UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MOUNTAIRE FARMS, INC.,
Employer

and

Case No. 05-RD-256888

UNITED FOOD AND
COMMERCIAL WORKERS
UNION, LOCAL 27,
Incumbent Exclusive Representative,

and

OSCAR CRUZ SOSA,
Petitioner.

BRIEF OF *AMICI CURIAE*
COALITION FOR A DEMOCRATIC WORKPLACE, AMERICAN TRUCKING ASSOCIATIONS, ASSOCIATED BUILDERS AND CONTRACTORS, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, INDEPENDENT ELECTRICAL CONTRACTORS, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NATIONAL READY MIXED CONCRETE ASSOCIATION, WESTERN ELECTRICAL CONTRACTORS ASSOCIATION

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Colo. Fire Sprinkler, Inc.,
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Colo. Fire Sprinkler, Inc. v. NLRB,
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Conair Corp. v. NLRB,
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Crossett Lumber Co.,
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Lechmere, Inc. v. NLRB,
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Leonard Wholesale Meats, Inc.,
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Loomis Armored US, Inc.,
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Nassau & Suffolk Contractors' Ass'n, Inc.,
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Skyline Distribs v. NLRB,
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Suffolk Banana Co., Inc.,
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Other Authorities

BUREAU OF LABOR STATISTICS, UNION MEMBERS SUMMARY (2019),
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Gerald Mayer, CONGRESSIONAL RESEARCH SERVICE, UNION MEMBERSHIP TRENDS IN THE UNITED STATES (August 31, 2004) ... 8

James Sherk, *Unelected Representatives: 94 Percent of Union Members Never Voted for a Union*, *available at* https://www.heritage.org/jobs-and-labor/report ... 10

NLRB, *Annual Reports*,
available at https://www.nlrb.gov/reports/agency-performance-reports/historical-reports/annual-reports ... 9, 10

NLRB, *Decertification Petitions-RD*,
available at https://www.nlrb.gov/reports/nlrb-case-activity-reports/representation-cases/intake/decertification-petitions-rd ... 9, 10

INTERESTS OF THE *AMICI CURIAE*

The **Coalition for a Democratic Workplace** ("CDW") represents hundreds of employer associations, individual employers, and other organizations that together represent millions of businesses of all sizes. CDW's members employ tens of millions of individuals working in every industry and every region in the United States.

American Trucking Associations ("ATA") is an 86-year old federation and the largest national trade organization advocating for America's trucking industry, with affiliates in all 50 states. Together, our federation represents more than 34,000 motor carriers and suppliers, covering every sector of the industry – from LTL to Truckload, agriculture and livestock to auto haulers, and from large fleets down to the independent contractor and small family-run operations.

Associated Builders and Contractors ("ABC") is a national construction industry trade association representing more than 21,000 members. ABC and its 69 chapters represent all specialties within the U.S. construction industry, comprised primarily of firms that perform work in the industrial and commercial sectors. ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry, which is based on the principles of nondiscrimination due to labor affiliation and fair and open competition.

Associated General Contractors of America ("AGC") works to ensure the continued success of the commercial construction industry by advocating for federal, state and local measures that support the industry; providing opportunities for firms to learn about ways to become more accomplished; and connecting firms with the resources and individuals they need to be successful businesses and corporate citizens. Over 27,000 firms, including more than 7,000 of America's leading general contractors, nearly 9,000 specialty-contracting firms and almost 11,000 service providers and suppliers belong to the association through its nationwide network of chapters.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. 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 curiae* briefs in cases that raise issues of concern to the nation's business community.

Independent Electrical Contractors ("IEC") is the nation's premier trade association representing America's independent electrical and systems contractors with over 50 chapters, representing 3,400 member companies that employ more than 80,000 electrical and systems workers throughout the United States. IEC aggressively works with the industry to promote the concept of free enterprise, open competition and economic opportunity for all.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for nearly two-thirds of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Association of Wholesaler-Distributors ("NAW") is an employer and a non-profit trade association that represents the wholesale distribution industry, the link in the supply chain between manufacturers and retailers as well as commercial, institutional, and

governmental end users. NAW is comprised of direct member companies and a federation of national, regional, state and local associations which together include approximately 40,000 companies operating at more than 150,000 locations throughout the nation. The overwhelming majority of wholesaler-distributors are small to medium size, closely held businesses. The wholesale distribution industry generates $5.9 trillion in annual sales volume and provides stable and well-paying jobs to more than 5.9 million workers.

