ONE STEP UP AND ANOTHER STEP DOWN: MODERN LABOR ACTION AND THE JUDICIAL RESPONSE

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Greetings. It is truly an honor to be here. As mentioned in the gracious introduction, I am the Executive Director of the Workers' Rights Institute at Georgetown Law, an arbitrator, mediator, and the former Chair of the National Labor Relations Board (NLRB). I have spent nearly half of my 40 plus year-long career working with the Board, first as a lawyer, then ultimately as a Board Member and Chairman.

I enjoyed the very comprehensive (and somewhat neutral) presentation of Grant and Aaron. I will be touching on some of the cases they mentioned.

Not long ago, the impact of unions in the American work environment was, to some, an out-of-step deterrence to the economic growth of the "job creators" in this country. Unions, though on the decline, were blamed for manufacturing shifting to the south or offshore.[1] However, today, it is impossible to ignore the remarkable resurgence of labor activity.[2]

From the "summer of strikes," the surprising election win of the Amazon workers in Staten Island, New York, to the incredible national momentum of Starbucks' workers organizing, we are seeing meaningful gains for workers across sectors.[3] We also have a Presidential administration supportive of labor, and the current Democratic Board has issued decisions that move the needle for workers in important ways.

But then there is the judiciary—a Supreme Court taking aim at the power of administrative agencies. During this term alone, there are multiple cases that put forth theories that would severely weaken the power of the NLRB. There are theories that opponents of worker rights believe would find welcome reception with the conservative majority. This dynamic emboldens advocates, and we see employers like SpaceX, Amazon, and Trader Joe's pushing back against labor law by arguing that the NLRA is

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[1] Drew DeSilver, *Job Categories Where Union Membership Has Fallen Off Most*, PEW RSCH. CTR. (Apr. 27, 2015), https://www.pewresearch.org/short-reads/2015/04/27/union-membership/ [https://perma.cc/LG2Z-2QXR].

[2] Margaret Poydock & Jennifer Sherer, *Major Strike Activity Increased by 280% in 2023*, ECON. POL'Y INST. (Feb. 21, 2024), https://www.epi.org/publication/major-strike-activity-in-2023/ [https://perma.cc/JMY3-24YK].

[3] Timothy J. Minchin, *A New Labor Movement? Assessing The Worker Upsurge in the Contemporary U.S.*, 65 LAB. HIST. 433, 434 (2024), https://doi.org/10.1080/0023656X.2024.2327487.

unconstitutional.[4] How do we make sense of this juxtaposition and chart a path forward? All of this is within a period of resurgent labor activity.

I. CURRENT RESURGENCE OF LABOR ACTIVITY

Taking a look at 2023, the so-called "year of the strike," and this year—2024—a year that shows no sign of slowing the strike momentum.[5] What started as the "Summer of Strikes" turned into a year marked by some of the largest labor disputes in more than two decades and increasing pro-union sentiment.[6] In total, 2023 saw 451 labor strikes.[7] For many of these union workers, such as those from Writers Guild of America (WGA), Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), and United Auto Workers (UAW), going on strike paid off in the form of historic victories.[8] 2023 and 2024 also saw increased interest in union organizing.

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[4] Lynn Rhinehart & Celine McNicholas, *What's Behind the Corporate Effort to Kneecap the National Labor Relations Board?*, ECON. POL'Y INST. (Mar. 7, 2024, 9:43 AM), https://www.epi.org/blog/whats-behind-the-corporate-effort-to-kneecap-the-national-labor-relations-board-spacex-amazon-trader-joes-and-starbucks-are-trying-to-have-the-nlrb-declared-unconstitutional/ [https://perma.cc/UHW2-7PHT].

[5] Mell Chhoy & Mark Gaston Pearce, *Worker Outbursts, Workplace Rules and a Resurgence of Worker Voice*, 31 GEO. J. POVERTY L. & POL'Y 355 (2024) (citing Ian Kullgren, *Diverse Workforce Reaps Benefits of Strikes as Contracts Kick In*, BLOOMBERG L. (Dec. 13, 2023), https://news.bloomberglaw.com/daily-labor-report/diverse-workforce-reaps-benefits- of-strikes-as-contracts-kick-in; Kate Bronfenbrenner, *For Labor Unions, 2023 Was the Year of the Strike–and Big Victories*, WALL ST. J. (Dec. 4, 2023), https://www.wsj.com/business/unions-workers- 2023-strikes-companies-da09de12; Drew DeSilver, *2023 Saw Some of the Biggest, Hardest-Fought Labor Disputes in Recent Decades*, PEW RSCH. CTR. (Jan. 4, 2024), https://www.pewresearch.org/shortreads/2024/01/04/2023-saw-some-of-the-biggest-hardest-fought-labor-disputes-in-recent-decades/ [https://perma.cc/P2AC-YHFH]; Max Zahn, *Unions Made 2023 the Year of the Strike. What Will Happen Next*?, ABC NEWS (Dec. 26, 2023), https://abcnews.go.com/Business/unions-made-2023-year-strike-happen/story?id=105556127 [https://perma.cc/769H-4CXC]); *see also ILR School Strike Tracker*, CORNELL UNIV. SCH. OF INDUS. & LAB. RELS., https://striketracker.ilr.cornell.edu/ [https://perma.cc/5LMX-YMSD] (documenting 135 labor actions in 177 locations since January 1, 2024).

