No. 22-451

In the
Supreme Court of the United States

LOPER BRIGHT ENTERPRISES, *et al.*,
Petitioners,

v.

GINA RAIMONDO, SECRETARY OF COMMERCE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF COALITION FOR A DEMOCRATIC WORKPLACE & 7 OTHER ASSOCIATIONS REPRESENTING EMPLOYERS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The concerns that petitioners raise about *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), are not limited to the agencies in this case. This brief provides a glimpse into the mischief wrought by the *Chevron* doctrine in the area of labor law, where the National Labor Relations Board ("NLRB" or "the Board") has expansively and inconsistently interpreted the National Labor Relations Act ("NLRA" or "the Act") for decades with the protection of *Chevron*.

Amici curiae have an interest in the proper and consistent implementation of federal labor relations law.

Amicus Coalition for a Democratic Workplace represents millions of businesses that employ tens of millions of workers across the country in nearly every industry. Its purpose is to combat regulatory overreach by the NLRB that threatens the wellbeing of employers, employees, and the national economy.

Amicus Associated Builders and Contractors ("ABC") is a national construction industry trade association representing more than 22,000 members. Founded on the merit shop philosophy, ABC and its 68 Chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC

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[1] This brief was not authored in whole or in part by counsel for any party. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person, other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

and its members work. ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors.

Amicus International Foodservice Distributors Association is the premier trade association for the foodservice distribution industry, which employs over 350,000 workers at more than 15,000 facilities, with $351 billion in U.S. annual sales.

Amicus National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. NRF has filed briefs in support of the retail community on dozens of policy issues.

Amicus Independent Electrical Contractors ("IEC") is the nation's premier trade association representing America's independent electrical and systems contractors with over 50 chapters, representing 3,700 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.

Amicus International Franchise Association ("IFA") is the world's oldest and largest organization representing franchising. IFA members include franchise companies in over 300 different industries (including restaurants, retail, hospitality, healthcare and home health services, education, automotive

services, home repair and remodeling, global packaging and shipping services, personal wellness services, childcare, and financial and tax services), individual franchisees, and companies dedicated solely to support those franchise companies in marketing, law, technology, and business development. Since 1960, IFA has worked to protect, enhance and promote franchising and the approximately 790,492 franchise establishments that support nearly 8.4 million direct jobs, $825.4 billion of economic output for the U.S. economy, and almost 3 percent of the U.S. Gross Domestic Product. IFA has a strong interest in protecting the interests of its members.

Amicus National Association of Wholesaler-Distributors ("NAW") is an employer and a non-profit, non-stock, incorporated trade association that represents the wholesale distribution industry—the essential link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is made up of direct member companies and a federation of national, regional, state and local associations which together include approximately 35,000 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 more than $7 trillion in annual sales volume and provides stable and well-paying jobs to more than 6 million workers.

Amicus HR Policy Association is the leading organization representing the Chief Human Resource Officers ("CHROs") of the largest corporations doing business in the United States and globally.

Collectively, the Association's nearly 400 member companies employ more than ten million employees in the United States—nearly nine percent of the private sector workforce—and 20 million employees worldwide. The Association brings CHROs together to discuss and advocate for improvements in human resource policy and practices, and to pursue initiatives that promote job growth, employment security, and competitiveness.

Amici take no position on whether the Court should abolish *Chevron* deference entirely. But, in light of the examples described in this brief, they agree with Petitioners that some reform is needed.

This Court recently "reinforce[d]" the limits of deference to an agency's interpretation of its own regulation. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019). Now, the Court has the opportunity to at least do something similar with respect to *Chevron* deference. It absolutely should.

SUMMARY OF ARGUMENT

I. The NLRB relies almost exclusively on adjudication to create binding interpretations of its organic statute, the NLRA. The Board's five members—appointed to staggered terms by the President with the advice and consent of the Senate—hear adjudications involving unfair labor practices filed by the General Counsel and, like a court, issue orders explaining the Board's interpretation of the Act and its application to a given set of facts.

Though the Board's case-by-case approach resembles the common law, the Board does not adhere to the same *stare decisis* principles as do courts. The Board's membership is subject to frequent and

continued change, and whenever a new Board majority disagrees with a prior precedent, it often overrules that precedent.

On review of a Board order, federal courts of appeals defer to the Board's interpretation of the Act under *Chevron*. Provided that the Board gave a "reasonable" construction of the Act, the courts follow the agency's interpretation.

