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**WHICH SIDE ARE YOU ON:  
CEMEX, MANDATORY BARGAINING, AND THE FUTURE OF ORGANIZED LABOR**

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❖ Note ❖

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I. INTRODUCTION

Under President Joe Biden, the frequency of union elections exploded— election petitions increased by roughly a quarter in 2024 compared to 2022 and 2023,<sup>1</sup> and were double those filed in 2021.<sup>2</sup> While many factors have likely contributed to the rise in union elections,<sup>3</sup> the August 2023 National Labor Relations Board (“NLRB”) decision in *Cemex Construction Materials Pacific, LLC* plays a major role.<sup>4</sup>

A three-to-one ruling of the NLRB Board, *Cemex* lowered requirements for the issuance of mandatory bargaining orders.<sup>5</sup> Departing from previous standards adopted fifty years ago, the Board held that any unfair labor practice could justify a bargaining order.<sup>6</sup> Regardless of whether the union achieved (or would have achieved) a majority vote in the election, once a bargaining order is issued, employers must open good-faith negotiations with a representative, usually culminating in the establishment of a union.<sup>7</sup>

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<sup>1</sup> *Number of Elections Held Per FY*, NAT’L LAB. REL. BD., <https://www.nlr.gov/reports/nlr-case-activity-reports/representation-cases/election/election-statistics> (last visited May 24, 2025).

<sup>2</sup> *Id.*

<sup>3</sup> *See, e.g., 16 Million Workers Were Unionized in 2024*, ECONOMIC POLICY INSTITUTE (Jan. 28, 2025), <https://www.epi.org/publication/millions-of-workers-millions-of-workers-want-to-join-unions-but-couldnt/>.

<sup>4</sup> Gabriel Thompson, *A Landmark Federal Ruling Against Union Busting Has Boosted Organizing*, THE AMERICAN PROSPECT (Aug. 28, 2024), <https://prospect.org/labor/2024-08-28-landmark-federal-ruling-union-busting-boosted-organizing/>.

<sup>5</sup> *Cemex Constr. Materials Pac., LLC and Int’l Bhd. Teamsters*, 372 N.L.R.B. No. 130, slip op. at 25 (2023).

<sup>6</sup> *Id.*

<sup>7</sup> *Bargaining in Good Faith with Employees/Union Representative*, NAT’L LAB. REL. BD., <https://www.nlr.gov/about-nlr/rights-we-protect/thelaw/bargaining-in-good-faith-with-employees-union-representative> (last visited May 24, 2025).

This new precedent has set a strict standard for employers to be on their best behavior during union elections.<sup>8</sup> Any unfair labor practice may be used as evidence of a fraudulent election, at which point the NLRB can step in and order the bargaining process to begin.<sup>9</sup> Yet this expansion of union power has not gone unquestioned, as the new decision has opened the NLRB to criticism for trampling employers' rights.<sup>10</sup> *Cemex* has been appealed and could potentially make its way to the Supreme Court.<sup>11</sup> All the while, the political future of the NLRB itself sits in doubt.<sup>12</sup> The continued existence of *Cemex* and the expansion of union power it represents may well become a climactic confrontation between the interests of labor and those of employers that will set the tone for workers' rights in the twenty-first century.<sup>13</sup>

This Note will analyze the changes to mandatory bargaining orders prompted by *Cemex*, and how the *Cemex* decision sheds light on pressing issues in labor law and with the NLRB. Part II of this Note will explore the history of mandatory bargaining orders in the National Labor Relations Act and the back-and-forth history of the NLRB's approach toward bargaining orders.<sup>14</sup> Part III analyzes the implications of *Cemex* for the labor movement, as well as the challenges currently facing the continued existence of the *Cemex* Doctrine, primarily in the form of a potential Supreme Court appeal.<sup>15</sup> Part IV argues why *Cemex* should survive a Supreme Court challenge, as well as how the labor movement can make the most of *Cemex* rules while they still exist.<sup>16</sup>

## II. BACKGROUND

### *A. Bargaining Orders in the National Labor Relations Act*

The National Labor Relations Act, passed on July 5, 1935, established the NLRB and the basis for union certification.<sup>17</sup> Most relevant to bargaining orders are sections

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<sup>8</sup> See *Cemex*, 372 N.L.R.B. 130 at 36.

<sup>9</sup> *Cemex*, 372 N.L.R.B. 130 at 26.

<sup>10</sup> See Daniel Pasternak & Scott Held, *The NLRB and Employers' Terrible, Horrible, No Good, Very Bad Week: A Deep-Dive Analysis of Recent Activist NLRB Decisions (US)*, SQUIRE PATTON BOGGS (Sept. 14, 2023), <https://www.employmentlawworldview.com/the-nlr-and-employers-terrible-horrible-no-good-very-bad-week-a-deep-dive-analysis-of-recent-activist-nlr-decisions-us/>.

<sup>11</sup> Petition for Review of Nat'l Lab. Rel. Bd. Decision and Order, *Cemex Constr. Materials Pac., LLC v. Nat'l Lab. Rel. Bd.*, No. 23-1232 (9th Cir. Sept. 30, 2023).

