No. 16-3076
No. 16-3570

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NOVELIS CORPORATION, Petitioner-Cross-Respondent

JOHN TESORIERO, MACHAEL MALONE, RICHARD FARRANDS, AND ANDREW DUSCHEN, Intervenors,
v.
NATIONAL LABOR RELATIONS BOARD, Respondent-Cross-Petitioner,

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATL UNION, AFL-CIO, CLC, Intervenor.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF A DECISION OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND COALITION FOR A DEMOCRATIC WORKPLACE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Circuit Rules 26.1 and 29, the *amici* hereby certify that they are trade associations and their purpose includes preserving and protecting the rights of employers under the National Labor Relations Act. The specific purpose of each of the *amici* is set forth below in the section of this brief entitled, "Identity and Interests of the *Amici*."

The *amici* hereby certify that neither of them have any outstanding shares or debt securities in the hands of the public. They further certify that neither of them has any parent company, nor does any publicly held company have a 10% or greater ownership interest in either of the *amici*. [1]

[1] All parties have consented to the filing of this *amici* brief. No party, party's counsel, or person other than the *amici*, their members, and their counsel, has: (1) authored this brief in whole or in part or (2) contributed money that was intended to fund preparing or submitting the brief.

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IDENTITY AND INTERESTS OF THE *AMICI*

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every business sector and from every region of the country, many of whom are covered by the NLRA. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases involving issues of concern to the nation's business community.

The Coalition for a Democratic Workplace (CDW) consists of over 600 member organizations and employers, who in turn represent millions of additional employers, the vast majority of whom are covered by the NLRA or represent organizations covered by the NLRA. CDW members have joined together to express their mutual concern over recent regulatory overreach by the National Labor Relations Board that threatens the statutorily protected rights of employers and employees, and thereby hampers economic growth.

Amici are filing this brief to make the Court aware that the Board's decision in this case raises significant questions concerning the free speech rights of employers and the right of employees to choose whether to be represented by a

labor organization based upon the results of a secret ballot election. The Board's imposition of a bargaining order overriding the election results here, based in significant part on protected, non-threatening speech by the Petitioner, violates longstanding precedent. In addition, the Board's failure to address the changed circumstances of the Petitioner's workplace, as required by longstanding precedent in this circuit, threatens to undermine the protected rights of employers and employees to resolve questions of union representation through the secret ballot electoral process. The Board's order should therefore be denied enforcement.[2]

As noted above, all parties have consented to the filing of this *Amici* Brief. The matters asserted are relevant to the disposition of the case and should be desirable to the Court in focusing on the broader impact of the Board's decision on rights previously protected by the National Labor Relations Act.

[2] *Amici* support the additional grounds for review set forth in the briefs of the Petitioner and the intervening employees. However, this brief will seek to avoid duplication and focus on the issues of greatest concern to the broader business community represented by the *amici*.

INTRODUCTION

In 1947, Congress amended the National Labor Relations Act ("NLRA") to protect the rights of employers to engage in non-coercive speech regarding unionization. Section 8(c) of the NLRA embodies this protection, establishing that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). The Supreme Court has long held that in enacting Section 8(c), Congress intended "to encourage free debate on issues dividing labor and management." *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966).

In *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), the Court held that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *Id*. at 617. More recently, in *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008), the Court declared:

> It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA [adding Section 8(c) of the Act] rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken word … has been expressly fostered by Congress and approved by the NLRB."

Id. at 2413 (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 272-273 (1974)).

The challenged Board decision in the present case constitutes a radical departure from the settled legal principles set forth above. By setting aside the results of an election in which a majority of the Petitioner's employees voted against union representation, and by then issuing a bargaining order rejecting the will of the majority primarily based on non-coercive speeches by the employer, the Board has violated the free speech guarantees of the Act. If upheld by this Court, the Board's decision will have a chilling effect on employers around the country.

Even worse, the bargaining order issued here fails to follow this Court's longstanding precedents by giving inadequate attention to the remedial actions already taken and the changed circumstances involving employee and management turnover that have erased any impact of activities found to have been objectionable that occurred nearly three years ago. The Court should deny enforcement of the Board's order on these grounds alone, but certainly in combination with the numerous additional grounds stated in more detail by the Petitioner and intervening employees.

