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 REPLY BRIEF TO CHARGING PARTY'S ANSWERING BRIEF

Submitted by:

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The General Counsel filed her Answering Brief in this case on September 1, 2026, arguing that the Board should dismiss the complaint, overturn *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023), *enforced mem.*, No. 23-2081, 2026 WL 1079297 (9th Cir. Apr. 21, 2026), 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). This Reply Brief responds to the Charging Party's September 2, 2026, Answering Brief.

1. The General Counsel is not required to be recused from this matter. Her participation in this case is consistent with ethical guidelines, her signed NLRB Ethics Agreement, and her congressional testimony. Throughout her involvement in this matter, the General Counsel has acted in compliance with guidance from the NLRB's Acting Designated Agency Ethics Official (DAEO). The DAEO conducted an independent, thorough analysis of the Charging Party's arguments (Charging Party Ans. Br. at 21-22) and found them meritless, concluding that the General Counsel does not need to recuse herself from participating in this case. *See* 5 C.F.R. § 2635.502(c) (granting the agency's DAEO authority to "make an independent determination as to whether a reasonable person with knowledge of the relevant facts would be likely to question the employee's impartiality in the matter"); *Hy-Brand Industrial Contractors, Ltd.*, 366 NLRB No. 26, slip op. at 1 & n.3 (2018) (vacating prior decision because DAEO determined that Board member was disqualified pursuant to Section 2635.502(c)).

Here, the DAEO's decision is based on several reasons. First, the General Counsel's covered relationship with Amazon expired on December 13, 2025, before her confirmation as General Counsel. Second, Seyfarth Shaw represents Amazon in this case, not Morgan Lewis,

and the General Counsel has no knowledge suggesting that Morgan Lewis is directing Amazon's litigation strategy. Third, the General Counsel never worked on this particular matter while representing Amazon and has no knowledge of any confidential, non-public information about this matter from her time in private practice. It is further legally irrelevant that this case commenced in October 2024 when the General Counsel was a partner at Morgan Lewis because the recusal analysis applies to her participation in the matter – which began after the one-year covered period ended – rather than the initiation of the case. Fourth, contrary to the Charging Party's assertion, the catch-all provision, 5 C.F.R. § 2635.502(a)(3), does not independently compel recusal. That provision is a self-directed employee process, not an independently enforceable mandate that a third party can invoke to compel recusal. It is satisfied here because the DAEO has made an independent determination that recusal is not required. Finally, the General Counsel's statement at her July 2025 confirmation hearing that she would recuse herself from Amazon cases reflected that she was subject to the one-year covered relationship with Amazon at that time. Her subsequent June 4, 2026 testimony before the House Education and Workforce Health, Employment, Labor, and Pensions (HELP) Subcommittee, clarified that her July 2025 Amazon recusal commitment was based on the recusal obligations contained in her Ethics Agreement at that time, however, that covered relationship expired in December 2025.

Thus, in accordance with the DAEO's determination, the General Counsel does not have an obligation to recuse herself from this case. *See Hy-brand*, 366 NLRB No. 26, slip op. at 1 & n.3.

2. The Board should follow longstanding precedent and overturn *Cemex* retroactively. It is the Board's "usual practice" to apply new law retroactively to "all pending cases in whatever stage," except where retroactive application would result in a "manifest

injustice." *Browning-Ferris Industries of California, Inc. d/b/a/ BFI Newby Island Recyclery*, 374 NLRB No. 46, slip op. at 8 (2026) (internal quotations omitted). This is also true in representation-related cases, even where a certified union may lose its representative status as a result of a change in law. *See Cristal USA, Inc*., 368 NLRB No. 141, slip op. at 2 (2019) (finding no manifest injustice in applying new unit-appropriateness standard in test-of-certification case notwithstanding union's certification under prior law). The propriety of retroactive application is informed by balancing any ill effects of retroactivity against "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *SNE Enterprises,* 344 NLRB 673, 673 (2005) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). In evaluating whether retroactivity would produce a manifest injustice, the Board considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application. *Id.*

The Board's usual retroactive application is appropriate here because the Charging Party has not shown that retroactive application would result in a manifest injustice, especially where it chose to rely solely on the brand new *Cemex* scheme instead of also seeking a bargaining order under *Gissel*—the prevailing law for half a century.

First, the Charging Party relied solely on *Cemex,* which has only been Board law since 2023, and upended over fifty years of settled Supreme Court precedent and unbroken Board law, despite being on notice from surrounding circumstances that *Cemex* would be challenged. The April 21, 2025, Complaint in this case was issued months *after* GC Memorandum GC 25-05, *Rescission of Certain General Counsel Memoranda*, dated Feb. 14, 2025, at 2, which explicitly put the public on notice that Acting General Counsel William B. Cowen disagreed with former

General Counsel Jennifer A. Abruzzo's *Cemex* guidance. Accordingly, the Charging Party was well aware that the *Cemex* scheme would likely be short-lived. Despite this, the Charging Party declined to seek a *Gissel* bargaining order in the alternative. Having chosen to forego that option, the Charging Party cannot be heard now to complain that it detrimentally relied on *Cemex*. This is especially so given that the Board itself continued to order both *Cemex* and *Gissel* remedies, as alternatives – even before complaint issued in this and the related case that forms the basis for the Charging Party's belated request for a *Gissel* bargaining order.[1] *See NP Red Rock LLC d/b/a Red Rock Casino Resort Spa*, 373 NLRB No. 67, slip op. at 12 (2024), *enforced*, No. 24-1221, 2026 WL 1676491 (D.C. Cir. June 10, 2025). Indeed, *Cemex* itself applied its new rule retroactively, thereby removing any doubt as to retroactivity in reconsidering that precedent. *See Cemex*, 372 NLRB No. 130, slip op. at 29-30.

