NO. _____

# In the Supreme Court of the United States

WISMETTAC ASIAN FOODS, INC.,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Did the National Labor Relations Board violate Section 8(c) of the National Labor Relations Act, 29 U.S.C. § 158(c), which guarantees employer free speech as protected by the First Amendment to the United States Constitution, by finding that Petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), when it provided information to its employees as to how to revoke a previously executed union authorization card?

2. Did the National Labor Relations Board violate Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, by interfering with employees' "right to refrain" from unionization by disallowing Petitioner to provide its employees information as to revocation of union authorization cards.

3. Did the Court of Appeals for the Ninth Circuit issue a ruling contrary to other United States Circuit Courts of Appeal in addressing this issue?

4. Is the case law of the National Labor Relations Board and the United States Courts of Appeal, addressing the concept of "ministerial assistance" in cases similar to the present facts inconsistent, ambiguous and vague, making it impossible for employers to engage in protected First Amendment activity?

## PARTIES TO THE PROCEEDINGS

### Petitioner

Wismettac Asian Foods, Inc.

### Respondents

National Labor Relations Board

International Brotherhood of Teamsters Local 630 (charging party before the National Labor Relations Board in case 21-CA-207463, et al.)

## CORPORATE DISCLOSURE STATEMENT

Wismettac Asian Foods, Inc. is a privately held California corporation. Wismettac Asian Foods, Inc. is a wholly owned subsidiary of Nishimoto Co., Ltd., a Japan-based holding company, which is listed on the Tokyo Stock Exchange.

## LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

No. 20-73768

Wismettac Asian Foods, Inc., *Petitioner*,
v. National Labor Relations Board, *Respondent*

No. 21-70142

National Labor Relations Board, *Petitioner*,
v. Wismettac Asian Foods, Inc., *Respondent*

Date of Final Opinion: February 2, 2022

Date of Rehearing Denial: February 24, 2022

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National Labor Relations Board

No. 21-CA-207463, 21-CA-208128, 21-CA-209337, 21-CA-213978, 21-CA-219153, and 21-CA-212285

Wismettac Asian Foods, Inc. *and*
International Brotherhood of Teamsters, Local 630 *and* Rolando Lopez

Date of ALJ Decision: August 30, 2019

Date of Final Order: October 14, 2020

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# In the Supreme Court of the United States

WISMETTAC ASIAN FOODS, INC.,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

WISMETTAC ASIAN FOODS, INC. (hereinafter, "Petitioner") is an employer as defined by Section 2.2 of the National Labor Relations Act ("NLRA" or the "Act"), 29 U.S.C. § 152, and respectfully petitions for a writ of certiorari to review the decision of the National Labor Relations Board ("NLRB") in *Wismettac Asian Foods, Inc.,* 370 NLRB 35 (2020), as upheld by the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The decision of the United States Court of Appeal for the Ninth Circuit (App.1a-6a), upholding enforcement of an order of the NLRB (App.7a-26a) issued in *Wismettac Asian Foods, Inc.*, 370 NLRB 35 (2020). The Ninth Circuit did not designate the opinion for publication.

## JURISDICTION

The opinion of the Ninth Circuit was entered on February 2, 2022. The Ninth Circuit denied a timely filed petition for rehearing on February 24, 2022. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit assumed jurisdiction under 29 U.S.C. § 160(f).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### FEDERAL CONSTITUTIONAL PROVISIONS

**U.S. Const. amend. I**

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably

to assemble, and to petition the Government for a redress of grievances.

## FEDERAL STATUTORY PROVISIONS

**Section 8(c) of the NLRA, 29 U.S.C. § 158(c):**
[Expression of views without threat of reprisal or force or promise of benefit]

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

**Section 7 of the NLRA, 29 U.S.C. § 157:**

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title]. (Emphasis added.)

**Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1):**

> It shall be an unfair labor practice for an employer —(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

Additional pertinent constitutional and statutory provisions are reprinted in the Appendix to this petition. (App.232a-233a).