ARGUMENT

I. THE BOARD'S DECISION INFRINGES THE FREE SPEECH RIGHTS OF EMPLOYERS.

According to the Board's decision, the bargaining order in this case rests upon three "particularly serious violations." Board Dec. at 4. While none of the

claimed violations justify issuing a bargaining order for the reasons fully demonstrated in the Petitioner's brief, the Board's mischaracterization of the Petitioner's pre-election communications to its employees will have the most chilling effect on other employers' free speech rights, an outcome which is of great concern to the *amici*.

In this regard, the Board found that CEO Phil Martens and Plant Manager Chris Smith, in three speeches, "threatened employees with job loss." *Id*. at 5. To reach this unwarranted conclusion, the Board extracted disconnected sentences from the three lengthy speeches, and then added its own prejudicial paraphrasing of words not uttered by either executive. The speeches are all part of the record and must be read in their entirety to appreciate the misleading nature of the Board's findings, but suffice it to say that nowhere did the Petitioner's spokesmen "sharply contrast" the Company's past commitment to the Oswego plant with a "perilous" assertion that the Company's commitment would be "undermined" by voting for the Union. *Id.* Instead, the focus of all the speeches was on demonstrating the Company's substantial investment in the Oswego plant and the plans for more jobs in the future.

Nor did Martens or Smith "couple" the (nonexistent) threat of job loss with any statements that unionization would impair the Company's ability to perform its contractual obligations or would cause the Petitioner to lose current and future

contracts at the Oswego plant. *Id*. To the contrary, the overall tone of the speeches was that the future was bright in Oswego, that the Company had invested heavily in new production technology, and that the employees' jobs were more secure than ever before. *Id*. at 27. The Company did express concerns about the Union's lack of knowledge of the industry and the "distraction" of pitting groups of employees against each other, as the Petitioner had every right to do. *Id.* at 28. But the executives nowhere threatened job loss or loss of business. *Id*.[3]

This kind of speech has been given by many companies to their employees without any previous finding that such communications violate the Act. Indeed, this Court upheld a Board order rejecting such a finding in *Stanadyne Automotive Corp*, 345 NLRB 85, 89-90 (2005), *enf'd in relevant part*, *Int'l Union v. NLRB*, 520 F.3d 192 (2d Cir. 2008). There, the Board held that union claims that the employer had threatened job loss by describing prior shutdowns of unionized plants did not establish any threats of job loss at the employer's facility. The Board emphasized that the employer refrained from "embellishment regarding the [lack of] security of its future, conveying only what had happened in the past." 345 NLRB at 89-90. This Court properly upheld the Board's finding that no unlawful

[3] The Board also failed to adequately acknowledge the numerous communications by the Petitioner before and after the 25th Hour speeches that provided the necessary context to the speeches themselves, and reassured the employees of their employer's commitment to the Oswego plant. See, e.g., RX 47.

threats had occurred, declaring that "[a]n employer is not so cabined by the prohibition against interfering with a union election that it cannot express its views about unionization so long as the communications do not contain a threat of reprisal or force or promise of benefit." 520 F.3d at 196.

To the same effect are such cases as *Smithfield Foods, Inc.*, 347 NLRB 1225 (2006), *enf'd, Int'l Union, UAW v. NLRB*, 506 F.3d 1078, 1083 (D.C. Cir. 2007) (finding that employers have the right to provide employees with "relevant, factual information" about a plant's history, in the absence of any coercive threats); *Kinney Drugs v. NLRB*, 74 F.3d 1419 (2d Cir. 1996) (same); and *Manhattan Crowne Plaza*, 341 NLRB 619, 619-20 (2004) (upholding right of employers to provide concrete examples including negative outcomes happening to employees represented by a petitioning union where employer did not predict the same outcome as a result of the impending election); *see also Novi American, Inc*., 309 NLRB 544 (1992); *Caradco Corp*., 267 NLRB 1356 (1983).