The **National Federation of Independent Business** ("NFIB"), based in Nashville, Tennessee, is the nation's leading small business association, representing members in Washington, DC, and all 50 state capitals. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses. To protect its members' interests, NFIB frequently files amicus curiae briefs in cases that impact small businesses.

The **National Ready Mixed Concrete Association** ("NRMCA"), founded in 1930, is the leading industry advocate. Our mission is to provide exceptional value for our members by responsibly representing and serving the entire ready mixed concrete industry through leadership, promotion, education and partnering to ensure ready mixed concrete is the building material of choice.

The **Western Electrical Contractors Association** ("WECA") is a regional construction industry trade association representing more than 200 members. WECA's membership represents electrical and low-voltage contractors within the western U.S. construction industry and is comprised of firms that work in the industrial, residential, public works, and commercial sectors.

The foregoing associations, who represent both unionized and non-union employers across the country, will be referred to collectively below as the **"Business *Amici*."** As further explained below, the questions presented by the Board in the Notice are of great importance to the Business *Amici*, as the Board's determination will have immediate and long-lasting effects on their members' labor relations, workplace morale and productivity.

SUMMARY OF ARGUMENT

When the Board created and then expanded the current contract bar doctrine, the agency claimed to be "heed[ing] the appeals" of "the overwhelming majority of labor *and management* representatives." *General Cable Corp.*, 139 NLRB 1123, 1125 (1962) (emphasis added). This "most important consideration" – according to the Board itself – no longer holds true in the modern era of labor relations. The Business *Amici* signing onto this brief represent the management of millions of businesses covering a broad spectrum of industries, both unionized and nonunion, who do *not* agree that the present version of the contract bar is necessary to achieve labor relations stability, and instead believe that it seriously impairs employee freedom of choice in a manner contrary to the Act.

For the reasons discussed below and in the briefs of the Petitioner and the Employer in this case, the Business *Amici* respectfully submit that: (1) the Board should rescind the contract bar doctrine; or (2) the Board should modify the contract bar doctrine significantly to shorten the bar period and lengthen the period during which employees may challenge a union's majority status, both before, during, and after collective bargaining for a new agreement occurs.

ARGUMENT

I. The Board Should Rescind the Contract Bar Doctrine.

A. The Underlying Grounds Used To Justify The Current Contract Bar Doctrine Are No Longer True.

As the Board and courts have long acknowledged, neither the Act nor judicial precedent compels the imposition of a contract bar against representation petitions. *See, e.g.*, *Ford Motor Co.*, 95 NLRB 932, 934 (1951) ("The contract bar rule is not compelled by the Act or by judicial decision thereunder. It is an administrative device early adopted by the Board in the exercise of its discretion as a means of maintaining stability of collective bargaining relationships."); *NLRB v. Dominick's Finer Foods*, 28 F.3d 678, 683 (7th Cir. 1994) ("The contract bar rule is not statutorily or judicially mandated, but is a creation of the Board."); *see also YWCA of Western Massachusetts*, 349 NLRB 762, 776 n.17 (2007) (same); *Direct Press Modern Litho, Inc.*, 328 NLRB 860, 860-61 (1999) (same). The only "bar" to election petitions appearing in the NLRA is the one year "election bar." *See* 29 U.S.C. §§ 159(c)(3) & 159(e)(2).

In the earliest years of the Act, the Board specifically rejected a contract bar. *See, e.g.*, *New England Transp. Co.*, 1 NLRB 130, 137-38 (1936); *Swayne & Hoyt, Ltd.*, 2 NLRB 282, 286 (1936) ("Even if the agreement is assumed to be valid and binding, it nevertheless is no bar to an election and consequent bargaining by the certified representatives of the employees, and can in no wise be construed so as to curtail the right of the employees to change their representatives for bargaining.").