## STATEMENT OF THE CASE

### A. Underlying Events

Petitioner is a Japanese owned company operating in the United States and is in the business of distributing Asian food products around Southern California from its branch office in Santa Fe Springs. From August 2017 into the Spring of 2018, Petitioner was the object of a highly contentious union organizing drive by the International Brotherhood of Teamsters, Local 630 (the "Union"). The conduct of the Union included an unlawful and disruptive trespass action on Petitioner's premises on August 21, 2017.

The basic operative facts of this case are not in dispute. As discussed below, Petitioner provided its employees with information as to how such employees could disassociate themselves from the Teamsters Union. In labor relations terminology developed by the NLRB, an employer's action in such circumstances is referred to as "ministerial assistance."

There were two different NLRB conducted elections, on September 17, 2017 and February 6, 2018. There were also unfair labor practice charges filed. Specifically, claims were made in cases 21–CA–207463, 21–CA–208128, 21–CA–209337, 21–CA–213978, 21–CA–219153, and 21–CA–212285 as well as in election objections and cross-objections filed by both parties.

During this process, Petitioner, in order to maintain its business, enforced reasonable and existing rules of discipline when employees engaged in misconduct; while also engaging in speech protected under the First Amendment and Section 8(c) of the NLRA, 29 U.S.C. § 158(c), explaining to its employees Petitioner's legitimate beliefs that unionization was unnecessary.

In order for the NLRB to conduct an election for representation among the employees, there must be a sufficient "showing of interest" (employee support) to trigger the representation process which culminates in an election. *See* 29 U.S.C. § 151, 156, Section 102, et al. This employee showing of interest is manifested by so-called "authorization cards," which are cards signed by an employee expressing support for a particular union.

During the course of the organizing drive and NLRB elections, Petitioner was approached by a number of employees, asking if they could revoke or disavow the authorization cards they previously signed in support of the Teamsters. Petitioner provided employees with information on how to do so (see below).

Each of the actions taken towards its employees by Petitioner was not discriminatory, but instead based upon good faith review of the employee conduct at issue and the actions taken were entirely justified under those circumstances.

### B. Procedural Background

Despite the proper nature of Petitioner's actions, the NLRB found that its conduct was in violation of the Act.

There were three administrative/judicial decisions in the case. The NLRB Administrative Law Judge

Eleanor Laws ruled on August 30, 2019 that the actions taken by Petitioner of supplying its workers information about revocation of authorization cards was unlawful (App.27a-229a); her decision was then upheld by the full National Labor Relations Board on October 14, 2020 in *Wismettac Asian Foods, Inc.*, NLRB 370 No. 35 (2020) (App.7a-26a); and the Board order was enforced by the Court of Appeal for the Ninth Circuit on February 2, 2022 (App.1a-6a).

The aforementioned cases detail the events involving the Petitioner, the Union and the NLRB.

### C. Facts Related to Petitioner's Communication to Employees as to Revocation of Authorization Cards

The facts surrounding the Petitioner's actions is discussed by the Administrative Law Judge (App.27a-229a).

Petitioner's communications regarding the authorization cards was testified to at the NLRB trial by labor relations consultant Gustavo Flores. (App.234a-256a). Mr. Flores testified that he was working in a consulting capacity for Petitioner in relation to the ongoing union organizing drive. Mr. Flores also testified that he had received questions from employees as to how they could revoke previously signed authorization cards and/or otherwise disassociate from the Teamsters Union. Mr. Flores conducted three meetings during March of 2018, during which handouts and a sample letter were made available to employees. They stated:

> To WLA Employees:
>
> A number of employees have approached WLA management asking how they can revoke authorization cards they may have previously signed and/or resign their membership in Teamsters Local 630. Attached is a sample letter that can be sent to Local 630 for card revocation/membership resignation.
>
> Sending this letter is your individual choice. There will be no adverse job consequences whether you send or do not send such a letter. WLA does not discriminate against employees based upon their Union affiliation or support.
>
> Should you have questions you may contact NLRB Region 21 NLRB (213-894-5254 or 888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449) and/or the National Right to Work Legal Defense Foundation (800-336-3600 or www.nrtw.org/free-legal-aid).

(*See* GC Exhibit 20 (App.257a)).