[6] Steven Greenhouse, *'It feels like it's strike summer': US unions flex muscles across industries*, GUARDIAN, (July 26, 2023), https://www.theguardian.com/us-news/2023/jul/26/strike-summer-us-unions-flex-muscles [https://perma.cc/QXX7-357Y]; DeSilver, *supra* note 1.

[7] *ILR School Strike Tracker*, CORNELL UNIV. SCH. OF INDUS. & LAB. RELS., https://striketracker.ilr.cornell.edu/ [https://perma.cc/5LMX-YMSD] (tracking strikes from 01/01/2023 to 12/31/2023).

[8] *See* Greenhouse, *supra* note 6; Haleluya Hadero, *UPS Reaches Tentative Contract with 340,000 Unionized Workers, Potentially Dodging Calamitous Strike*, AP NEWS (July 25, 2023), https://apnews.com/article/ups-teamsters-strike-labor-logistics-delivery-a94482dbff7bfb67ad82f607ab127672; Nora Naughton, *Workers at Ford, GM, and Jeep-maker Stellantis Just Got One Step Closer to Striking as Automaker Union Negotiations Heat Up*, BUS. INSIDER (Aug. 25, 2023), https://www.businessinsider.com/uaw-auto-workers-union-negotiations-contract-strike-ford-gm-stellantis-2023-7 [https://perma.cc/N6BT-T4EB]; Chris Isidore & Vanessa Yurkevich, *UAW Workers Launch Unprecedented Strike Against All Big Three Automakers*, CNN (Sept. 15, 2023), https://www.cnn.com/2023/09/15/business/auto-workers-strike/index.html [https://perma.cc/AKL4-TY3P]; Josh Eidelson, Laura B. Jensen & Jo Constantz, *Unions Are Winning Big for the First Time in*

Take Starbucks as an example. As of April 2024, Starbucks workers at 415 Starbucks stores in 43 states won union elections and even more have filed elections.[9]

For context, Starbucks has 9,000 stores.[10] The union representing these workers, Starbucks Workers United, announced an agreement on a bargaining framework with the coffee giant:[11] A departure from Starbucks's nationwide delay and union-busting tactics.[12] The victories of Starbucks workers have galvanized many workers and led many to celebrate our current labor resurgence.

This resurgence is remarkable given data that shows a decline in labor. According to the Bureau of Labor Statistics, since 1983, the union membership rate for private-sector workers in nonagricultural industries has *trended downward* from 16.8% to the 2023 rate of 6.1%.[13] The public-sector—which has for decades retained the highest union density—has dropped from 37% in 2011 to the current membership of 32.5%.[14] This drop is undoubtedly due in part to the decertification of public sector unions in places like Wisconsin and the Supreme Court's decision in *Janus*, which barred unions from requiring agency fees of bargaining unit members that they are legally obligated to represent.[15]

But the general decline in private sector union density is significantly due to flaws built into the National Labor Relations Act (NLRA), an almost 90-year-old piece of legislation which at the very least is in need of stronger remedies including punitive damages, an independent right of action for victims, and the power to insure a first contract after an election is won.

In 2019, I testified before the House of Representatives Committee on Health Education and Labor along with the late Richard Trumka, then

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Decades, BLOOMBERG (Oct. 31, 2023), https://www.bloomberg.com/news/ articles/2023-10-31/uaw-strike-ups-drivers-writers-union-mark-record-wins-for-us-labor-movement?embedded-checkout=true; Vanessa Yurkevich & Chris Isidore, *GM and the UAW Come to Tentative Agreement*, CNN (Oct. 30, 2023), https://www.cnn.com/2023/10/30/business/gm-uaw-tentative-agreement/index.html [https://perma.cc/T72N-TXSE]; David Shepardson & Joseph White, *UAW Reaches Deal with GM, Ending Strike Against Detroit Automakers*, REUTERS (Oct. 30, 2023), https://www.reuters.com/business/autos-transportation/gm-reaches-tentative-deal-with-uaw-source-says-2023-10-30.

[9] *Map: Where Are Starbucks Workers Unionizing*, MORE PERFECT UNION, https://perfectunion.us/map-where-are-starbucks-workers-unionizing/ [https://perma.cc/EZA7-Y84C].

[10] Daniel Wiessner, *Starbucks Agrees to US Union Organizing 'Framework'*, REUTERS, (Feb. 27, 2024, 6:05 PM), https://www.reuters.com/business/retail-consumer/starbucks-us-union-agree-form-framework-organizing-bargaining-2024-02-27/.

[11] *Id.*

[12] *See* Mark Gaston Pearce, *Testimony Before the House Committee on Education and Labor*, EDUC. & THE WORKFORCE COMM. DEMOCRATS 1 (Sept. 14, 2022), https://democrats-edworkforce.house.gov/download/markpearcetestimony.

