UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMAZON.COM SERVICES LLC

and

Case 20-CA-353378

TEAMSTERS AMAZON NATIONAL NEGOTIATING COMMITTEE, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO THE RESPONDENT'S EXCEPTIONS

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I. INTRODUCTION

This is the first case litigated under *Cemex* alleging an employer's commission of an unfair labor practice solely due to its inaction when presented with a request to recognize the union based on an assertion that a majority of employees in an appropriate bargaining unit signed authorization cards designating the union as their exclusive representative. *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), *reh'g denied*, 372 NLRB No. 157 (2023), *enforced mem.*, No. 23-2081, 2026 WL 1079297 (9th Cir. Apr. 21, 2026), *reh'g denied, amended by* No. 23-2081, 2026 WL 1952740 (9th Cir. July 1, 2026), *stay denied*, No. 26A118, 2026 WL 2161826 (S. Ct. July 27, 2026). In this case, the Respondent never responded to the Union's request, did not file an RM petition, and is not alleged to have committed any other unfair labor practices.

In a brief decision applying *Cemex*, Administrative Law Judge Michael P. Silverstein concluded that the Respondent violated Section 8(a)(5) and (1) as alleged. The General Counsel agrees with the Respondent's position that the Board should overturn *Cemex* in this case and return to the Board's longstanding prior precedent that was consistent with *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), and *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301 (1974), including by reinstating its prior decision in *Linden Lumber*, 190 NLRB 718, 721 (1971), *enforcement denied sub nom. Truck Drivers Union Local No. 413 v. NLRB*, 487 F.2d 1099 (D.C. Cir. 1973).

Applying the General Counsel's proposed standard in this case, the Board should conclude that the Respondent did not violate the Act and dismiss the complaint. When confronted with the Respondent's lawful refusal to voluntarily recognize and bargain with the

Union, the duty to file an election petition properly fell on the Union, not the Respondent, in conformance with decades of Supreme Court precedent.

II. STATEMENT OF THE CASE

A. Factual Background

Sometime in 2023, employees at the Respondent's DCK6 facility in San Francisco reached out to the Union and began an organizing campaign among Tier 1 associates. (ALJD 4:18-19, 38-42). By October 1, 2024, the organizers obtained 80 signed authorization cards out of 121 DCK6 Tier 1 associates. (ALJD 5:22-23, 6:41-42 & n.10). On October 2, 2024, thirty Tier 1 associates informed Acting Site Lead Carr that a majority of employees had signed cards authorizing the Union to be their exclusive bargaining representative. They left Carr with a letter requesting that the Respondent recognize and bargain with the Union as the exclusive representative of a unit consisting of all full and part-time Tier 1 associates and offering to present evidence of majority support to a neutral third party upon request. (ALJD 5:27-37, 6:1-14). The Union sent letters reiterating its demands on October 17 and 18, 2024. The Respondent never responded to the Union and did not file an RM petition. The Union did not file an RC petition. (ALJD 6:16-36). There are no other unfair labor practices alleged in this case.

B. Procedural History

On October 23, 2024, the Union filed an unfair labor practice charge with Region 20 of the National Labor Relations Board alleging that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to negotiate with the Union upon request despite a majority of Tier 1 associates in the DCK6 warehouse having designated the Union as their exclusive bargaining representative. The Regional Director issued complaint on April 21, 2025.

On May 5, 2025, the Respondent filed an answer to the complaint admitting, among other things, that it did not file an RM Petition with the Board and stating its position that *Cemex* is invalid. A hearing was held before Administrative Law Judge Silverstein on August 5-6, 2025, and March 16, 2026. On April 24, 2026, both the Respondent and the Charging Party filed post-hearing briefs. The Respondent argued, among other things, that it had a right to refuse to recognize the Union's card majority and not to file for an election because under longstanding Supreme Court precedent, the burden is on the union to file for an election in such circumstances, not the employer.