And (the sample letter):

> Gentlemen:
>
> I write to inform you that I do not want to be "represented" by your Union, do not wish to be a member of your Union, and do not support your Union in any manner. Please consider my opposition to representation by your Union to be permanent and continuing in nature.
>
> I hereby revoke and rescind any Union "authorization" card, or any other indication of support for your Union, that I may have signed in the past. Any such card or indication of support for your Union is null and void, effective immediately. To the extent I may have become a member of the International Brotherhood of Teamsters/Teamsters Local 630, I hereby resign such membership.
>
> Please return to me any Union authorization card that I may have signed. Alternatively, please inform me in writing that you are honoring this revocation and rescission of support for your Union.
>
> Please be aware that refusing to honor my card revocation/resignation of membership will violate my rights under the National Labor Relations Act. Moreover, representing to my Employer, Wismettac Asian Foods, Inc., that I support representation by your Union will similarly violate my legal rights.

(*See* GC Exhibit 21 (App.258a)).

Mr. Flores's testimony was clear that these handouts were not "distributed," they were only left in a location where they could be accessed by the employees. (App.248a). With regard to the issue as to whether or not this information was provided in response to employee inquires, Mr. Flores testified as follows:

> Q. BY MR. WILSON: Okay. So what information did you become aware of then in January of 2018 about the topic referenced in the first sentence of General Counsel 20?
>
> A. Employees raised the question how can I get rid of this union? How can I retrieve my union authorization card that I signed because I am tired of this?
>
> Q. Okay. And did employees tell you that directly?
>
> A. Yes.
>
> Q. And that was in January 2018.
>
> A. Correct.

(App.242a).

The factual testimony offered by Mr. Flores above was not disputed. However, the Administrative Law Judge, the NLRB, and the Ninth Circuit ruled that the information provided by consultant Flores regarding revocation of authorization cards was unlawful. In the NLRB decision there was a very strong and persuasive dissenting opinion as to why the Petitioner's conduct was not unlawful.

This issue is addressed by NLRB Member Emanuel in his dissent. (App.10a-12a). In reviewing Petitioner's communication, and the facts surrounding it, Board Member Emanuel stated as follows:

Member Emanuel would reverse the judge's finding that the Respondent violated Sec. 8(a)(1) by informing employees of their right to revoke their union authorization cards and providing employees with sample revocation forms. An employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance or otherwise creates a situation in which employees would tend to feel peril in refraining from such revocation. *R.L. White Co.*, 262 NLRB 575, 576 (1982). Here, there is no evidence that the Respondent attempted to ascertain whether employees revoked their authorization cards. Nor is there any evidence that the Respondent threatened or coerced employees to revoke their cards. Moreover, the aid rendered by the Respondent, supplying information and sample revocation forms, constituted mere ministerial assistance. *See*, *e.g.*, *Ernst Home Centers, Inc.*, 308 NLRB 848, 848 (1992); *Mariposa Press*, *supra*, 273 NLRB at 529–530. Member Emanuel recognizes that the Respondent committed other unfair labor practices. However, these violations, while serious, did not create an atmosphere where employees would tend to feel peril in refraining from revoking their authorization cards. There is no link between the violations and the card signing process, and most of the violations were remote in time. Furthermore, in its letter informing employ-

ees of their right to revoke their authorization cards, the Respondent assured employees that the decision was their "individual choice" and that there would be "no adverse job consequences" whether or not they revoked their cards. *See Mariposa Press*, *supra*, 273 NLRB at 530. *See also AdvancePierre Foods, Inc.*, 366 NLRB No. 133, slip op. at 4 fn. 9 (2018) (Member Emanuel, dissenting in part), enfd. 966 F.3d 813 (D.C. Cir. 2020).

Unlike his colleagues, Member Emanuel would not find the Respondent's conduct unlawful based on its timing, shortly after the second election. Under Sec. 7, the employees retained the right to revoke their authorization cards after the election and the Respondent did no more than truthfully inform them of that right using language that was factually and legally accurate, in response to the employees' inquiries. At the time the Respondent did so, moreover, the outcome of the election was unknown. There were pending objections and 54 determinative challenged ballots. The objections and challenges were not resolved, and the Union's representative status was not determined, until more than 2 years after the Respondent apprised the employees of their right to revoke their authorization cards. In these circumstances, Member Emanuel does not agree with his colleagues that employees would reasonably view the Respondent's actions "as a coercive attempt to undermine the results of that election and to invalidate the Union's representative status at a time

