

IN THE
Supreme Court of the United States

NEXSTAR MEDIA INC., AUTHORIZED TO
OPERATE TELEVISION STATION WROC-TV,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MATTHEW T. CLARK
CONSTANGY, BROOKS, SMITH
& PROPHETE, LLP
6 Campus Drive,
Suite 305
Parsippany, NJ 07054

CHARLES W. PAUTSCH
NEXSTAR MEDIA GROUP, INC.
545 East John W. Carpenter
Freeway
Irving, TX 75062

STEVEN B. KATZ
Counsel of Record
CONSTANGY, BROOKS, SMITH
& PROPHETE, LLP
2029 Century Park East,
Suite 1100
Los Angeles, CA 90067
(310) 909-7775
skatz@constangy.com

DEAN KPERE-DAIBO
CONSTANGY, BROOKS, SMITH
& PROPHETE, LLP
4240 Duncan Avenue,
Suite 200
St. Louis, MO 63100

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the Second Circuit's deferential approach causes a circuit split with an Eighth Circuit decision addressing the same legal issue?
2. Whether the Second Circuit erred in declining to apply *Loper Bright Enter. v. Raimondo*, 603 U.S. 369 (2024) and not conducting non-deferential *de novo* review of the Board's legal conclusions?

PARTIES TO PROCEEDING

Petitioner (respondent below) is Nexstar Media Group, Inc., authorized to Operate Television Station WROC-TV.

Respondent (petitioner below) is the National Labor Relations Board.

The National Association of Broadcast Employees & Technicians – Communications Workers of America, AFL-CIO was an intervenor below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Nexstar Media Group, Inc. is a publicly held corporation (Nasdaq: NXST). Nexstar Media Group, Inc. does not have a parent corporation.

According to information contained in a Schedule 13G/A filed by BlackRock, Inc. (NYSE: BLK) with the Securities and Exchange Commission on April 3, 2025, BlackRock, Inc. owns approximately 10.5% of Nexstar's outstanding stock.

No other publicly held company owns 10% or more of Nexstar Media Group, Inc.'s stock.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings:

United States Court of Appeals (2d Cir.)

National Labor Relations Board v. Nexstar Media, Inc., No. 24-2818 (not reported to the Federal Reporter).

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
PARTIES TO PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT	iii
STATEMENT OF RELATED PROCEEDINGS	iv
TABLE OF CONTENTS.....	v
TABLE OF APPENDICES	vii
TABLE OF CITED AUTHORITIES	viii
PETITION FOR WRIT OF CERTIORARI.....	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
A. STATUTORY BACKGROUND	4
B. FACTUAL AND PROCEDURAL BACKGROUND	5

Table of Contents

	<i>Page</i>
REASONS FOR GRANTING THE PETITION.....	6
I. The Second Circuit’s Deference to the Board Regarding Supervisory Status Conflicts With The Eight Circuit’s Holding in <i>KDSK Multimedia</i> and this Court’s Holding in <i>Loper Bright</i>	8
II. The Approach Taken by the Second Circuit Here is an Outlier	11
A. The <i>Loper</i> Standard Has Been Applied Consistently to the Board by the Fifth, Sixth, Tenth, and D.C. Circuits.....	11
B. The Second Circuit Has Contradicted Itself	13
C. Intervention from this Court Has Already Provided Critical Clarity	14
III. The Question Presented is Recurring, Important, and Squarely Presented.....	16
IV. This Court Should Vacate the Second Circuit’s Decision So As to Allow It to Reconsider Its Decision In Light of <i>Loper Bright</i>	17
CONCLUSION	17

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JUNE 30, 2026.....	1a
APPENDIX B – DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, FILED AUGUST 29, 2024	14a

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>3484, Inc. v. NLRB</i> , 137 F.4th 1093 (10th Cir. 2025)	3, 12
<i>Airgas USA, LLC</i> , 373 NLRB No. 102 n.2 (Sep. 18, 2024).	10
<i>Allegheny Gen. Hosp. v. NLRB</i> , 608 F.2d 965 (3d Cir. 1979)	11
<i>Am. Fed’n of Lab. v. NLRB</i> , 308 U.S. 401 (1940).	5
<i>Amalgamated Utility Workers v.</i> <i>Consolidated Edison Co. of New York</i> , 309 U.S. 261 (1940).	16
<i>Beverly Enters. v. NLRB</i> , 727 F.2d 591 (6th Cir. 1984).	11
<i>Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).	11, 12, 13, 14
<i>Heartland Plymouth Ct. MI, LLC v. NLRB</i> , 838 F.3d 16 (D.C. Cir. 2016).	11
<i>Hosp. Menonita de Guayama, Inc. v. NLRB</i> , 145 S. Ct. 982 (2024).	4, 14, 15

Cited Authorities

	<i>Page</i>
<i>Hospital Menonita De Guayama, Inc. v. NLRB</i> , 183 F.4th 745 (D.C. Cir. 2026)	3, 4, 12-15, 17
<i>Hospital Menonita de Guyama, Inc. v. NLRB</i> , 94 F.4th 1 (D.C. Cir. 2024)	14
<i>Hudson Inst. of Process Research, Inc. v. NLRB</i> , 117 F.4th 692 (5th Cir. 2024)	9
<i>In re Oakwood Healthcare, Inc.</i> , 348 NLRB 686 (NLRB 2006)	9
<i>Ithaca Coll. v. NLRB</i> , 623 F.2d 224 (2d Cir. 1980)	11
<i>Johnson v. U.S. R.R. Ret. Bd.</i> , 969 F.2d 1082 (D.C. Cir. 1992)	11
<i>Loper Bright Enter. v. Raimondo</i> , 603 U.S. 369 (2024)	2, 3, 4, 7-9, 11-15, 17
<i>Magnum Import Co. v. Coty</i> , 262 U.S. 159 (1923)	13
<i>Marbury v. Madison</i> , 1 Cranch 137 (1803)	2
<i>Marmet Health Ctr., Inc. v. Brown</i> , 565 U.S. 530 (2012)	15, 16

Cited Authorities

	<i>Page</i>
<i>Multimedia KSDK, Inc. v. NLRB</i> , 303 F.3d 896 (8th Cir. 2002)	3, 6-10, 17
<i>Myers v. Bethlehem Shipbuilding Corp.</i> , 303 U.S. 41 (1938).	16
<i>NLRB v. Ashkenazy Prop. Mgmt. Corp.</i> , 817 F.2d 74 (9th Cir. 1987).	11
<i>NLRB v. Hearts Publications, Inc.</i> , 322 U.S. 111 (1944).	11
<i>NLRB v. Int’l Ass’n of Bridge, Structural and Ornamental Ironworkers, AFL-CIO</i> , 434 U.S. 335 (1978).	11
<i>NLRB v. Nexstar Media, Inc.</i> , No. 24-2818, 2026 WL 1876260 (2d Cir. Jun. 30, 2026)	9
<i>NLRB v. Pier Sixty, LLC</i> , 855 F.3d 115 (2d Cir. 2017)	8
<i>NLRB v. Truck Drivers Local Union No. 449, Int’l Brotherhood of Teamsters, Warehousemen and Helpers of Am., A.F.L.</i> , 353 U.S. (1957).	11
<i>Northeastern Univ. v. NLRB</i> , 138 F.4th 64 (1st Cir. 2025)	9

