JUMPING FOR *JOY SILK*: HOW THE REVIVAL OF A MID-CENTURY LABOR UNION ORGANIZING DOCTRINE WOULD INCREASE COST EFFICIENCY FOR THE NATIONAL LABOR RELATIONS BOARD

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INTRODUCTION

The COVID-19 pandemic's economic impact has sparked a contemporary wave of union activity across the United States.[1] To protect employees' health and economic security amidst employers' dismissal of concerns regarding worker safety and stagnant wages during the pandemic, union organizers have tried—and in many instances, succeeded—to unionize employees at Fortune 500 companies like Starbucks, Amazon, Trader Joe's, Target, and Apple.[2] In July 2022, the National Labor Relations Board (NLRB or the Board) issued a press release announcing that petitions for Board certification of union representatives increased by 58% in the first three-quarters of the 2022 fiscal year—October 1, 2021 to September 31, 2022—during which workers filed 1,892 election petitions compared to 1,197 petitions in the first three-quarters of the previous fiscal year.[3] Within the first eight months of the 2022 fiscal year, petitions exceeded the total number of petitions filed during the entire 2021 fiscal year.[4] These gains for the labor movement—which generated a corresponding increase in workloads for NLRB regional staff responsible for conducting union representation elections—come at a time when NLRB staff report that the agency is understaffed and lacks sufficient resources.[5] Indeed, the General Counsel (GC) of the Board stated in her July 2022 press release

1. *See generally* Heidi Shierholz, Margaret Poydock, John Schmitt & Celine McNicholas, *Latest Data Release on Unionization Is a Wake-up Call to Lawmakers*, ECON. POL'Y INST. (Jan. 20, 2022), https://www.epi.org/publication/latest-data-release-on-unionization-is-a-wake-up-call-to-lawmakers (finding that polling data and substantial levels of union activity in 2021 demonstrate that a large share of workers value unions and desire to have a union in their workplace despite "fierce corporate opposition to union organizing").

2. *See* Michael Sainato, *Trader Joe's Workers Push to Unionize Amid Wave of Organizing Efforts*, GUARDIAN (May 23, 2022, 5:00 AM), https://www.theguardian.com/us-news/2022/may/23/trader-joes-workers-massachusetts-push-for-union (reporting on union organizing at companies that had previously avoided unionization).

3. Press Release, NLRB, Correction: First Three Quarters' Union Election Petitions Up 58%, Exceeding All FY21 Petitions Filed (July 15, 2022) [hereinafter NLRB Press Release], https://www.nlrb.gov/news-outreach/news-story/correction-first-three-quarters-union-election-petitions-up-58-exceeding.

4. *Id.*

5. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-242, NATIONAL LABOR RELATIONS BOARD: MEANINGFUL PERFORMANCE MEASURES COULD HELP IMPROVE CASE QUALITY, ORGANIZATIONAL EXCELLENCE, AND RESOURCE MANAGEMENT 28 (2021) [hereinafter GAO REPORT] (explaining that National Labor Relations Board (NLRB or the Board) staff attributed low employee morale to understaffing and pressure from heavier workloads).

that "[t]he [NLRB] urgently needs more resources to process petitions and conduct elections."[6]

Because of the mounting pressure on NLRB staff, the Board should consider and implement policies that would ease workload burdens while remaining true to the purposes of the National Labor Relations Act[7] (NLRA or the Act) and the overall objectives of the Board.[8] Congress passed the NLRA in 1935 to govern the relationship between employees, unions, and management in the private sector; to safeguard the right of employees to organize and collectively bargain with their employer; and to promote the efficiency of employer–employee relationships in commerce.[9] The NLRA also established the NLRB, an independent federal agency, to enforce the Act and to prevent the commission of unfair labor practices (ULPs).[10]

The NLRB has multiple organizational parts, each with different functions.[11] The Board is a "quasi-judicial body" that reviews decisions of the agency's administrative law judges (ALJs) and is empowered to modify or overrule any findings or orders issued by an ALJ.[12] The GC of the NLRB is independent from the Board and is charged with investigating and prosecuting ULP charges and overseeing the NLRB's regional offices.[13] The NLRB has forty-eight offices nationwide; the staff in these regional offices carry out the Board's primary functions by investigating charges of ULPs, conducting union representation elections, and facilitating settlements between management and unions.[14] Upon issuance of a complaint detailing a ULP in violation of the Act, the Board has the power to petition a U.S.

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6. NLRB Press Release, *supra* note 3.

7. National Labor Relations Act (NLRA or the Act), 29 U.S.C. §§ 151–69.

8. *See* NLRB, FY 2023: JUSTIFICATION OF PERFORMANCE BUDGET FOR THE COMMITTEE ON APPROPRIATIONS 3 (2022) [hereinafter FY 2023 BUDGET JUSTIFICATION], https://www.nlrb.gov/sites/default/files/attachments/pages/node-155/fy-2023-nlrb-congressional-budget-justification.pdf (stating that the NLRB protects employees' rights to form and join a union by interpreting and enforcing the NLRA).

9. *See* § 151 (providing findings and declaration of policy).

10. §§ 153(a), 160(a).

11. *See* FY 2023 BUDGET JUSTIFICATION, *supra* note 8, at 5 (outlining the organizational structure of the NLRB).

12. *Id.* at 4; *see* § 160(c)–(d) (providing that an administrative law judge files a factual report and proposed order with the Board, and the Board can authorize the proposed order or may "modify or set aside, in whole or in part, any finding or order"). The Board is comprised of five members who are appointed by the President and confirmed by the Senate. § 153(a).

13. § 153(d).

14. FY 2023 BUDGET JUSTIFICATION, *supra* note 8, at 4.

district court to grant appropriate temporary relief to remedy the ULP.[15]

Under § 8(a)(5) of the NLRA, an employer's "refus[al] to bargain collectively with the representatives of his employees, subject to the provisions of [§ 9(a)]" constitutes a ULP.[16] Section 9(a) defines those representatives as the individual or labor organization "designated or selected" by a majority of employees as the exclusive representative for collective bargaining.[17] Under current NLRB procedures, a union representative or group of employees typically files a petition with the Board to conduct a secret-ballot election in which all eligible employees cast an anonymous ballot in favor of or opposing the designation of a union as their exclusive collective bargaining representative.[18] Notably, however, § 9(a) does not specifically require that the individual selected as a collective bargaining representative be certified through a Board-conducted election.[19]

In February 2021, the Biden Administration announced the nomination of Jennifer Abruzzo as GC of the Board, signaling a move toward a more active, labor-friendly Board.[20] In August of the same year, Abruzzo issued a memorandum to all NLRB Regional Directors declaring her intention to "carefully examine" the *Joy Silk*[21] doctrine.[22] The *Joy Silk* doctrine is a labor policy established in a 1949 NLRB administrative decision regarding § 8(a)(5)

15. § 160(j).

16. § 158(a)(5).

17. § 159(a).

18. *See Conduct Elections*, NLRB, https://www.nlrb.gov/about-nlrb/what-we-do/conduct-elections (last visited Feb. 7, 2023) (explaining the union representation election process); NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969) ("The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.").

19. *See* § 159(a); *see also Gissel*, 395 U.S. at 596 (noting that the NLRA "refers to the representative as the one 'designated or selected' by a majority of the employees without specifying precisely how that representative is to be chosen"). *But see* § 159(c) (directing the Board to conduct an election by secret ballot when a question of representation exists).

20. Press Release, White House, President Biden Announces Key Nomination on Jobs Team, (Feb. 17, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/17/president-biden-announces-key-nomination-on-jobs-team/ (declaring that General Counsel (GC) Abruzzo will work to safeguard the rights of workers to improve their wages and working conditions and protect against unfair labor practices (ULPs)).

21. *In re* Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949).