By contrast, the Board decision here cites no prior case in which a bargaining order was found to be justified based upon statements remotely similar to the speeches that the Board now deems to be "particularly serious violations" in the present case. Certainly the two cases cited in the Board's decision on this point bear no resemblance to the present facts. *See* Board Dec. at 5 (citing *Cardinal Home Products*, 338 NLRB 1004, 1011 (2003); *Evergreen America Corp*., 348

NLRB 178, 180 (2006), *enf'd*, 531 F.3d 312 (4th Cir. 2008)). In *Cardinal Home Products*, the Board found no evidence of threats of plant closure at all, and primarily on this basis declined to issue a bargaining order, finding instead that "absent such threats … the violations here do not render slight the possibility of a fair rerun election … [and] the coercive effects of the Respondent's [other] conduct can be erased by the use of our normal remedies." 338 NLRB at 1011. In *Evergreen America Corp*., 348 NRB at 180, 199, the Board did find evidence of threats of job loss, but in a manner that again is distinguishable from the facts present here, *i.e*., there was overwhelming evidence that Company executives *explicitly and repeatedly* linked the union vote to plant closure. *Id*. at 199 ("[I]f the Union becomes involved with the company, the Company could be 'destroyed' or could 'shut the door,' [or] be completed, finished."). Again, nothing in the record of the present case is remotely comparable to the threats of job loss that the Board has previously found to invoke a bargaining order.

By thus departing from its own precedent without explanation, the Board has sent a chilling message to employers across the country. No longer will they be able to recite historical facts of their commitment to their employees if that message is "coupled," no matter how remotely, with criticism of a union organizing effort. The Board's decision violates the Act's "free speech" protections, as applied on numerous occasions by the Supreme Court, by this

Court, and by the Board itself.[4] Because the Board's order relies heavily on the improper finding that the Petitioner's lawful speeches constituted a "particularly serious violation," when in fact no violation at all should have been found, the Board's order should not be enforced.

II. THE BOARD'S ISSUANCE OF A BARGAINING ORDER VIOLATES SETTLED LAW IN THIS CIRCUIT.

Even if the Board's infringement of the free speech rights of employers in this case could be overlooked, which it cannot, the Board's decision must also be denied enforcement because the bargaining order directly contravenes the law of this Circuit regarding the validity of such bargaining orders where a majority of employees have voted against union representation. In particular, the Board failed meaningfully to address the changed circumstances of Petitioner's workplace when it issued its order, nearly two and one-half years after the election, as this Court's longstanding precedents uniformly require.

This Court's position requiring the Board to consider any changed circumstances prior to issuing a bargaining order is well settled and of long

[4] It is worth noting that in *Gissel Packing*, the Supreme Court upheld a bargaining order only because the employer told employees that it was "in a precarious financial position," that the union was "strike happy," that the "probable result" of the predicted strike would be a "shutdown," and that the employees would have "great difficulty finding employment elsewhere"—none of which was supported by any objective evidence. 395 U.S. at 619-620. The Petitioner here made no statements similar to these. *See also Int'l Union v. NLRB*, 520 F.3d at 196 (finding no violation in the absence of direct threats of reprisals due to union organizing).

standing. As stated in *NLRB v. Heads & Threads Co*., 724 F.2d 282 (2d Cir. 1983), consideration of events occurring after alleged pre-election unfair labor practices are a "mandatory part of the required analysis," even in cases involving much more serious and coercive misconduct than was alleged to have occurred here. *Id.* at 289. Additional decisions of this Court to the same effect include *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1332-33 (2d Cir. 1996); *Kinney Drugs v. NLRB*, 74 F.3d 1419 (2d Cir. 1996); *J.L.M., Inc. v. NLRB*, 31 F.3d 79, 83-85 (2d Cir. 1994); *NLRB v. J. Coty Messenger Serv., Inc*., 763 F.2d 92 (2d Cir. 1985); *NLRB v. Windsor Industries, Inc.*, 730 F.2d 860, 866 (2d Cir. 1984); *NLRB v. Pace Oldsmobile, Inc*., 739 F.2d 108 (2d Cir. 1984); *NLRB v. Knogo Corp*., 727 F.2d 55 (2d Cir. 1984); *NLRB v. Marion Rohr Corp., Inc*., 714 F. 2d 228 (2d Cir. 1993); *NLRB v. Chester Valley, Inc*., 652 F.2d 263, 273 (2d Cir. 1981); *J.J. Newberry Co. v. NLRB*, 645 F.2d 148 (2d Cir. 1981); and *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980). Every one of these cases denied Board bargaining orders, in whole or in part, because the Board failed to consider the impact of changed circumstances, including employee turnover, management turnover, and/or the passage of time.