> when no challenge to that status could be raised." The majority's reliance on *Adair*, *supra*, 290 NLRB at 318, is misplaced. In *Adair*, the Board relied on two factors that are not present in this case. First, the Board found that the employer "put[] employees 'in the limelight and on the spot' in a manner inconsistent with their basic Section 7 right freely to choose whether to engage in or refrain from union activities" by directing them to their supervisors to request revocation forms. *Id.* Second, the Board found that the coercive impact of the employer's conduct "was not mitigated by any employer assurances against reprisals for failing to request a form." *Id.* In Member Emanuel's view, these factual differences provide significant grounds for distinguishing *Adair* from the present case. Accordingly, Member Emanuel would dismiss this allegation of the complaint.

(Dissent at App.10a-12a (emphasis added)).

On December 22, 2020, Petitioner filed a petition for review pursuant to Section 10(f) of the NLRA, as amended (29 U.S.C. § 160(f)) and Rule 15 of the Federal Rules of Appellate Procedure (Fed. R. App. P. 15); and, the NLRB filed a cross-application for enforcement on January 22, 2021 pursuant to Section 10(e) and (f) of the NLRA, as amended (29 U.S.C. § 160(e) and (f)). Petitioner raised the issue in its opening brief before the Ninth Circuit, yet in the Ninth Circuit's decision on February 2, 2022, it barely references the facts or legal analysis by the Board of Petitioner's conduct regarding authorization card revocation, stating only:

> The ALJ's finding that WLA violated § 8(a)(1) by soliciting employees to revoke union authorizations is supported by substantial evidence. *See NLRB v. Deutsch Co., Metal Components Div.*, 445 F.2d 902, 906 (9th Cir. 1971). WLA mailed employees a letter explaining how to revoke authorization with a sample revocation letter attached. WLA held meetings in which sample revocation forms were distributed, and its labor consultant told workers in those meetings that "the Union is not going to win" the election. The consultant testified that WLA wanted to explain "how can [employees] get rid of this union? How can [employees] retrieve [their] union authorization card. . . because [employees are] tired of this?" But there is no evidence that any employee ever inquired with WLA about revoking union authorization.

(App.5a-6a)

The above quote by the Ninth Circuit does not address the issues raised by Petitioner as to the legality of the information provided and the opinion is factually incorrect as to what was communicated to the employees. Additionally, contrary to the Ninth Circuit decision, there was testimony by Mr. Flores (*see* above) that there were in fact employees inquiries.

Thereafter, on February 2, 2022, Petitioner filed a petition for rehearing, which was denied on February 24, 2022. (App.229a.)

## REASONS FOR GRANTING THE PETITION

In recent years, there has been a major surge in union organizing under the NLRA. Its extremely important that there is clarity as to permitted speech during the course of union organizing and individual employees are aware that they have a right to refrain from engaging in union activity.

Employers covered by the NLRA have a protected right to engage in employee communications which are free from coercion as defined by the Act. To avoid erroneous depravations of an employer's First Amendment right, this Court should clarify the extent to which an employer can communicate to its employees regarding revocation of authorization cards. Additionally, employees have a right to "refrain from unionization" and that right should not be interfered with by limiting non-coercive lawful employer communications to employees. The decision of the NLRB and the courts are confusing and contradictory as to the right of an employer to provide so-called "ministerial assistance" to employees in exercising this right, in circumstances such as the present case.

### I. THE UNDERLYING DECISIONS FAIL TO PROTECT AN EMPLOYER'S PERMISSIBLE FIRST AMENDMENT SPEECH GUARANTEED BY NLRA SECTION 8(C).

As noted by the Court, Section 8(c) guarantees employer free speech under the NLRA. In fact, the U.S. Supreme Court has long recognized the constitutionally based protections of employer free speech under Section 8(c). As the Board noted in *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969),

> But we do note 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. Thus, § 8(c) (29 U.S.C. § 158(c)) merely implements the First Amendment by requiring that the expression of "any views, argument, or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of § 8(a)(1). Section 8(a)(1), in turn, prohibits interference, restraint or coercion of employees in the exercise of their right to self-organization.

*Id*. at 617.