22. Memorandum from Jennifer A. Abruzzo, Gen. Couns. to Reg'l Dirs., Officers in Charge, and Resident Officers, NLRB 1, 7 (Aug. 12, 2021), https://apps.nlrb.gov/link/document.aspx/09031d4583506e0c (referencing *Joy Silk*s, 85 N.L.R.B. 1263, *aff'd*, 185 F.2d 732 (D.C. Cir. 1950)).

ULPs and the use of bargaining orders that was abruptly abandoned two decades later in the Supreme Court decision in *NLRB v. Gissel Packing Co*.[23]

Under the *Joy Silk* doctrine, an employer must engage in collective bargaining, even without a Board-conducted election to certify a union representative, if the union representative can sufficiently demonstrate that a majority of employees support union membership.[24] This might include a potential collective bargaining representative collecting union authorization cards from a majority of the employees as evidence of their majority status.[25] The process of using signed authorization cards to designate a union representative is commonly known as card-check.[26] Currently, card-check recognition occurs only if the employer voluntarily acquiesces, and an employer may refuse to voluntarily recognize the representative and demand a Board-conducted election prior to meeting the employees at the bargaining table.[27]

Under *Joy Silk*, however, an election would become a condition for designating a union representative only if the employer could sufficiently demonstrate a good faith reason for believing the representative did not have support from the employees.[28] An employer's bad faith refusal to recognize a union representative with sufficient evidence of majority status is a violation of § 8(a)(5) of the Act requiring the Board to issue a bargaining order.[29] A bargaining order is a remedy requiring an employer to engage

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23. 395 U.S. 575, 594 (1969) ("[T]he Board announced at oral argument that it had virtually abandoned the *Joy Silk* doctrine altogether."). *See generally infra* Part I (explaining the policy established in the *Joy Silk* decision and its subsequent abandonment by the Board).

24. *Joy Silk*, 85 N.L.R.B. at 1263–65 (finding that the employer refused to recognize and bargain with a union within the meaning of § 8(a)(5) of the Act when the employer did not have a good faith doubt as to majority support for the union).

25. *See infra* Part III.B (describing the card-check method of union recognition).

26. *See* Rafael Gely & Timothy Chandler, *Organizing Principles: The Significance of Card-Check Laws*, 30 ST. LOUIS PUB. L. REV. 475, 477 (2011) (explaining that "card-check" is a form of union recognition wherein employers "recognize the union as the representative of employees on the basis of authorization cards without a need for an election").

27. *Id.*

28. *Joy Silk*, 85 N.L.R.B. at 1264 (holding that an employer "unlawfully refuses to bargain if its insistence on such an election is motivated, not by any bona fide doubt as to the union's majority, but rather by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union") (emphasis omitted) (quoting *In re* Artcraft Hosiery Co., 78 N.L.R.B. 333, 334 (1948)).

29. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 593 (1969) (stating that under *Joy Silk*, the Board could impose a bargaining order if "the employer had come forward with no reasons for entertaining any doubt and therefore that he must have rejected the bargaining demand in bad faith").

in collective bargaining with a union representative.[30] A bargaining order compels an employer "to meet at reasonable times [with the representative of the employees] and confer in good faith with respect to wages, hours, and other terms and conditions of employment."[31]

The Board utilized the *Joy Silk* doctrine from 1949 until the Supreme Court's *Gissel* decision in 1969.[32] In December 2021—a few months after issuing the memorandum declaring her intention to reexamine *Joy Silk*—the Abruzzo submitted a brief in the NLRB administrative case *Cemex Construction Materials Pacific, LLC v. International Brotherhood of Teamsters*[33] explicitly calling on the Board to reinstate the *Joy Silk* doctrine.[34]

Under current NLRB policy,[35] the Board has shown overwhelming preference for union certification via Board-conducted elections.[36] The Board has been unwilling to impose bargaining orders—such orders are considered an "extraordinary remedy."[37] After its departure from *Joy Silk*, the Board issued an average of fewer than ten bargaining orders per year between 1987 and 1996,[38] much lower than the 107 bargaining

30. Brandon R. Magner, *The Good-Faith Doubt Test and the Revival of Joy Silk Bargaining Orders* 2–3 (Oct. 13, 2021) (unpublished manuscript), https://ssrn.com/abstract=3942091; *see also* 29 U.S.C. § 160(j) (authorizing the Board to obtain temporary injunctive relief from a U.S. district court to remedy a ULP).

31. 29 U.S.C. § 158(d) (stating the obligation to bargain collectively).

32. *Compare Joy Silk*, 85 N.L.R.B. at 1265 (requiring employers to negotiate with their employees' chosen representative if the employees demonstrate they have formed a simple majority in favor of a union), *with Gissel*, 395 U.S. at 579 (abandoning the *Joy Silk* doctrine and allowing an employer to demand a certification election absent any doubt in majority support for a union).

33. N.L.R.B. No. 28-CA-230115 (Dec. 16, 2021).

34. *See* General Counsel's Answering Brief to Respondent's Exceptions to the Admin. Law Judge's Decision at 36–45, Cemex Construction Materials Pacific, LLC v. Int'l Brotherhood of Teamsters, N.L.R.B. No. 28-CA-230115 (Dec. 16, 2021) [hereinafter *Cemex Construction* Brief].

35. *See infra* Part I (discussing the Board's abandonment of the *Joy Silk* doctrine).

36. *See Gissel*, 395 U.S. at 602 ("The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support."); Aaron Bros. Co. of Cal., 158 N.L.R.B. 1077, 1078 (1966) ("An election by secret ballot is normally a more satisfactory means of determining employees' wishes . . . ."); *see also* Charles J. Morris, *Undercutting* Linden Lumber*: How a Union Can Achieve Majority-Status Bargaining Without an Electio*n, 35 HOFSTRA LAB. & EMP. L.J. 1, 1–2 (2017) (observing that since the 1974 *Linden Lumber* decision, an election conducted by the Board has essentially become "sine qua non" of union certification) (referencing Linden Lumber Div. v. NLRB, 419 U.S. 301 (1974)).

37. Magner, *supra* note 30, at 34 (quoting NLRB v. Am. Cable Sys., Inc., 427 F.2d 446, 448 (5th Cir. 1970)).

38. *Id.* at 35–36.

orders issued by the Board in 1967 alone.[39] In comparison, the Board handled over a thousand union representation cases in 2021.[40]

The Board's standard process for union certification through Board-conducted elections,[41] however, creates a critical period between the point at which a union petitions the Board for a representation election and the time the election takes place; during this critical period, ULPs pose a significant risk.[42] The pronounced reliance on elections not only incentivizes employer misconduct, but also creates unnecessary expenses for the Board and increases NLRB regional staff workload.[43]

This Comment argues that reviving the *Joy Silk* doctrine—whereby clearly demonstrated evidence of majority support for a union representative requires employers to bargain—would reduce costs for the NLRB and alleviate the excessive workloads overburdening NLRB regional staff, without impacting the agency's ability to fulfill its mission.[44] Because the NLRB relies on appropriations from Congress, there is no process to automatically increase the agency's staffing and funding levels when caseload activity escalates.[45] The NLRB's appropriations from Congress have stagnated during the last decade; when taking in the effects of inflation, however, the Board's budget has effectively decreased by 17% between 2010 and 2019.[46] Because of these budget cuts, the Board has reduced regional staff levels by a third.[47] In the July 2022 press release, Abruzzo urged Congress to increase NLRB appropriations, stating that NLRB staff "are handling unsustainable caseloads."[48] This understaffing and

39. *Id.* at 40 n.213.

40. *Representation Petitions - RC*, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/representation-cases/intake/representation-petitions-rc (last visited Feb. 7, 2023).

41. *See infra* Part II.A (outlining the Board's procedure for employees seeking to unionize).