<sup>12</sup> See, e.g., Peter Rich, *The Pendulum Swings – Changes at the NLRB Under the Trump Administration*, JD SUPRA (Mar. 10, 2025), <https://www.jdsupra.com/legalnews/the-pendulum-swings-changes-at-the-nlr-3537341/>.

<sup>13</sup> See, e.g., Matt Breunig, *Acting General Counsel Rescinds Long List of Biden-Era Guidance*, NLRB EDGE (Feb. 17, 2025), <https://www.nlrbedge.com/p/acting-general-counsel-rescinds-long>.

<sup>14</sup> See *infra* Part II.

<sup>15</sup> See *infra* Part III.

<sup>16</sup> See *infra* Part IV.

<sup>17</sup> National Labor Relations Act, ch. 372, 49 Stat. 449 (1935); see also 29 U.S.C. §§ 151–169 (2023).

8(1) and 9I.<sup>18</sup> Section 8(1) states that unfair labor practices may take the form of a refusal to initiate collective bargaining or attempts to hinder workers from forming unions.<sup>19</sup> Originally, Section 9(c) mandated that the Board had the power to investigate petitions for unionization, and could “take a secret ballot of employees, or utilize any other suitable method” to verify whether a union enjoyed majority support.<sup>20</sup> Once such a result was found, the employer was obligated to initiate bargaining negotiations with the union.<sup>21</sup>

This Act empowered the NLRB to certify unionization through whatever means they desired.<sup>22</sup> Employers immediately criticized the NLRB’s perceived prioritization of unions.<sup>23</sup> In 1939, the Board willingly moved away from a more expansive reading of Section 9(c) in *Cudahy Packing Company* and *United Packing House Workers Local Industrial Union*.<sup>24</sup> With the still-nascent Board under immense political pressure, they signaled in *Cudahy* that only elections would be sufficient to confirm the existence of a union.<sup>25</sup> The 1947 Taft-Hartley amendments cemented this change, mandating that the Board must “direct an election by secret ballot and . . . certify the results thereof.”<sup>26</sup>

#### B. *The Joy Silk Decision and its Descendants*

The NLRB turned to the language of section 8 to justify stepping into the union formation process.<sup>27</sup> In 1949, the Board issued its decision *Joy Silk Mills, Inc.* and *United Textile Workers of America, A.F.L.*, barring employers from refusing to bargain when presented with proof of a union’s majority support, even without an election, unless the employer demonstrably refused in good faith.<sup>28</sup> As the Board noted, biding for time to garner more support was indicative of a bad faith justification for refusal.<sup>29</sup> If the Board found the employer to be acting in bad faith, they could step in and issue a

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<sup>18</sup> National Labor Relations Act, ch. 372, §§ 8(1), 9(c), 49 Stat. 449, 452–53 (1935). Codified at 29 U.S.C. §§ 158(a), 159(c) (2023).

<sup>19</sup> 29 U.S.C. §§ 158(a)(1), 158(a)(5).

<sup>20</sup> National Labor Relations Act, ch. 372, § 9(c), 49 Stat. 449, 453 (1935). *National Labor Relations Act: New Deal Legislation (July 5, 1935)*, PEPP. UNIV. SCH. OF PUB. POL’Y, <https://publicpolicy.pepperdine.edu/academics/research/faculty-research/newdeal/legislation/nlr070535.htm> (last visited May 24, 2025).

<sup>21</sup> Leslie Sanmarco, *Remedial Collective Bargaining Orders: Compelling Employer Recognition Where the Union Has Never Attained a Majority*, 15 J. MARSHALL L. REV. 649, 651–52 (1982).

<sup>22</sup> Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 505-07 (1993).

<sup>23</sup> *Id.* at 508-10.

<sup>24</sup> *Cudahy Packing Co.*, 13 N.L.R.B. 526 (1939); see Becker, *supra* note 22, at 506–10.

<sup>25</sup> Becker, *supra* note 22, at 508–11.

<sup>26</sup> 29 U.S.C. § 159(c)(1)(B).

<sup>27</sup> *Cemex Constr. Materials Pac., LLC and Int’l Bhd. Teamsters*, 372 N.L.R.B. 130, slip op. at 19 (2023); 29 U.S.C. §§ 158(a)(1), 158(a)(5).

<sup>28</sup> *Joy Silk Mills, Inc. and United Textile Workers Am., A.F.L.*, 85 N.L.R.B. 1263, 1264 (1949).

<sup>29</sup> *Id.* at 1265.

mandatory bargaining order.<sup>30</sup> This meant that many unionization campaigns could sidestep the election process through card checks, where employees sign cards certifying their interest in a union.<sup>31</sup> If an employer refused in bad faith to accept the card checks (or some similar method), the Board could issue a bargaining order in response, forcing the employer to begin negotiations with the union representatives.<sup>32</sup>

Because these bargaining orders were issued in response to an unfair labor practice, they were issued under Section 10(c) rather than Section 9(c).<sup>33</sup> This allowed the Board to avoid the Taft-Hartley requirement that elections are the sole way to form a union.<sup>34</sup> Section 10(c) grants the Board authority, upon a finding of any unfair labor practices, to “require[e] [any person named in the complaint] to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this Act.”<sup>35</sup> Besides bargaining orders, Board orders commonly require the reinstatement of former employees as the simplest remedy to many unfair labor practices.<sup>36</sup> Through the Section 10(c) loophole, the Board was empowered to issue bargaining orders, so long as some sort of unfair labor practice meeting the *Joy Silk* standard had occurred.