II. Like the National Marine Fisheries Service ("NMFS") here, the NLRB has a record of interpreting its power expansively even in the face of express limitations. *Amici* offer two examples. One is the Board's longstanding protection of former employees. By its terms, the NLRA protects former employees in very specific circumstances only. Yet the Board has claimed the authority to apply the Act's protections to former employees as a general class. The second example is the Board's protection of individual employee activities. The NLRA covers "concerted activities," but the Board has read that term so broadly as to include individual activities so long as they are taken in the presence of others. Both examples show the Board aggressively reading the Act to authorize regulatory authority in arguable conflict with express statutory limitations.

III. *Chevron* also has enabled the NLRB's unworkable track record of frequent flip-flopping.

A. The Board famously changes its interpretations of the NLRA with alacrity, sometimes as quickly as the White House changes hands (which causes the majority to shift politically). Indeed, the D.C. Circuit has referred to the NLRA's "invariabl[e] fluctuat[ions]" under the NLRB as a "fact of life in NLRB lore." Scholars, too, have long documented the

phenomenon. *Amici* provide a handful of examples that illustrate the confusion any observer of federal labor law must endure.

B. *Chevron* deference all but ensures that these flip-flops stick and will continue. Under *Chevron* as it has been applied, there is little judicial obstacle to the NLRB routinely changing the authoritative meaning of its organic statute, even on threshold questions such as the agency's authority to regulate in the first place. Indeed, empirical analysis shows that the NLRB's success rate in the federal courts of appeals is substantially higher when *Chevron* is invoked than when it is not.

The current General Counsel's public agenda confirms as much. She has declared it a top priority to invite the Board to overrule a myriad of prior precedents, and has already been successful in some instances.

Amici urge the Court, in evaluating *Chevron* deference, to take into account the NLRB's practices and at least modify the doctrine to ensure more predictability and workability for regulated parties.

ARGUMENT

I. The NLRB interprets the NLRA through adjudications initiated by its General Counsel.

The NLRA is a tool to protect "the free flow of commerce" by "restoring equality of bargaining power between employers and employees" and eliminating some labor organizations' proclivity to create "industrial unrest" or otherwise impair the public interest. 29 U.S.C. § 151. One of Congress's "primary objective[s]" in enacting the NLRA was "[t]o achieve

stability of labor relations." *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362 (1949).

Among the Act's contributions is the list of what have come to be known as "Section 7 rights." Employees have the right to, among other things, organize and engage in collective bargaining through duly enacted representatives and to engage in "other concerted activities for the purpose of collective bargaining." 29 U.S.C. § 157. If employers or labor unions interfere with, restrain, or coerce employees in their exercise of Section 7 rights, that constitutes an unfair labor practice. *Id.* §§ 158(a)(1), (b)(1).

To carry out the NLRA, Congress created a multi-member Board and a General Counsel. *Id.* § 153(a), (d). An unfair-labor-practice charge begins with the General Counsel, who acts as prosecutor. Appointed by the President with the advice and the consent of the Senate, the General Counsel carries out her responsibilities through Regional Directors appointed by the Board and subject to her supervision. *Id.* § 153(b); 29 C.F.R. § 101.4. Regional Directors investigate charges and, if the charges appear meritorious, initiate formal action before an administrative law judge ("ALJ"). 29 U.S.C. § 160(b); 29 C.F.R. §§ 101.2, 101.4, 101.8, 101.10(a). Parties may challenge the ALJ's decision before the Board. 29 C.F.R. §§ 101.11(b), 101.12(a).

The Board plays a quasi-judicial role. It consists of five members, each appointed by the President with the advice and consent of the Senate for a five-year term. 29 U.S.C. § 153(a). Members' terms are staggered, so that one term expires (and absent delay, a new one begins) annually. *See New Process Steel, L.P. v. NLRB*, 564 F.3d 840, 845 (7th Cir. 2009), *rev'd*

on other grounds, 560 U.S. 674 (2010). It is customary (though not mandated by statute) that no more than three of the five members will belong to the President's political party. Nevertheless, that means each President can guarantee that a majority of the Board shares his ideological priors. Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. Pa. J. Lab. & Emp. L. 707, 714-16 (2006).

The Board's adjudicatory decisions are its primary means of carrying out its "special function of applying the general provisions of the Act to the complexities of industrial life." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). Though it has authority to promulgate rules and regulations, 29 U.S.C. § 156, the "Board, uniquely among major federal administrative agencies, has chosen to promulgate virtually all the legal rules in its field through adjudication rather than rulemaking," *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). Frequently, panels of three members decide adjudications. *See* 29 U.S.C. § 153(b) (authorizing the Board to delegate its power to "any group of three or more members").