C. Judge Silverstein's Decision

On June 22, 2026, Judge Silverstein issued a brief decision applying *Cemex* and concluding that the Respondent violated Section 8(a)(5) and (1) as alleged by failing and refusing to recognize and bargain collectively with the Union. (ALJD 14:15-30). In concluding that the Respondent violated the Act, Judge Silverstein found that the Tier 1 associates were an appropriate unit and that the Charging Party demonstrated majority support in that unit via authenticated authorization cards. (ALJD 10:40-11:22, 11:24-12:24). He then rejected the Respondent's defenses arguing against the application of *Cemex* because Respondent's legal arguments reiterated then-Member Kaplan's partial dissent, which the *Cemex* majority had specifically rejected. (ALJD 12:26-14:13). However, Judge Silverstein added that if the case were "a matter of first impression . . . [Respondent's] arguments could be persuasive." (ALJD 12:34-35).

III. BACKGROUND

Cemex essentially created two new pathways for unions to obtain Board-ordered recognition without filing a representation petition. Under the new scheme, if a union claims to represent a majority of employees in an appropriate unit based on authorization cards and instead

of filing an RC petition demands recognition from an employer, and the employer withholds recognition while failing to promptly file an RM petition, the Board will find that the employer violated Section 8(a)(5) and issue a bargaining order.[1] *Cemex*, 372 NLRB No. 130, slip op. at 25-26. Additionally, even if the employer files an election petition, it will be ordered to recognize and bargain with the union if it commits any unfair labor practices that frustrate the election process. *Id*. The Board's low threshold for finding such frustration includes any Section 8(a)(3) violation during the critical period, as well as any Section 8(a)(1) violation unless it is "virtually impossible" to conclude that the misconduct could have affected the outcome. *Id.*, slip op. at 26 n.142. The Board will no longer order re-run elections in such cases; every election that is set aside for employer unfair labor practices will result in a bargaining order. *Id*., slip op. at 26.

In fashioning this new scheme, the Board explicitly overruled its decision in *Linden Lumber,* 190 NLRB at 721, which held that an employer does not violate Section 8(a)(5) "solely upon the basis of its refusal to accept evidence of majority status other than the results of a Board election." *Cemex*, 372 NLRB No. 130, slip op. at 25, 30. Notably, the Supreme Court sustained the Board's *Linden Lumber* holding that "a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the Board's election procedure." *Linden Lumber*, 419 U.S. at 310. The *Cemex* Board, completely ignoring almost five decades of settled Supreme Court law, concluded

[1] In this context, absent unforeseen circumstances, "promptly" means within two weeks of being presented with the union's demand for recognition. *Cemex*, 372 NLRB No. 130, slip op. at 25 n. 139. However, the Board will not dismiss an RM petition that is untimely under *Cemex*. *See St. John's College*, 374 NLRB No. 72, slip op. at 1-2 (2026).

that its *Linden Lumber* holding represented a permissible, but not mandatory, construction of the Act. 372 NLRB No. 130, slip op. at 24, 25 & n. 138.

The *Cemex* Board also announced that it would move away from seeking remedial bargaining orders under *Gissel*, 395 U.S. 575 (again, throwing *over* five decades of settled Supreme Court law to the wayside), which focuses on the likelihood of holding a future fair election. 372 NLRB No. 130, slip op. at 27. In the majority's view, *Gissel* created "perverse incentives to delay" and "resulted in persistent failures to enable employees to win timely representation." *Id.* The Board explained that by "making remedial bargaining orders more readily available," the new scheme would deter employer misbehavior in the critical period before a Board election and diminish delays in representation. *Id.* What the *Cemex* Board ignored was the significant impact its decision had on worker free choice—a backbone of the NLRA.

Applying this new scheme retroactively, the Board concluded that Cemex unlawfully refused to bargain after the union requested recognition since it later committed unfair labor practices requiring the election to be set aside. *Id*., slip op. at 29 & n.155. Accordingly, the Board issued a bargaining order to remedy that Section 8(a)(5) violation, notwithstanding that it had already determined that a remedial bargaining order was warranted under *Gissel* based on extensive unfair labor practices. *Id*., slip op. at 12-19, 29-30.