While this new standard was friendly to unions, the Board struggled to adequately implement it.<sup>37</sup> Complainants had particular difficulty proving employers’ subjective state of mind.<sup>38</sup> Twenty years after *Joy Silk*, in 1969, the Supreme Court addressed this concern—issuing a new standard for determining when an MBO is necessary.<sup>39</sup> In *N.L.R.B. v. Gissel Packing Co.*, the Court held that when the employer committed ULPs that were so egregious that no election or rerun would be fair, the Board “should issue” an MBO.<sup>40</sup> In other circumstances, i.e., those where the effects of ULPs were not quite as pervasive, the Court determined that a number of factors could be consulted: whether the union at one point had a majority, the extent of the unfair labor practices, impact of those practices on the election outcome, and the likelihood that the unfair

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<sup>30</sup> *Id.* at 1264–65.

<sup>31</sup> Grace DuBois, comment, *Jumping for Joy Silk: How the Revival of a Mid-Century Labor Union Organizing Doctrine Would Increase Cost Efficiency for the National Labor Relations Board*, 75 ADMIN L. REV. 159, 163 (2023).

<sup>32</sup> *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263, 1264, 1293 (1949).

<sup>33</sup> National Labor Relations Act, ch. 372, § 10(c), 49 Stat. 449, 454 (1935). Codified at 29 U.S.C. § 160(c) (2023).

<sup>34</sup> 29 U.S.C. § 159(c)(1)(B).

<sup>35</sup> National Labor Relations Act, ch. 372, § 10(c), 49 Stat. 449, 454 (1935). Codified at 29 U.S.C. § 160(c) (2023).

<sup>36</sup> *Id.*

<sup>37</sup> Brian J. Petruska, *Adding Joy Silk to Labor’s Reform Agenda*, 57 SANTA CLARA L. REV. 97, 104 (2017).

<sup>38</sup> *Cemex*, 372 N.L.R.B. 130 at 23.

<sup>39</sup> *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969).

<sup>40</sup> *Id.* at 614–15.

labor practices might be repeated.<sup>41</sup> Generally speaking, however, the Court held that MBOs were inappropriate outside some significant violation by the employer.<sup>42</sup>

*Gissel* severely curtailed *Joy Silk*.<sup>43</sup> Two years later, the Board issued a decision officially overturning the *Joy Silk* standard.<sup>44</sup> In *Linden Lumber Division, Summer & Co. and Truck Drivers Union Local No. 413*, the Board declared it would not “reenter the ‘good-faith’ thicket of *Joy Silk*,” instead stating that employers should not be punished for refusing any sort of proof beside an election to show that the union had achieved a majority.<sup>45</sup> The decision eventually made its way to the Supreme Court, where the Court reaffirmed the Board’s *Linden Lumber* standard as a reasonable interpretation of the NLRA.<sup>46</sup> The Board was no longer allowed to enforce card checks or similar methods outside of particularly extreme examples; the Court stated that if the employer’s violations were merely “limited,” a bargaining order would be rarely necessary.<sup>47</sup>

### C. *Cemex and the Reexamination of Bargaining Orders*

This standard remained unchanged for almost fifty years, until the Board’s 2023 decision, *Cemex Construction Materials Pacific, LLC and Truck Drivers Union Local No. 413*. *Cemex* concerned cement drivers in Ventura County, California who sought to unionize.<sup>48</sup> *Cemex* quickly organized a campaign to sway the drivers against the union.<sup>49</sup> The Administrative Judge recommended setting aside the election results on account of the numerous unfair labor practices committed by *Cemex*, but per *Gissel*, thought that these violations were insufficient to justify a bargaining order.<sup>50</sup> This was primarily due to the “lack of dissemination of knowledge of [*Cemex*]’s coercive conduct among unit employees.”<sup>51</sup> The Board disagreed, found that *Linden Lumber* was too constraining, and overturned *Linden Lumber* as a result.<sup>52</sup>

Instead, the Board adopted a broader standard.<sup>53</sup> When “the employer commits an unfair labor practice that requires setting aside the election, the petition . . . will be

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<sup>41</sup> *Id.* at 614.

<sup>42</sup> *Id.* at 615.

<sup>43</sup> See Petruska, *supra* note 37, at 112.

<sup>44</sup> *Linden Lumber Div., Summer & Co., and Truck Drivers Union Local No. 413*, 190 N.L.R.B. 718, 721 (1971).

<sup>45</sup> *Id.*

<sup>46</sup> *Linden Lumber Div., Summer & Co. v. N.L.R.B.*, 419 U.S. 301, 309-10 (1974).

<sup>47</sup> *Id.* at 305.

<sup>48</sup> *Cemex Constr. Materials Pac., LLC and Int’l Bhd. Teamsters*, 372 N.L.R.B. 130, slip op. at 2 (2023).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1, 14.

<sup>51</sup> *Id.* at 14.

<sup>52</sup> *Id.* at 24.