Cited Authorities

	<i>Page</i>
<i>Pittsburgh Plate Glass Co. v. NLRB</i> , 313 NLRB 146 (1941)	5
<i>Rieth-Riley Constr. Co., Inc. v. NLRB</i> , 114 F.4th 519 (6th Cir. 2024)	3, 12
<i>Siren Retail Corp. v. NLRB</i> , No. 24-3168, 2026 WL 2588722 (2d Cir. Sep. 2, 2026)	3, 7, 14
<i>United Natural Foods, Inc. v. NLRB</i> , 138 F.4th 937 (5th Cir. 2025)	3, 12
<i>Universal Protection Servs., LLC v. NLRB</i> , No. 24-11150, 2024 WL 1194880 (11th Cir. May 1, 2026)	9
<i>Viking River Cruises, Inc. v. Moriana</i> , 596 U.S. 639 (2022)	15, 16

Statutes and Other Authorities

28 U.S.C. § 1254(1)	1
28 U.S.C. § 2106	17
29 U.S.C. § 57	2
29 U.S.C. § 152(3)	1, 4

Cited Authorities

	<i>Page</i>
29 U.S.C. § 152(11).....	1, 3, 4, 9, 17
29 U.S.C. § 157.....	4
29 U.S.C. § 158(a)-(b).....	6
29 U.S.C. § 158(a)(1)	5
29 U.S.C. § 158(a)(5)	5
29 U.S.C. § 160(a)-(c).....	6
29 U.S.C. § 160(e).....	6, 16
29 U.S.C. § 160(f).....	6, 16

PETITION FOR WRIT OF CERTIORARI

Nexstar Media Group, Inc., Authorized to Operate Television Station WROC-TV respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit in this case.

OPINIONS BELOW

The summary order of the court of appeals is reproduced at App.001-013.

The order of the National Labor Relations Board is reported at *Nexstar Media, Inc., Authorized to Operate Television Station WROC-TV*, 373 NLRB No. 88 (Aug. 29, 2024), and reproduced at App.014.

JURISDICTION

The court of appeals entered judgment on June 30, 2026. (App.001-013). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

29 U.S.C. § 152 (3) & (11) provide in relevant part:

The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise... but shall not include any individual employed as...a supervisor...

...The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 57 provides in relevant part:

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 such activities ...

STATEMENT OF THE CASE

“[I]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 1 Cranch 137, 177 (1803). Thus, this Court made clear in *Loper Bright Enter. v. Raimondo*, 603 U.S. 369 (2024), that the era of judicial deference to an agency’s interpretation of the law is finished. *Id.* at 384. It is “the proper and peculiar province of the *courts*” to interpret law, not lawyers employed by administrative agencies. *Id.* at 385 (emphasis added) (*citing* The Federalist, No.

78, at 525 (A. Hamilton)). But some circuits have been reluctant to bring the era of judicial deference to a close when it comes to the National Labor Relations Board’s (“NLRB” or the “Board”) interpretation of the National Labor Relations Act of 1935 (“NLRA” or the “Act”).

In *Multimedia KSDK, Inc. v. NLRB*, 303 F.3d 896 (8th Cir. 2002) (*en banc*), the Eighth Circuit said what the law is for the 29 U.S.C. § 152(11) supervisory status of television producers. The Eighth Circuit said that television producers are supervisors, excluded from the protection of the Act. *Id.* at 897-898.

Here, the Second Circuit said otherwise because it applied the incorrect standard of legal review to a Board decision. App.003. Instead of following the directive of *Loper Bright*, the Second Circuit held “[l]egal conclusions based upon the Board’s expertise should receive, pursuant to longstanding Supreme Court precedent, *considerable deference*.” App.003. (emphasis added). Two months later—too late for Petitioner to seek rehearing—the Second Circuit finally acknowledged “it is for *us* to decide the law. . . we may no longer defer to the opinions of the NLRB . . .” *Siren Retail Corp. v. NLRB*, No. 24-3168, 2026 WL 2588722, at *4 (2d Cir. Sep. 2, 2026). Its acceptance of this bedrock principle brings it into accord with the Fifth, Sixth, Tenth, and D.C. Circuits. *United Natural Foods, Inc. v. NLRB*, 138 F.4th 937, 946-948 (5th Cir. 2025); *3484, Inc. v. NLRB*, 137 F.4th 1093, 1103-1104 (10th Cir. 2025); *Rieth-Riley Constr. Co., Inc. v. NLRB*, 114 F.4th 519, 528-529 (6th Cir. 2024). *Hospital Menonita De Guayama, Inc. v. NLRB*, 183 F.4th 745, 750, 754-755 (D.C. Cir. 2026) (“*Hospital Menonita II*”).

The Second Circuit’s tardy acquiescence in this Court’s clear mandate creates a circuit split and leaves Petitioner with nowhere to turn except this Court. It should do as it did in *Hospital Menonita II*—GVR with directions for “further consideration in light of *Loper Bright*.” *Hosp. Menonita de Guayama, Inc. v. NLRB*, 145 S. Ct. 982 (2024).

A. STATUTORY BACKGROUND

The Act gives employees “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 and protection”—and the right “to refrain from any or all such activities...” 29 U.S.C. §157.

“Employee” is expressly defined by the Act. 29 U.S.C. § 152(3). “Supervisors” are excluded from the Act’s definition of “employee.” 29 U.S.C. § 152(11). The following individuals do not enjoy the protection of the Act:

...[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Id.

B. FACTUAL AND PROCEDURAL BACKGROUND

1. On September 26, 2023, the Regional Director for Region 3 of the Board issued a Certification of Representative in Case 03-RC-309322, certifying the Union as the exclusive collective-bargaining representative of employees in a petitioned-for unit. App.014-015.

2. Petitioner requested review of the Certification of Representative, which the Board denied on January 2, 2024. App.019.

3. To obtain judicial review of the Board's denial of review, Petitioner used the means necessary by refusing to bargain with National Association of Broadcast Employees & Technicians – Communications Workers of America, AFL-CIO (“NABET” or the “Union”), beginning on or about December 14, 2023. App.019. *Pittsburgh Plate Glass Co. v. NLRB*, 313 NLRB 146, 152 (1941); *Am. Fed'n of Lab. v. NLRB.*, 308 U.S. 401, 409 (1940).

4. On January 4, 2024, NABET filed an unfair labor practice charge (“ULP”), alleging Petitioner violated Sections 8(a)(1) and (5) of the Act, 29 U.S.C. §158(a)(1) & (5). App.014.

5. The Board's General Counsel issued a complaint, on April 10, 2024, alleging that Petitioner violated Sections 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) & (5). App.014.

6. Petitioner filed an answer and asserted affirmative defenses. App015.

7. The Board's General Counsel moved for summary judgment on May 16, 2024; the matter was transferred to the Board, and a notice to show cause as to why the motion should not be granted was issued on May 30, 2024. App.015.

8. Petitioner responded to the notice to show cause. App.015.

9. On August 29, 2024, the Board granted the motion for summary judgment and issued an order directing Respondent to recognize and bargain with NABET. App.020-028.

