucks Corp.*, 372 NLRB No. 50 (2023).
[33] GC Memo. 22-04, The Right to Refrain from Captive Audience and other Mandatory Meetings (Apr. 7, 2022).
[34] *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956).

mandate. The General Counsel is further seeking to stifle protected employer speech by outlawing statements of opinion by management that historically have been lawful under the Act, often and arbitrarily parsing the words of management to manufacture a threat where none exists.[35]

The General Counsel's extensive agenda also includes designating college student-athletes as "employees" under the NLRA, which, in addition to upending decades of established precedent, would have significant implications on athletic departments and their ability to sustain the broad array of varsity sports that many institutions support.

The agenda being pursued by the General Counsel – to date largely embraced by the Board majority – not only represents the radical departure from well-established precedent but also distracts the Board from its core mission. It is inevitable that the Board's case backlog is growing, and case delay will only become longer. This is troubling to me, and it should be troubling to anyone who cares about carrying out the mission of the Act. Today, parties needing the Board to resolve a dispute involving union organizing or collective bargaining will have to wait while the NLRB pursues non-compete violations against a non-union cannabis processor.[36] All this, ironically, at a time the NLRB claims to be underfunded and understaffed while continuing to seek additional budget from Congress.

CONCLUSION

The NLRA has been in place for almost a century, and, over that time, has continued to achieve the objectives Congress set – ensuring workplace democracy and industrial peace. As is clear from the statutory language of the Act and its legislative history, the NLRA seeks to ensure industrial peace by affording employees the right to organize while seeking to prevent "strikes and other forms of industrial strife or unrest."[37] As the Supreme Court has recognized, the NLRA "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."[38]

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[35] The General Counsel's new and radical position that employers should be prohibited from union-related speech during paid time is contrary to Section 8(c) of the NLRA and the First Amendment. Section 8(c) affirmatively *protects* the expression of union-related "views, argument, or opinion," and the Supreme Court has held that 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.'" *Chamber of Com. of US v. Brown*, 554 U.S. 60, 67-68 (2008) (citation omitted).

[36] Iafolla, *NLRB's First Noncompete Case Is Window Into Enforcement Strategy*, Bloomberg (June 9, 2023), https://news.bloomberglaw.com/product/blaw/bloomberglawnews/exp.

[37] 29 U.S.C. § 151 et seq.

[38] *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 680-681 (1981).

No one would claim the NLRA is perfect and, at times, both labor and management have argued that aspects of the Act should be changed. As evidenced by a series of amendments over the years, Congress has seen fit to fix some of the imperfections as they have been identified. But in the end, it is Congress – not the NLRB – that should decide our federal labor policy. And this is particularly true when it comes to fundamental aspects of that policy like whether there should be union elections and who should police every handbook, policy and employment document in the country.

This concludes my testimony. I look forward to answering questions from members of the Committee.

JOHN F. RING