<sup>53</sup> *Id.* at 25.

dismissed, and the employer will be subject to a remedial bargaining order.”<sup>54</sup> An employer may also violate the new *Cemex* standard by “refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files” an election petition.<sup>55</sup>

These two expansions of the already-existing *Gissel* standard radically increased the number of situations where bargaining orders could potentially be granted.<sup>56</sup> The new standard also goes well beyond *Joy Silk*; there is no need to show bad faith, nor does the union need to show it ever actually had majority support.<sup>57</sup> Because *Cemex* had committed a variety of unfair labor practices that justified setting aside an election, the Board found that a mandatory bargaining order was proper and issued one.<sup>58</sup> Following the decision, *Cemex* appealed to the Ninth Circuit, where the case was deferred to a later date awaiting the conclusion of a recent case dealing with the ability of the NLRB to administer financial remedies.<sup>59</sup>

While the *Cemex* appeal is pending, NLRB is experiencing a political crisis of its own. On January 27, 2025, President Donald Trump fired Gwynne Wilcox from her position on the NLRB Board,<sup>60</sup> claiming the “aims and purposes of the Administration with respect to the work on the Board can be carried out most effectively with personnel of my own selection.”<sup>61</sup> In March 2025, the U.S. District Court for the District of Columbia declared that Wilcox remains a member of the Board and found her dismissal unlawful.<sup>62</sup> Yet, on appeal, the Supreme Court declined to reinstate Wilcox to the Board in a 6-3 decision.<sup>63</sup> The move has caused chaos, denying the Board a quorum.<sup>64</sup> William Cowen, the acting General Counsel of the NLRB, has also issued new guidance to the agency, including rescinding a memo offering guidance on how

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 26.

<sup>57</sup> *Id.* at 24-25.

<sup>58</sup> *Id.* at 40-41.

<sup>59</sup> Daniel Wiessner, *NLRB, Macy’s Duel Over US Supreme Court Ruling’s Impact on Agency Powers*, REUTERS (Aug. 13, 2024, 11:29 AM), <https://www.reuters.com/legal/government/nlr-macys-duel-over-us-supreme-court-rulings-impact-agency-powers-2024-08-13/>; Int’l Union of Operating Eng’rs, *Stationary Eng’rs, Loc. 39 v. Nat’l Lab. Rels. Bd.*, 127 F.4th 58, 68 (9th Cir. 2025).

<sup>60</sup> *Court Finds That Trump’s Termination of NLRB Member Gwynne Wilcox Was Unlawful and Void*, OFF. ATTORNEY GEN. (Mar. 7, 2025), <https://oag.ca.gov/news/press-releases/court-finds-trump%E2%80%99s-termination-nlr-member-gwynne-wilcox-was-unlawful-and-void>.

<sup>61</sup> Matt Breunig, *Read the Trump Email Firing Member Wilcox and GC Abruzzo*, NLRB EDGE (Jan. 30, 2025), <https://www.nlrbedge.com/p/read-the-trump-email-firing-member>.

<sup>62</sup> Robert Iafolia, *Fired NLRB Member Reinstated in Decision Nixing Trump Move (4)*, BLOOMBERG LAW (Mar. 6, 2025, 5:39 PM), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberglaw-news/XD6FLDI0000000>.

<sup>63</sup> *See* *Trump v. Wilcox*, 145 S.Ct. 1415 (2025)

<sup>64</sup> Alejandro Agustin Ortiz, *Trump’s Attempt to Deride NLRB Won’t Stop Power of Collective Actions*, ACLU (Mar. 21, 2025), <https://www.aclu.org/news/racial-justice/trumps-attempt-to-deride-nlr-wont-stop-power-of-collective-actions>.

best to interpret *Cemex*.<sup>65</sup> With the aforementioned changes and uncertainty, the future of the *Cemex* decision may seem unsettled.

### III. ANALYSIS

The *Cemex* decision bodes well for the labor movement in the face of the Trump administration's anti-labor push.<sup>66</sup> The sharp uptick in employer-filed election petitions provides strong evidence thereof; in the nine years preceding *Cemex*, the NLRB oversaw an average of sixteen employer-filed petitions each year.<sup>67</sup> In the year after *Cemex*, however, this number skyrocketed to 197 representation management petitions, more than the previous decade combined.<sup>68</sup> This likely stems from employers' fear of being targeted by a mandatory bargaining order, and a hope that they may be able to sway the election results in their favor without resorting to any unfair labor practices.<sup>69</sup>

While the decision seems to have put employers on heightened notice to act, union representatives or labor advocates should also pay close attention. While previously under *Gissel* only a significant violation by employers could justify a mandatory bargaining order, now nearly any unfair labor practice could be grounds for the Board's intervention.<sup>70</sup> Where previously union advocates might be better off filing an election petition as soon as they had significant support, now there may be more merit not filing one at all. If the employer fails to do so, a bargaining order may be issued, sidestepping an election entirely.<sup>71</sup> Even a well-organized union campaign can fail, but once the bargaining order is issued the question of support is moot.<sup>72</sup> Even if the employer does file a petition, any sort of unfair labor practice would still be legally sufficient for a mandatory bargaining order, giving the union supporters several opportunities beyond the election itself to win recognition.<sup>73</sup>

The longevity of the *Cemex* decision remains unclear. As mentioned, it is currently pending on appeal in the Ninth Circuit, where observers believe it will likely be upheld by the court.<sup>74</sup> This would open the possibility of a further appeal to the Supreme

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<sup>65</sup> Robert Iafolla, *Top Labor Board Lawyer Withdraws Slew of Biden-Era Policy Memos*, BLOOMBERG LAW (Feb. 14, 2025), <https://news.bloomberglaw.com/daily-labor-report/top-labor-board-lawyer-withdraws-slew-of-biden-era-policy-memos>.