Then-Member Kaplan issued a partial dissent arguing, among other things, that the majority's new scheme was dicta, conflicted with longstanding Supreme Court and circuit court precedent, and undermined employees' statutory rights. *Id*., slip op. at 40-52.[2]

[2] The Board denied Cemex's motion for reconsideration, rejecting, among other things, the arguments that the new scheme violated the major-questions doctrine and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* *Cemex*, 372 NLRB No. 157. The Sixth Circuit

IV. ARGUMENT

Over 50 years ago, the Supreme Court explicitly set forth a tiered framework for determining whether violations of the Act are sufficiently serious in nature and number to preclude the holding of a fair election, thus warranting imposition of a remedial bargaining order. *Gissel*, 395 U.S. at 613-15. Around the same time, the Board, with Supreme Court approval, held that an employer could lawfully refuse to recognize a union based on a mere card majority, leaving to the union the task of petitioning the Board for a secret-ballot election if it so chose. *Linden Lumber*, 419 U.S. at 309-10. *Cemex* upended these settled principles, putting the burden on the employer to quickly petition for an election and setting the standard for issuing bargaining orders so low that such orders will inevitably issue in run-of-the-mill cases involving any sort of undefined unfair labor practice. In GC Memorandum 24-01 (April 29, 2024),[3] then-General Counsel Abruzzo made clear that even one non-hallmark violation was enough to trigger a *Cemex* bargaining order. In doing so, *Cemex* severely undermined the longstanding preference for secret-ballot elections—which best protect employees' freedom of choice and majority rule. Under *Cemex*, the Board, and the then-General Counsel, made clear that there were no particular requirements for how, who, or in what form a demand was made, that employers may ask for evidence of majority support, but that unions were not obligated to provide it, and that if a third-party neutral were used to perform the card check, such process would not toll an employer's deadline. Thus, the *Cemex* Board made clear that employee free choice was not its actual concern—certification of a union, even without actual proof of majority status, was its only

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subsequently ruled that the *Cemex* decision was an improper exercise of adjudicatory authority. *Brown-Forman Corp. v. NLRB*, 169 F.4th 646 (6th Cir. 2026), *reh'g denied*, No. 24-2107, 2026 WL 2015371 (6th Cir. June 23, 2026).

[3] *Rescinded by* GC Memorandum 25-05 (February 14, 2025).

focus. Because *Cemex* is contrary to Supreme Court precedent and sound labor policy, the Board should overrule it and return to prior Board law, including by reaffirming the binding applicability of *Gissel* and reinstating *Linden Lumber,* 190 NLRB 718. Applying this restored pre-*Cemex* precedent, the Board should conclude that the Respondent did not violate Section 8(a)(5) and (1) by refusing to file an RM petition when confronted with a demand for recognition based purportedly on authorization cards demonstrating majority support for the Union.

A. *Cemex* is Contrary to Binding Supreme Court Precedent and Upended Over Fifty Years of Settled Law and Sound Labor Policy

Cemex should be overturned because it is contrary to *Gissel*, which is controlling Supreme Court law here, and *Linden Lumber*, which reflects the best interpretation of the statute. These cases formed the foundation for over half a century of stable, settled precedent.

i. *Cemex* is fundamentally incompatible with *Gissel*, which is binding Supreme Court law and sound labor policy

At its core, *Cemex* conflicts with binding Supreme Court precedent because it imposes bargaining orders based on unfair labor practices that the *Gissel* Court expressly ruled "will not sustain a bargaining order." 395 U.S. at 615. The question before the Court in *Gissel* was "the propriety of a bargaining order as a remedy for a [Section] 8(a)(5) refusal to bargain where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside." *Id.* at 610. In answering this question, the Court identified three categories of cases. The first category encompasses "exceptional" cases marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies could not erase their coercive effects, making a fair election impossible. *Id.* at 613-14. The second category includes "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency

to undermine majority strength and impede the election process." *Id*. at 614. The Court decided that bargaining orders were appropriate in this second category of cases if (1) the union had majority support at one time, and (2) the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight" and "employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *Id*. at 614-15. In deciding whether a case falls into this second category, the Court noted that the Board can properly consider the "extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future." *Id.* at 614. Significantly, however, the Court held that a third category of cases involving "minor or less extensive unfair labor practices . . . *will not sustain a bargaining order*" because of their "minimal impact on the election machinery." *Id*. at 615 (emphasis added).