10. The Board sought enforcement of its order before the Second Circuit on October 24, 2024. In response, Petitioner challenged the Union's certification on grounds that the bargaining unit was certified improperly to include news producers, digital content producers, and creative services producers (collectively, "producers"), who are supervisors within the meaning of the Act and exempt from coverage of the Act consistent with the Eight Circuit's holding in *Multimedia KSDK*. App.001-013.

REASONS FOR GRANTING THE PETITION

The Board does not have *carte blanche* to interpret the NLRA as it sees fit. It may investigate, prosecute, and adjudicate allegations of conduct violating the Act. 29 U.S.C. § 158(a)-(b); 29 U.S.C. § 160(a)-(c). But courts ultimately determine the meaning of the Act. 29 U.S.C. § 160(e) & (f).

The question here is what standard applies when courts are called on to determine the Act's meaning. Despite this Court's express direction in *Loper Bright*, lower courts remain hesitant to conduct true *de novo* review of the Board's orders and actions. Petitioner comes before this Court simply asking that this Court remind the lower courts that it meant what it said and that the law as to supervisory status of television producers has already been established by *Multimedia KDSK*.

This petition is an ideal vehicle for resolving the discrepancy between the approach taken by the Second Circuit in this matter and the approach taken by the Eighth Circuit in *Multimedia KDSK*. It is an equally ideal vehicle to resolve the approach taken by the Second Circuit taken in the instant matter and the approach it took just two months later in *Siren Retail Corp. Loper Bright* requires the courts to consider the Board's legal conclusions *de novo* and decide the law without deference to the opinions of the Board and *Multimedia KDSK* governs the outcome of disputes as to the supervisory status of television producers under *de novo* review. Here, the Second Circuit refused to meet its obligation to exercise its independent judgment in deciding whether the Board acted within its statutory authority.

As it stands, a party seeking review of a Board action before the circuit courts has no way to determine which legal standard will apply to the supervisory status of television producers—the one applied here or the one applied by the Eighth Circuit. Parties also have no way to determine which legal standard will apply to circuit courts review of Board decisions—the one applied here, or the one applied just two months later. This discrepancy

leads to uneven, unpredictable, and unjust enforcement of the Act. Only this Court's intervention can resolve this inconsistency.

This Court's intervention is imperative. This issue first recurs every time a party seeks review of a Board action as to supervisory status. The issue also recurs every time a party comes before the Second Circuit seeking *de novo* review of a Board action. This second conflict arose too late for Petitioner to seek rehearing in the Circuit. It is profoundly unjust for parties to come before the circuit courts, left only to guess which of two legal standards will apply to their case. This Court should grant *certiorari* to restore uniformity to enforcement of a critical federal statute.

I. The Second Circuit's Deference to the Board Regarding Supervisory Status Conflicts With The Eight Circuit's Holding in *KDSK Multimedia* and this Court's Holding in *Loper Bright*

"To the extent necessary to decision when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of an agency action." *Loper Bright*, 603 U.S. at 391. Here, the Second Circuit paid only lip service to this principle with a single citation to *NLRB v. Pier Sixty, LLC*, 855 F.3d 115 (2d Cir. 2017), which predates *Loper Bright* by just over seven (7) years. App.003. In reality, the panel deferred to the Board, premising its decision on the now invalid standard that "[l]egal conclusions based on the Board's expertise should receive, pursuant to longstanding Supreme Court precedent, considerable

deference.” App.003. And it did so just over two (2) years after this Court handed down *Loper Bright*.

Applying this improper deferential standard, the Circuit relied upon the Board’s interpretation of “assign” as used in Section 2(11) of the Act, 29 U.S.C. § 152(11), set forth in *In re Oakwood Healthcare, Inc.*, 348 NLRB 686 (NLRB 2006). App.006-007. *Oakwood*, decided in 2006, and the Board’s interpretation of Section 2(11) set forth in *Oakwood* has not been fully vetted by any circuit court as required by *Loper Bright*. See *NLRB v. Nexstar Media, Inc.*, No. 24-2818, 2026 WL 1876260, at *2 (2d Cir. Jun. 30, 2026); *Universal Protection Servs., LLC v. NLRB*, No. 24-11150, 2024 WL 1194880, at *6 (11th Cir. May 1, 2026); *Northeastern Univ. v. NLRB*, 138 F.4th 64, 71-73 (1st Cir. 2025); *Hudson Inst. of Process Research, Inc. v. NLRB*, 117 F.4th 692, 703 (5th Cir. 2024).

This is in clear conflict with the Eighth Circuit’s holding in *KDSK Multimedia*. The petitioned-for unit here included, in relevant part, the following positions: (a) Producer 1, News; (b) Digital Content Producers; (c) Producer, Digital Content (NE); (d) Producer 1, Creative Services; and (e) Producer 1, Digital. App.018. These employees, like their peers in *KDSK Multimedia* are supervisors within the meaning of the Act because they:

...[H]ave the overall responsibility for putting together a newscast from planning to air... [a]ttend daily meetings with the executive producer, assignment editor, the assistant news director, and reporters to discuss ideas for news stories. The producer ultimately decides which stories will be covered and creates a ‘rundown’ for each newscast...

...In addition to creating the rundown, producers assign writers, reporters, photographers, and graphic artists to each story. The producers instruct the other employees as to how the story should be covered, including such things as the desired length of the story, whether it will be shot live, whether it will use a taped interview, what graphics will accompany the story, and more...

...[P]roducers are responsible for the accuracy and style of the individual stories reported... [and] can question reporters regarding the factual accuracy of stories, including inquiring about their sources of information. The producers also instruct the director responsible for technical production of the broadcast how stories should be presented...If a producer is not satisfied with any of the work done on a story, he or she can decide to drop the story from the newscast.

Id. at 897-898.

The Board, at least outwardly, cites a need for uniformity in creating a coherent national labor policy. *See Airgas USA, LLC*, 373 NLRB No. 102, at *1 n.2 (Sep. 18, 2024). The purported logic is that only the Board, having nationwide jurisdiction, can articulate rules. *See id.* So the Board may follow its own rules, even when those rules conflict with judicial precedent in some circuits. *See id.*

This has been criticized by the circuit courts and called “unacceptable,” “contumacious,” and “outside the

law.” See, e.g. *NLRB v. Ashkenazy Prop. Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987); *Beverly Enters. v. NLRB*, 727 F.2d 591, 593 (6th Cir. 1984); *Ithaca Coll. v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979). This practice does little more than force parties to spend time and money appealing to a circuit court to police the Board and its whims. *Beverly Enters.*, 727 F.2d at 593. The result is uniformity only at the administrative level, causing continued expenditure on appellate litigation. *Heartland Plymouth Ct. MI, LLC v. NLRB*, 838 F.3d 16, 18 (D.C. Cir. 2016); cf. *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1093 (D.C. Cir. 1992).

II. The Approach Taken by the Second Circuit Here is an Outlier

A. The *Loper* Standard Has Been Applied Consistently to the Board by the Fifth, Sixth, Tenth, and D.C. Circuits

The weight of authority shows the Board is neither immune from *Loper Bright*, nor entitled to receive any special deference under precedent pre-dating *Chevron*, *U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). See contra *NLRB v. Truck Drivers Local Union No. 449, Int’l Brotherhood of Teamsters, Warehousemen and Helpers of Am., A.F.L.*, 353 U.S. 97, 96 (1957); *NLRB v. Int’l Ass’n of Bridge, Structural and Ornamental Ironworkers, AFL-CIO*, 434 U.S. 335, 350 (1978); *NLRB v. Hearts Publications, Inc.*, 322 U.S. 111, 130-131 (1944).