Second, overturning *Cemex* prospectively would be contrary to the Act's statutory design. As set forth fully in the General Counsel's Answering Brief, *Cemex* is inconsistent with decades of law and 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). Retroactively overruling *Cemex* would immediately reestablish this longstanding sound precedent.

3. Finally, the Board should reject the Charging Party's new argument – which it had not previously raised in any Board proceeding – that if the Board retroactively overrules *Cemex*, the Board should consolidate this case with Case Nos. 20-CA-353627, 20-CA-354332 and 20-CA-356004 and issue a *Gissel* bargaining order. (Charging Party Ans. Br. at 26-28). The

[1] *See* Charging Party Ans. Br. at 26-28.

Board should decline to do so because the *Gissel* issue was not plead or fully litigated, the Charging Party did not raise it on exceptions in either case and thus waived it, and requiring the Respondent to litigate the issue at this late stage would raise serious due process concerns.

The Board generally requires issues to have been fully litigated in the ALJ proceedings in order to consider them on exceptions. *See, e.g., Wind-Chester Roofing Products*, 302 NLRB 878, 878 n.1 (1991) (refusing to consider impasse defense, first raised on exceptions, because it had not been litigated inasmuch as it was not raised in respondent's answer or at the hearing). A contention raised for the first time on exceptions is ordinarily untimely and, therefore, waived. *See, e.g.*, *Prime Communications, LP*, 374 NLRB No. 88, slip op. at 1 n.1 (2026); *Yorkaire, Inc*., 297 NLRB 401, 401 (1989), *enforced mem.*, 922 F.2d 832 (3d Cir. 1990).

Even when an issue was litigated before the ALJ, a party waives it by failing to raise the issue in its exceptions. Under Section 102.46(a)(1)(ii) and (f) of the Board's Rules and Regulations, "[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived" and "[m]atters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding." Applying these rules, parties will be deemed to have waived arguments they failed to assert in exceptions, including potential theories of violation. *See E.I Dupont De Nemours and Co*., 367 NLRB No. 145, slip op. at 2 n.4 (2019) (potential theory of violation waived where ALJ did not address it and parties did not file relevant exceptions).

Moreover, a party cannot circumvent these rules by asserting exceptions for the first time in its answering brief. *See, e.g.*, *Bohemian Club*, 351 NLRB 1065, 1067 n.6 (2007) (party waived defenses it asserted for the first time in its answering brief as "[t]he Board's Rules and Regulations do not permit a party to assert cross-exceptions in an answering brief").

In this case, the Charging Party clearly waived its new *Gissel* argument. The issue was never litigated before the ALJ. The complaints in neither the instant case nor the related case sought a *Gissel* bargaining order. Indeed, the issue was not even briefed by any party prior to the Charging Party's Answering Brief in this proceeding. The *Cemex* bargaining order sought in this case was based solely on the Respondent's decision not to file an RM petition rather than any unfair labor practices that would warrant setting aside an election. (ALJD 2:1-4). While the related case involves unfair labor practice allegations, including an alleged discharge and interrogations, *Amazon.com Services LLC*, 20-CA-353627 et al., JD-33-26, slip op. at 2-3 (May 29, 2026), none of the parties submitted any argument or evidence specific to what weight to accord those alleged violations with respect to a *Gissel* bargaining order. For example, no arguments were offered as to whether a fair election could be obtained following application of traditional remedies. *Gissel*, 395 U.S. at 614-15. Nor were evidentiary findings made on key facts relevant to such inquiry, such as the extent of dissemination of the violations among the bargaining unit. *See, e.g., Bristol Industrial Corp. and C.O. Sabino Corp.*, 366 NLRB No. 101, slip op. at 3 (2018) (listing relevant factors for a *Gissel* bargaining order). Thus, imposition of a *Gissel* bargaining order at this juncture would detrimentally affect the Respondent's due process right to present relevant defenses, which it has never had a chance to do.

Moreover, neither Counsel for the General Counsel nor the Charging Party filed exceptions to the ALJ's remedies in the related case, JD-33-26, or the *Cemex* remedy in the instant case (ALJD 15:12-23), asserting that a *Gissel* order is appropriate. Instead, the Charging Party improperly seeks to circumvent the Board's rules by using its Answering Brief as exceptions to object to the ALJD's *Cemex* remedy and assert a new theory it never advanced. The Board's rules are clear that the Charging Party's hindsight regret about its litigation

decisions in this case comes too late. This is especially so given that the General Counsel never sought a *Gissel* bargaining order, the Respondent was not afforded due process rights to challenge that claim, and the record is incomplete as to that issue.

Since the Charging Party has waived its new, alternative *Gissel* argument on multiple grounds, the Board should exercise restraint by not considering it. As a matter of quasi-judicial restraint, the Board "generally limit[s]" its review to the issues and arguments raised by the parties in order to further, among other things, procedural due process. *Postal Workers Local 64 (USPS)*, 340 NLRB 912, 912 (2003). A *Gissel* bargaining order is an "extraordinary remedy." *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1077 (D.C. Cir. 1996). It was never sought in the complaint or at the hearing, never litigated in this case or the related one, and likewise never raised on exceptions. Accordingly, the Board should decline to consider it at this late juncture.

Accordingly, the Board should overrule *Cemex* retroactively, reaffirm its commitment to longstanding and binding Supreme Court precedent in *Gissel* and *Linden Lumber*, decline to consider a *Gissel* bargaining order by consolidating this matter with the related case, and dismiss the complaint in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Counsel for the General Counsel's Reply Brief to the Charging Party's Answering Brief 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 16th day of September, 2026.

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