42. *See* Brian J. Petruska, *Adding* Joy Silk *to Labor's Reform Agenda*, 57 SANTA CLARA L. REV. 97, 101 (2017) ("[T]he abandonment of *Joy Silk* triggered a massive increase in the commission of ULPs during union organizing campaigns . . . ."); Celine McNicholas, Margaret Poydock, Julia Wolfe, Ben Zipperer, Gordon Lafer & Lola Loustaunau, *Unlawful: U.S. Employers Are Charged with Violating Federal Law in 41.5% of All Union Election Campaigns*, ECON. POL'Y INST. (Dec. 11, 2019) (finding that employers were charged with violating the NLRA in 41.5% of all union elections and over half (54.4%) of employers in elections with over sixty employees were charged with violations).

43. *See infra* II.B.

44. *See* GAO REPORT, *supra* note 5 at 33 (warning that the NLRB risks compromising the quality of its work if it fails to adjust for excessive workloads).

45. *See, e.g.*, Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49, 491 (appropriating funds to the NLRB for salaries and expenses necessary to carry out agency functions).

46. GAO REPORT, *supra* note 5, at 10.

47. *Id.* at 13.

48. NLRB Press Release, *supra* note 3.

the lack of sufficient resources cultivate widespread employee dissatisfaction.[49] In failing to address excessive workloads for personnel, the agency risks less thoroughly investigated and reviewed cases because individual staff members may cut corners to meet quantitative goals.[50]

Because the NLRB appropriates most of its budget to handling ULP and representation cases,[51] reducing the incidence of ULPs and easing the union recognition process would decrease the demands on a staff that is already stretched thin. Because an employer's bad faith refusal to recognize a union representative constitutes a ULP that would justify a bargaining order under the *Joy Silk* scheme,[52] readopting *Joy Silk* would effectively incentivize employers to recognize union representatives who demonstrate majority status without requiring a Board-conducted election. The readoption of the *Joy Silk* doctrine would decrease the administrative costs associated with the current union certification scheme, including reducing the cost of conducting union representation elections and the costs associated with investigating and remedying ULPs that occur during the election process.

Readopting the *Joy Silk* doctrine would be an effective measure to reduce burdens on NLRB staff. Part I of this Comment reviews the Board's decision in *Joy Silk* and the eventual abandonment of the decision in subsequent case law.[53] In Part II, this Comment discusses the myriad administrative costs associated with the current petition-and-election process of union certification and the burdens placed on NLRB regional staff who conduct union representation elections as well as handle and investigate ULP charges.[54] Finally, in Part III, this Comment argues that the Board should revive the *Joy Silk* doctrine because it would be a cost-saving initiative for the NLRB and would reduce the excessive workloads placed on NLRB staff.[55]

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49. GAO REPORT, *supra* note 5, at 33 ("NLRB has experienced a significant decline in employee satisfaction, ranking last compared to other medium-sized agencies in the annual Federal Employee Viewpoint Survey on measures related to employees' confidence in their agency management.").

50. *See id.* at 28–29.

51. *Id.* at 8 (explaining that since 2010, the NLRB has obligated between 85% and 92% of its appropriations on ULP and union representation cases).

52. *See In re* Joy Silk Mills, Inc., 85 N.L.R.B. 1263, 1264, 1266 (1949), *aff'd*, 185 F.2d 732 (D.C. Cir. 1950) (imposing a bargaining order when the employer did not have a good faith reason for refusing to recognize the representative and insisted the union prove its majority status in a Board-conducted election).

53. *Infra* Part I.

54. *Infra* Part II.

55. *Infra* Part III.

I. THE DEPARTURE FROM *JOY SILK*

Rather than using formal notice-and-comment rulemaking to establish NLRB policy, the Board has historically relied on adjudication to interpret the NLRA and promulgate federal labor policy.[56] Some scholars argue that the Board's preference for adjudication leads to frequent changes in policy that create confusion and diminish respect for the Board's precedent.[57] Despite these objections, the Board has favored adjudication because the practice allows the Board to be flexible to fact-specific issues and to respond quickly to rapid changes in labor-management relations.[58] In its policymaking regarding bargaining orders and § 8(a)(5) ULPs, the Board has opted to utilize adjudication over rulemaking.[59]

In *Joy Silk*, a union representative of the United Textile Workers of America collected union authorization cards signed by thirty-eight of the fifty-two employees at Joy Silk Mills, a textile mill.[60] The employees' representative approached the employer with the signed cards requesting recognition; in turn, the employer refused to bargain with the union unless the union proved its majority status in a Board-conducted election.[61] Upon reviewing the case, the Board held that an employer "unlawfully refuses to bargain if its insistence on such an election is motivated, not by any bona fide doubt as to the union's majority, but rather by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union."[62]

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56. James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 960 (1996) ("Throughout its existence, the Board has relied on adjudication rather than rulemaking to interpret and apply the NLRA."). *But see* Press Release, NLRB, NLRB Rulemaking Agenda Announced (May 22, 2019), https://www.nlrb.gov/news-outreach/news-story/nlrb-rulemaking-agenda-announced (revealing that the NLRB, under the Trump Administration, intended to utilize formal rulemaking to alter several labor policies).

57. *See* Emily Baver, Comment, *Setting Labor Policy Prospectively: Rulemaking, Adjudicating, and What the NLRB Can Learn from the NMB's Representation Election Procedure Rule*, 63 ADMIN. L. REV. 853, 854–55 (2011).

58. *See id.* at 859 (noting that the NLRB is reluctant to engage in notice-and-comment rulemaking because the areas of labor law that it regulates evolve too quickly to accommodate rulemaking, and that adjudication allows the Board to amend its policies with less delay).

59. *See generally* Magner, *supra* note 30, at 10–33 (detailing the extensive history of the good faith doubt test established in *Joy Silk*).

60. Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732, 736 (D.C. Cir. 1950), *aff'g In re* Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949).

61. *Joy Silk* 85 N.L.R.B. at 1263–64, *aff'd*, 185 F.2d 732.

62. *Id.* at 1264 (quoting *In re* Artcraft Hosiery Co., 78 N.L.R.B. 333, 334 (1948)) (emphasis omitted).

The Board determined that Joy Silk Mills had indeed insisted on an election to gain additional time to undermine union support—not because of any good faith doubt in the union representative's majority status—in violation of § 8(a)(5).[63] The Board imposed an order on the employer to bargain collectively with the United Textile Workers of America.[64] Because the imposition of a bargaining order hinges on the subjective motivations of the employer, the Board stated that the necessity of such an order "must be determined in the light of all relevant facts in the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct."[65]

Under the original *Joy Silk* doctrine, an employer faced with adequate proof of a union's majority status bears the burden of demonstrating a valid basis for its good faith doubt in the ostensible majority support for the union.[66] In 1961, the Board affirmed and applied this policy in *Snow & Sons*.[67] There, the Board imposed a bargaining order when the employer had no reasonable doubt about the union representative's majority status and sought a Board-conducted election without a valid ground for requesting the election.[68]

In the 1966 *Aaron Brothers*[69] case, however, the Board issued a decision that shifted the burden to the GC to establish an affirmative showing of an employer's bad faith to justify a bargaining order rather than requiring the employer to prove its good faith doubt in a union representative's majority status.[70] The *Aaron Brothers* decision further established that the NLRB must provide sufficient evidence that the employer engaged in "substantial unfair labor practices calculated to dissipate union support" to impose a bargaining order.[71]

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63. *Id.* at 1264–65.

64. *Id.* at 1266; *see also* 185 F.2d at 744 (affirming that when an employer refuses to bargain in violation of § 8(a)(5), the Board's authority to compel the employer to collectively bargain is "amply sustained by precedent").

65. *Joy Silk*, 85 N.L.R.B. at 1264.

66. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 592–93 (1969).

67. 134 N.L.R.B. 709 (1961).