Cemex takes a wrecking ball to *Gissel*'s careful categorical delineation of cases. Under *Cemex,* there is no longer any third category—*virtually every unfair labor practice* committed after an election petition is filed will result in a bargaining order. As *Cemex* acknowledged, every Section 8(a)(3) violation during the critical period between the filing of an election petition and the election results in a remedial bargaining order. 372 NLRB No. 130, slip op. at 26 & n.142. And any critical period Section 8(a)(1) violation is, a fortiori, conduct that results in a remedial bargaining order unless it is so de minimis that it is "virtually impossible" to conclude that the violation could have affected the outcome. *Id.* This directly contradicts *Gissel*'s binding admonition that "minor or less extensive" violations cannot sustain such an order. 395 U.S. at 615. Worse still, in recent years the Board has outlawed many widely accepted, customary

business practices, further expanding the reach of *Cemex* bargaining orders.[4] In short, the "ready imposition of bargaining orders" under this scheme cannot be reconciled with *Gissel*, which did not intend for the Board to "dispense casually with the election process." *Rapid Mfg. Co. v. NLRB*, 612 F.2d 144, 150-51 (3d Cir. 1979).

In addition, *Cemex* conflicts with *Gissel* by eliminating the holding of elections or rerun elections even after traditional remedies have cleansed the atmosphere. Implicit in *Gissel*'s categories is the principle that fair elections and reruns can be had in some cases—namely, where the "possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun)" is more than "slight." 395 U.S. at 614. By finding a bargaining order to be warranted in *virtually every case*, *Cemex* is contrary to a key principle underpinning the Supreme Court's decision in *Gissel*.

The *Cemex* majority attempted to sidestep these plain inconsistencies with *Gissel* by asserting that *Cemex* bargaining orders would "rest upon a fundamentally different rationale than those under *Gissel*"—that is, such orders would be based on the initial refusal to recognize when the union demanded bargaining (with no actual requirement to demonstrate majority status)

[4] *See, e.g.*, Counsel for the General Counsel's Answering Brief to Respondent's Exceptions at 26-27, *Honeywell International Inc.*, 09-CA-327389 (NLRB June 1, 2026) (arguing to overturn work rule standard in *Stericycle, Inc.*, 372 NLRB No. 113 (2023)); Counsel for the General Counsel's Motion to Withdraw Exceptions to Administrative Law Judge's Decision at 2 nn.2-3, *UPS Supply Chain Solutions, Inc.*, 32-CA-295913 (NLRB May 13, 2026) (urging the Board to overturn so-called captive audience meeting standard in *Amazon.com Services LLC*, 373 NLRB No. 136 (2024), and return to *Babcock & Wilcox Co.*, 77 NLRB 577, 578 (1948), and to overturn the standard for predictions about unionization's impact on relationship between individual employees and their employer in *Siren Retail Corp. d/b/a Starbucks*, 373 NLRB No. 135 (2024), and return to *Tri-Cast, Inc.,* 274 NLRB 377 (1985)); Counsel for the General Counsel's Exception and Supporting Brief to the Administrative Law Judge's Decision, *Starbucks Corp.*, 13-CA-322871 (NLRB June 17, 2026) (arguing to overturn dress code standard in *Tesla, Inc.*, 371 NLRB No. 131 (2022), *enforcement denied*, 86 F.4th 640 (5th Cir. 2023), and return to *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (2019)).

rather than as a remedy for the subsequent Section 8(a)(1) and (3) violations that interfered with an election. *Cemex*, 372 NLRB No. 130, slip op. at 25-26, 34-35. However, as a practical matter, this is a distinction without a difference. If a union demands recognition based on cards and the employer opts to wait for election results pursuant to an RM petition,[5] commits no unfair labor practices in the pre-election period, and loses the election, the duty to bargain would attach as of the date of the election. *Id.*, slip op. at 26 n.145. In contrast, if that same employer violates the Act in the pre-election period so as to set aside the election, it would be subject to a bargaining order as of the date of the union's recognitional demand. *Id.*, slip op. at 26 & n.141. In both cases, the employer refuses to bargain initially, in response to the union's card-based demand for recognition, but only the one that commits unfair labor practices in the pre-election period is subject to a bargaining order and a duty to bargain as of the date of the demand. Common sense dictates that a *Cemex* bargaining order attempting to restore the status quo that existed prior to the violations is, in actuality, remedying those later unfair labor practices rather than the initial denial of recognition. Indeed, the *Cemex* majority's reliance on its remedial authority, as well as the failure of *Gissel* bargaining orders to sufficiently deter unlawful conduct, to justify its new scheme underscores that *Cemex* simply erected a replacement *remedial* scheme that is wholly inconsistent with *Gissel*'s remedial framework and ignores decades of settled Supreme Court law. *See id.*, slip op. at 25, 34-35.