<sup>66</sup> Max Burns, Opinion, *What to Expect as Trump's Anti-Labor Agenda Takes Shape*, THE HILL (Feb. 19, 2025, 9:00 AM), <https://thehill.com/opinion/white-house/5151459-trump-anti-worker-nlrb-unions/>.

<sup>67</sup> *Number of Elections Held Per FY*, *supra* note 1.

<sup>68</sup> *Id.*

<sup>69</sup> *Cemex Constr. Materials Pac., LLC and Int'l Bhd. Teamsters*, 372 N.L.R.B. 130, slip op. at 26.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 25.

<sup>72</sup> *Id.* at 28.

<sup>73</sup> *Id.* at 25.

<sup>74</sup> Joshua Fox & Michael Kratochvil, *Ninth Circuit Panel Hears Oral Argument on the NLRB's Transformative Cemex Decision*, PROSKAUER (Oct. 23, 2024), <https://www.proskauer.com/blog/ninth->

Court.<sup>75</sup> Considering the Court’s willingness to address and curtail administrative agencies’ powers in recent years, it seems likely certiorari will be granted.<sup>76</sup>

Given the current makeup of the Supreme Court and its record of handling cases dealing with the NLRB and executive agencies,<sup>77</sup> it seems unlikely that the *Cemex* rule will survive review.<sup>78</sup> Yet in 2023, the Supreme Court held in *Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174* that a longstanding NLRB rule protecting unions’ strike rights remained valid, dampening the hopes of some and fears of others that the Court would take an axe to it.<sup>79</sup> While this by no means shows the current Court is fanatically pro-labor, it does show that most justices are not interested in cutting away *all* union rights or NLRB powers even if they may support weakening them overall.<sup>80</sup>

Still, recent cases show the Court’s increasing skepticism of administrative agencies’ power. *Loper Bright*, likely the most high-profile recent case dealing with administrative law, demonstrated the Court’s move away from a broad deference toward agency decision making.<sup>81</sup> The decision, which overturned the “*Chevron* deference” doctrine, emphasized that ambiguous readings of statutes should be left to judges; “the court, after applying all relevant interpretive tools, concludes” what interpretation should be followed.<sup>82</sup>

The end of *Chevron* deference and the emphasis on judges having the final say suggests the Court may take issue with an important element of the Board’s argument

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circuit-panel-hears-oral-argument-on-the-nlrbs-transformative-cemex-decision; *Federal Appeals Court Hears Arguments Over NLRB Union Rule*, NEW ENGLAND BIZ L. UPDATE (Nov. 12, 2024), <https://newenglandbizlawupdate.com/2024/11/12/federal-appeals-court-hears-arguments-over-nlr-union-rule/>.

<sup>75</sup> *Buck v. Davis*, 580 U.S. 100, 127 (2017) (quoting *Schiro v. Farley*, 510 U.S. 222, 229 (1994)).

<sup>76</sup> See, e.g., Joseph S. Diedrich, *Landmark Supreme Court Decisions Restrain Federal Administrative Agency Power*, HUSCH BLACKWELL (June 28, 2024), <https://www.huschblackwell.com/newsandinsights/landmark-supreme-court-decisions-restrain-federal-administrative-agency-power>; Shay Dvoretzky, Parker Rider-Longmaid & Sylvia O. Tsakos, *Supreme Court Decisions Curtail Regulatory Agencies’ Powers, Making It Easier To Challenge Rules*, SKADDEN (Sept. 2024), <https://www.skadden.com/insights/publications/2024/09/insights-september-2024/supreme-court-decisions-curtail-regulatory-agencies-powers>.

<sup>77</sup> See, e.g., *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024); *Securities and Exchange Commission v. Jarkesy*, 603 U.S. 109, 136-40 (2024); *Corner Post, Inc. v. Bd. Of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 823-25 (2024).

<sup>78</sup> See Christopher J. Walker, *Congress and the Shifting Sands in Administrative Law*, 34 WIDENER COMMONWEALTH L. REV. 187, 192–93 (2024).

<sup>79</sup> *Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 598 U.S. 771, 776-77 (2023); Alexander S. Whistler, *Labor Law’s Preemption Problem: Glacier Northwest and What the Fate of Garmon Means for American Workers*, 75 HASTINGS L.J. 853, 858 (2024).

<sup>80</sup> See *Glacier Nw., Inc. v. Int’l Bhd. of Teamsters Loc. Union No. 174*, 598 U.S. 771, 785-88 (2023) (Thomas, J., dissenting).

<sup>81</sup> *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400 (2024).