The Board treats precedent as binding, but only until a new majority deems it incorrect. In this way, it differs significantly from courts. *Compare, e.g.*, *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1097 (D.C. Cir. 2001) (describing changes in Board composition leading to changes in Board law as "a fact of life"), *with, e.g.*, *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015) ("[A]n argument that we got something wrong … cannot by itself justify scrapping settled precedent."). The Board itself has touted its "flexibility" to change rules just as quickly as its members' views change. *Midland Nat'l Life Ins. Co.*,

263 NLRB 127, 132 (1982) (quoting *Leedom v. Int'l Bhd. of Elec. Workers*, 278 F.2d 237, 243 (D.C. Cir. 1960)); *see also Allentown Mack*, 522 U.S. at 374.

Following a final order from the Board, either party may seek enforcement or judicial review in a federal court of appeals, 29 U.S.C. §§ 160(e), (f); 29 C.F.R. § 101.14, which under *Chevron* ordinarily grants "considerable deference to the Board's interpretation of the [NLRA]," *e.g.*, *NLRB v. Me. Coast Reg'l Health Facilities*, 999 F.3d 1, 8 (1st Cir. 2021); *see Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574 (1988). That deference stems from what is understood to be the Board's "special competence in th[e] field" of labor relations. *E.g.*, *NLRB v. Weingarten*, 420 U.S. 251, 266 (1975); *see Chevron*, 467 U.S. at 865.[2]

II. The NLRB is emboldened by *Chevron* to interpret its power expansively.

Like the NMFS here, the NLRB has a record of interpreting its power expansively even in the face of express limitations. For example, Section 7 rights enable a distinct group to engage in enumerated activities. Specifically, it grants "[e]mployees" the right to "engage in" or "refrain from" various "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. But the Board has asserted authority in areas beyond those provided by the text—knowing

[2] Even prior to *Chevron*, this Court deferred to interpretations offered by the NLRB based on rationales consistent with *Chevron*. *E.g.*, *Weingarten*, 420 U.S. at 266; *see Edward J. DeBartolo Corp.*, 485 U.S. at 574 (noting the Court's ordinary deference to the NLRB and citing *Chevron*).

it can claim protection from judicial scrutiny under *Chevron*.

To begin, the Act explicitly extends Section 7 rights to former employees only in limited circumstances. 29 U.S.C. § 152(3). The employee's work must have "ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice." Further, the employee must "not [have] obtained any other regular and substantially equivalent employment." *Id.* On the question of all other former employees' rights, the Act is at best silent.

Yet the Board has claimed for itself the authority to protect the activities of *all* former employees. *E.g.*, *McLaren Macomb*, 372 NLRB No. 58, 2023 WL 2158775, at *7 (Feb. 21, 2023); *Waco, Inc.*, 273 NLRB 746, 747 n.8 (1984). For instance, under Board precedent, an employer commits an unfair labor practice when he photographs any former employee engaged in a picket at or near the employer's property. *Waco*, 273 NLRB at 747. The Board has also policed restrictions on former employees' means of resolving disputes with their former employers. *E.g., Haynes Bldg. Servs., LLC*, 363 NLRB 1149, 1150-52 (2016), *abrogated on other grounds by Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

What is more, Section 7 protects "concerted activities" only. 29 U.S.C. § 157; *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 831 n.8 (1984). This Court has even acknowledged that the question of what workplace "activities" are "concerted" may be a "jurisdictional" one. *See City Disposal Sys.*, 465 U.S. at 830 n.7. And it has also said that, at minimum, this requirement means that one employee's actions

"must be linked" in some manner "to the actions of fellow employees." *Id.* at 830-31, 833 n.10.

Yet the Board has nearly read the "concerted" limitation out of Section 7. Under the Board's *Interboro* doctrine, for instance, a single employee's invocation of "a right grounded in a collective-bargaining agreement" is deemed concerted activity, *id*. at 829, even when there is "no evidence" that the employee "discussed" his complaint "with other employees, sought their support in remedying the problem," requested any "assistance in protesting to his employer," "warn[ed] others of the problem," or even knew there was a collective-bargaining agreement, *id*. at 843 n.3, 846 (O'Connor, J., dissenting). *See Interboro Contractors, Inc.*, 157 NLRB 1295 (1966). That remarkable reading was upheld by this Court, pre-*Chevron*, as a "reasonable construction" of the Act. *City Disposal Sys.*, 465 U.S. at 829, 832-33.