[5] Notably, an employer is excused of its obligation to file an RM petition if the union files an RC petition. *Cemex*, 372 NLRB No. 130, slip op. at 25. Thus, an employer can effectively do nothing and still avoid a *Cemex* bargaining obligation so long as it avoids committing unfair labor practices in the run up to the election. This further underscores that the *Cemex* bargaining order is truly remedying Section 8(a)(3) and (1) violations rather than a breach of the duty to bargain given that it attaches not based on the employer's response to the union's demand but rather its subsequent violations of the Act.

These inconsistencies with *Gissel* are fatal to the *Cemex* scheme because that Supreme Court decision is binding authority. *Gissel* involved several consolidated cases involving multiple employers with very similar facts. 395 U.S. at 579-80. In each case, the union demanded recognition based on valid authorization cards from a majority of unit employees, the employer refused to bargain on the ground that the cards were inherently unreliable, and the employer then waged an antiunion campaign that resulted in numerous unfair labor practices. *Id.* at 580. Applying Board precedent, the Board found that each employer had violated Section 8(a)(5) by refusing to recognize the union because each employer lacked a good faith doubt as to the union's majority status when recognition was first sought. *Id.* at 582-84 (citing *Aaron Brothers*, 158 NLRB 1077 (1966); *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), *enforced in relevant part*, 185 F.2d 732 (D.C. Cir. 1950)). At oral argument before the Supreme Court, however, the Board announced that it had "virtually abandoned" that precedent. *Id.* at 594. Because of this change in law in between the Board's underlying decisions and the Supreme Court argument, the Court could not discern whether the Board had issued a bargaining order based on the employer's initial, unlawful refusal to recognize or because the employer's subsequent unfair labor practices ensured the authorization cards were a more reliable test of employees' desires than an election. *Id.* at 615-16. Thus, the Court remanded these cases to the Board to clarify the basis of its bargaining orders, in short, whether they fell into category two. The significant takeaway from this procedural history is that in delineating the contours of category two cases, the Court was not merely blessing a standard articulated by the Board. Rather, it was the Court's view, apart from any deference to the Agency's expertise and interpretation of the Act, that bargaining orders could only be sustained in the limited circumstances defined in *Gissel*. Thus, this is not an area where the Board can write on a blank

slate and *Cemex* should be overruled given that it is fundamentally incompatible with that Supreme Court precedent.

ii. *Cemex* is the reverse of *Linden Lumber*, which represents the best reading of the statute

The *Cemex* majority also upended Supreme Court precedent and decades of settled law by imposing a brand-new obligation on employers to file an election petition whenever they are presented with a request for recognition from a card-majority union, if they decline to grant the request. In this respect, *Cemex* instituted a procedure that is exactly the reverse of what the Supreme Court approved over fifty years ago in *Linden Lumber*. There the Court sustained the Board's holding that "employers 'should not be found guilty of a violation of Section 8(a)(5) solely upon the basis of (their) refusal to accept evidence of majority status other than the results of a Board election.'" *Linden Lumber*, 419 U.S. at 310 (quoting *Linden Lumber*, 190 NLRB at 721). In so finding, the Court upheld the Board's view that "an employer's petition for an election, though permissible, is not the required course." *Id.* at 309. In short, an employer that refuses to recognize a card-majority union has no obligation to file an RM petition. In the decades that followed, the Board never wavered from this position until *Cemex*.