In other words, the effect of 8(c) is to incorporate the First Amendment into the NLRA as long as the employer's speech is not coercive of employee rights protected by the Act.

The U.S. Supreme Court reasserted this principle in *Chamber of Commerce of the United States v. Brown*, 554 U.S. 60 (2008). The case involved restrictions put upon healthcare employers, who receive Medicaid funds, preventing them from expressing their views against unionization. The primary issue in the Court's decision was "federal preemption," but the court also addressed the 8(c) issue noting:

> From one vantage, § 8(c) "merely implements the First Amendment," *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), in that it responded to particular constitutional rulings of the NLRB. *See* S.Rep. No. 80-105, pt. 2, pp. 23–24

> (1947). But its enactment also manifested a "congressional intent to encourage free debate on issues dividing labor and management." *Linn v. Plant Guard Workers,* 383 U.S. 53, 62, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA 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." *Letter Carriers v. Austin*, 418 U.S. 264, 272–273, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974). . . . In the case of noncoercive speech, however, the protection is both implicit and explicit. Sections 8(a) and 8(b) demonstrate that when Congress has sought to put limits on advocacy for or against union organization, it has expressly set forth the mechanisms for doing so.

*Id*. at 67-68.

First, it is uncontradicted that Mr. Flores was acting in response to employee inquiries about this issue. Mr. Flores testified at length that prolonged association with the Union was a concern of many employees and they wished to disassociate. (App.242a). There is no evidence whatsoever that Petitioner and/or Mr. Flores instigated employees or suggested to them that they should revoke their authorization cards.

Also, the employer communication explicitly stated that seeking to revoke the authorization cards was voluntary and that no adverse job actions against employees would be taken. (*See* GC Exhibit 20 (App.257a)).

Board Member Emanuel's dissent is correct in asserting that that there was no coercion of employees; Petitioner did not initiate the revocation effort; the election was still in doubt, *i.e.*, there were fifty-four challenged ballots outstanding, meaning the revocation of the cards was in fact potentially relevant; no employees were singled out in the meetings with Mr. Flores; and any actual request to revoke an authorization card only occurred if an employee mailed such a request to the Union. Under these circumstances, Petitioner/Mr. Flores did not violate the Act. And there was no contrary testimony offered by the General Counsel establishing intimidating and/or coercive conduct.

Neither the Board nor the Ninth Circuit decisions identify how Petitioner's conduct standing alone was unlawful. Instead, the Board seems to justify its findings that Petitioner violated the Act, not because of the events occurring at the meetings in March of 2018, but because it found that Petitioner committed other unfair labor practices. Instead of explaining why the particular exchange between Petitioner and its employees as to the authorization cards was independently unlawful, the Board simply "bootstraps" its findings of other unlawful conduct by Petitioner to justify its finding.

## II. THE NLRB AND THE NINTH CIRCUIT DECISIONS INTERFERED WITH EMPLOYEES SECTION 7 RIGHTS TO "REFRAIN" FROM UNIONIZATION.

While Section 7 gives employees certain rights to engage and participate in concerted activities on behalf of a labor organization, it likewise explicitly states that employees have a right to "refrain" from such activity. As stated by the Court:

> Moreover, the amendment to § 7 calls attention to the right of employees to refuse to join unions, which implies an underlying right to receive information opposing unionization. Finally, the addition of § 8(c) expressly precludes regulation of speech about unionization "so long as the communications do not contain a 'threat of reprisal or force or promise of benefit."

*Chamber of Commerce of the United States v. Brown*, 554 U.S. at 68 (quoting *Gissel Packing,* 395 U.S. at 618).

In this case, employees approached the Petitioner seeking information about how to disassociate themselves from the Teamsters Union. The Board in the Ninth Circuit interfered with the employees' right to refrain under Section 7 by finding Petitioner's conduct unlawful.

## III. THE BOARD'S MINISTERIAL ASSISTANCE STANDARD IS UNCLEAR AND APPLIED INCONSISTENTLY.

The existing decisions of the Board and the courts regarding an employer's right to provide "ministerial assistance," under circumstances similar to those in the present case, to employees who seek information regarding refraining from union activities are inconsistent and set an impossible standard for employers to follow.