68. *Id.* at 710–12.

69. Aaron Bros. Co. of Cal., 158 N.L.R.B. 1077 (1966).

70. *Id.* at 1078; *see also* Magner, *supra* note 30, at 21 ("Where a Board attorney could previously set forth the facts of the employer's obstinate conduct and wait to rebut any assertions of good faith doubt, investigators were now required to present evidence of the employer's lack of good faith up front.").

71. *Aaron Bros*, 158 N.L.R.B. at 1079.

Three years later, in *NLRB v. Gissel Packing Co.*,[72] the Supreme Court addressed the issue of when a bargaining order is appropriate and whether union authorization cards obtained from a majority of employees can be sufficient to impose a duty to bargain on an employer.[73] Most notably, the Court stated:

> [T]he Board announced at oral argument that it had virtually abandoned the Joy Silk doctrine altogether . . . . Thus, an employer can insist that a union go to an election, regardless of [the employer's] subjective motivation, so long as [the employer] is not guilty of misconduct; [the employer] need give no affirmative reasons for rejecting a recognition request, and [the employer] can demand an election with a simple 'no comment' to the union.[74]

Although the Court determined that union authorization cards do not impose a duty to bargain, a bargaining order may nevertheless be appropriate when an employer engages in ULPs that "have the tendency to undermine majority strength and impede the election processes."[75] Because the employers in *Gissel* engaged in misconduct that undermined the ability to hold a fair certification election—conduct that was distinct from their refusal to bargain in response to the presentation of union authorization cards—the Court expressly avoided the question of "whether a bargaining order is ever appropriate in cases where there is no interference with the election processes."[76]

In *Linden Lumber Division v. NLRB*,[77] the Court confronted the question it left open in *Gissel* because in *Linden Lumber* there was no charge that the employer engaged in any ULPs apart from its refusal to bargain.[78] The Court held that in the absence of a charge that an employer engaged in a ULP, the employer should not be found guilty of violating the NLRA solely based on its refusal to recognize a collective bargaining representative until Board-certified election results confirmed the representative's majority

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72. 395 U.S. 575 (1969). This case consolidated four separate cases that presented the same legal issues and had similar fact patterns. *Id.* at 579–80.

73. *Id.* at 579.

74. *Id.* at 594. There is evidence, however, that "the Board abandoned *Joy Silk* through a mistake by, and possibly the improper conduct of, one of its attorneys" during the *Gissel* oral arguments. Petruska, *supra* note 42, at 108.

75. *Gissel*, 395 U.S. at 614. *But see* Magner, *supra* note 30, at 3 (explaining that *Gissel* bargaining orders are virtually irrelevant because they will only be issued in cases where an employer's conduct is so outrageous as to make a fair certification election impossible). Because of the heavy evidentiary burden on the GC in *Gissel* bargaining order cases, the issuance of such orders drastically decreased after the *Gissel* decision. *See id.* at 34–36.

76. *Gissel*, 395 U.S. at 595.

77. 419 U.S. 301 (1974).

78. *Id.* at 302.

status.[79] Additionally, the Court placed the burden of filing a petition for a Board-conducted election on the union representative to confirm its majority status even if it is the employer that refuses to recognize the union until it has been certified in an election.[80] Because employers do not have a duty to recognize or bargain with a union representative who has requested voluntary recognition based on sufficient evidence of majority support, an employer can refuse to recognize the representative and demand the union be certified in a Board-conducted election before it will begin the collective bargaining process.[81]

The total abandonment of *Joy Silk* in the *Gissel* and *Linden Lumber* decisions contributed to the existing employment landscape that is hostile to union organizing and expensive for the NLRB.[82] Although evidence shows that employers commit ULPs during a substantial number of union representation elections in an attempt to avoid successful unionization,[83] NLRB staff must collect and establish extensive evidence of pervasive unlawful conduct for the Board to impose a bargaining order under the *Gissel* standard.[84]

II. THE ADMINISTRATIVE COSTS OF ELECTIONS AND UNFAIR LABOR PRACTICES

The current practice of petition-and-election is associated with myriad costs for the Board: the cost of conducting representative certification elections, the cost of investigating ULP charges, and the costs of litigation and enforcement when the parties do engage in ULPs during the election process.[85] Currently, the NLRB regional offices are understaffed and do not have sufficient resources to handle these various agency activities, hampering the ability of employees to fully exercise their rights established in the NLRA.[86]

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79. *Id.* at 302–03.

80. *Id.* at 309.

81. *See Gissel*, 395 U.S. at 594 (stating that an employer does not need to provide any "affirmative reasons for rejecting a recognition request, and he can demand an election with a simple 'no comment' to the union").

82. *See infra* Part II.

83. McNicholas et al., *supra* note 42 (finding that employers were charged with violating the NLRA in 41.5% of all union elections and over half (54.4%) of employers in elections with over sixty employees were charged with violations).

84. *See generally infra* notes 194–198 and accompanying text (explaining that *Gissel* bargaining orders are issued in rare cases when an employer's unlawful conduct is outrageous and pervasive).

85. *See* GAO REPORT, *supra* note 5, at 8 (stating that between 85% and 92% of the NLRB's budget has been appropriated for casehandling, field investigation, and mission support for ULP and representation cases).

86. *Id.* at 28–29, 32 (finding that, in 2019, only 35% of regional staff felt they had a reasonable

A. Representation and ULP Cases

The Board currently utilizes a structured procedure for employees seeking to unionize. Any case that involves determining, certifying, or decertifying a representative for an appropriate unit is referred to as a representation case.[87] The election process begins when a union representative files a Petition of Election with the appropriate NLRB regional office.[88] Between fiscal years 2013 and 2022, unions or employees filed an average of just over 1,800 petitions for representation elections each year.[89] If an NLRB agent determines that there are no existing labor contracts or recent elections that would bar an election, the employer communicates a Notice of Petition of Election with the employees.[90] NLRB staff then facilitate a stipulated election agreement between the employer, union, and employees setting the date, time, and place for balloting.[91] Once those parties reach an agreement, the NLRB Regional Director conducts a secret-ballot.[92] In a secret-ballot election, each eligible employee casts one anonymous ballot conveying their preference for (or their rejection of) the union representative.[93] A representative who receives a majority of votes cast in the election is certified as the employees' bargaining representative, and the employer is obligated to collectively bargain with the representative.[94]

The Board's application of *Gissel* to the NLRA has failed to sufficiently deter the commission of ULPs during union election campaigns because *Gissel* bargaining orders require the Board to establish extensive evidence of

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workload, and only 26% of regional staff reported that they had sufficient resources to do their jobs).

87. *See The NLRB Process*, NLRB https://www.nlrb.gov/resources/nlrb-process (last visited Feb. 7, 2023) (explaining that petitions filed by unions, employees, or employers to certify a potential bargaining representative or to remove a currently recognized union are all considered representation cases). The NLRB webpage states an "RC" petition is filed by a union to certify a bargaining representative, an "RD" petition is filed by employees who seek to remove the currently recognized representative, and an "RM" petition is filed by an employer who seeks an election because one or more individuals or unions have sought recognition or because the employer has a reasonable belief that the current union has lost its majority status. *Id.*

88. *Conduct Elections*, *supra* note 18.

89. *Representation Petitions - RC*, *supra* note 40.

90. *Conduct Elections*, *supra* note 18.

91. *Id.*

92. *Id.*

93. *See* Joel Dillard & Jennifer Dillard, *Fetishizing the Electoral Process: The National Labor Relations Board's Problematic Embrace of Electoral Formalism*, 6 SEATTLE J. SOC. JUST. 819, 824 (2008) (discussing the formalistic aspects of union representation procedures).

94. *Conduct Elections*, *supra* note 18.