Critically, this Court, in *Loper Bright*, did not exempt the Board from the requirement of *de novo* review.

See Hospital Menonita II, 183 F.4th at 755. Recent authority from four (4) of the thirteen (13) circuit courts demonstrates that circuit courts must apply *Loper Bright* when called on to review the Board’s legal conclusions:

- “In our prior opinion in this case, we observed that courts accord deference to the NLRB’s ‘reasonable interpretation of ambiguous provisions in the NLRA’ under *Chevron*...Following *Loper Bright*, we no longer accept such deference. We must instead ‘exercise [our] independent judgment in deciding whether an agency has acted within its statutory authority.’” *United Nat. Foods, Inc.*, 2025 WL 1513871, at *5. (internal citations omitted).
- “As for our review of the Board’s interpretation of the NLRA, in the past we have shown ‘considerable deference’ to the Board. But recently *Loper Bright*...involved the (APA) to hold that ‘[c]ourts must exercise independent judgment in deciding whether an agency has acted within its statutory authority’ and ‘may not defer to an agency interpretation of the law simply because a statute is ambiguous.’ Hence, deference is no longer owed.” *3484, Inc.*, 137 F.4th at 1103-1104.
- “We do not defer to the NLRB’s interpretation of the NLRA, but exercise independent judgment in deciding whether an agency acted within its statutory authority.” *Rieth-Riley Constr. Co.*, 114 F.4th at 528.

- The Board may “stress” that *Loper Bright* “did not ‘call into question prior cases that relied on the *Chevron* framework.’” *Hospital Menonita II.*, 183 F.4th at 755. This is immaterial because “*Loper Bright* prohibits [courts] from deferring to the Board’s legal conclusions.” *Id.*

The jurisdiction to bring cases before this Court was given “first to secure uniformity of decision between those courts in the...circuits.” *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). This petition should be granted as it squarely presents an opportunity for the Court to secure uniformity in application of the *Loper Bright* standard to Board orders and actions.

B. The Second Circuit Has Contradicted Itself

The Second Circuit’s conflicting decisions make the need for uniformity clear. On June 30, 2026, in this matter, the Second Circuit held that the Board’s legal conclusions “should receive, pursuant to longstanding Supreme Court precedent, considerable deference.” App.003.

On September 2, 2026, sixty-four (64) days later, the Second Circuit held:

In considering what the law should be in a particular case, it is for us to decide the law. In making our legal determination, we may no longer defer to the opinions of the NLRB but may still consider whether they are persuasive. Thus, while the NLRB’s legal conclusions may no longer have the power to control, as they did

under *Chevron*, they may still have the power to persuade...

...Such persuasive force is not present, however, in instances where the Board misinterprets and misapplies the law. We have unfettered authority under *Loper Bright* to analyze such questions de novo. In such cases, we must exercise our judgment in deciding whether an agency has acted within its statutory authority.

Siren Retail Corp., No. 24-3168, 2026 WL 2588722, at *4. (internal citations and quotations omitted).

It cannot be that the Second Circuit will sometimes defer to the Board’s legal conclusions and other times properly carry out its duty of *de novo* review of the Board’s orders and actions—all without any clear criteria defining when each standard applies. This petition should be granted to direct the Circuit to cure this discrepancy.

C. Intervention from this Court Has Already Provided Critical Clarity

On February 27, 2024, the D.C. Circuit decided *Hospital Menonita de Guyama, Inc. v. NLRB*, 94 F.4th 1 (D.C. Cir. 2024) (“*Hospital Menonita I*”). The D.C. Circuit concluded that the Board’s orders and actions are entitled to deference. *Id.* at 277, 280-281. A petition for writ of certiorari followed. *Hospital Menonita II*, 183 F.4th at 753.

This Court “granted certiorari, vacated the panel’s judgment, and remanded for ‘further consideration in light of *Loper Bright*.’” *Id.* (quoting *Hosp. Menonita*

de Guayama, Inc. v. NLRB, 145 S. Ct. 982 (2024). On vacatur and remand, the D.C. Circuit recognized “*Loper Bright* prohibits us from deferring to the Board’s legal conclusions” and, on remand, independently reconsidered whether the challenged Board action was consistent with the Act. *Id.* at 755.

After proper independent legal evaluation, the D.C. Circuit determined that the challenged Board action exceeded the authority the Act granted the Board. *Id.* The employer’s petition for review was then granted and the Board’s cross-petition for enforcement denied. *Id.*

This Court should take the same approach here as it took in *Hospital Menonita*. Should the Court be disinclined to grant *certiorari* to undertake plenary review, it should consider alternative summary reversal following GVR, with a short *per curiam* opinion concluding that the Second Circuit’s decision was error for failure to apply *Loper Bright*. This would likely nudge the Second Circuit to bring itself fully into conformity without the need for this Court (and the parties) to devote significant resources to briefing, argument, and decision articulating the correct standard for review of the Board’s legal conclusions—and send a signal to other circuits that have not yet faced the question to avoid the Second Circuit’s path

This procedure has been employed in the face of other doctrinal errors. *See, e.g. Marmet Health Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) (*per curiam* opinion reversing lower court decision at odds with Supreme Court precedent following GVR order). A *per curiam* opinion reversing and reading would be a decision on the merits with precedential value. *See, e.g. Viking River Cruises*,

Inc. v. Moriana, 596 U.S. 639, 658 (2022) (characterizing *Marmet Health* as “our precedent[]”).

III. The Question Presented is Recurring, Important, and Squarely Presented

1. The standard of review application to the Board’s legal conclusions is a question of exceptional and recurring importance. Between 2016 and 2025, the Board issued between six hundred and thirty-five (635) and one thousand two hundred and seventy-two (1,272) complaints in response to alleged unfair labor practices. NATIONAL LABOR RELATIONS BOARD, UNFAIR LABOR PRACTICE LITIGATION, (Sep. 2026) (available at <https://www.nlr.gov/reports/nlr-b-case-activity-reports/unfair-labor-practice-cases/litigation/unfair-labor-practice>). From these complaints, the Board “issues several hundred decisions per year.” NATIONAL LABOR RELATIONS BOARD, DECIDE CASES, (Sep. 2026) (available at <https://www.nlr.gov/about-nlr/what-we-do/decide-cases>).

2. The circuit courts play a critical role in enforcing and applying the Act. The Board cannot enforce its own orders. 29 U.S.C. § 160(e); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48(1938). Instead, the Board must petition a circuit court for enforcement. *Id.*; *Amalgamated Utility Workers v. Consolidated Edison Co. of New York*, 309 U.S. 261, 266 (1940). The circuit courts also hear petitions of “[a]ny person aggrieved by a final order of the Board.” 29 U.S.C. § 160(f).