The Board did not recognize a contract bar until 1939. *See Nat'l Sugar Ref. Co.*, 10 NLRB 1410, 1415 (1939). Even in that decision, the Board did not refer to any contract bar "doctrine;" it merely held that no election should occur during the duration of the particular one-year contract at issue in that case. *Id.* at 1415. Without acknowledging that it was overruling precedent, the Board

explained the change by stating only that "[t]he duration of the contract is not for such a long period as to be contrary to the purposes and policies of the Act." *Id.*

Subsequently, asserting the right to exercise its discretion to promote "stability" under the Act, the Board expanded the contract bar, first to a two-year bar and eventually to a three-year bar. *See Pacific Coast Ass'n of Pulp & Paper Mfrs.*, 121 NLRB 990, 992 (1958) (expanding the bar to two years); *General Cable Corp.*, 139 NLRB at 1125 (expanding the bar to three years). Each time the Board expanded the length of the contract bar, the Board acknowledged that any further expansion of the contract bar would infringe on employees' statutory freedom of choice. *See Pacific Coast Ass'n of Pulp & Paper Mfrs.*, 121 NLRB at 992 ("Having thereby substantially reduced the opportunity of employees to redesignate bargaining representatives while a contract is in effect, we do not believe that an extension of time such a contract will bar representation elections is warranted at this time."); *General Cable Corp.*, 139 NLRB at 1125 ("[I]f...we were at present to cause further delay by expanding the bar period to more than 3 years, stability of industrial relations would in our judgment be so heavily weighted against employee freedom of choice as to create an inequitable imbalance.").

But in maintaining and expanding the contract bar in the foregoing cases, the Board engaged in no substantive analysis to explain why one year, two years, or three years was an appropriate amount of time to bar employees from expressing their choice of exclusive labor representation in the manner designated by Congress in Section 9 of the Act. The primary reason given by the Board for expanding the length of the contract bar in its *General Cable* opinion was to "heed[] the appeals" for a more extended contract-bar period by the "overwhelming majority of labor and management representatives." *General Cable Corp.*, 139 NLRB at 1125. The Board added that "[i]ndeed, this substantially unified stand of both labor and management has been a

most important consideration in arriving at our decision." *Id.*

Contrary to the once "unified stand" of labor and management, so heavily relied on by the Board in *General Cable*, there is no longer any consensus of labor and management in support of the contract bar doctrine. Employer opposition to the contract bar has grown in recent decades, as evidenced by the Employer's opposition to the contract bar in this case and by numerous other recent cases. *See, e.g.*, *Silvan Indus.*, 367 NLRB No. 28 (2018); *Brunswick Bowling Prods., LLC*, 364 NLRB No. 96 (2016); *Colo. Fire Sprinkler, Inc.*, 364 NLRB No. 55 (2016); *Shaw's Supermarkets, Inc.*, 350 NLRB No. 55 (2007). The Business *Amici* are submitting this brief as representatives of broad sectors of the business community who likewise do <u>not</u> support the contract bar policy currently being enforced by the Board.

Employers represented by the Business *Amici,* including many unionized employers, have reached the conclusion that by stifling employee discontent over their labor representation, the contract bar is harmful to labor-management relations. In particular, where a substantial number of bargaining unit members have become so dissatisfied with their union representation that they believe it is necessary to take the extraordinary step of petitioning for decertification, it is harmful to workplace morale and productivity for such employees to be frustrated in their decertification efforts by the arbitrary roadblocks of the contract bar doctrine.

Other than the long ago "unified stand" in favor of the contract bar by both labor and management in the 1950's and 1960's – a consensus which no longer exists – the "other elements" cited by the Board in *General Cable Corp*. to support expansion of the contract bar's duration bear little resemblance to 21st century economic conditions. The Board's analysis of these "other elements" in *General Cable* consisted of a cursory statement alluding to "recent developments in the labor movement" [no raiding agreements], "Federal labor legislation" [the newly passed

Landrum Griffin Act], and "the labor law handed down by the Supreme Court" [the *Steelworkers* trilogy]," together with "economic developments resulting from unemployment, the international setting, and technological changes, which tend to complicate and unsettle labor-management relations." *Id*. at 1125-26 & nn.9-11.

The Board gave no explanation how any of the foregoing list of factors supported the contract bar doctrine even in 1962. But it cannot be disputed that organized labor's place in today's economy differs dramatically from the collective bargaining conditions which the Board in *General Cable* sought to "stabilize."[1] *See General Cable Corp.*, 139 NLRB at 1125. In any event, the efforts of the mid-century Board to freeze in place the collective bargaining conditions of that era have been superseded by myriad economic developments, including international and technological changes undreamed of by the mid-20th century Board. Therefore, the archaic grounds on which the Board previously relied to create and expand the contract bar should no longer be allowed to justify impinging on the statutory rights of employees to petition for changes in their union representation.