"'outrageous' and 'pervasive'" employer misconduct during union organizing drives.[95] Section 8(a) of the NLRA enumerates employer ULPs that may be considered when determining whether to impose a bargaining order, including restraining or interfering with employees' exercise of their rights protected by the Act, coercing employees, interfering with the formation of a labor organization, and discriminating based on union affiliation in regard to the terms and conditions of employment.[96] More specifically, employer misconduct could be discharging employees engaged in a unionization campaign, threating retaliation for involvement with a union, interrogating employees about union activity, or engaging in surveillance.[97]

In the decades after the Board abandoned *Joy Silk*, the incidence of ULPs exploded—illegal discharges increased by 125% (8,122 in 1969 compared to 18,313 in 1981) and illegal intimidation charges increased by over 525% (947 in 1969 compared to 6,493 in 1981).[98] In union elections involving over sixty employees, over half of employers (54.4%) were charged with violating the NLRA during the election.[99]

The median number of days between filing a petition and the initiation of a Board-conducted election is thirty-eight days; the risk of ULPs is especially high during this period as employers attempt to coerce employees to cast a "no" vote on the union representative.[100] In the D.C. Circuit case affirming the agency decision in *Joy Silk*, the court stated that "it is not one of the purposes of the election provisions [of the Act] to supply an employer with a procedural device by which [the employer] may secure the time necessary to defeat efforts toward organization being made by a union."[101] Unfortunately, the D.C. Circuit Court's reasoning

95. Magner, *supra* note 30, at 3 (citing NLRB v. Gissel Packing Co., 395 U.S. 575, 594 (1969)); *see also* Petruska, *supra* note 42, at 115 ("[B]ecause the *Gissel* doctrine is granted only in extraordinary cases, *Gissel* actually provides incentives to employers to commit ULPs during Board-supervised elections, because it sends the message that, except in extraordinary circumstances, the employer's illegal conduct will accomplish its intended aim.") (emphasis omitted).

96. 29 U.S.C. § 158(a).

97. *See* McNicholas et al., *supra* note 42, at 26 app. tbl.1 (listing detailed charges of ULPs against employers).

98. Petruska, *supra* note 42, at 117.

99. McNicholas et al., *supra* note 42, at 7.

100. Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 FIU L. REV. 361, 365 (2010) ("The gap in time before the election takes place also enables employers to reduce support for the union by running anti-union campaigns, whether or not the tactics used are deemed unlawful.").

101. Joy Silk Mills, Inc. v. NLRB, 185 F.2d 732, 741 (D.C. Cir. 1950), *aff'g In re* Joy Silk Mills, Inc., 85 N.L.R.B. 1263 (1949).

has not stopped employers from engaging in aggressive opposition campaigns during union representation elections.[102]

Under the Trump Administration, the NLRB established new union election procedures that further delay the election process.[103] The changes to representation procedures include: extending the period of time in which employers must distribute a Notice of Petition for Election from two days to five days; extending the period of time in which employers are required to furnish a voter list from two days to five days; delaying an election until disputes about bargaining unit composition and voter eligibility have been litigated; and halting certification of a union if an employer's request for review of the election is pending.[104] The prolonged delay of an election provides additional opportunity for employers to engage in union avoidance campaigns.[105]

The Starbucks Workers United union has been at the forefront of the contemporary labor resurgence, and in May 2022, the NLRB's Regional Director in Buffalo, New York issued a complaint against Starbucks for twenty-nine ULP charges that included over 200 violations of the NLRA.[106] These violations include threatening and intimidating workers seeking to unionize, engaging in unlawful surveillance, firing workers, reducing workers' compensation, and closing stores.[107]

Once an aggrieved employee or union files a ULP charge with the Board, it is assigned to an NLRB agent who investigates the charge by collecting evidence, interviewing relevant parties, and taking affidavits.[108] If the Regional Director determines that the charge has merit, the Board agent will try to resolve the charge by negotiating a formal or informal settlement

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102. *See* McNicholas et al., *supra* note 42, at 5 (finding "employers were frequently alleged to have engaged in [ULPs] around the time of elections" and that the number of ULP charges likely understate the full extent of anti-union activity because employees do not always file charges with the NLRB).

103. *See* Representation Case Procedures, 84 Fed. Reg. 69,524, 69,524-26 (Dec. 18, 2019) (codified at 29 C.F.R. pt. 102) (providing a full list of amendments to the Board's representation case procedures).

104. *Id.*

105. Estreicher, *supra* note 100, at 365.

106. Kate Rogers, *Starbucks Hit with Sweeping Labor Complaint Including Over 200 Alleged Violations*, CNBC (May 6, 2022, 7:46 PM), https://www.cnbc.com/amp/2022/05/06/starbucks-accused-of-more-than-200-labor-violations-in-nlrb-complaint.html.

107. *Id.*; *cf. Amazon Union Election Do-Over to Commence by Mail on Feb. 4 (2)*, Daily Lab. Rep. (BL) (Jan. 11, 2022)(explaining that the NLRB Regional Director ordered a second representation election after the union credibly accused Amazon of intimidating and unlawfully surveilling workers during the first election period).

108. FY 2023 BUDGET JUSTIFICATION, *supra* note 8, at 29; *see also* 29 U.S.C. § 161 (outlining the investigatory powers of the Board and its agents).

between employees and management.[109] If the parties cannot agree to a settlement, the Regional Director, on behalf of the Board's GC, issues a complaint against the charged party and the complaint is litigated before an ALJ.[110] A final ALJ decision on a complaint is subject to review by the Board.[111] Considering that an average of over 19,000 ULP charges were filed with the NLRB per year between 2012 and 2021,[112] processing charges, investigating conduct, and facilitating settlements are significant program activities for regional staff.[113] During the 2022 fiscal year, the number of ULP charges filed with the Board increased 16% from the previous year, driving up caseloads for NLRB staff.[114]

B. Current State of the Board's Appropriations and Staffing

Board agents in the NLRB's forty-eight regional offices are responsible for conducting representation elections and handling ULP cases.[115] These two program activities constitute the vast majority of the NLRB's operations; for the past decade, the NLRB allocates between 85% and 92% of their budget to casehandling, field investigation, and mission support for ULP and representation cases.[116] Mission support refers to casehandling support functions, such as administration, human resources, and information technology.[117] In 2021, the Board allocated $244.8 million of its $274.2 million budget—89.3%—to casehandling and mission support.[118] That money went to handling 15,081 ULP cases and 1,638 representation cases in 2021.[119]

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109. FY 2023 BUDGET JUSTIFICATION, *supra* note 8, at 29 (stating that over 90% of meritorious charges are resolved by a settlement).

110. *Id.* at 30.

111. *Id.*

112. *Unfair Labor Practice and Representation Cases Filed per Fiscal Year*, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/annual-case-intake/unfair-labor-practice-and-representation (last visited Feb. 7, 2023).

113. *See* FY 2023 BUDGET JUSTIFICATION, *supra* note 8, at 28–29 (documenting that, of the NLRB's five program activities, casehandling receives the highest funding and employs the most full-time employees).

114. NLRB Press Release, *supra* note 3.

115. *See Conduct Elections*, *supra* note 18; *Investigate Charges*, NLRB., https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges (last visited Feb 7, 2023).

116. GAO REPORT, *supra* note 5, at 8. The NLRB does not separate the costs of handling ULP cases and representation cases because staff "generally work on both and do not distinguish time worked on one or the other." *Id.* at 8–9, 9 n.17.

117. *Id.* at 8 n.16.

118. FY 2023 BUDGET JUSTIFICATION, *supra* note 8, at 28.

119. *Unfair Labor Practice and Representation Cases Filed per Fiscal Year*, *supra* note 112.