[13] *See Union Members Summary*, US BUREAU LAB. STAT. (Jan. 23, 2024), https://www.bls.gov/news.release/union2.nr0.htm.

[14] *Id.*

[15] Janus v. AFSCME, Council 31, 585 U.S. 878 (2018).

President of the AFL-CIO. At the hearing entitled "Protecting Workers' Right to Organize: The Need for Labor Law Reform," I made a plea for labor law reform and compared Congress with an auto plant charged with producing legislation to protect the working people of this country.[16] In this metaphor, the NLRA would have to be described as a heavy-duty vehicle with major design flaws—an underpowered engine and only three wheels. If workers are making such progress with a defective vehicle, imagine what they could accomplish with better labor law?

II. PROGRESS UNDER THE BIDEN NLRB

While labor law reform is nowhere in sight, some administrations have attempted to jumpstart the engine by implementing pro-labor initiatives with the objective of getting the current law to work better. This is what we have seen under the Biden Administration. President Biden has implemented a host of pro-worker initiatives, from incentivizing union manufacturing to supporting federal sector unionization.[17]

After dismissing a Trump-appointed NLRB General Counsel ("GC")—found by the US Government Accountability Office (GAO) to have been dismantling the agency from the inside[18]—President Biden made key appointments and nominations, including dynamic women with a strong history of advocating for the protection of worker rights. Among these women were Julie Su to the Department of Labor; Jennifer Abruzzo, only the second woman in the 88-year history of the agency to be named GC of the

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[16] Mark Gaston Pearce, *Testimony Before the House Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions United States House of Representatives*, CONGRESS.GOV 1 (2019), https://www.congress.gov/116/meeting/house/109412/witnesses/HMTG-116-ED02-Wstate-PearceM-20190508.pdf; Richard Trumka, *Testimony of Richard L. Trumka on Deterring Unfair Labor Practices and the Protecting the Rights to Organize Act*, AFL-CIO (May 8, 2019), https://aflcio.org/testimonies/testimony-richard-l-trumka-deterring-unfair-labor-practices-and-protecting-right [https://perma.cc/2FVX-5N5J].

[17] *See FACT SHEET: President Biden Announces New Workforce Hubs to Train and Connect American Workers to Good Jobs Created by the President's Investing in American Agenda,* WHITE HOUSE, (Apr. 25, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/04/25/fact-sheet-president-biden-announces-new-workforce-hubs-to-train-and-connect-american-workers-to-good-jobs-created-by-the-presidents-investing-in-america-agenda/; *see also* Exec. Order No. 14,003, 86 Fed. Reg. 7,231 (Jan. 22, 2021); Exec. Order No. 14,025 86 Fed. Reg. 22.829 (Apr. 26, 2021).

[18] U.S. GOV'T ACCOUNTABILITY OFF., NATIONAL LABOR RELATIONS BOARD: MEANINGFUL PERFORMANCE MEASURES COULD IMPROVE CASE QUALITY, ORGANIZATIONAL EXCELLENCE, AND RESOURCE MANAGEMENT 1 (2021), https://www.gao.gov/assets/gao-21-242.pdf [https://perma.cc/QPV8-8GSD].

NLRB; and to the NLRB Gwynne Wilcox[19], the first black woman to ever serve as a Board member.[20]

We are seeing the fruits of these appointments in policy. For example, GC Abruzzo launched an ambitious agenda to "vigorously protect the rights of workers."[21] This is part of what has enabled the current Democratic Board majority to tackle Trump-era decisions that tilted the scales towards employers.

The Board has ushered in a series of decisions that help advance the rights of workers across a wide range of areas. For example, one action has been for the commission of unfair labor practices ("ULPs") to thwart union election wins has increased in response to the increase in organizing.

One tool the Board has at its disposal is issuing a bargaining order to the employer. Under the old *Gissel Packing* standard,[22] bargaining orders were reserved for instances where an employer's extreme ULPs during an election made a rerun election ineffective. However, the Board determined that these types of bargaining orders were an inadequate deterrent for ULPs, given the pervasive and often flagrant violations commonly experienced during an election campaign.[23] As a result, the Board announced a new standard in *Cemex*.[24] Now, when an employer is presented with a demonstrated majority of employees requesting voluntary recognition, the employer will have two options: recognize the union or file for an election.[25] If, however, the employer does not file in a timely manner, or if the employer commits unfair labor practices, the Board can issue a bargaining order, allowing workers to begin negotiations right away instead of going through a protracted re-run election.[26]

The Board also announced a new standard for when work rules constitute unfair labor practices under the Act in *Stericycle*, overruling Trump-era

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[19] *See* Daniel Wiessner, *US Senate Panel Clears Biden Labor Secretary Nominee Su over Republican Criticism*, REUTERS (Feb. 27, 2024); *President Biden Announces Key Nomination on Jobs Team*, WHITE HOUSE (Feb. 17, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/17/president-biden-announces-key-nomination-on-jobs-team/ (last visited Dec. 24, 2024); *Gwynne A. Wilcox Sworn in for Second Term as Board Member*, NLRB (Sept. 11, 2023), https://www.nlrb.gov/news-outreach/news-story/gwynne-a-wilcox-sworn-in-for-second-term-as-board-member [https://perma.cc/M9R9-8ELZ].