B. The Current Contract Bar Policy Interferes With the Statutory Right of Employees to Choose or Refrain From Choosing Union Representation

In the decades since *General Cable* was decided, the Supreme Court has recognized that "the NLRA confers rights only on *employees*, not on unions . . . ." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) (emphasis in original)); *see also Circus Circus Casinos, Inc. v. NLRB*, 961 F.3d 469, 478 (D.C. Cir. 2020) (recognizing generally that "employee choice" is "a central policy

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[1] Among the most salient differences between the labor economy of *General Cable* and today is that unionized collective bargaining agreements, which covered 34% of the private sector workforce in the 1950's, now cover less than 7% of the private workforce. Gerald Mayer, CONGRESSIONAL RESEARCH SERVICE, UNION MEMBERSHIP TRENDS IN THE UNITED STATES, CRS-12 (August 31, 2004), *available at* digitalcommons.ilr.cornell.edu; BUREAU OF LABOR STATISTICS, UNION MEMBERS SUMMARY, (2019), *available at* https://www.bls.gov/news.release/pdf/union2.pdf.

of the NLRA"); *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (D.C. Cir. 2018) ("The *raison d'être* of the National Labor Relations Act's protections for union representation is to vindicate the employees' right to engage in collective activity and to empower employees to freely choose their own labor representatives.") (emphasis in original); *Skyline Distribs v. NLRB*, 99 F.3d 403, 411 (D.C. Cir. 1996) (describing the right of employees to bargain collectively through chosen representatives, or to refrain from bargaining altogether, as "[o]ne of the principal protections of the NLRA"); *Conair Corp. v. NLRB*, 721 F.2d 1355, 1381 (D.C. Cir. 1983) (listing "[t]he Act's twin pillars" as "freedom of choice and majority rule in employee selection of representatives").

Section 7 of the Act expressly protects the right of employees to refrain from supporting unions, and Section 9(c)(1) expressly protects the right of employees to petition to decertify unions who they no longer wish to represent them. The contract bar doctrine plainly interferes with these statutory rights of free choice, and the main beneficiaries of this infringement – contrary to the express language of the Act – are labor organizations. *See, e.g.*, *Americold Logistics LLC*, 362 NLRB 493, 503 (2015) (Member Miscimarra, dissenting) (noting that Board decisions have improperly "treat[ed] the Board's 'bar' doctrines as essential means to protect unions from decertification or displacement by a rival union"); *MGM Grand Hotel, Inc.*, 329 NLRB 464, 475 (1999) (Member Brame, dissenting) ("[T]he Board must never forget that unions exist at the pleasure of the employees they represent. Unions *represent* employees; employees do not exist to ensure the survival or success of unions.") (emphasis in original).

In the decade prior to the recent pandemic, decertification elections reached their lowest levels since the 1947 enactment of Section 9(c)(1) in the Taft-Hartley Act.[2] Not coincidentally, it

[2] NLRB, *Annual Reports*, 1945-2009, *available at* https://www.nlrb.gov/reports/agency-performance-reports/historical-reports/annual-reports; NLRB, *Decertification Petitions-RD*, *available at*

was determined in the last decade that ninety-four percent of employees represented by unions have never voted for the union representing them.[3] The contract bar doctrine appears to have contributed to the decline in employee petitions and should therefore be rescinded or modified to allow greater choice by employees as intended by the Act.

C. The Contract Bar's Infringement of Employee Rights Is Compounded By Narrow and Confusing Window Periods Which Further Restrict the Ability of Employees to Petition For Decertification

Under the current contract bar doctrine, an employee may file a decertification petition only during a narrow, thirty-day period between sixty and ninety days before the end of the contract. This unnecessary restriction was imposed by the Board in the same year as the *General Cable* decision, and should be reconsidered together with the contract bar itself. *See Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1001 (1962).[4] The problems with this window period are twofold. First, the narrow scope of the window makes it difficult for employees to gather the necessary signatures to timely file a petition for decertification.[5] Second, because the window occurs before the contract runs out, employees do not have any recourse if they are dissatisfied with the new contract that the union negotiates on their behalf.[6]

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https://www.nlrb.gov/reports/nlrb-case-activity-reports/representation-cases/intake/decertification-petitions-rd.

[3] James Sherk, *Unelected Representatives: 94 Percent of Union Members Never Voted for a Union*, *Available at* https://www.heritage.org/jobs-and-labor/report.