In the present case, notwithstanding this long line of precedent, the Board again refused to "consider turnover among bargaining unit employees or management officials and the passage of time in determining whether a *Gissel*

order is appropriate." Board Dec. at 6, n.17. Indeed, the Board could not have considered such evidence because the agency denied Petitioner's repeated motions to reopen the record to introduce it. *Id*. For this reason alone, the bargaining order must be denied enforcement under the settled law of this Circuit.

Having held that it would not consider changed circumstances in this case, the Board nevertheless proceeded in the same footnote to state that "[e]ven if we were to consider the [Petitioner's] evidence, it would not require a different result." *Id*. But the Board's cursory analysis that followed this statement failed to address the issues required by this Court. First, the Board stated that "some" employees who were employed at the time of the election "may" no longer work for the Petitioner. *Id*. In reality, the undisputed evidence in Petitioner's motions to reopen the record established that 84 pre-election employees had left the Company by the time the Board rendered its decision more than two years after the election.

More importantly, the Board failed to acknowledge that 255 new hires (42.5% of the original unit) became employed only after the election. The combined turnover rate (new hires as a percentage of the bargaining unit after departed employees are subtracted) at the time of the Board decision was thus 49%. This amount of turnover is greater than the percentage of turnover that this Court found to compel denial of bargaining orders in several of the cases cited above. *See, e.g., J.L.M*, 31 F.3d at 84 (bargaining order denied due to 41%

turnover); *Marion Rohr*, 714 F.2d at 231 (bargaining order denied due to 35% turnover); *Chester Valley*, 652 F.2d at 263 (34% turnover led to denial of bargaining order).

The Board also failed to acknowledge or address this Court's holdings that turnover in the management responsible for the alleged misconduct is a significant factor undermining the need for a bargaining order. The Board merely noted that "Respondent's ownership" remains the same and "some" of the management personnel who engaged in unfair labor practices remain employed by Respondent. Board Dec. at 6, n.17. But the Board failed to refute the fact that the "particularly serious violations" on which the Board primarily relied in issuing the bargaining order were all committed by senior management officials who have now left the Company: specifically CEO Martens, Plant Manager Smith, and Operations Leader Jason Bro (who allegedly committed less serious violations).

Finally, the length of time passing since the election was already two and one-half years at the time the Board issued its decision, and will have reached more than three years since the date of the election by the time this case is heard by the Court. Such a time period has again been held by this Court to be a material factor that must considered by the Board. *HarperCollins*, at 1333; *J.L.M*, at 85. The Board arbitrarily rejected these holdings, saying only that "we do not consider the passage of time since the [Petitioner's] violations to be unacceptable for *Gissel*

purposes." Board Dec. at 6, n.17. This aspect of the Board's decision again defies the law of this Circuit and constitutes grounds for refusing enforcement of the bargaining order.[5]

In light of the Board's failure to consider the significantly changed circumstances of employee turnover, management turnover, and passage of time in this case, the Board's bargaining order cannot be enforced under the settled law of the Circuit. Indeed, adoption of the Board's announced standard for issuing bargaining orders in the present case, which ignores or unfairly minimizes the clearly changed circumstances, could result in a proliferation of non-majority bargaining orders, undermining the intent of Congress to favor the secret ballot election process. As this Court has repeatedly held, bargaining orders under *Gissel* are supposed to be "extraordinary" remedies, whereas the Board's approach, if accepted, would make such orders routine. 395 U.S. at 562. *Amici* accordingly ask that the bargaining order be denied enforcement.

[5] In the Board's footnote declining to consider changed circumstances, the Board also relies on a Fifth Circuit case for the proposition that "[p]ractices may live on in the lore of the shop" even after original participants have departed. Board Dec. at 6, n.17 (quoting *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978)). This Court's precedents cited above do not recognize any such principle, particularly in the absence of any proof of lingering effects of alleged misconduct. In any event, the misconduct described in the *Bandag* case involved explicit threats to close a plant, discharge of the chief union organizer, and numerous additional acts far more serious than anything found to have occurred in the present case.

CONCLUSION

For each of the reasons stated above and in Petitioner's Brief, the Petition for Review should be granted and the Board's decision should be denied enforcement.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify pursuant to FRAP 32(a)(7) that the foregoing brief contains 3,237 words of proportionally-spaced 14-point type, and the word processing system used was Microsoft Word 2010.

/s/ *Maurice Baskin*

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2017, I electronically filed a true and correct copy of the foregoing brief using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

/s/ Maurice Baskin