[20] Now, Wilcox, since a change in administrations, has the regrettable distinction of being the first Board Member to have been removed by the President contrary to the terms and dictates of the National Labor Relations Act.

[21] *General Counsel Jennifer Abruzzo Releases Memorandum Presenting Issue Priorities*, NLRB (Aug. 12, 2021), https://www.nlrb.gov/news-outreach/news-story/general-counsel-jennifer-abruzzo-releases-memorandum-presenting-issue [https://perma.cc/QU6Z-KQLX].

[22] Nat'l Lab. Rel. Bd. v. Gissel Packing Co., Inc., 395 U.S. 575, 612–14 (1969).

[23] Cemex Construction Materials Pacific, LLC, 372 N.L.R.B. 130, slip op. at *50 (2023), https://apps.nlrb.gov/link/document.aspx/09031d4583b21d51.

[24] *Id.* at *26–*27.

[25] *Id.* at *26.

[26] *Id.*

precedent.[27] Now, the Board asks whether a worker would "reasonably construe" the employer work rule to infringe NLRA rights.[28] This places the onus on the employer to provide clarity and specificity to rules they promulgate in order that these rules do not serve to chill protected activity.

The Board also made progress in a host of other areas (and far too many areas to go into great detail). To summarize a few: in a recent decision involving *Home Depot*, the Board held that an employee who wrote "BLM" on their work apron was engaged in protected, concerted activity, clarifying that issues of racial justice can be workplace issues sufficient to warrant the Act's protection.[29] In *Atlanta Opera*, the Board revised the standard for determining whether a worker is an independent contractor or actually an employee, expanding coverage of the Act to misclassified workers.[30] And in *Thryv Inc*., the Board clarified that employers must make employees whole for all "direct or foreseeable pecuniary harm" suffered as a result of those unfair labor practices, which will lead to stronger remedies—e.g. the increased cost of taking out a loan because the job loss has ruined the fired employee's credit).[31] These (and many other) decisions intervene at core points in the organizing process to help expand the Act's protection to more workers, expand the scope of protection under the Act, and strengthen remedies.[32]

III. POTENTIAL IMPACT OF THE COURTS

These decisions and efforts provide welcome tools for labor advocates, elated that labor policies are seemingly moving in the same direction as a resurging labor movement. However, simultaneous with this euphoria is a feeling of dread. Why?

Because these labor advocates know that employers are fighting these efforts tooth and nail with an array of constitutional arguments—arguments that include wholesale challenge to the structure of the administrative state.

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[27] Stericycle, Inc., 372 N.L.R.B. 113, slip op. at *1 (2023), https://apps.nlrb.gov/link/document.aspx/09031d4583af43bd.

[28] *Id.* at *42.

[29] Home Depot USA, Inc., 373 N.L.R.B. No. 25, slip op. at *7 (2024), https://apps.nlrb.gov/link/document.aspx/ 09031d4583c6ebac.

[30] Atlanta Opera, Inc., 372 N.L.R.B. No. 95, slip op at *12–*14 (2023), https://apps.nlrb.gov/link/document.aspx/ 09031d4583a9b372.

[31] Thryv, Inc., 372 N.L.R.B. No. 22, slip op at *1, *18, (2022), https://apps.nlrb.gov/link/document.aspx/ 09031d458392d6f2.

[32] Miller Plastics, 372 N.L.R.B. No. 134 (2022) (reversing checklist requirements of *Alstate Maintenance*, acknowledging *Myers II* and *Republic Aviation*, and finding that PCA is often situational). *See* Myers Indus., Inc., 268 N.L.R.B. 493 (1984); *see also* Republic Aviation Corp., 351 U.S. 1 (1956); Alstate Maintenance, 268 N.L.R.B. 638 (1984).

Unfortunately, the courts seem to be fertile ground for these arguments. Indeed, this Supreme Court's recent history is replete with anti-labor decisions, a dynamic that employers have been quick to seize upon.

Even in the interim between the time I authored my remarks for this talk and now, the Supreme Court (apparently in an effort to aid what it anticipated to be a boring speech by me) has issued the anticipated decision in *Starbucks v. McKinney*. In that case, the Court looked at the standard for when the Board can seek what are referred to as 10(j) injunctions.[33]

Section 10(j) of the NLRA allows the Board to seek temporary injunctions in federal district courts against employers to halt unfair labor practices while cases are being litigated before Administrative Law Judges ("ALJs") or the Board.[34]

The GC seeks injunctions in only a handful of cases, but it remains a powerful tool to prevent egregious ULPs and irreparable harm. Federal Circuit courts applied varying tests to determine the Board's burden of proof for securing injunctions.