The actual dollar amount of the Board's budget has remained unchanged since 2010, but the value of the budget has diminished by 17% when accounting for the effects of inflation.[120] As a result of this inadequate funding, the Board's "total number of staff decreased from 1,733 in fiscal year 2010 to 1,281 in fiscal year 2019, or by 26 percent . . . . These decreases occurred less in NLRB headquarters, which saw an 8 percent decrease in staff, than in NLRB's regions, which saw a 33 percent decrease."[121] The recent surge in union organizing, election petitions, and ULP charges—without a commensurate increase in NLRB staff—exacerbates the immense workload placed on NLRB field staff.[122]

The Government Accountability Office (GAO) conducted a review of NLRB organizational performance and found that these staffing and budget cuts adversely affect the Board's staff.[123] Staff reported low morale caused by understaffing and pressure from heavier workloads.[124] In 2019, only 35% of regional staff responded that they had a reasonable workload,[125] and only 26% of regional staff reported that they had sufficient resources to do their jobs.[126] By contrast, in 2012, 61.1% of NLRB employees agreed or strongly agreed with the statement "[m]y workload is reasonable."[127]

The National Labor Relations Board Union (NLRBU)—which represents the rank-and-file attorneys, investigators, and administrators who work in the NLRB headquarters and field offices—publicly criticized Congress for "deliberately ignor[ing] another opportunity to provide our agency with the necessary funding to fulfill its statutory mission of enforcing federal labor law."[128] The NLRBU further stated that their resources have been "tremendously strained" and that staffing losses have caused a crisis.[129] Accordingly, the NLRB ranked last of seventeen medium-sized federal

120. GAO REPORT, *supra* note 5, at 9.

121. *Id.* at 13.

122. *See* NLRB Press Release, *supra* note 3 ("The NLRB is processing the most cases it has seen in years with the lowest staffing levels in the past six decades.").

123. *See generally* GAO REPORT, *supra* note 5, at 28–31 (analyzing the NLRB's results from the Federal Employee Viewpoint Survey).

124. *Id.* at 28.

125. *Id.* at 28–29.

126. *Id.* at 32.

127. U.S. OFF. OF PERS. MGMT., 2012 FEDERAL EMPLOYEE VIEWPOINT SURVEY RESULTS: NATIONAL LABOR RELATIONS BOARD AGENCY RESULTS (2012).

128. @TheNLRBU, TWITTER (Aug. 9, 2022, 11:59 AM), https://twitter.com/TheNLRBU/status/1557033942070558720?cxt=HHwWgIC8xd2H2ZsrAAAA.

129. @TheNLRBU, TWITTER (Aug. 9, 2022, 11:59 AM), https://twitter.com/TheNLRBU/status/1557033943928561664.

agencies in employee satisfaction in 2019.[130] The GAO warned that, without making adjustments to reduce the excessive workload pressure on staff, the NLRB risks compromising the quality of its work.[131] Regional staff may resort to "cutting corners" to meet timeliness goals by reviewing cases less thoroughly and reducing the quality of its investigations into ULP charges.[132]

The NLRB requested $319.4 million from Congress in its Fiscal Year 2023 Budget Request,[133] which is about $45 million more than the Board's 2022 Budget.[134] The NLRB intends to use additional appropriations to account for pay increases[135] and to increase staffing levels to manage programmatic activities like casehandling.[136] In its budget request, the Board reported it would hire nearly fifty new full-time employees for handling ULP and representation cases and thirty-six new full-time mission support employees.[137] Both the U.S. Senate budget panel proposal and the U.S. House of Representatives Appropriations Committee bill recommend providing the full $319.4 million in funding to the NLRB for the 2023 fiscal year.[138] However, the full House and Senate have not yet considered the measures; it may be difficult for Democrats to further their budget priorities—which includes increasing funding for the NLRB—considering Congress's current makeup.[139] Additional funding for the agency is uncertain, and the past decade of flat-funding does not suggest otherwise.[140] Regardless of whether Congress fulfills the Board's request for $319.4 million in the next federal budget, readopting the *Joy Silk* doctrine remains good policy because the

130. GAO REPORT, *supra* note 5, at 33.

131. *Id.*

132. *Id.* at 29.

133. FY 2023 BUDGET JUSTIFICATION, *supra* note 8, at 7.

134. *See id.* at 27.

135. *Id.* at 8.

136. *Id.* at 28–30.

137. *Id.* at 28.

138. *Senate Would Give Labor Department $13.8 Billion in 2023 Budget*, Daily Lab. Rep. (BL) (July 28, 2022).

139. *See House Midterm Elections: GOP Takes House*, NBC NEWS (Dec. 29, 2022), https://www.nbcnews.com/politics/2022-elections/house-results; *see also* Amber Phillips, *What to Know About the Big Budget Battles in Congress*, WASH. POST (Sept. 21, 2021, 5:15 PM), https://www.washingtonpost.com/politics/2021/09/09/congress-budget-fights/ (noting that Democrats do not expect Republican votes to get their "legislative priorities" passed).

140. *See* GAO REPORT, *supra* note 5, at 10; Glenna Li, *President Biden's Best Agency Is Starved for Cash*, AM. PROSPECT (June 23, 2022), https://prospect.org/labor/president-bidens-best-agency-is-starved-for-cash/ (calling the NLRB a "casualty of the hyper-politicization of the federal budget").

doctrine reduces the incidence of ULPs, better enabling the NLRB to fulfill its purpose of protecting employees' right to organize.[141]

III. POLICY RECOMMENDATION: READOPTION OF *JOY SILK*

In the past decade, Congress has repeatedly failed to codify the *Joy Silk* doctrine and statutorily require the Board to certify, without an election, an individual or labor organization to be a § 9(a) representative if a majority of employees have signed valid authorization cards designating the individual or organization as their bargaining representative.[142] Legislative gridlock bolstered by the business community's fierce opposition to labor interests will likely prevent any substantial reform of the NLRA by Congress.[143]

Adjudication, however, allows the Board to establish labor policy more quickly than if it were to utilize notice-and-comment rulemaking.[144] The Board should use adjudication to clearly establish that union authorization cards signed by a majority of employees are sufficient to "designate" a union representative for collective bargaining purposes under § 9(a) of the Act.[145] Under a revitalized *Joy Silk* doctrine, an employer would again be required to bargain with a representative designated by union authorization cards or otherwise be charged with a ULP for violating § 8(a)(5) of the Act.[146] A § 8(a)(5) ULP would once again justify the imposition of a bargaining order.[147] Finally, the burden of

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141. *See* Petruska, *supra* note 42, at 111 (explaining that the *Joy Silk* doctrine "negates an employer's incentive to violate" the NLRA); *see also supra* text accompanying notes 98–99 (discussing how the frequency of ULPs exploded after the *Gissel* decision).

142. *See, e.g.*, Employee Free Choice Act of 2016, H.R. 5000, 114th Cong.; Employee Free Choice Act of 2009, H.R. 1409, 111th Cong.; Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (citing examples of unsuccessful legislative attempts to establish card-check as a method of union certification).

143. *See* Brudney, *supra* note 56, at 944.

144. *See* Baver, *supra* note 57, at 859 (stating that adjudication creates "less delay" than rulemaking); *cf.* U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-330, WORKPLACE SAFETY AND HEALTH: MULTIPLE CHALLENGES LENGTHEN OSHA'S STANDARD SETTING 7–8 (2012) (finding that the Occupational Safety and Health Administration, a division of the U.S. Department of Labor, takes an average of seven years and nine months—and up to nineteen years—to develop and promulgate new workplace safety regulations through the notice-and-comment rulemaking process).

145. 29 U.S.C. § 159(a) (stating that employees' exclusive representative for collective bargaining is the representative "designated or selected" for that purpose).

146. *See In re* Joy Silk Mills, Inc., 85 N.L.R.B. 1263, 1264–66 (1949), *aff'd*, 185 F.2d 732 (D.C. Cir. 1950) (finding the employer violated § 8(a)(5) of the NLRA when the employer refused in bad faith to recognize a union with authorization cards signed by thirty-eight of fifty-two employees).