<sup>82</sup> *Id.*

in *Cemex*.<sup>83</sup> Crucial to the logic underlying overturning *Linden Lumber* is the fact the Supreme Court held *Linden Lumber* was merely one of many plausible interpretations.<sup>84</sup> Because the Court seemingly left open the possibility for other interpretations, the Board felt justified in concluding that the *Linden Lumber* standard was not mandated by the Supreme Court but merely acknowledged as a reasonable conclusion.<sup>85</sup> With the end of *Chevron* deference, the Court might not look as favorably on the latitude the Board felt comfortable taking.<sup>86</sup>

Kaplan’s dissent in *Cemex* suggests the route the Supreme Court’s analysis would take. First, it would presumably address whether the Supreme Court’s prior agreement with the *Linden Lumber* standard implies that only the Court could overturn that standard, or if the Board was correct in concluding that they could do so as well.<sup>87</sup> This argument rests largely on the fact the Supreme Court reversed the Court of Appeals’ decision, which could imply that the Court viewed its interpretation as the correct one rather than one of many.<sup>88</sup> This argument is disconnected from the actual text of *Linden Lumber*. The Court merely found that the Board’s new interpretation was not “arbitrary and capricious or an abuse of discretion.”<sup>89</sup> Further, the dissent (largely presaging the standard adopted in *Cemex*) disagreed with the majority that *Linden Lumber* “constitutes a permissible interpretation of sections 8(a)(5) and 9(a)” of the NLRA.<sup>90</sup> Instead, Justice Stewart argued that the text of the NLRA requires employers to either bargain with a union or call an election.<sup>91</sup> The text therefore makes it quite clear that the Supreme Court did not view *Linden Lumber* as the only interpretation of the NLRA.

Second, the Supreme Court would likely address whether the Board has the authority to expand the circumstances in *Gissel* where a bargaining order may be called for. *Gissel* set out two main possibilities: either (1) an employer commits unfair labor practices that “impede the election processes,” justifying a bargaining order; or (2) an employer commits unfair labor practices that could be overcome by a rerun of the election, in which case a bargaining order is not called for.<sup>92</sup> The Court stated that the NLRA contains “no per se rule that the commission of any unfair labor practice will

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<sup>83</sup> *Id.*

<sup>84</sup> *Cemex Constr. Materials Pac., LLC and Int’l Bhd. Teamsters*, 372 N.L.R.B. 130, slip op. at 24 n.138 (2023).

<sup>85</sup> *Id.* at 24 n.138, 30.

<sup>86</sup> *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 401 (2024) (it “makes no sense to speak of a ‘permissible’ interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best”).

<sup>87</sup> *Cemex Constr. Materials Pac., LLC and Int’l Bhd. Teamsters*, 372 N.L.R.B. 130, slip op. at 44 (Kaplan, M., dissenting).

<sup>88</sup> *Id.*

<sup>89</sup> *Linden Lumber Div., Summer & Co. v. N.L.R.B.*, 419 U.S. 301, 309 (1974).

<sup>90</sup> *Id.* at 310 (Stewart, J., dissenting).

<sup>91</sup> *Id.* at 317.

<sup>92</sup> *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969).

automatically result in a section 8(a)(5) violation and the issuance of an order to bargain.”<sup>93</sup>

This language suggests that *Gissel* represents the outer bounds of mandatory bargaining orders. Yet in a footnote, the *Gissel* Court states

We . . . need not decide whether, absent election interference by an employer’s unfair labor practices, he may obtain an election only if he petitions for one himself; whether, if he does not, he must bargain with a card majority if the Union chooses not to seek an election; and whether, in the latter situation, he is bound by the Board’s ultimate designation of the card results.<sup>94</sup>

This language shows the Court’s thinking; they simply intended to clarify a possible situation where mandatory bargaining orders could be proper, rather than draw a firm line on what situations could not be solved through bargaining orders.<sup>95</sup> Without the *Linden Lumber* standard, *Gissel* only serves to clarify the appropriateness of bargaining orders. Therefore, *Cemex* is merely an expansion to the number of situations justifying mandatory bargaining orders and does not contradict *Gissel* despite how it might first appear.<sup>96</sup>

In the aftermath of *Loper Bright*, the Supreme Court may well attempt to check the powers of the NLRB. Yet *Loper Bright* changed very little about how the Court would analyze the Board’s decision.<sup>97</sup> As discussed, the Supreme Court has considered the exact boundaries of the NLRB’s remedial authority on numerous occasions.<sup>98</sup> The Court found in *Linden Lumber* that the Board’s approach to bargaining orders was permissible; this decision was not based on *Chevron* deference, but rather an analysis that showed the Board’s decision to be clearly within statutory limits.<sup>99</sup>

Many of the concerns voiced in *Loper Bright* are inapplicable to the NLRB.<sup>100</sup> The Supreme Court has a long tradition of deferring to the NLRB that long predates *Chevron*.<sup>101</sup> This was a deliberate choice to deprive courts of oversight and ensure decision making power was firmly in the hands of experts.<sup>102</sup> This deference

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<sup>93</sup> *Id.* at 615.

<sup>94</sup> *Id.* at 601 n.18.

<sup>95</sup> *Id.* at 597-98.

<sup>96</sup> *Cemex Constr. Materials Pac., LLC and Int’l Bhd. Teamsters*, 372 N.L.R.B. 130, slip op. at 24-26.

<sup>97</sup> *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400-01 (2024).

<sup>98</sup> *See, e.g.*, *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Linden Lumber Div., Summer & Co. v. N.L.R.B.*, 419 U.S. 301 (1974).