This brings us to the case at hand. The case began with the Memphis 7, a group of workers who the union alleges were fired in 2022 in retaliation for trying to unionize.[35] The NLRB sought an injunction against Starbucks while the charge was pending, ordering reinstatement of the employees and other protections for organizing.[36]

The district court, applying a two-part test established by the Sixth Circuit, agreed with the NLRB and granted the injunction, which included reinstatement of the Memphis 7 six months after the workers were terminated.[37] The two-part test "asks whether 'there is reasonable cause to believe that unfair labor practices have occurred,' and whether injunctive relief is 'just and proper.'"[38]

After committing more than 400 violations of the NLRA nationwide, including the firing of 59 union leaders and with more than 60 additional complaints awaiting decision,[39] Starbucks finally agreed to seriously bargain with the Starbucks Workers United, stating that it hopes to reach a first contract by the end of 2024.

Starbucks nevertheless appealed the Memphis 7 injunction all the way to the Supreme Court—arguing that the district court should have used a

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[33] Starbucks Corp. v. McKinney, 602 U.S. 339, 342 (2024).
[34] 29 U.S.C. § 160(j).
[35] *Starbucks Corp.*, 602 U.S. at 343–44.
[36] *Id.* at 344.
[37] *Id.* at 339.
[38] *Id.* at 344 (quoting McKinney v. Ozburn-Hessey Logistics, LLC, 875 F. 3d 333, 339 (2017)).
[39] Brief of Starbucks Workers as Amici Curiae Supporting Respondents, Starbucks Corp., v. McKinney, 602 U.S. 339, No. 23-367 (2024), 2024 WL 1443242.

standard used in some other circuits, to decide whether the injunction was merited.

This standard was established in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), which employs a four-factor test that requires a plaintiff to make a clear showing that:

> [1] he is likely to succeed on the merits;
> [2] that he is likely to suffer irreparable harm in the absence of preliminary relief;
> [3] that the balance of equities tips in his favor; and
> [4] that an injunction is in the public interest.[40]

The Supreme Court granted certiorari "to resolve the Circuit split about what standard governs the Board's requests for preliminary injunctions under Section 10(j) . . . ."[41] The question before the Supreme Court was a narrow one: is the correct test for 10(j) injunctions the *Winter* framework, or the Board's more lenient standard?[42]

The Court rejected the Board's argument that contextual considerations require district courts to apply the traditional criteria in a less exacting manner and the Sixth Circuit's reasonable cause standard allows for this.[43] The Court majority, in an opinion written by Justice Thomas, found that the reasonable cause standard substantially "lowers the bar for securing a preliminary injunction by requiring courts to yield to the NLRB's preliminary view of the facts, law, and equities," and they were not having that![44]

Justice Jackson partially dissented from the majority opinion as it "casts a district court's decision regarding a § 10(j) request as one that invokes the full sweep of a court's traditional equitable discretion—without regard for the Board's authority or the statutory scheme that authorizes courts to issue such in-terim relief in the first place."[45]

Commentators have noted that some good has come from this decision: the circuit split as to the correct test to apply to 10(j) injunctions created uncertainty, and workers often suffer in cases where there are inconsistent standards. Consistency, at the very least, should bring about a more

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[40] Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (citing Munaf v. Geren, 553 U.S. 674, 689–690 (2008); Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–312 (1982)).

[41] *Starbucks Corp*., 602 U.S. at 345.

[42] *Id.*

[43] *Id.* at 349.

[44] *Id.*

[45] *Id.* at 366 (Jackson, J., dissenting).

predictable reception from the district courts stemming from more anticipatory court strategies.

But what cannot be overlooked is the fact that the Court has enshrined a 10(j) injunction process with a higher bar, which—as Justice Jackson argues—threatens to impede the whole purpose of injunctions by imposing a standard that ignored the choices Congress has made in the NLRA about how courts should exercise their discretion in light of the NLRB's authority over labor disputes.[46]

Another impact of this case is the chilling effect placed on any injunction petition sought before an ALJ's record has been established. In such cases, the NLRB will be subject to successful discovery motions by employers seeking evidence and witness information not otherwise available to them during an administrative proceeding. Workers who may have participated in the investigative process with the understanding that their participation would be confidential unless and until they had to testify in NLRB proceedings would be vulnerable to exposure. Furthermore, significant inner workings of the organizing campaign might be discoverable. The coercive effect of that might be so devastating that unions and organizers may not want the NLRB to pursue 10(j) relief.

This raises a second related point: the delay caused by waiting for a record—in order to circumvent the harm that a discovery motion could cause and in order to increase the chance of success before judges ignorant of Board law yet unwilling to grant deference, the NLRB would be inclined to wait until a record is established in NLRB proceedings before an ALJ before seeking injunctive relief.

While waiting would obviate the need for discovery orders and their chilling effect, this delay detracts from the entire purpose of 10(j), which is for the agency to be able to act immediately. Now, workers may have to wait for a hearing before an ALJ, which could take as much as six months to a year or more for relief that, under the statute, was intended to be expeditious.

Lastly, it is also important to think about why this case is emerging now. Attacks on 10(j) injunctions have become more frequent because the NLRB is using this tool more. But why is the NLRB using 10(j) injunctions more? Because flagrant ULPs are on the rise. There has been a substantial increase in ULPs: in 2023, 22,463 ULP cases were filed, a significant increase from the 20,509 cases filed in 2022.