[4] The Board in *Leonard Wholesale Meats, Inc*. narrowed the start of the decertification window period from 150 days prior to contract expiration, which was the window previously established by the Board in *Deluxe Metal Furniture Co*., 121 NLRB 995, 1000 (1958). The Board thereby arbitrarily shortened the window period from a total of 90 days down to 30 days.

[5] Employees considering decertification, who often lack representation by counsel, additionally may struggle to assess when the thirty-day window occurs. Even if they are aware of the counter-intuitive timing of the window period itself, they may confront union contracts which have uncertain expiration dates. *See Suffolk Banana Co., Inc.*, 328 NLRB 1086 (1999); *Watkins Sec. Agency of DC, Inc.*, No. 05- RD-201720 (Aug. 16, 2017). Employees who have missed their chance due to confusion under these rules, have nevertheless been compelled to wait another three years to challenge the union. *See also Valley Doctors Hosp., Inc*., 222 NLRB 907, 907 (1976)

[6] *See generally* Sherk, *Unelected Representatives*, *supra*.

The obstacles faced by disaffected employees under the contract bar doctrine are exacerbated by case law depriving employees of the right to ratify the bargaining agreements negotiated by their exclusive union representatives. *See, e.g.*, *Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208, 212 (6th Cir. 1967) ("The Union, by virtue of its certification as exclusive bargaining agent, was empowered by its members to make agreements on behalf of the employees it represented without securing the approval of those employees."); *N. Country Motors Ltd.*, 146 NLRB 671, 674 (1964) ("The Act imposes no obligation upon a bargaining agent to obtain employee ratification of a contract it negotiates in their behalf."). The contract bar, including its narrow pre-negotiation window, thus deprives many employees of any opportunity to challenge their exclusive union's bargaining status at the time they most need to do so, *i.e.*, after the union has made a bad multi-year deal with their employer.

D. The Contract Bar Doctrine Is Not Needed to Maintain Stability In Collective Bargaining

To the extent that industrial stability is equated with the right of employees to petition for elections during the term of union collective bargaining agreements, there is no empirical data showing that the present contract bar doctrine is necessary to achieve such stability. Indeed, if the lack of a contract bar by itself caused such instability, there would be little reason for parties to enter into contracts for longer than three years. Many employers and unions, however, do enter into contracts with durations exceeding three years, and have continued to do since *General Cable* was decided. *See, e.g.*, *Coca-Cola Enters., Inc.*, 352 NLRB 1044, 1046 (2008) (referencing five-year contract); *Shen-Valley Meat Packers, Inc.*, 261 NLRB 958, 958 (1982) (same); *GES Exposition Servs., Inc.*, Case No. 12-RC-9333, at 6 (2008) (same); *Madelaine Chocolate Novelties, Inc.*, 333 NLRB 1312, 1312 (2001) (referencing four-year contract). Notwithstanding the Board's having limited the contract bar to no more than three years, there is no data showing significantly

higher numbers of decertification petitions being filed in the fourth or fifth years of over-long union contracts. In other words, labor stability has been maintained in four-year or five-year bargaining agreements without any contract bar in effect.

Similarly, experience in the construction industry under Section 8(f) of the Act, where no contract bar is permitted at all, shows that the absence of a contract bar does not lead to substantially higher numbers of mid-term decertification petitions. Section 8(f) allows construction industry employers to enter into collective bargaining agreements without any showing that a majority of employees in the bargaining unit support or desire such representation. 29 U.S.C. § 158(f). Recognizing the unfairness of imposing union representation and bargaining agreements upon employees without their consent, Congress made clear in Section 8(f) that such an agreement "shall not be a bar to a petition filed pursuant to section 159(c) or 159(e)." It is thus well settled that employees have the unfettered right to petition for decertification of any union signatory to a bargaining agreement entered into pursuant to Section 8(f), at any time during the agreement's term. *See John Deklewa & Sons, Inc.*, 282 NLRB 1375, 1385 (1987). Notwithstanding the absence of any contract bar rule in the construction industry, there has been no noticeable proliferation of mid-term decertification petitions in that industry since the enactment of Section 8(f) in 1959.