And so the Board went further. In *Alleluia Cushion Co.*, the Board established a rebuttable presumption that an employee's solo complaint regarding an employer's noncompliance with occupational-safety laws is concerted activity, even in the "total absence of any evidence" that the employee acted "in conjunction with other employees," that the employee "believed that he was acting as their representative," or that "the other employees even shared [his] concern for safety." 221 NLRB 999, 1000 (1975). The supposed "concert of action," according to the Board, "emanates from the mere assertion of such statutory rights." *Id*. More recently, in *Wyndham Resort Development Corp.*, the Board held that one employee voicing complaints about "changes to

employment terms" in front of coworkers is concerted activity. 356 NLRB 765, 766 (2011).

These efforts by the NLRB are similar in kind to what NMFS did here, claiming *Chevron* deference for an expansion of powers that are narrowly and specifically addressed in the statute.

III. *Chevron* has also enabled an unworkable track record of frequent flip-flopping by the Board.

A. The NLRB is notorious for its frequent and substantive reinterpretations of the NLRA.

If there is any common thread to the Board's interpretations of the NLRA, it is that they are consistently inconsistent. It is "a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board." *Epilepsy Found.*, 268 F.3d at 1097. Scholars have documented the phenomenon of ideologically driven interpretation and reinterpretation of the NLRA for decades. *See, e.g.*, Turner, *supra*, at 711 ("[I]deology has been a persistent and, in many instances, a vote-predictive factor when the Board decides certain legal issues."); Leonard Bierman, *Reflections on the Problem of Labor Board Instability*, 62 Denv. U.L. Rev. 551 (1985). That practice holds true across presidential administrations of both major parties. *See* Michael J. Lotito, *et al.*, Coal. for a Democratic Workplace & Littler's Workplace Pol'y Inst., *Was the Obama NLRB the Most Partisan Board in History?* 1 (Dec. 6, 2016) ("Overall, the Obama Board upended 4,559 total years of established law."); Bierman, *supra*, at 551 (documenting the Board's "fast and furious pace" of

overruling precedent during the Reagan administration). It also frustrates Congress's objective to instill "stability of labor relations" through the NLRA. *Colgate-Palmolive-Peet*, 338 U.S. at 362. Below are just a few examples.

Concerted Activity

As discussed above, in *Alleluia Cushion*, the Board expanded its interpretation of "concerted activities" in 29 U.S.C. § 157 to include an individual employee's independent advocacy "for the benefit of all employees" (which necessarily includes invocation of occupational-safety laws). 221 NLRB at 1000; p. 11, *supra*.

But then over the course of three-and-a-half decades, the Board changed its position three times. First, the *Meyers* decision "reject[ed] the principles the Board adopted in *Alleluia*." *Meyers Indus.*, 268 NLRB 493, 493 (1984). It instead required proof that the activity was engaged in with or on the authority of other employees. *Id*. at 497. Then in 2011, the Board effectively overruled *Meyers*,[3] holding that complaining about employment terms in front of coworkers necessarily constitutes concerted activity, because the employee is inherently "engaged in initiating group action." *Wyndham*, 356 NLRB at 766; pp. 11-12, *supra*. Eight years later, the Board reversed course once more and overruled *Wyndham*. *Alstate Maint., LLC*, 367 NLRB No. 68, 2019 WL 183862, at *6 (Jan. 11, 2019).

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[3] *See Wyndham*, 356 NLRB at 768 (Hayes, Member, dissenting) ("The majority … reduces to meaninglessness the *Meyers* distinction between unprotected individual activity and protected concerted activity.").

The Board's definition of "concerted activities" may change yet again. The current General Counsel is considering urging the Board to overrule *Alstate Maintenance*. Mem. from Jennifer A. Abruzzo, Gen. Counsel, NLRB, to All Regional Directors, Officers-in-Charge, and Resident Officers, Mem. GC 21-04, Re: *Mandatory Submissions to Advice* 1, 3 (Aug. 12, 2021) ("GC Mem. 21-04"); *see also* pp. 18-19, *infra*. For the third time since 2011, the Board may do an about-face in its statutory interpretation and march in the opposite direction.

Election Propaganda

For nearly 20 years after the passage of the NLRA, the Board declined to regulate campaign propaganda in union elections or examine the effect of campaign propaganda on election results. Instead, the Board trusted employees to "recognize such propaganda for what it is, and discount it." *Corn Prods. Refining Co.*, 58 NLRB 1441, 1442 (1944).