Why are we seeing more ULPs? Because there is an upsurge in organizing. The NLRB saw union petitions increase by over 53% in 2022, and the organizing surge has continued into 2023. Employers are responding to this surge with anti-union tactics, and the General Counsel has been

[46] *Id.* at 365–66.

proactive, but now, the Board will need to jump through a stricter test to respond in kind.

Starbucks v. McKinney is not the first case where this court has issued an 8–1 decision taking aim at the NLRB—we saw a similar dynamic in *Glacier Northwest* last term. There, the issue was federal preemption. The facts of the case centered on union workers' strike activity.[47] Glacier, a concrete company, alleged that during a strike, workers walked off the job with some of their trucks containing partial or full loads of wet concrete.[48] As a result, Glacier had to take mitigating measures to dispose of the concrete and clean out their trucks to ensure that the concrete did not harden inside.[49] None of Glacier's trucks were actually damaged.[50] Yet, Glacier filed a lawsuit in Washington state court alleging that the Union had "intentionally" destroyed its property.[51]

Typically, such a case is barred from proceeding under *Garmon* preemption, a doctrine that says that the NLRA preempts state law whenever a lawsuit is based on conduct that is either "arguably" protected or prohibited by the NLRA.[52] Here, the Washington State Court applied *Garmon* and found that workers' strike was arguably protected by the NLRA, and thus, the NLRB would get first bite at the apple.[53] But the employer appealed and the Supreme Court granted certiorari, leading many to predict the end of *Garmon*.

On the one hand, the result was not as bad as some commentators predicted: the Court did not get rid of *Garmon* altogether. But, in an 8-1 majority opinion written by Amy Coney Barrett, the Court held that the drivers' strike was not protected because the employees did not take "reasonable precautions" to protect the employer's property.[54] The Court reasoned that the workers went further than the right to strike, taking affirmative steps to endanger Glacier's property by loading the trucks with perishable cement before walking off the job.[55] As a result, the union's conduct was not even "arguably protected" by the NLRA, and the state-level lawsuit against the union can proceed.[56] The result is that it is now easier for employers to sue unions in state court over strike-related actions—a move that could seriously chill unions' ability to undertake crucial concerted activity.

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[47] Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 598 U.S. 771, 774 (2023).
[48] *Id.* at 781.
[49] *Id.* at 778–779.
[50] *Id.* at 779.
[51] *Id.*
[52] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959)
[53] Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Local Union No. 174, 198 Wash. 2d 768, 805 (2021).
[54] *Glacier Nw., Inc.*, 598 U.S. at 781.
[55] *Id.* at 785.
[56] *Id.* at 781.

As a sidebar, the "reasonable precautions" rationale of the Court should cause one to wonder whether the court would apply the same logic to employers in a lockout.[57] Is an employer obligated to take "reasonable precautions" against workers losing their homes, healthcare, their children's loss of tuition, and the worker's all-around emotional stability? Would a civil suit of this nature be likewise outside of the preemption doctrine? Alas, the majority made no mention of this.

Ironically, after a subsequent hearing before the NLRB, an ALJ found the allegations that the union failed to take "reasonable precautions" were unsupported by the evidence.[58]

So, while *Garmon* survives another term, there is still cause for concern. Justices Thomas, Alito, and Gorsuch wrote separately to question the doctrine's legitimacy.[59] Second, this decision chips away at unions' ability to operate without fear of overzealous and aggressive lawsuits by employers. This will subject unions to expensive discovery at least until the union can get the NLRB to issue a complaint against the employer.[60]

Justice Ketanji Brown-Jackson's lone fiery dissent underscores this concern, offering an impassioned argument for robust strike protections.[61] She also took issue with the Supreme Court's overreach. Congress tasked the Board, not the Supreme Court, with administering the "labor policy for the Nation . . . equipped with its specialized knowledge and cumulative experience."[62]

In addition to decisions that have already come down, the Supreme Court is still considering multiple cases that threaten to weaken the power of federal agencies. Although not labor cases directly, these cases could severely limit the power of the NLRB. One such case is *Loper Bright Enterprises v. Raimondo*, which takes aim at what is referred to as the *Chevron* doctrine.[63] The *Chevron* doctrine, which was established by the Supreme Court in 1984, holds that courts must defer to agencies' reasonable constructions of ambiguous statutory language.[64]

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[57] *Id.*

[58] Glacier Nw., Inc. d/b/a CalPortland, Docket No. 19-CA-203068, at 32 (N.L.R.B. Div. of Judges Dec. 27, 2023), *available at* https://apps.nlrb.gov/link/document.aspx/09031d4583c0e5c6 (pagination based on NLRB-source document).

[59] *Glacier Nw., Inc.*, 598 U.S. at 785 (Thomas, J., concurring).

[60] Andrew Strom, *Glacier Northwest Could Have Been Worse, But it's Still Bad*, ONLABOR (June 6, 2023), https://onlabor.org/glacier-northwest-could-have-been-worse-but-its-still-bad/ [https://perma.cc/9LG7-4SCM].