Between 2016 and 2025, between twenty-one (21) and one hundred and twenty-one (121) Board orders are presented to the circuit courts for enforcement or review each year. NATIONAL LABOR RELATIONS BOARD, APPELLATE COURT DECISIONS (10 YEARS), (Sep. 2026) (available at

<https://www.nlr.gov/reports/nlr-case-activity-reports/unfair-labor-practice-cases/litigation/appellate-court>).

3. This case is an ideal vehicle to ensure uniformity in circuit court review of the Board's legal conclusions.

IV. This Court Should Vacate the Second Circuit's Decision So As to Allow It to Reconsider Its Decision In Light of *Loper Bright*

This Court “may...vacate...any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and...require such further proceedings to be had as may be just under the circumstances.” 28 U.S.C. § 2106.

CONCLUSION

The abuse of discretion standard applied by the Second Circuit here—including its decision to ignore *KDSK Multimedia*—cannot withstand scrutiny under *Loper Bright*. Petitioner must be afforded true *de novo* review of the Board's decision as to the 29 U.S.C. § 152(11) supervisory status of television producers. The dual purposes of conflict resolution and error correction are served equally by *certiorari*.¹ The petition for writ of *certiorari* should be granted.

1. Should this Court be disinclined to grant *certiorari* to undertake plenary review, it should consider in the alternative summary reversal following GVR, with a short *per curiam* opinion consistent with *Hospital Menonita II*. Such an opinion could nudge the circuits to bring themselves into correct uniformity under *Loper Bright* without the need for the Court (and the parties) to devote significant resources to briefing, argument and decision articulating the correct standard to resolve the difference between the approaches taken by the Second and Eighth Circuits.

Respectfully submitted,

MATTHEW T. CLARK
CONSTANGY, BROOKS, SMITH
& PROPHETE, LLP
6 Campus Drive,
Suite 305
Parsippany, NJ 07054

CHARLES W. PAUTSCH
NEXSTAR MEDIA GROUP, INC.
545 East John W. Carpenter
Freeway
Irving, TX 75062

STEVEN B. KATZ
Counsel of Record
CONSTANGY, BROOKS, SMITH
& PROPHETE, LLP
2029 Century Park East,
Suite 1100
Los Angeles, CA 90067
(310) 909-7775
skatz@constangy.com

DEAN KPERE-DAIBO
CONSTANGY, BROOKS, SMITH
& PROPHETE, LLP
4240 Duncan Avenue,
Suite 200
St. Louis, MO 63100

Attorneys for Petitioner

APPENDIX

TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JUNE 30, 2026.....	1a
APPENDIX B – DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, FILED AUGUST 29, 2024	14a

1a

**APPENDIX A — ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT, FILED JUNE 30, 2026**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

24-2818

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NEXSTAR MEDIA INC., AUTHORIZED TO
OPERATE TELEVISION STATION WROC-TV,

Respondent,

THE NATIONAL ASSOCIATION OF
BROADCAST EMPLOYEES & TECHNICIANS -
COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Intervenor.

SUMMARY ORDER

Filed June 30, 2026

Present: DEBRA ANN LIVINGSTON,
Chief Judge,
DENNY CHIN, JOSEPH F. BIANCO,
Circuit Judges.

Appendix A

On application for enforcement of the August 29, 2024 decision and order of the National Labor Relations Board.

UPON DUE CONSIDERATION of this petition for enforcement of the August 29, 2024 decision and order of the National Labor Relations Board, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the petition for enforcement is **GRANTED**.¹

Petitioner National Labor Relations Board (“NLRB” or “Board”) seeks enforcement of its August 29, 2024 order directing Respondent Nexstar Media, Inc., Authorized to Operate Television Station WROC-TV (“Nexstar”), to recognize and bargain with Intervenor the National Association of Broadcast Employees & Technicians-Communications Workers of America, AFL-CIO (the “Union”) based on its finding that Nexstar violated Sections 8(a)(1) and (a)(5) of the National Labor Relations Act (“NLRA” or “Act”), 29 U.S.C. §§ 158(a)(1), (a)(5). Nexstar challenges the Union’s certification as bargaining representative in the underlying representation proceeding on the grounds that: (1) the bargaining unit was certified improperly to include news producers, digital content producers, and creative services producers (collectively, “producers”), who are supervisors within the meaning of the Act and are therefore exempt from the coverage of the

1. All parties reference Nexstar’s cross-petition for judicial review but we discern no record of a cross-petition having been filed in this matter. At any rate, we have considered all Nexstar’s arguments whether they are characterized as opposition to the Board’s application for enforcement or in support of a cross-petition for judicial review, and we find them without merit.

Appendix A

Act; and (2) the NLRB abused its discretion in overruling Nexstar’s election objections without a pre-election and post-election hearing. We assume the parties’ familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

* * *

We review the NLRB’s factual findings to determine whether they are supported by substantial evidence on the record as a whole, *see* 29 U.S.C. § 160(e), (f), reversing a factual finding “only . . . if, after looking at the record as a whole, we are left with the impression that no rational trier of fact could reach the conclusion drawn by the Board.” *Nat’l Lab. Rels. Bd. v. Katz’s Delicatessen of Houston St., Inc.*, 80 F.3d 755, 763 (2d Cir. 1996) (internal quotation marks omitted). *See also Universal Camera Corp. v. Nat’l Lab. Rels. Bd.*, 340 U.S. 474, 488-89 (1951); *HealthBridge Mgmt., LLC v. Nat’l Lab. Rels. Bd.*, 902 F.3d 37, 43 (2d Cir. 2018). We review the NLRB’s legal conclusions *de novo*. *Nat’l Lab. Rels. Bd. v. Pier Sixty, LLC*, 855 F.3d 116, 122 (2d Cir. 2017), *as amended* May 9, 2017. “Legal conclusions based upon the Board’s expertise should receive, pursuant to longstanding Supreme Court precedent, considerable deference.” *Nat’l Lab. Rels. Bd. v. Starbucks Corp.*, 679 F.3d 70, 77 (2d Cir. 2012) (citation modified).

I. Challenged Ballots

Turning first to the question whether the Union was properly certified as a bargaining unit, substantial evidence supports the NLRB’s conclusion that the

Appendix A

producers were not statutory supervisors under the Act because, contrary to Nexstar’s suggestion on appeal, they neither assigned work to others using independent judgment nor responsibly directed the work of others.²

The NLRA allows employees to organize and bargain collectively. 29 U.S.C. § 159(a); *id.* § 157. However, the Act excludes “supervisors” from collective bargaining rights. *Id.* § 152(3) (“The term ‘employee’ shall include any employee . . . but shall not include . . . any individual employed as a supervisor . . .”); *id.* § 164(a) (“[N]o employer . . . shall be compelled to deem individuals defined . . . as supervisors as employees for the purposes of any law . . . relating to collective bargaining.”). The NLRA defines a “supervisor” as:

. . . any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

2. Regarding the challenged ballots, Nexstar also urges that the supervisory status of television producers has been well-established since *Multimedia KSDK, Inc. v. National Labor Relations Board*, 303 F.3d 896 (8th Cir. 2002). However, as the Board notes, *Multimedia* is neither binding nor pertinent.

Appendix A

Id. § 152(11). The Supreme Court has held that the Act sets forth a three-part test for determining the supervisory status of employees.

Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.”