<sup>99</sup> *Linden Lumber Div., Summer & Co. v. N.L.R.B.*, 419 U.S. 301, 309 (1974).

<sup>100</sup> *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400-01 (2024).

<sup>101</sup> Fred B. Jacob, *The National Labor Relations Act, The Major Questions Doctrine, and Labor Peace in the Modern Workplace*, 65 B.C. L. REV. 1381, 1441-42 (2024).

<sup>102</sup> *Id.* at 1438-39.

is encompassed within the very text of the act.<sup>103</sup> The NLRB is also purely remedial—it has no real policy-making powers outside of crafting remedies and the circumstances they may apply, within the confines of the NLRA.<sup>104</sup> While *Loper Bright* may provide an excuse to reexamine the NLRB’s power, it does not provide an independent rationale to restrain that power.<sup>105</sup>

Even though there are legal arguments to defend *Cemex* as it remains under appeal,<sup>106</sup> it is clear that the NLRB itself will, as usual, radically shift course under the new administration.<sup>107</sup> In addition to the policy memo circulated by Acting General Counsel William Cowen, President Trump has announced his choice for General Counsel, garnering much ire from unions nationwide.<sup>108</sup> It is obvious that a general rollback of union capabilities and workers’ rights is underway.<sup>109</sup> This makes it quite likely that the NLRB may attempt to overturn *Cemex* of their own accord.<sup>110</sup> No matter the outcome of the appeal to the Ninth Circuit, the Board could find some case that presents a similar issue to *Cemex*, and use said case to return to something more in line with *Gissel* and *Linden Lumber*, or potentially even revert to a harsher standard on mandatory bargaining orders.<sup>111</sup> Indeed, it is possible the Board could simply state that they will no longer issue bargaining orders at all, since they are a completely discretionary tool.<sup>112</sup> Such a result would be a devastating blow to workers’ rights in the United States.<sup>113</sup>

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<sup>103</sup> *Id.* at 1439.

<sup>104</sup> *Id.* at 1437–39.

<sup>105</sup> *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400-01 (2024).

<sup>106</sup> Petition for Review of Nat’l Lab. Rel. Bd. Decision and Order, *Cemex Constr. Materials Pac., LLC v. Nat’l Lab. Rel. Bd.*, No. 23-1232 (9th Cir. Sept. 30, 2023).

<sup>107</sup> John W. Hargrove & Matthew C. Lonergan, *The NLRB’s 2025 U-Turn: Stay Buckled*, THE NAT’L L. REV. (Apr. 30, 2025), <https://natlawreview.com/article/nlrbs-2025-u-turn-stay-buckled>.

<sup>108</sup> See, e.g., David Dayen, *Trump to Pick Union-Busting Attorney for Key Labor Law Position*, AM. PROSPECT (Mar. 17, 2025), <https://prospect.org/labor/2025-03-17-trump-pick-union-busting-attorney-key-labor-law-position-nlrbs/>; *Teamsters Union Opposes Nomination of Crystal Carey as NLRB General Counsel*, INT’L BHD. OF TEAMSTERS (Mar. 25, 2025, 7:20 PM), <https://www.prnewswire.com/news-releases/teamsters-union-opposes-nomination-of-crystal-carey-as-nlrbs-general-counsel-302411356.html>.

<sup>109</sup> See, e.g., Steven Greenhouse, *Trump and Musk Are Setting the Example: How Companies Are Becoming Emboldened to Be More Anti-Union*, THE GUARDIAN (Apr. 7, 2025, 7:00 AM), <https://www.theguardian.com/us-news/2025/apr/07/trump-union-workers-rights>.

<sup>110</sup> Breunig, *supra* note 13.

<sup>111</sup> See Matt Breunig, *Another Trump NLRB*, NLRB EDGE (Nov. 6, 2024), <https://www.nlrbedge.com/p/another-trump-nlrbs/>.

<sup>112</sup> See, e.g., *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263, 1292–94 (1949); 29 U.S.C. § 160(c).

<sup>113</sup> See, e.g., Walter M. Meginnis, Jr., *Comments on the PRO Act’s Bargaining Order and Secondary Boycott Provisions*, ABA J. LAB. & EMP. L. 367, 371–73 (2023).

## IV. RECOMMENDATIONS

*Cemex* might only last a few more years. Even if the appellate courts upheld the *Cemex* standard in its entirety, the decision will still be faced with a hostile NLRB that has already signaled its willingness to overturn it.<sup>114</sup> Union rates remain at some of the lowest ever since the passage of the NLRA, and even the relatively pro-union policies of the Biden administration could not buck that trend completely.<sup>115</sup> On the whole, the future of organized labor seems bleak.<sup>116</sup> Still, as long as *Cemex* remains viable it presents labor leaders with potent tools to advance their agendas in the short term. If nothing else, the decision may create hesitation for employers to engage in any sort of election misconduct for fear of receiving a bargaining order as a result.<sup>117</sup>

Right now, union advocates can make use of the *Cemex* standard. This means that they may be able to win union fights with less support than might otherwise be necessary should the employer commit an act that falls into either of the two types of employer behavior that can justify a bargaining order.<sup>118</sup> Yet this should be done with caution. As noted, the NLRB is looking for opportunities to overturn the *Cemex* decision, and if the case ended up before the Board, they might use it as a chance to do just that.<sup>119</sup>

Since *Cemex* will likely be overturned one way or another, it might be in labor's best interest to use it for political theater.<sup>120</sup> Labor leaders like Shawn Fain have been able to successfully use media access to eke out victories, and while it is unlikely a similar strategy would change the ultimate outcome of the case, it might help galvanize workers and labor against the Trump-controlled NLRB.<sup>121</sup> This might mean short-term losses, but the potential for major rewards in the long term, as more workers consider the possibility of unionization and collective action.<sup>122</sup>

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<sup>114</sup> See Breunig, *supra* note 13.