[61] *Glacier Nw., Inc.*, 598 U.S. at 789–90 (Jackson, J., dissenting).

[62] *Id.* at 793 (quoting *Garmon*, 359 U. S., at 242).

[63] *See Loper Bright Enterprises v. Raimondo*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/loper-bright-enterprises-v-raimondo/ [https://perma.cc/HW6E-5FUT].

[64] *Id.*

The plaintiffs in *Loper* are arguing that the *Chevron* doctrine is unconstitutional because deferring to agencies' construction undermines the ability for the courts to "say what the law is."[65] It was reported that "[a]fter more than three-and-a-half hours of oral argument . . . a majority of the justices seemed ready to jettison the doctrine or at the very least significantly limit it."[66] The Court's ruling, which will be rendered this month, is predicted to have ripple effects across the federal government, where agencies commonly use highly trained experts to interpret and implement federal laws. Just as in *Glacier,* this case threatens the subject matter expertise that the Board brings to the decision-making process. It also threatens to upend settled law and policy which, increases uncertainty on the part of workers and employers.

A. Constitutional Challenges to NLRB Authority

This environment of Constitutional challenges to agency authority creates fertile ground for more arguments which can be seen in a recent challenge brought by SpaceX.[67] SpaceX, joined by Trader Joe's and Amazon, is challenging the constitutionality of the NLRB. The SpaceX suit is just the latest attack on the administrative state that threatens to dramatically destabilize not only federal labor law but the functioning of the federal government broadly.

On June 15, 2022, a small group of SpaceX employees used the company's internal communications platform to send an 'Open Letter' to thousands of the company's employees denouncing the behavior of company CEO Elon Musk's behavior.[68] Between June and August 2022, SpaceX terminated several employees involved with the Open Letter for apparently "violating numerous company policies."[69] Eight former employees filed charges with the NLRB, alleging that the company terminated them for

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[65] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2285 (2024).

[66] Amy Howe, *Supreme Court likely to discard Chevron*, SCOTUSBLOG (Jan. 17, 2024), https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/ [https://perma.cc/R8B4-ZD2V].

[67] Robert Iafolla, *Amazon, SpaceX Take Assaults on Labor Board to Fifth Circuit*, BLOOMBERG LAW (Nov. 15, 2024, 5:40 AM), https://news.bloomberglaw.com/daily-labor-report/amazon-spacex-take-assaults-on-labor-board-to-fifth-circuit [https://perma.cc/EJ24-JU36].

[68] Loren Grush, *SpaceX employees draft open letter to company executives denouncing Elon Musk's behavior*, VERGE (June 16, 2022, 9:05 AM), https://www.theverge.com/2022/6/16/23170228/spacex-elon-musk-internal-open-letter-behavior [https://perma.cc/QRB7-4J8D].

[69] *SpaceX accused of unlawfully firing employees who were critical of Elon Musk*, ASSOCIATED PRESS (updated Jan. 4, 2024, 8:32 PM), https://apnews.com/article/spacex-elon-musk-employee-firings-nlrb-6d92159b6c6519258757f9e3c58ed74f.

engaging in protected concerted activity.[70] The Regional Director of the NLRB's Region 31 issued a complaint against SpaceX, alleging that by drafting and distributing the open letter, the employees had, in fact, "engaged in concerted activities with other employees for the purposes of mutual aid or protection as the letter detailed workplace concerns."[71]

Rather than moving forward with the NLRB process, SpaceX instead filed a federal suit arguing that the NLRB itself is unconstitutional. The lawsuit has four core claims: First, it claims the NLRB's ALJs are unconstitutionally insulated from removal under the Appointments Clause;[72] second, NLRB's Members are unconstitutionally insulated from removal;[73] third, NLRB ALJ adjudications of private rights without a jury trial violate the Seventh Amendment; [74] and finally, it argues the NLRB's exercise of prosecutorial, legislative, and adjudicative authority violates the Fifth Amendment's due process clause.[75] Each of these arguments, if adopted, would severely curtail the power of the NLRB, and each argument goes against well-settled case law.

B. First Amendment

And still, there is another Constitutional challenge lurking in employer arguments: the First Amendment. *Home Depot*, and a series of other similar cases, focused on whether Black Lives Matter ("BLM") messaging is protected activity under the NLRA. Employers are arguing that a rule enforcing such protection would be compelled speech in violation of the First Amendment.[76] In *Home Depot*, the Board determined that the employer committed an unfair labor practice when they ordered an employee to remove the phrase "BLM" that they had written on their work apron.[77] Applying settled law, the Board found that the BLM message constituted protected, concerted activity because it stemmed from group efforts to address racism within the store. Although employers and the ALJ tried to portray BLM as a distinct protest movement focused on police brutality, the Board recognized

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[70] *Could SpaceX Change the Labor Board's Future? Here's What Employers Need to Know*, FISHER PHILLIPS (July 18, 2024), https://www.fisherphillips.com/en/news-insights/could-spacex-change-the-labor-boards-future.html [https://perma.cc/DG4X-LNUP].