Nat’l Lab. Rels. Bd. v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 712-13 (2001) (quoting *Nat’l Lab. Rels. Bd. v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 573-74 (1994)).

“Supervisory status within the meaning of Section 2(11) of the NLRA is a question of fact.” *Nat’l Lab. Rels. Bd. v. Meenan Oil Co.*, 139 F.3d 311, 320 (2d Cir. 1998). The “party claiming that the employee is a supervisor . . . bear[s] the burden of proving supervisory status.” *Ky. River Cmty. Care*, 532 U.S. at 710-11; *see Nat’l Lab. Rels. Bd. v. Quinnipiac Coll.*, 256 F.3d 68, 73 (2d Cir. 2001).

a. Assignment

At the start, substantial evidence supports the NLRB’s conclusion that the producers did not exercise independent judgment in the assignment of others. Under the Act, to “assign” is to “designat[e] an employee to a place (such as location, department, or wing), appoint[] an employee to a time (such as a shift or overtime period), or giv[e]

Appendix A

significant overall duties, i.e., tasks, to an employee.” *In re Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006). Assignment does not automatically confer supervisory status; the Act also requires the use of “independent judgment.” *See* 29 U.S.C. § 152(11). “[T]o exercise ‘independent judgment’ an individual must . . . act . . . free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood*, 348 NLRB at 692-93. To qualify as a statutory supervisor, assignment must “rise above the merely routine or clerical.” *Id.* at 693.

News Producers. The record supports the Board’s conclusion that the news producers do not designate employees to places or departments, assign shifts, or give significant overall duties to employees. *See id.* at 689. While Nexstar points to evidence of a news producer telling a reporter to return to the station after the reporter emailed the producer to state that an address she was visiting was inaccessible, such instruction was not an exercise of independent discretion. *See Meenan Oil*, 139 F.3d at 321. Asking a reporter to return due to an inaccessible location is merely a “commonsense consideration[.]” *Id.* (quoting *B.P. Oil, Inc.*, 256 NLRB 1107, 1109 (1981), *enf’d*, 681 F.2d 804 (3d Cir. 1982)). Further, while news producers can authorize additional airtime to a reporter, ask technical employees to perform “double boxes,” and decide where a photographer will be at a location, Nexstar adduced no examples of these occurrences, and thus failed to show how news producers make such judgments and consider “the factors weighed or balanced.” *See In re Croft Metals, Inc.*, 348 NLRB 717, 722 (2006). Without such evidence, the Board properly declined to “conclude that the degree

Appendix A

of discretion involved in these activities rises above the routine or clerical.” *See id.*

Digital Content Producers. Substantial evidence also supports the Board’s finding that the digital content producers are not supervisors within the meaning of Section 2(11) of the Act. Nexstar points to evidence that a digital content producer requested that an editor expedite a task. Because the digital content producer was acting at the behest of the Digital Executive Producer, however, this example does not establish supervisory status. Nor does evidence that a digital content producer sought permission from the News Director to obtain a substitute for an unavailable photographer. Without more, both examples instead show that the digital content producers *lack* authority to assign.

Creative Services Producers. Finally, substantial evidence supports the Board’s finding that the creative services producers are also not supervisors within the meaning of Section 2(11) of the Act. Although the creative services producers may direct the designer to create graphics and motion graphics, instruct the designer to shoot video, and the editor to edit commercial copy, such assignment does not rise above the routine or clerical. Because there was only one designer and one editor in the department, there was only one self-evident choice. *See Oakwood*, 348 NLRB at 693 (“If there is only one obvious and self-evident choice (for example, assigning the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating) . . . then the assignment is routine or clerical in nature and does not implicate independent judgment . . .”).

*Appendix A***b. Responsible Direction**

Substantial evidence similarly supports the NLRB's conclusion that the producers do not responsibly direct the work of others. To qualify as a supervisor by virtue of such direction, "the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *Id.* at 691-92. Here, the record is devoid of evidence that the news producers, digital content producers, or creative service producers were responsible for a subordinate's performance of his or her job. Therefore, Nexstar failed to show that these producers responsibly directed the work of others.

II. Election Objections

Nexstar next challenges the NLRB's decision to overrule its election objections and certify the Union without a hearing. As we have said before, "when reviewing a request to overturn a Board decision refusing to set aside an election, we are limited to the narrow question of whether the Board abused its discretion in certifying the election." *Nat'l Lab. Rels. Bd. v. Arthur Sarnow Candy Co., Inc.*, 40 F.3d 552, 556 (2d Cir. 1994) (citation modified). Nexstar bears the burden of demonstrating such abuse. *Id.* Moreover, "[t]he Board has broad discretion to determine whether the circumstances of an election come sufficiently close to laboratory conditions so that employees can exercise free choice in deciding whether to

Appendix A

select the Union as their representative.” *Amalgamated Serv. & Allied Indus. Joint Bd. v. Nat’l Lab. Rels. Bd.*, 815 F.2d 225, 227 (2d Cir. 1987). And to obtain a hearing, an objecting party must make an “offer of proof” raising “substantial and material factual issues which, if resolved in its favor, would warrant setting aside the election.” *Nat’l Lab. Rels. Bd. v. Newton-New Haven Co.*, 506 F.2d 1035, 1036 (2d Cir. 1974) (quoting *Polymers, Inc. v. Nat’l Lab. Rels. Bd.*, 414 F.2d 999, 1004-05 (2d Cir. 1969), *cert. denied*, 369 U.S. 1010 (1970)); *see also* 29 C.F.R. § 102.69(c)(1)(i). Here, the Board did not abuse its discretion in overruling Nexstar’s objections.

a. Pre-Election Litigation of Voter Eligibility

At the start (and contrary to its argument on appeal), Nexstar was not entitled under the 2019 Rule to a pre-election hearing on voter eligibility. Under the 2019 Rule, “[d]isputes concerning unit scope, voter eligibility and supervisory status *will normally be* litigated and resolved by the Regional Director before an election is directed. However, the parties may agree to permit disputed employees to vote subject to challenge, thereby deferring litigation concerning such disputes until after the election.” Representation-Case Procedures, Final Rule, 84 Fed. Reg. 69,524, 69,593 (Dec. 18, 2019) (codified at 29 C.F.R. § 102.64(a)) (emphasis added). The 2019 Rule is inapplicable here, where there was an election agreement in which all parties waived a pre-election hearing in favor of post-election litigation. *See Nat’l Lab. Rels. Bd. v. Black Bull Carting Inc.*, 29 F.3d 44, 46 (2d Cir. 1994) (“A party seeking to overturn an election on the ground of a

Appendix A

procedural irregularity has a heavy burden. The presence of such an irregularity is not in itself sufficient to overturn an election.” (citation modified)). Nexstar’s argument to the contrary is without merit.

b. Voter List

Nor has Nexstar shown that the Board’s election agent compromised the election’s integrity in contravention of the right to refrain, 29 U.S.C. § 157, by giving both parties the names of the challenged voters who had cast a ballot during the first voting session prior to commencement of the second voting session. Here, the election agent’s list-keeping was in line with the Board’s established practices. *See In re Mead Coated Bd., Inc.*, 337 NLRB 497, 498 (2002) (“[T]he Board has long recognized the right to refer to a challenge list as an exception to the general prohibition against keeping lists, in order to ensure that the parties have a full opportunity to challenge the ballots of voters they believe to be ineligible.” (citing *Bear Creek Orchards*, 90 NLRB 286 (1950))). Because the stipulated election agreement expressly provided that employees in the disputed categories would vote subject to challenge, the election agent was permitted to keep a challenge list. Furthermore, the election agent took a number of precautions to safeguard the integrity of the election and the secrecy of the challenged voters. And critically, “[o]ur review of the record reveals no evidence which indicates that the outcome of the election was affected by the disclosure.” *Rochester Joint Bd., Amalgamated Clothing & Textile Workers Union v. Nat’l Lab. Rels. Bd.*, 896 F.2d 24, 27 (2d Cir. 1990).