Historically, when employer speech is at issue, there is a tension between the statutory acknowledgment of an employer's right to communicate freely with employees so long as the communication is non-coercive (Section 8(c)), and the Board's concern with enforcing Section 8(a)(1), *supra*, of the Act (which makes it an unfair labor practice to interfere with, restrain or coerce employees in the exercise of their Section 7 rights). Employer communication about the revocation of authorization cards or decertification are examples of this tension, and naturally, the standard the Board uses to analyze the lawfulness of an employer's communications must take this tension into account.

When determining whether an employer's assistance in either context is unlawful, the Board determines "whether the [employer's] conduct constitutes more than ministerial aid [or assistance]." *Times-Herald, Inc.*, 253 NLRB 524 (1980); *see also Sears, Roebuck & Co. & Local 881 United Food & Commercial Workers*, No. 13-CA-191829, 2018 WL 3993289, at *1 (Aug. 17, 2018) (stating "[i]n allowing employers to provide employees with information and other ministerial aid in response to questions about ending union representation, the Board has balanced employers' free

speech rights recognized in Section 8(c) of the Act with employees' right under Section 7 of the Act to not be coerced by their employers in their choices regarding collective-bargaining representatives"). However, the definition of what constitutes "ministerial aid" or "ministerial assistance" is unclear to both employers and reviewing courts. In fact, in review of an NLRB order regarding decertification and ministerial aid, the Seventh Circuit stated, "we are unclear just what the Board's rule is." *Vic Koenig Chevrolet, Inc. v. NLRB*, 126 F.3d 947, 950 (7th Cir. 1997).

In *Vic Koenig Chevrolet*, the Seventh Circuit denied a Board order that applied a ministerial assistance standard. Instead, the court applied Section 7's "unquestioned standard that the employer must not . . . interfere with employee free choice." *Vic Koenig Chevrolet*, 126 F.3d at 950. In reviewing the Board's decision, the court took issue with "the Board expressly endors[ing] the 'no more than ministerial aid' formula, . . . but fail[ing] to indicate whether the formula means anything more than that the employer may not give aid that is likely to affect the outcome of the decertification effort." *Id.* at 949. The court went on to point out the inconsistent definition of ministerial aid applied by the Board:

> The Board began its discussion with a quotation from the *Eastern States Optical* case, which had seemed to define 'ministerial aid' as aid not likely to affect the outcome. . . . But elsewhere the opinion in the present case discusses the 'ministerial aid' formula as if its interpretation stood free from any reference to the objective of protecting the free choice of the employees, in much the

> same way that the *Miranda* rule stands free from its underlying objective of preventing coerced confessions: even if the circumstances thoroughly negate any inference of coercion, if the rule is violated the confession must be suppressed.

*Id.* at 949.

In addition, other District and Circuit Courts have recognized the lack of clarity of the Board's ministerial aid standard. *See Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 164 (1st Cir. 2005) (stating that the parameters of the ministerial aid standard "are not entirely clear") citing Catherine Meeker, *Defining "Ministerial Aid": Union Decertification Under the National Labor Relations Act*, 66 U. CHI. L. REV. 999 (1999); *see also Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 975 (D.C. Cir. 1998); *Perez v. Noah's Ark Processors, LLC*, No. 4:19-CV-3016, 2019 BL 169885, at *9 (D. Neb. May 10, 2019).

The confusion among the circuit courts of appeal is understandable given the imprecise—and sometimes different—standard(s) applied by the Board when analyzing employer conduct in the context of communication about the revocation of authorization cards or decertification. In some cases, the Board applies what appears to be a stricter standard or interpretation of ministerial aid that focuses more on Section 8(a)(1) of the Act. On other occasions, the Board applies a more liberal standard that appears to focus more on an employer's Section 8(c) right to communicate freely so long as the communication is noncoercive.