Over the next thirty years, the Board's treatment of propaganda entered a state of disarray as it repeatedly modified its precedents. The Board began setting aside elections based on propaganda if employees were deceived as to the *source* of campaign propaganda. *United Aircraft Corp.*, 103 NLRB 102 (1953), *decision supplemented*, 124 NLRB 392 (1959). Then, based on *truth or falsity* of the propaganda. *Gummed Prods. Co.*, 112 NLRB 1092, 1093-94 (1955). Then, only if the deceptive propaganda "prevent[ed] the other party or parties from making an effective *reply*." *Hollywood Ceramics Co.*, 140 NLRB 221, 224 (1962) (emphasis added).

Finally, the Board stopped simply modifying its precedents and began overruling them. In 1977, the

Board overruled *Hollywood Ceramics* and refused to consider the truth or falsity of propaganda. *Shopping Kart Food Market, Inc.*, 228 NLRB 1311, 1313 (1977). Twenty months later, the *Shopping Kart* dissent was a majority, and *Hollywood Ceramics* governed again. *Gen. Knit of Cal., Inc.*, 239 NLRB 619, 623 (1978). Four years after that, *Shopping Kart* was back in, and *Hollywood Ceramics* was back out. *Midland Nat'l Life Ins.*, 263 NLRB at 132-33.

The Recognition Bar

From 1966 to 2007, if an employer voluntarily recognized a union as having majority status without undergoing an election, the Board would not allow employees to seek decertification of that union for a "reasonable time" after such recognition. *In re Lamons Gasket Co.*, 357 NLRB 739, 739 (2011). This practice was known as the "voluntary recognition bar."

Then in a brief four-year span, Board majorities from 2007 to 2011 traded overruling precedents regarding the practice. In 2007, the Board established a 45-day window during which employees could challenge the majority status of any union that an employer voluntarily recognized. *Dana Corp.*, 351 NLRB 434, 434 (2007). *Dana* lasted only until the Board overruled it in 2011 and returned to its earlier precedents. *Lamons Gasket*, 357 NLRB at 748.

Joint Employer—Bargaining Unit Consent Requirement

As a "general rule," a bargaining unit under 29 U.S.C. § 159(b) does not contain employees of different employers. *Lee Hosp.*, 300 NLRB 947, 948 (1990). Complications arise when some employees

answer to two different employers (known as "joint employers"), but their coworkers answer to only one employer. *See id.* Successive majorities have disagreed whether employees in such a situation can form a bargaining unit.

In *Lee Hospital*, the Board held that these employees cannot be in a single bargaining unit absent consent from both employers. *Id.* Ten years later, the Board overruled *Lee Hospital* and held that such employees can constitute a bargaining unit. *In re M.B. Sturgis, Inc.*, 331 NLRB 1298, 1304 (2000). Four years after that, the Board flipped back to *Lee Hospital*, overruling *Sturgis*. *H.S. Care LLC, d/b/a Oakwood Care Ctr.*, 343 NLRB 659, 662 (2004). Eight years later, the Board scrapped *Lee Hospital* (again) and returned to *Sturgis*. *Miller & Anderson, Inc.*, 364 NLRB 428, 440-41 (2016). The rollercoaster paused three years after that, when the Board expressed its "*open[ness]* to reconsidering [*Miller & Anderson*] in a future appropriate case" but did not do so. *Stericycle of P.R., Inc.*, Case No. 12-RC-238280, 2019 WL 7584356, at *1 n.1 (NLRB Oct. 31, 2019) (emphasis added).

Weingarten

In *Weingarten*, 420 U.S. at 260, this Court upheld the Board's ruling that the NLRA protects the right of an employee in a unionized workplace to have a union representative present at an interview that the employee reasonably believes might result in disciplinary action. In *Materials Research Corp.*, the Board extended the *Weingarten* right to non-union workplaces. 262 NLRB 1010, 1013 (1982). Three years later, the Board reversed course, overruled *Materials Research*, and held that *Weingarten* does

not apply to non-union workplaces. *Sears, Roebuck & Co.*, 274 NLRB 230, 230 n.5, 231 (1985), *modified by E.I. DuPont De Nemours*, 289 NLRB 627, 628 (1988). But the Board flipped back to *Materials Research* when it then overruled *DuPont*, *see In re Epilepsy Found. of Ne. Ohio*, 331 NLRB 676, 678 (2000), *review granted in part, decision rev'd in part sub. nom.*, 268 F.3d 1095 (D.C. Cir. 2001), only to return to *DuPont* four years later by overruling *Epilepsy Foundation*, *see In re IBM Corp.*, 341 NLRB 1288, 1288 (2004).