*Appendix A***c. Union Dues**

Finally, the Board acted within its discretion in overruling Nexstar's objection asserting that the Union interfered with the election by supposedly discounting its union membership dues. "[U]nions are allowed to describe preexisting benefits to which employees would ordinarily be entitled as union members," but may not "create new benefits for the purpose of the election, or condition the receipt of such benefits on joining the union before the election or on voting for the union." *Jam Prods., Ltd.*, 371 NLRB No. 26, slip op. at 13 (2021) (citing *Dart Container of Cal.*, 277 NLRB 1369, 1370 (1985)). To succeed with an objection, "[t]he Employer must demonstrate, based upon an objective standard, whether the Union's conduct would reasonably have a tendency to influence the outcome of the election." *Needham Excavating, Inc.*, 371 NLRB No. 146, slip op. at 41 (2022) (citation modified). We consider the following factors: "the size of the benefit related to the stated purpose of granting it; the timing of the benefit compared to the election; and how employees would reasonably view the purpose of the benefit." *Id.*

Here, the Union described a pre-existing condition of union membership. The Union told employees that they would be placed in Local 51022 and that their dues rate would be 1.33% of gross wages. There was no discount because the Union did not disseminate a higher dues rate prior to releasing this information. Rather, five days prior, *Nexstar* released a different dues rate for a different union chapter that cannot be attributed to the Union. Furthermore, the Board correctly concluded that

Appendix A

Nexstar's proffered evidence concerning the open and notorious union supporter was insufficient to warrant a hearing because it was unclear whether such a statement was attributable to the Union.

Moreover, the *Needham Excavating* factors counsel in favor of the Board's determination that the Union's conduct had little tendency to influence the outcome of the election. First, the size of the benefit is negligible at .34% of gross wages. *See id.* Second, the Union released this information ten days after the stipulated election agreement was signed and approved and a little over two weeks in advance of the election. *See id.* No meaningful conclusions can be drawn from the timing given the short window between the election agreement and election. Finally, the employees would reasonably view the purpose of the benefit as neutral information about different union chapter fees. *See id.* And a union is allowed unconditionally to "lower[] . . . self-imposed barriers" to union membership by lowering the dues structure. *Nat'l Lab. Rels. Bd. v. Whitney Museum of Am. Art*, 636 F.2d 19, 22 (2d Cir. 1980).

In sum, we conclude that the Board acted within its wide discretion in overruling Nexstar's election objections without a post-election hearing. *See Nat'l Lab. Rels. Bd. v. Hale Mfg. Co.*, 602 F.2d 244, 248 (2d Cir. 1979) ("[A] party is entitled to a hearing if it demonstrates by Prima facie evidence the existence of substantial and material factual issues which, if resolved in its favor, would require the setting aside of the representation election." (citation modified)). The Board properly certified the Union and

Appendix A

Nexstar concedes its refusal to recognize and bargain with the Union. Therefore, we discern no error in the Board's determination that Nexstar violated Sections 8(a)(5) and (1) of the Act.

* * *

We have considered Nexstar's remaining arguments and find them to be without merit. Accordingly, the petition for enforcement is **GRANTED**.

For the Court:

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk

**APPENDIX B — DECISION AND ORDER OF
THE NATIONAL LABOR RELATIONS BOARD,
FILED AUGUST 29, 2024**

NATIONAL LABOR RELATIONS BOARD

Case 03-CA-332930

NEXSTAR MEDIA INC., AUTHORIZED TO
OPERATE TELEVISION STATION WROC-
TV *and* NATIONAL ASSOCIATION OF
BROADCAST EMPLOYEES & TECHNICIANS-
COMMUNICATIONS WORKERS OF AMERICA,
AFLCIO.

Filed August 29, 2024

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND
MEMBERS PROUTY AND WILCOX

This is a refusal-to-bargain case in which Nexstar Media Inc., Authorized to Operate Television Station WROC-TV (the Respondent)¹ is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on January 4, 2024, by National Association of Broadcast Employees & Technicians - Communications Workers of America, AFL-CIO (the Union), the General Counsel issued a complaint on April 10, 2024, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain

1. We have corrected the Respondent's name to conform to the name used in the representation proceeding.

Appendix B

with the Union following the Union's certification in Case 03-RC-309322. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer and corrected answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On May 15, 2024, the General Counsel filed a Motion for Summary Judgment. On May 16, 2024, the Board issued an Order Transferring the Proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On May 30, 2024, the Respondent filed a response to the Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits that it has refused to bargain but asserts that it has no duty to bargain and contests the validity of the Union's certification of representative based on its objections to the election in the underlying representation proceeding and its contention, raised and rejected in the underlying representation proceeding, that the bargaining unit includes statutory supervisors.²

2. In its answer to the complaint, the Respondent denies the paragraphs alleging the appropriateness of the bargaining unit, the Union's status as the unit employees' exclusive collective-bargaining representative, that it has failed and refused to recognize and bargain with the Union, that it has violated the Act, and that its unfair labor practices affect commerce. In its

Appendix B

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor has it established any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.³

On the entire record, the Board makes the following

affirmative defenses, the Respondent admits that it has refused to bargain with the Union to test certification, and claims that in the underlying representation proceeding its objections were improperly overruled; its objections warranted a hearing; and certain unit employees should have been designated Sec. 2(11) supervisors. It incorporates the claims from the underlying representation case in its response to the Board's Notice to Show Cause. Because those issues were fully litigated and resolved in the underlying representation proceeding, we conclude that the Respondent's denials of the allegations in pars. 6(a), 6(c), 7(c), 8, and 9 of the complaint, its affirmative defenses, and the arguments raised in its response to the Board's Notice to Show Cause do not raise any issues warranting a hearing.

Lastly, there is no merit to the Respondent's affirmative defense that Sec. 10(b) bars some or all of the allegations in the complaint. The charge was filed on January 4, 2024, and the complaint alleges that the Respondent's refusal to bargain began on December 14, 2023, and is ongoing.

3. The Respondent's request that the complaint be dismissed is therefore denied.

Appendix B

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Rochester, New York (the Respondent's facility), and has been operating a television station.