In *Linden Lumber*, the Court found "no suggestion that Congress wanted to place the burden of getting a secret election on the employer." *Id.* at 307. In the Taft-Hartley amendments of 1947, Congress authorized employers to file their own representation petitions by enacting Section 9(c)(1)(B). *Id.* That subsection provides:

> (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . .
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in [Section 9(a)] . . .
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall

> provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c). The court of appeals had concluded that, by enacting this provision, Congress had placed the burden on employers to file RM petitions when they withhold recognition from a card-majority union. *Linden Lumber*, 419 U.S. at 307. But the Supreme Court disagreed, finding that "the history of that provision indicates it was aimed at eliminating the discrimination against employers which had previously existed under the Board's prior rules," which had only permitted employers to petition for an election when confronted with demands for recognition by at least two unions.[6] *Id.* With this statutory purpose in mind, it makes no sense to interpret Section 9(c) as requiring employers to file a petition when faced with a demand for recognition but allowing unions complete discretion in choosing whether to file or not. It is the union seeking representation after all, so placing the sole burden on an employer to file a petition essentially seeking to clarify representation on behalf of its employees defies common sense in the circumstances presented by *Cemex* where only a demand, not actual proof of support, is required.

Indeed, the statutory text reinforces that each side has an equal opportunity to file a petition in the context of a card-based demand for recognition. In this regard, Section 9(c)(1)(A)

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[6] The Court cited the following remarks from Senator Taft in the legislative history:

> Today an employer is faced with this situation. A man comes into his officer and says, 'I represent your employees. Sign this agreement, or we strike tomorrow.' Such instances have occurred all over the United States. The employer has no way in which to determine whether this man really does represent his employees or does not. The bill gives him the right to go to the Board under those circumstances, and say, 'I want an election. I want to know who is the bargaining agent for my employees.'

Linden Lumber, 419 U.S. at 307-08 (quoting 93 Cong. Rec. 3838 (1947)).

provides that the Board shall process a petition filed by a union whenever the petition "alleg[es] that a substantial number of employees (i) wish to be represented for collective bargaining and that *their employer declines to recognize their representative as the representative*." 29 U.S.C. § 159(c)(1)(A) (emphasis added). Likewise, Section 9(c)(1)(B) provides that the Board shall process a petition filed by an employer whenever the petition "alleg[es] that one or more individuals or labor organizations *have presented to him a claim to be recognized as the representative*." 29 U.S.C. § 159(c)(1)(B) (emphasis added). Thus, the relevant statutory language suggests that RC and RM petitions are equally available when a union demands recognition based on a claim of majority status and the employer declines to voluntarily grant the union's request. The most natural interpretation, therefore, is that whichever party wishes to pursue an election should file the petition. In short, if the employer declines to file an RM petition, the "union should go forward and ask for an election" if it wants to compel recognition through the Board's processes. *Linden Lumber*, 419 U.S. at 309.

Accordingly, even assuming the *Cemex* majority was correct that the *Linden Lumber* rule merely reflected a "permissible construction of the statute" that was subject to change, 372 NLRB No. 130, slip op. at 24, 31, the Board should return to this longstanding rule because it represents a better reading of the statute in light of its text and legislative history than does the majority's interpretation in *Cemex*.[7]

[7] To be sure, four dissenters considered the *Linden Lumber* rule regarding RM petitions to be an impermissible interpretation of the Act. However, the dissenting opinion was grounded in the assumption that there is an obligation to recognize and bargain "whenever the union representative presents convincing evidence of majority support," 419 U.S. at 311 (Stewart, J., dissenting). The Board effectively abandoned this view of the duty to bargain in its *Linden Lumber* decision, which the Supreme Court upheld. *See Linden Lumber*, 190 NLRB at 723-24 (Fanning and Brown, dissenting) (criticizing the *Linden Lumber* majority for quietly abandoning the "convincing evidence of majority support" standard).

B. In Cases Where a Remedial Bargaining Order is Not Warranted Under *Gissel*, *Cemex* Severely Curtails Secret-Ballot Elections, Undermining Employee Free Choice