B. Affording *Chevron* deference to the NLRB gives the Board free rein to impose an ever-changing federal labor law regime.

Chevron deference all but ensures that these flip-flops stick, "reduc[ing] the judicial process … to a mere feint" and rendering the NLRA's meaning fundamentally unstable. *SEC v. Chenery Corp.*, 332 U.S. 194, 210 (1947) (Jackson, J., dissenting). That follows directly from this Court's decision in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 981, 983 (2005), which held that even in changing its interpretation of a statute, an agency remains "the authoritative interpreter" so long as its interpretations remain "reasonable." Even the NLRB's threshold determinations—whether it has regulatory authority in an area at all—are free from meaningful judicial scrutiny. *City of Arlington v. FCC*, 569 U.S. 290, 301 (2013).

Empirical analysis bears out *Chevron*'s impact. In cases reviewing NLRB decisions between 1993 and 2020, which cite *Chevron*, the NLRB won 83.9% of the time. Amy Semet, *Statutory Interpretation and*

Chevron *Deference in the Appellate Courts: An Empirical Analysis*, 12 U.C. Irvine L. Rev. 621, 651 n.226, 679 (2022). When the reviewing court did not apply *Chevron*, but rather a "*Chevron*-like reasonableness analysis," the NLRB still prevailed 67.6% of the time. *Id.* at 679. But when *Chevron* did not apply "in any form," the NLRB's interpretation survived in only 36.4% of cases. *Id.*

Without *Chevron* or "*Chevron*-like" deference, then, there is reason to believe that the NLRB's success rates in the federal courts of appeals would decrease significantly. That heightened risk would incentivize the Board to engage in a more measured interpretive exercise than the shameless flip-flopping that exists today. *See Michigan v. EPA*, 576 U.S. 743, 763 (2015) (Thomas, J., concurring) (noting that prior decisions affording agencies deference had "emboldened" EPA's interpretations).

But *Chevron*, as it exists and is applied today, gives the Board cover to continuously realign federal labor law with its vacillating political views. Despite NMFS's touting *Chevron*'s "predictability" and "workability," Br. in Opp. 27, 29, the doctrine is anything but predictable or workable for the labor organizations, employees, and employers that must follow the NLRA. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

Were there any doubt, this Court need look no further than the current General Counsel's whole-hearted embrace of the Board's frequent changes in position. She has declared that "one of [her] most important objectives as General Counsel" is placing certain NLRB precedents "before the Board for

reconsideration." Mem. from Jennifer A. Abruzzo, Gen. Counsel, NLRB, to All Reg'l Directors, Officers-in-Charge, and Resident Officers, Mem. GC 23-04, Re: *Status Update on Advice Submissions Pursuant to GC Memo 21-04*, at 1 (2023) ("GC Mem. 23-04").

So the beat goes on. The Board recently overturned multiple decisions targeted by the General Counsel that were decided only as far back as 2020. *McLaren Macomb*, 2023 WL 2158775, at *1 (overruling, *e.g.*, *Baylor Univ. Med. Ctr.*, 369 NLRB No. 43 (Mar. 16, 2020), which in turn overruled *Clark Distribution Sys.*, 336 NLRB 747 (2001)); *see* GC Mem. 21-04, at 2. Many more cases involving the General Counsel's disfavored precedents remain pending before the Board. GC Mem. 23-04, at 5 n.4 (listing pending cases).

Something must change. Employers need a level of "certainty" so that they can "reach decisions without fear of later evaluations labelling [their] conduct an unfair labor practice." Unions, too, need certainty so that they may discern "the limits of [their] prerogatives." *The Boeing Co.*, 365 NLRB No. 154, 2017 WL 6403495, at *10 n.40 (Dec. 14, 2017) (quoting *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 679, 685 (1981)). The Board, however, provides no predictability. And so long as *Chevron* continues in its current form, there is little hope the courts will do so either. At a minimum, this Court should enforce limits on *Chevron* that reduce the ability of agencies like the NLRB to change position so easily.

CONCLUSION

Amici urge the Court, in evaluating *Chevron* deference, to consider the NLRB's history of flip-

flopping and expanding its authority in the face of express statutory limitations.

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Respectfully submitted,

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