[71] Order Consolidating Cases, Consolidated Complaint and Notice of Hearing at 4, Space Exploration Technologies Corp., Nos. 31-CA-307446, 31-CA-307532. 31-CA-307539, 31-CA-307546, 31-CA-307551, 31-CA-307555, 31-CA-307514, 31-CA-307525, (Jan. 3, 2024), *available at* https://apps.nlrb.gov/link/document.aspx/ 09031d4583c00986.

[72] Complaint for Declaratory and Injunctive Relief at 10, Space Expl. Techs. Corp. v. NLRB. et. al., No. 1:24-cv-00001 (S.D. Tex. Jan. 4, 2024).

[73] *Id.* at 12.

[74] *Id.* at 15.

[75] *Id.* at 19.

[76] Home Depot USA, Inc., 373 NLRB No. 25, slip op. at *13 (2024).

[77] *Id.* at *1–2.

that the BLM message had a clear connection to the discrimination that occurred in the workplace.[78]

Bolstered by recent First Amendment decisions like *303 Creative*,[79] Home Depot argued that requiring employers to permit BLM messaging in the workplace is tantamount to compelling government speech.[80] The problem with this argument, as the Board points out, is that it is not actually supported by case law. The Board and courts have long recognized that employers *do* have First Amendment rights under the NLRA.[81] But, it is equally well settled that the government may still regulate employer unfair labor practices that impact employer communications "without offending the First Amendment."[82] This is why employees have the right under the NLRA to display pins, stickers, or other insignia that contain messages related to protected, concerted activity.

So why should we care about Home Depot's briefs when the NLRB rejected this argument, and there is well-settled jurisprudence on the matter? Home Depot's First Amendment argument is simply the latest iteration of the "Weaponized First Amendment," a term used to describe the use of First Amendment arguments to achieve a deregulatory agenda. We have seen this strategy work before (*Janus* was decided under the First Amendment, for example). More broadly, this argument is cause for concern because there is legitimate fear of the judicial attack on the administrative state. In the past, Courts have made great efforts to interpret statutes to avoid conflicts with the Constitution. It appears that one can no longer rely on such efforts by the judiciary. Although the Supreme Court established the constitutionality of the NLRA almost a century ago, the current Court has made clear that it is willing to change its mind regarding well-established precedent.

CONCLUSION

So, what is to be done about this juxtaposition of the resurgent worker activism and the hard thump of the judge's gavel? What is to be expected as we see exciting labor law developments on the one hand and the specter of an anti-labor judiciary on the other? If you add of the fact that we now have a second Trump administration with more judicial appointments, the landscape for labor becomes even more bleak.

As we look at landscapes, we ought to consider that what I have reported is but one part of the myriads of challenges ahead of labor at this moment.

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[78] *Id.* at *10.

[79] *See* 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

[80] Home Depot USA, Inc., 373 NLRB No. 25, slip op. at *13 (2024).

[81] *Id.* at *13–14.

[82] NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229, 974 F.3d 1106, 1108 (9th Cir. 2020).

The gains from the Biden Administration and the current Board will need to be channeled into worker organizing at an unprecedented scale.

Workers know the odds are stacked against them and that tomorrow has never been promised. Yet, we see an undaunted Gen Z entering the job market willing to take risks and stand in solidarity with one another. I take solace in the fact that labor has been here before and that throughout history, workers have faced insurmountable odds to achieve wins.

I think about leaders like A. Philip Randolph and the Brotherhood of Sleeping Car Porters who secured critical benefits for Black workers even at a time when even the labor laws discriminated against Black people. I think about César Chávez and Dolores Huerta who, without the protection of federal statutes, changed a nation when they organized thousands of laborers so they could earn a living wage and have humane working conditions. I also think about the challenges confronting public sector unions caused by the *Janus* case. Commentators wondered whether Janus would be the death knell for public-sector workers. It was not, because Workers organized.

I look at the organizing efforts of domestic workers and the success of farm workers who now can unionize in New York State. While I shudder at anti-union states like Alabama and South Carolina, I look at the progressive state law initiatives to enhance worker protection in California, New York, Minnesota, Washington State, and others. I look at the efforts and successes of unions like the UAW who have committed to organizing a hostile south and are winning where they have never won before. Unions are not just winning in manufacturing, it is happening in retail, hospitals, tech, media, museums, and not-for-profits. I look at this landscape and I have to say, maybe labor is not done yet.

Lest we forget, it was not the decisions of a Biden Board or the agenda of a progressive General Counsel that gave rise to this resurgence of labor activism. It is the desires and demands of today's workers. It is the lessons learned from the pandemic—corporate greed and disregard for worker health and welfare, wage disparities. The challenges of AI and other new technologies, and the fissured workplace.

Now, we have union favorability at 71%. Rampant unfair labor practices and hostile local governments have not stopped the momentum of a workforce demanding workplace equity and justice. Nor is it likely that conservative courts seeking to slow this roll will be successful in achieving that end. But they will just make it harder.