<sup>115</sup> U.S. Bureau of Labor Statistics, *Union Membership Rate Fell by 0.2 Percentage Point to 10.1 Percent in 2022*, ECON. DAILY (Jan. 24, 2023), <https://www.bls.gov/opub/ted/2023/union-membership-rate-fell-by-0-2-percentage-point-to-10-1-percent-in-2022.htm>.

<sup>116</sup> See Sydney Wertheim & Meghna Chakrabarti, *What the Future Holds for Labor Unions*, WBUR (Aug. 14, 2019), <https://www.wbur.org/onpoint/2019/08/14/labor-unions-beaten-down-worked-up-steven-greenhouse>.

<sup>117</sup> *Cemex Constr. Materials Pac., LLC and Int'l Bhd. Teamsters*, 372 N.L.R.B. 130, slip op. at 26.

<sup>118</sup> *Id.* at 25.

<sup>119</sup> Breunig, *supra* note 13.

<sup>120</sup> See, e.g., *Id.*; see also Greenhouse, *supra* note 109.

<sup>121</sup> See Shawn Fain, Opinion, *Shawn Fain: UAW Members Will Fight Hard to Protect Their Jobs*, DETROIT NEWS (Feb. 13, 2025, 8:01 PM), <https://www.detroitnews.com/story/opinion/2025/02/13/shawn-fain-uaw-members-will-fight-hard-to-protect-their-jobs/78525169007/>.

<sup>122</sup> See Heidi Shierholz, Celine McNicholas, Margaret Poydock & Jennifer Sherer, *Workers Want Unions, but the Latest Data Point to Obstacles in Their Path*, ECON. POL'Y INST. (Jan. 23, 2024), <https://www.epi.org/publication/union-membership-data/#epi-toc-4>.

The uncertainty surrounding *Cemex* is nothing new; nor is the oscillation between differing standards for mandatory bargaining orders.<sup>123</sup> The Board is infamous for its sudden policy shifts depending on the politics of new appointees, causing rapid fluctuations in labor law to which both employees and employers must respond.<sup>124</sup> Even if *Cemex* endures, its implementation will come down to the willingness of the new Trump-appointed Board to enforce the standard.<sup>125</sup> This situation aptly demonstrates the common critique that the NLRB is overly reliant on enforcement issues.<sup>126</sup>

To develop a more durable and consistent body of labor law would require significant changes to the NLRB itself, rather than the policies it chooses to adopt. One such proposal, the Protecting the Right to Organize Act, came close to passing during the Biden Administration, but is unlikely to be passed given the new administration.<sup>127</sup> Still, it represents a step into the right direction, and a *bona fide* attempt to reform labor law for the first time in at least a generation. Additional changes could include expanding the NLRB's arsenal of responses to include new options but giving Board members less choice in determining what responses are appropriate for a given situation.<sup>128</sup> This is just one way the influence of the Board could be decreased without harming the rights of unions or workers; with individual Board members wielding less power, the NLRB would be more insulated from sudden swings.

## V. CONCLUSION

The *Cemex* decision is only the latest in a series of back-and-forth rulings on labor law. Yet even if it only lasts a few years, it has already had a significant impact on the strength of unions and will continue to do so. By significantly lowering the threshold for a bargaining order, *Cemex* has created a strong incentive for employers to preemptively recognize unions, without risking the standard election process. The decision has also provided savvy labor advocates with a variety of options to pursue unionization in the workplace.

The emerging fight over *Cemex* also reveals the need for staunch support for workers' rights, and the institutional weaknesses of the NLRB in this regard. The reliance of the NLRB on the executive branch creates a pendulum effect, leading to

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<sup>123</sup> Leonard Bierman, Rafael Gely & William B. Gould IV, *Achieving the Achievable: Realistic Labor Law Reform*, 88 MO. L. REV. 311, 325 (2023).

<sup>124</sup> See, e.g., Charlotte Garden, *Enforcement-Proofing Work Law*, 44 BERKELEY J. EMP. & LAB. L. 191, 191–92 (2023).

<sup>125</sup> See Breunig, *supra* note 13.

<sup>126</sup> Charlotte Garden, *Enforcement-Proofing Work Law*, 44 BERKELEY J. EMP. & LAB. L. 191, 199 (2023).

<sup>127</sup> *Id.*

<sup>128</sup> Michael Weiner, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579, 1624 (2005).

rapid changes in the status of labor law and workers' rights. While reform in the short term seems unlikely, renewed efforts should be taken to strengthen the NLRB's role as a bastion of workers' rights.