E. The Board Is Authorized to Rescind or Modify the Contract Bar Policy, Notwithstanding the Policy's Age

Notwithstanding the longstanding nature of the contract bar policy, the Board unquestionably has the authority to reverse or modify it so long as it provides a rational explanation for doing so. Certainly, previous Boards have "exhibited no reluctance to modify well-established principles involving many of the most fundamental aspects of the Act." *Raytheon Network Centric*

Sys., 365 NLRB No. 161, slip op. at 19 (2017) (referring to the previous Board's overruling of numerous longstanding precedents).

For example, in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Board overruled eight decades of precedent adhering to *Crossett Lumber Co.*, 8 NLRB 440 (1938), by awarding interim employment expenses for the first time. There is no shortage of other examples in recent Board decisions. *See, e.g., Guardsmark, LLC*, 363 NLRB No. 103, slip op. at 1 (2016) (overruling *Oregon Washington Telephone*, 123 NLRB 339 (1959) regarding mail ballot issues); *Piedmont Gardens*, 362 NLRB 1135, 1138 (2015) (overruling *Anheuser-Busch, Inc.,* 237 NLRB 982 (1978) as to disclosure of witness statements); *Loomis Armored US, Inc.*, 364 NLRB No. 23, slip op. at 2 (2016) (overruling *Wells Fargo Corp.*, 270 NLRB 787 (1984) regarding mixed guard unions). Among the reasons given in the foregoing cases to overrule longstanding precedent were: to restore older precedents (*Piedmont Gardens*, 362 NLRB at 1138); to stop "unnecessarily sacrific[ing] one of the Act's primary objectives" *(Loomis Armored US, Inc*., 364 NLRB No. 23, slip op. at 2); to "avoid perpetuating... confusion" (*Guardsmark, LLC*, 363 NLRB No. 103, slip op. at 3); and simply to "effectuate[] the purposes of the Act." (*King Soopers, Inc*., 364 NLRB No. 93, slip op. at 7) (internal citations omitted).

Any of the foregoing justifications that the Board has previously relied on to overrule longstanding precedent apply equally or more so to the contract bar doctrine. Thus, a decision by the Board to end the contract bar and return Board policy to earlier precedent would be analogous to the Board's decision in *Piedmont Gardens* to conform Board policy on witness statements to older precedent. *See* 362 NLRB at 1138. The present case also mirrors the Board's justification for overruling precedent in *Loomis Armored US, Inc*., because the contract bar doctrine has "unnecessarily sacrifice[d] one of the Act's primary objectives," in this case the primary objective

of ensuring employee' freedom to choose their bargaining representative. 364 NLRB No. 23, slip op. at 2. Here too, as the Board asserted in its justification for overruling longstanding precedent in *Guardsmark, LLC,* the contract bar doctrine and its narrow open periods have created great confusion for employees attempting to navigate their rights under the Act. 363 NLRB No. 103, slip op. at 1.

It would therefore be consistent with the Board's past practice to overrule the contract bar doctrine, or significant portions of it, for any or all of the reasons set forth above and in the briefs of the Petitioner and the Employer.[7]

II. If The Board Does Not Rescind the Contract Bar Entirely, Then the Board Should Modify It to Better Protect the Section 7 Rights of Employees

A. The Board Should Limit the Duration of the Bar Period to One Year

If the Board maintains the contract bar, the Business *Amici* believe that the bar period should be significantly shortened from its current three-year length. At most, the Board should return to the one-year bar originally adopted by the Board in *Nat'l Sugar Refin. Co.*, 10 NLRB at 1415. Such a one-year bar would be the most consistent with the one-year election bar under the NLRA. 29 U.S.C. §§ 159(c)(3) & (e)(2).

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[7] The Union's brief in this case contests the Board's authority to decide contract bar issues, which the Union contends were not expressly raised in the petition for review. U. Br. at 8-13. To the contrary, as an appellate body, the Board has the authority "to resolve issues based on a legal standard that has not been expressly raised by the parties." *See Boeing Co.*, 365 NLRB No. 154, 168 (2017) (citing *Kamen v. Kemper Financial Servs.*, 500 U.S. 90, 99 (1991)); *see also BFI Newby Island Recyclery*, 362 NLRB 1599 (2015) (previous Board majority on its own initiative asked the parties and *amici* to brief whether to modify the joint employer standard). Nor is the Board's reconsideration of the contract bar doctrine in any way precluded by the Administrative Procedure Act. *See NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 293-94 (1974) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)); *see also Caesars Entm't Corp*., Case No. 28-CA-060841 (Notice), 2018 NLRB LEXIS 677, at *3 n.1 (Aug. 1, 2018) (rejecting APA objections by dissenting Board members).