For example, in *KONO-TV-Mission Telecasting Corp*, 163 NLRB 1005, 1006 (1967), the Board found

that the employer had not violated Section 8(a)(1) because the employer's actions did not have the effect of infringing on the employees' exercise of their Section 7 rights; or in other words, that the employees' choices were free and uncoerced. However, in *Hearst Corp*, 281 NLRB 764, 765 (1986), the Board was not concerned about the actual coercive effect of the employer's actions but whether the actions could interfere with the exercise of employee rights under the Act. Specifically, the Board found a violation for actions that the majority of employees were unaware of and noted that "the finding of a violation is not predicated on a finding of actual coercive effect, but rather on the 'tendency of such conduct to interfere with the free exercise of employee rights under the Act.'" *Id.*

In other cases, such as *R.L. White Co.*, 262 NLRB 575, 576 (1982), it is not clear whether the Board is applying the ministerial aid or assistance standard or a separate standard altogether. In *R.L. White*, the employer's executive vice president explained to rank-and-file employees at a meeting how they could retrieve authorization cards they had signed from the union and distributed a pamphlet that presented that information. *Id.* The Board stated: "[a]n employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." *Id.* The Board ultimately held that the employer did not violate Section 8(a)(1) without mentioning (at least directly) the concept of ministerial

aid or assistance even though some level of assistance was arguably provided through the employer providing information to employees as to how to revoke authorization cards. *Id.*

On the heels of *R.L. White*, the Board in *Ace Hardware Corp,* 271 NLRB 1174 (1984), seemed to abandon *R.L. White's* prohibition against giving assistance without discussing the ministerial aid standard applied in prior Board cases. The Board in *Ace Hardware* did not find a violation of 8(a)(1) where, in response to an employee's question about withdrawal from the union, a supervisor stated that "it was not his job to help people get out of the union, but that if they would come to him or members of management, he could assist them in getting out and would help them in any way possible." *Id.* Credited testimony also revealed that the supervisor held up a checkoff authorization card and stated that management had not approached anyone concerning the matter of canceling dues deductions but, if employees wanted to go to their supervisor or him, he would see what he could do. *Id.* The Board reasoned that "while employers may not solicit employees to withdraw from union membership, they may, on the other hand, bring to employees' attention their right to resign from the union and revoke dues-checkoff authorizations so long as the communication is free of threat and coercion or promise of benefit." *Id.* Importantly, the Board noted that it previously permitted an employer to supply withdrawal information and forms even where unsolicited by employees. *Id.* (citing *Perkins Machine Co.*, 141 NLRB 697 (1963)).

In addition, and importantly here, the Board has previously held that assistance may be lawful even where the employer committed other violations of the

Act. *See Wire Prods. Mfg. Corp.*, 326 NLRB 625, 635 (1998) (although employer committed other NLRA violations, assistance with decertification petition was ministerial); *Ernst Home Centers, Inc.*, 308 NLRB 848, 848-50 (1992) (same); *see also R.L. White Co.*, 262 NLRB 575, 576 (1982) (even with multiple unfair labor practices present, the Board did not find an 8(a)(1) violation where the employer's executive vice president addressed a meeting of rank-and-file employees, explained how they could retrieve authorization cards they had signed from the union, and distributed a pamphlet that presented that information).

The conflicting application of ministerial aid (or the application of a different standard entirely) leads to inconsistent results. For example, in *Dayton Blueprint Co.*, 193 NLRB 1100, 1107–08 (1971), the Board held that an employer violated Section 8(a)(1) when it responded to the employees' request by typing a decertification petition, allowing the employees to file the petition on company time, and use of the company car to submit the petition. However, in contrast, in *Washington Street Brass & Iron Foundry, Inc.*, 268 NLRB 338, 339 (1983), the Board did not find a violation of the Act when an employer's agent suggested changes to the wording of the decertification petition and gave the employees a ride to the Board office.

Unsurprisingly, in the instant case, the Board's application of the ministerial aid standard has led to an inconsistent result. As emphasized by Member Emanuel in dissent, such aid constitutes mere ministerial aid. Consequently, the "ministerial aid" line of cases needs to be reconciled by this Court to give an employer a clear direction as to what conduct is permitted.

## CONCLUSION

Petitioner requests that the Court grant its Petition for Writ of Certiorari, vacate the judgment of the Court of Appeals for the Ninth Circuit, and remand the matter back to the Ninth Circuit to address the issues raised by this Petition; or alternatively, to vacate the opinion of the NLRB, and remand the matter back to the NLRB to reconcile the issues raised herein in the first instance.

Respectfully submitted,

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