147. *See* 29 U.S.C. § 160(j) (providing the Board with the authority to obtain just and

proof would return to the employer who demands the union be certified by a Board-conducted election to sufficiently justify its good faith doubt in the union's majority status.[148] Because an employer's bad faith refusal to recognize a representative is a ULP that justifies a bargaining order, the *Joy Silk* doctrine effectively incentivizes employers to recognize union representatives who demonstrate majority status while reducing the necessary involvement of the NLRB and the agency's staff.[149]

A. The Cemex Construction *Brief*

In the absence of legislation, the Board has the authority to use adjudication to alter its interpretation of the NLRA.[150] Abruzzo hopes to revive the *Joy Silk* doctrine in precisely this way.[151] In the *Cemex Construction* brief, the GC argues that the Board should reinstate the *Joy Silk* doctrine because "the Board's current remedial scheme has failed to deter unfair labor practices during union organizing drives."[152] Although the current interpretation of the NLRA established in *Gissel* and *Linden Lumber* is a permissible construction of the statute, the interpretation is not a mandatory one, leaving open the possibility of reestablishing the good faith test from *Joy Silk*.[153] Moreover, the brief states that the interpretation of the Act in *Joy Silk* is permissible because the interpretation is rational and consistent with the purposes of the Act and adequately balances the rights and interests of employees and management.[154]

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proper relief from the appropriate U.S. District Court to remedy a ULP); Joy Silk Mills, Inc. v. NLRB, 185 F.2d at 744, *aff'g Joy Silk*, 85 N.L.R.B. 1263 (stating that when an employer refuses to bargain in violation of § 8(a)(5) of the Act, the Board's authority to order to employer to bargain collectively is "amply sustained by precedent").

148. See *infra* notes 192–193 and accompanying text.

149. *See* Magner, *supra* note 30, at 57–58 n.325 (noting that the "incentive provided by *Joy Silk* towards the private creation of collective bargaining relationships is simply another reason why the NLRB should consider re-adopting" the doctrine).

150. *See* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266–67 (1975) (holding that the Board's construction of the Act is permissible as long as the interpretation reconciles conflicting interests of labor and management, and such an interpretation is subject to limited judicial review); NLRB v. Curtin Matheson Sci., Inc., 494 U.S. 775, 786–87 (1990) (holding that the Court is considerably deferential to Board construction of the Act and will uphold a Board rule as long as it is rational and consistent with the Act); *see also* Petruska, *supra* note 42, at 105 ("The deference due to the Board even applies where the Board is reversing itself from prior positions.").

151. *See Cemex Construction* Brief, *supra* note 34, at 36 (calling on the Board to reinstate *Joy Silk*).

152. *Id.*

153. *See* Morris, *supra* note 36, at 2–3.

154. *Cemex Construction* Brief, *supra* note 34, at 37, 40–41 n.137.

In the brief, the GC argues that the employer's ULPs justify a bargaining order under the current standard established in *Gissel*, but Abruzzo also uses this case as a vehicle to articulate and champion her arguments in favor of prospectively reviving the *Joy Silk* doctrine.[155] To clarify what the new *Joy Silk* scheme would look like in practice, the GC explains that "an employer may ask a union to respond to good faith concerns it has about the authenticity of card signatures . . . . However, it may not simply refuse to respond or object to authorization cards as a method of demonstrating majority status."[156]

B. Card-Check Authorization Under Joy Silk

Reviving the *Joy Silk* doctrine would unlock a new path to collective bargaining for employees organizing under union-hostile management through what is essentially voluntary recognition—a process that already exists under the NLRA.[157] Voluntary recognition does not require the same staff-intensive involvement as Board-conducted certification elections.[158]

Although using union authorization cards signed by a majority of employees as a basis of recognition (the card-check method) is currently only available if an employer voluntary recognizes a union representative,[159] card-check would become sufficient to designate a § 9(a) collective bargaining representative and impose a § 8(a)(5) duty to bargain on an employer if the Board chooses to reinstate the *Joy Silk* doctrine.[160] Because § 9(a) of the NLRA only refers to collective bargaining representatives who are "designated or selected" and does not contain a requirement that the representative be certified through a Board-conducted election, card-check

155. *Id.* at 36 n.121 ("Given that the instant case warrants a bargaining order under *Gissel* and that [the GC] requests prospective application of the *Joy Silk* doctrine, [the GC] does not address in this brief whether a *Joy Silk* order would issue under the facts of the instant case.").

156. *Id.* at 41 n.138.

157. *See* Petruska, *supra* note 42, at 134 (stating that voluntary recognition has been recognized and enforced for the entire history of the NLRA); *see also* Nicholas M. Ohanesian, *Trying the Carrot and Sparing the Stick: An Incentive Based Reform Proposal for NLRB Elections, Voluntary Recognition, and Withdrawal of Recognition*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 485, 487 (2013) (noting that voluntary recognition is "typically quicker and easier for the initiating party").

158. *Conduct Elections*, *supra* note 18 (explaining that voluntary recognition agreements "are made outside the NLRB process").

159. Gely & Chandler, *supra* note 26, at 477.

160. *See* Morris, *supra* note 36, at 20 (asserting that the plain language of the NLRA supports recognition that authorization cards from a majority of employees should suffice to establish a majority-based duty to bargain).

is an appropriate method of designating such a representative.[161] In *Gissel*, Chief Justice Warren affirmed the validity of card-check as a method of union recognition, stating that since the inception of the NLRA, a union "did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the [ULP] provision of § 8(a)(5)—by showing convincing support . . . by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes."[162]

The card-check recognition process under the *Joy Silk* doctrine would operate like this: A union representative approaches an employer with signed authorization cards from a majority of employees. If the employer refuses to recognize the representative until the representative is first certified by an election, the union can file a charge against the employer for violation of the NLRA because § 8(a)(5) declares that it is a ULP for an employer to refuse to bargain collectively with a union representative who falls under § 9(a) of the Act.[163] An employer could lawfully refuse to recognize a union representative and avoid a bargaining order under such circumstances if it can demonstrate a good faith doubt in the representative's majority status. The basis of this good faith doubt could be, for example, evidence that the union engaged in ULPs enumerated in the NLRA, such as unlawfully coercing employees to sign an authorization card.[164]

Absent a valid reason for believing the representative does not have majority support, the Board has the authority to impose a bargaining order to remedy the § 8(a)(5) ULP and require the employer to bargain in good faith with the representative of the employees with respect to wages, hours, and other terms of employment.[165] Importantly, the Board does not have the authority to impose or dictate any substantive provisions of a contract between labor and management—it can only compel the parties to come to the bargaining table.[166] This Comment refers to this recognition process as "quasi-voluntary recognition" because the mere specter of a *Joy Silk*

161. *See* 29 U.S.C. § 159(a).

162. NLRB v. Gissel Packing Co., 395 U.S. 575, 596–97 (1969).

163. *See supra* text accompanying notes 14–18.

164. § 158(b)(1)–(7) (listing unfair labor practices by labor organization).

165. *See, e.g.*, Snow & Sons, 134 N.L.R.B. 709 (1961) (issuing a bargaining order when the employer had no reasonable doubt in the representative's majority status and insisted on a representation election without a valid ground therefor).