As noted above, *Gissel* authorizes a remedial bargaining order in cases involving violations of the Act that are sufficiently serious in nature and number to preclude the holding of a fair election. However, *Cemex* opened the floodgates to bargaining orders in run-of-the-mill cases, threatening core principles of the NLRA in the process. A fundamental flaw of *Cemex* is that it sacrifices the "preferred" means of ascertaining employees' genuine views on union representation—secret ballot elections—in order to speed up union representation. *Gissel*, 395 U.S. at 602. *Cemex* severely undermines elections in two ways. First, an employer presented with a request for recognition from a union that claims a card majority must either voluntarily recognize and bargain with the union or promptly file an RM petition. The consequence of employer inaction is that employees suffer by completely losing their ability to privately cast their vote in an election because the Board will impose a bargaining order *every time* in the absence of a petition. This is so even when an employer neglects to file an RM petition simply because it was not aware of its new obligations under *Cemex*, which upended fifty years of settled labor law. This problem is particularly acute for small businesses that may not have ready access to counsel, let alone a labor-relations expert. Second, even if the employer promptly files an RM petition (or an RC petition is already pending), employees' opportunity to register their choice in a secret-ballot election would be eliminated if the employer commits even a single critical period violation of Section 8(a)(1) or (3) that would warrant setting aside the election. As was clarified by then-General Counsel Abruzzo in GC Memorandum 24-01, even a single non-hallmark violation could result in a bargaining order. In those circumstances, the

Board would issue a bargaining order *every time*, no matter how easily an election could be held after the atmosphere is cleansed by remedying the underlying unfair labor practices.

Cemex cannot be reconciled with sound and longstanding labor policy inasmuch as it runs roughshod over employee free choice and the principle of majority rule—which are indisputably central to the Act, *Int'l Ladies' Garment Workers' Union v. NLRB* (*Bernhard-Altmann*), 366 U.S. 731, 737 (1961)—in order to achieve faster representation, an objective the *Cemex* majority unconvincingly strains to read into the statute. In this regard, the majority relies on cases endorsing the need for expeditious processing of elections and recognizing the Board's authority to establish election procedures, which clearly cannot support dispensing with elections in run-of-the-mill cases, such as when an employer neglects to file an RM petition or commits minor unfair labor practices in the critical period. 372 NLRB No. 130, slip op. at 20, 27-28 (citing *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 331 (1946) ("[T]he Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently, and speedily."), *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940) (describing Board's authority over election proceedings), and *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276 (1973) (same)). The right of employees to vote in a secret ballot election, free from coercion and from an informed position, once meant something—it should again. Accordingly, the purposes and policies of the Act would be better served by overruling *Cemex* and returning to settled law.[8]

[8] The harmful effect of *Cemex* routinely installing unions without elections, and based solely on demands for recognition, is compounded by the Board's current blocking charge policy, which slows the process for removing these unions when employees attempt to exercise their right to remove a union as their representative. *See* 29 C.F.R. § 103.20 (election procedures and blocking charges). The Board has been applying this policy for institutional reasons. *See Starbucks Corp.*, 22-RD-369759 (NLRB July 14, 2026). The General Counsel would welcome the opportunity to further elucidate her views on this policy should the Board pursue rulemaking in this area.

C. Applying Pre-*Cemex* precedent, the Board Should Dismiss the Complaint

Applying the law as it existed prior to *Cemex*, including the *Linden Lumber* rule, the Board should conclude that the Respondent did not violate Section 8(a)(5). The only unfair labor practice allegation in this case concerns the Respondent's failure to recognize and bargain with the Union, which claimed to represent Tier 1 employees at the DCK6 facility, without filing an RM petition to test the Union's majority support. The Board, as affirmed by the Supreme Court, held that an employer's "refusal to accept evidence of majority status other than the results of a Board election" does not violate the Act. *Linden Lumber,* 190 NLRB at 721. In other words, the Respondent was entitled to wait and see whether the Union filed an RC petition and withhold recognition unless and until the Union won an election. *See Linden Lumber*, 419 U.S. at 310.[9]

V. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board overrule *Cemex*, reaffirm its commitment to the longstanding and binding Supreme Court precedent in *Gissel*, reinstate its *Linden Lumber* decision, and dismiss the complaint.

Respectfully submitted,

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[9] Because the Board should overrule *Cemex* and dismiss the complaint on the bases set forth above, it is unnecessary for the Board to reach the other issues presented by the Respondent in its exceptions, including whether *Cemex* violates the Administrative Procedure Act or major-questions doctrine.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Counsel for the General Counsel's Answering Brief to the Respondent's Exceptions in Case 20-CA-353378 was electronically filed via NLRB E-Filing System with the National Labor Relations Board and served in the manner indicated to the parties listed below on this 1st day of September, 2026.

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