B. The Board Should Extend the Decertification Window Periods Up to Six Months Before the End of the Contract and Sixty Days Following the Ratification of the Successor Contract.

As noted above, under the current contract bar doctrine, an employee may file a decertification petition only during a narrow, thirty-day period between sixty and ninety days before the end of the contract. Largely for the reasons stated by the parties, the Business *Amici* believe that if the contract bar is retained, the window for decertification petitions should run for at least six months preceding the expiration of the current contract. This will allow employees more time to navigate the requirements to decertify a union, such as collecting requisite signatures.

Additionally, the Business *Amici* believe that the window should remain open during the *entire* six-month period preceding the expiration of the contract, even if the employer and the union enter into another contract within the six-month period. Finally, the Business *Amici* believe that a second, shorter window of sixty days should occur *after* the employer and union agree to a successor contract, so that employees may review the agreement entered into, which they may have had no chance to ratify.

As discussed above, under current law, employees do not have the right to vote on a particular contract that the union has purportedly negotiated on their behalf; and the employees therefore may have no means to express their dissatisfaction with the union's negotiated agreement, unless there is a window of opportunity for decertification after the agreement has been negotiated. This second window would allow employees to select a new representative if they are displeased with the negotiated contract. Moreover, the knowledge that employees could challenge the union's leadership after the employer and union ratify the contract would keep unions more accountable to the employees they represent.

C. The Board Need Not Modify the Formal Requirements for Affording Bar Quality under *Appalachian Shale*

If the contract bar doctrine is retained for any length of time, then the established requirements for affording bar quality to a contract should remain consistent with the Board's current rules. The Business *Amici* support the requirement that a contract which outlines sufficient terms and conditions of employment must be in writing and signed by the parties before a petition for decertification is filed. *Appalachian Shale Products, Co.*, 121 NLRB 1160, 1162-64 (1958); *Madelaine Chocolate Novelties, Inc.*, 333 NLRB at 1312; *Television Station WVTV*, 250 NLRB 198, 199 (1980); *see also Jackson Terrace Assocs.*, 346 NLRB 180, 181 (2005). The Business *Amici* also support requiring ratification of the collective bargaining agreement in all cases before the Board awards contract bar quality. *See Merico, Inc.*, 207 NLRB 101, 101 (1973).

D. Changed Circumstances During the Bar Period Should Limit Bar Quality

The Business *Amici* believe that several types of changed circumstances may support the need for a representation election, even if some aspects of the contract bar doctrine are retained. Specifically, increases in bargaining unit size through accretion should support a representation election; otherwise, a large number of new employees may be unable to exercise the free choice granted to them under the Act. Another instance supporting a limit on bar quality would be if the union undergoes an organizational change or merges with another union.

E. Contracts with Union Security Clauses Unlawful on Their Face Should Preclude the Application of the Contract Bar

Finally, the Business *Amici* support the positions of the Employer and the Petitioner here that the contract bar should not apply where a contract includes a union security clause that is unlawful on its face, as in the present case. *Paragon Prods. Corp.*, 134 NLRB 662 (1961). Such contracts could also include those requiring bargaining unit employees to become members of the

union, without clarifying the rights of non-member employees to object to becoming union members beyond payment of dues. *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988). In right-to-work states, the contract bar should similarly not apply where a contract includes a union security clause. The Board has concluded that the "very existence in the contract of the union security provision . . . acts as a restraint upon employees desiring to refrain from union activities." *See, e.g.*, *Hickey Cab Co.*, 88 NLRB 327, 329 (1950); *Nassau & Suffolk Contractors' Ass'n Inc.*, 118 NLRB 174, 205 (1957) (same). As such, if the Board maintains the contract bar doctrine, it should not afford bar quality to such contracts.

CONCLUSION

For the reasons set forth above, the Board should overrule the contract bar doctrine. Alternatively, to the extent the Board decides to maintain the contract bar doctrine, the Board should modify it to shorten the length of the bar and widen the window period during which employees may petition to decertify the union.

Respectfully submitted this 7th day of October, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Board's "Notice and Invitation to File Briefs," the undersigned hereby certifies that a copy of the foregoing amicus brief in Case 05-RD-256888 was electronically filed via the NLRB E-Filing system with the National Labor Relations Board and served via electronic mail to the parties listed below on this 7th day of October, 2020.

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