Annually, the Respondent, in conducting its business operations described above, derives gross revenues in excess of \$100,000 and purchases and receives at its Rochester, New York facility goods and services valued in excess of \$5000 directly from points outside the State of New York.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following an election conducted by secret ballot on February 15, 2023, the Regional Director issued a Certification of Representative in Case 03-RC-309322 on September 26, 2023, certifying the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:⁴

4. The Regional Director found that employees in the following classifications were included in the unit: Producer 1,

Appendix B

Included: All full-time and regular part-time employees employed in the classifications of Reporter 1, MultiMedia Journalists; Reporter 1, News Anchor; Reporter 1, Sports; Reporter 1, News; Meteorologist 1; Anchor III, News; Assistant 1, News Production; Assistant 1, Production; Designer 1, Graphic; Director 1, Production; Photographer 1, News; Operator 1, Master Control; Engineer 1, Broadcast; Editor 1, News; Editor I, Assignments; Editor 1, Creative Services Photographer; Engineer 1, Maintenance; Producer 1, News; Digital Content Producer; Producer, Digital Content (NE); Producer 1, Creative Services; Producer 1, Digital; and Paid Interns employed by the Respondent at its Rochester, New York facility.

Excluded: Office clerical employees, individuals employed in the classifications of Assistant 1, Administrative; Coordinator 1, HR Business; Receptionist; Sales; Chief Engineer; Assistant Chief Engineer; Sports Director; Chief Meteorologist; Chief Photographer; Creative Services Director; Managing Editor; Executive

News; Digital Content Producer; Producer, Digital Content (NE); Producer 1, Creative Services; and Producer 1, Digital. Further, employees in the classification Technician 1, IT System were permitted to vote subject to challenge, but it was unnecessary to resolve their inclusion in or exclusion from the unit because their ballots were not determinative. The Certification of Representative inadvertently failed to reflect these outcomes. We have corrected the unit description accordingly.

Appendix B

Producer; News Director; Assistant News Director; confidential employees, managers, guards, and supervisors as defined by the Act.⁵

On January 2, 2024, the Board denied the Respondent's request for review of the Regional Director's decision. The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

About December 14, 2023, and January 2, 2024, the Union, by email, requested that the Respondent bargain with the Union as the exclusive collective-bargaining representative of the unit. Since about December 14, 2023, and continuing to date, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

5. However, Technician 1, IT System is neither included in nor excluded from the bargaining unit covered by the certification, inasmuch as the parties did not agree on the inclusion or exclusion of Technician 1, IT System but agreed to vote them subject to challenge and resolution of their inclusion or exclusion was unnecessary because their ballots were not determinative of the election results.

Appendix B

CONCLUSION OF LAW

By failing and refusing since about December 14, 2023, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning on the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

In addition, the General Counsel requests that the Respondent be required to make its employees whole for the lost opportunity to bargain at the time and in the

Appendix B

manner contemplated by the Act. To do so would require overruling *Ex-Cell-O Corp.*, 185 NLRB 107 (1970), and outlining a methodological framework for calculating such a remedy. The Board has decided to sever this issue and retain it for further consideration to expedite the issuance of this decision regarding the remaining issues in this case.⁶ See *Longmont United Hospital*, 371 NLRB No. 162, slip op. at 2 (2022), *enfd.* 70 F.4th 573 (D.C. Cir. 2023). The Board will issue a supplemental decision regarding a make-whole remedy at a later date. See *Kentucky River Medical Center*, 355 NLRB 643, 647 fn. 13 (2010); *Kentucky River Medical Center*, 356 NLRB 6 (2010).

ORDER

The National Labor Relations Board orders that the Respondent Nexstar Media Inc., Authorized to Operate Television Station WROC-TV, Rochester, New York, and its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the National Association of Broadcast Employees & Technicians--Communications Workers of America, AFL-

6. In its response to the Board's Notice to Show Cause, the Respondent opposes the General Counsel's request that the Board overrule *Ex-Cell-O*. Because the issue of compensatory relief will be severed for future consideration, the Respondent's arguments on that matter are no barrier to granting summary judgment. See *Longmont United Hospital v. NLRB*, 70 F.4th 573, 581-582 (D.C. Cir. 2023).

Appendix B

CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Included: All full-time and regular part-time employees employed in the classifications of Reporter 1, MultiMedia Journalists; Reporter 1, News Anchor; Reporter 1, Sports; Reporter 1, News; Meteorologist 1; Anchor III, News; Assistant 1, News Production; Assistant 1, Production; Designer 1, Graphic; Director 1, Production; Photographer 1, News; Operator 1, Master Control; Engineer 1, Broadcast; Editor 1, News; Editor I, Assignments; Editor 1, Creative Services Photographer; Engineer 1, Maintenance; Producer 1, News; Digital Content Producer; Producer, Digital Content (NE); Producer 1, Creative Services; Producer 1, Digital; and Paid Interns employed by the Respondent at its Rochester, New York facility.

Appendix B

Excluded: Office clerical employees, individuals employed in the classifications of Assistant 1, Administrative; Coordinator 1, HR Business; Receptionist; Sales; Chief Engineer; Assistant Chief Engineer; Sports Director; Chief Meteorologist; Chief Photographer; Creative Services Director; Managing Editor; Executive Producer; News Director; Assistant News Director; confidential employees, managers, guards, and supervisors as defined by the Act.⁷

(b) Post at its facility in Rochester, New York, copies of the attached notice marked “Appendix.”⁸ Copies of

7. Technician 1, IT System is neither included in nor excluded from the bargaining unit.

8. If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that “This notice is the same notice previously [sent or posted] electronically on [date].” If this Order is enforced by a judgment of a United States court of

Appendix B

the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 14, 2023.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

25a

Appendix B

Dated, Washington, D.C. August 29, 2024

/s/ _____
Lauren McFerran, Chairman

/s/ _____
David M. Prouty, Member

/s/ _____
Gwynne A. Wilcox, Member

26a

Appendix B

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us
on your behalf

Act together with other employees for your
benefit and protection

Choose not to engage in any of these
protected activities.

WE WILL NOT fail and refuse to recognize and bargain with the National Association of Broadcast Employees & Technicians--Communications Workers of America, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

Appendix B

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

Included: All full-time and regular part-time employees employed in the classifications of Reporter 1, MultiMedia Journalists; Reporter 1, News Anchor; Reporter 1, Sports; Reporter 1, News; Meteorologist 1; Anchor III, News; Assistant 1, News Production; Assistant 1, Production; Designer 1, Graphic; Director 1, Production; Photographer 1, News; Operator 1, Master Control; Engineer 1, Broadcast; Editor 1, News; Editor I, Assignments; Editor 1, Creative Services Photographer; Engineer 1, Maintenance; Producer 1, News; Digital Content Producer; Producer, Digital Content (NE); Producer 1, Creative Services; Producer 1, Digital; and Paid Interns employed by the Respondent at its Rochester, New York facility.

Excluded: Office clerical employees, individuals employed in the classifications of Assistant 1, Administrative; Coordinator 1, HR Business; Receptionist; Sales; Chief Engineer; Assistant Chief Engineer; Sports Director; Chief Meteorologist; Chief Photographer; Creative Services Director; Managing Editor; Executive Producer; News Director; Assistant News Director; confidential employees, managers, guards, and supervisors as defined by the Act.*

28a

Appendix B

* Technician 1, IT System is neither included in
nor excluded from the bargaining unit.

NEXSTAR MEDIA INC., AUTHORIZED TO OPERATE TELEVISION
STATION WROC-TV

The Board's decision can be found at www.nlr.gov/case/03-CA-332930 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.