166. H. K. Porter Co. v. NLRB, 397 U.S. 99, 102 (1970) (holding that while the Board does have power under the NLRA to require employers and employees to negotiate, "it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement.").

bargaining order would incentivize employers to bargain with a union representative that has adequately demonstrated its majority status.[167] Rational employers understand that, under *Joy Silk*, engaging in an unlawful violation of § 8(a)(5)—leading to expensive litigation and, ultimately, a bargaining order—would be more costly than initially recognizing the employees' collective bargaining representative.[168]

Since the Board's 2011 ruling in *Lamons Gasket*,[169] when an employer has voluntarily recognized a union that has demonstrated majority support (through card-check, for example), the union is protected from challenges to its representative status for a reasonable period of time.[170] The Board defines "a reasonable period" of time as no less than six months and no more than one year.[171] This rule, referred to as the recognition bar, gives the union a "fair chance to succeed."[172]

Just four years prior to *Lamons Gasket*, the Board, in *Dana Corp.*,[173] established a forty-five-day period after voluntary recognition in which the employer or unsatisfied employees could file a petition for an election to decertify the union.[174] But in *Lamons Gasket*, the Board overruled *Dana Corp.* in part because empirical evidence demonstrated that voluntary recognition accurately reflects the will of the majority of employees.[175] In fact, in the four years between *Dana Corp.* and *Lamons Gasket*, employees decertified a voluntarily recognized union in only 1.2% of *Dana Corp.* cases.[176] This statistic demonstrates that voluntary recognition sans Board-conducted election is a reliable method for employees to express their preference for a union representative.[177] As further evidence of the efficacy of card-check, in about half of Canadian provinces, a union is automatically certified and a duty to bargain is imposed on an employer when the union presents signed authorization cards from a majority of workers, and the Canadian federal

167. *See* Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 987 (1999) (explaining that management attorneys consider litigation that exposes a workplace to legal scrutiny "inefficient and antithetical to the business interests").

168. *See* Petruska, *supra* note 42, at 138–39.

169. *In re* Lamons Gasket Co., 357 N.L.R.B. 739 (2011).

170. *Id.* at 739.

171. *Id.* at 748.

172. *Id.* at 739 (quoting Franks Bros. Co. v. NLRB, 321 U.S. 702, 705 (1944)).

173. *In re* Dana Corp., 351 N.L.R.B. 434 (2007).

174. *Id.* at 434.

175. *Lamons Gasket*, 357 N.L.R.B. at 739, 742.

176. *Id.* at 742.

177. *See id.*

government uses card-check certification for the industries within its jurisdiction.[178] Card-check has long been used as a valid and reliable method for employees to designate a representative under § 9(a) of the NLRA (and under the labor laws of other countries), and the process has the added benefit of requiring less involvement from NLRB staff.[179]

C. *Budgetary Benefits of Reviving* Joy Silk

Each time a union or employee files a petition for a representation election or charges an employer with a ULP, NLRB regional staff must invest time and resources into handling and resolving the cases, but the prototypical quasi-voluntary recognition process, such as card-check, does not place additional burdens on NLRB staff.[180] Under the *Joy Silk* doctrine, an employer could not demand certification via Board-conducted election unless he has a good faith doubt in the union representative's majority status; therefore, union representatives could gain the power to collectively bargain without the involvement of the Board.[181] Although it is difficult to quantitatively predict the extent to which the need for elections would decrease, this Comment asserts that a logical consequence of requiring good faith doubt in a § 9(a) representative's majority support would be a reduced reliance on Board-conducted elections to designate such representatives. Fewer Board-conducted elections would necessarily reduce costs for the agency and ease workloads for staff, while quasi-voluntary recognition would remain true to the purpose of the NLRA by effectuating employees' right to organize and collectively bargain.

In many cases where a union utilizes card-check and seeks voluntary recognition, a neutral third party will validate the signatures on the cards.[182] Additionally, the Federal Mediation and Conciliation Service (FMCS)—a neutral federal agency that promotes labor–management cooperation

178. MARION G. CRAIN, PAULINE T. KIM, MICHAEL SELMI & BRISHEN ROGERS, WORK LAW 39 (4th ed. 2020).

179. *Conduct Elections*, *supra* note 18 (noting that voluntary recognition agreements "are made outside the NLRB process").

180. *See id.*; *cf.* Ohanesian, *supra* note 157, at 490 (explaining that voluntary recognition predated the passage of the NLRA in 1935).

181. *See* Petruska, *supra* note 42 at 109 ("[I]f the employer were independently aware of the employees' support [for the union representative]—then that employer nevertheless might violate the Act by declining recognition and requesting an election."); Morris, *supra* note 36, at 5 (explaining that union bargaining-rights under § 8(a)(5) are not limited by the election process).

182. GERALD MAYER, CONG. RSCH. SERV., RL32930, LABOR UNION RECOGNITION PROCEDURES: USE OF SECRET BALLOTS AND CARD CHECKS 7 (2005).

by providing dispute resolution and conflict management services to employers and unions[183]—began offering card-check services at no charge in April 2022 to ease the voluntary recognition process.[184] Whether authorization cards are validated by the FMCS or another neutral third party, union recognition through quasi-voluntary card-check shifts the cost burden off of the NLRB and onto other parties.[185]

Additionally, Brian Petruska's article makes a compelling argument that the readoption of *Joy Silk* will lead to a substantial reduction in ULPs during union organizing campaigns.[186] Because any unlawful conduct of the employer is a factor in determining whether the Board should impose a *Joy Silk* bargaining order,[187] employers are deterred from committing ULPs during union organizing campaigns to avoid bargaining orders.[188] In the *Cemex Construction* brief, the GC acknowledges that the *Joy Silk* framework is superior to *Gissel* at disincentivizing employers from engaging in ULPs.[189] The anticipated reduction in ULP charges as a result of readopting *Joy Silk* will, accordingly, ease workload burdens on the NLRB regional staff who are responsible for investigating ULP charges, facilitating settlements, and litigating unresolved meritorious claims.

When an employer does refuse to recognize a union representative in violation of § 8(a)(5), the Board's burden to justify imposing a bargaining order under the *Joy Silk* doctrine is much lower than the current burden under *Gissel*, leading to a reduction in litigation costs in cases that necessitate such a remedy.[190] In the *Cemex Construction* brief, the GC explicitly argues that "the Board should reinstate *Joy Silk* in its original form, with the employer bearing the burden to

183. *About Us*, FED. MEDIATION & CONCILIATION SERV., https://www.fmcs.gov/aboutus/ (last visited Feb. 7, 2023).

184. *FMCS Offer No-Cost Card Check Services*, FED. MEDIATION & CONCILIATION SERV. (Apr. 26, 2022), https://www.fmcs.gov/fmcs-offers-no-cost-card-check-services/.

185. *See supra* notes 179–184 and accompanying text.

186. *See generally* Petruska, *supra* note 42, at 101, 111–27 (presenting "the analytical and empirical case for re-adopting the *Joy Silk* doctrine. . . . includ[ing] a discussion of why *Gissel*, the doctrine that substituted for *Joy Silk*, did not provide the same deterrence against [ULPs] during union organizing drives.").

187. *In re* Joy Silk Mills, Inc., 85 N.L.R.B. 1263, 1264 (1949), *aff'd*, 185 F.2d 732 (D.C. Cir. 1950).

188. Petruska, *supra* note 42, at 111 ("The doctrine directly negates an employer's incentive to violate the law . . . . By making a bargaining order the unavoidable consequence of a ULP, this policy makes ULPs counterproductive even for the most stubbornly anti-union of employers.").

189. *Cemex Construction* Brief, *supra* note 34, at 38.

190. *See* Magner, *supra* note 30, at 34 (noting that the Board has a "heavy evidentiary burden" to sustain a *Gissel* bargaining order in a circuit court).

demonstrate its good faith doubt as to [the representative's] majority status."[191] Under the pre-*Aaron Brothers* iteration of the *Joy Silk* doctrine, an employer who refused to bargain with a representative who had presented evidence of majority support bore the burden of establishing a good faith reason for doubting the representative's majority status.[192] After the 1949 decision, the Board and federal courts of appeals enforced *Joy Silk* bargaining orders in a "perfunctory fashion."[193]

Gissel bargaining orders, however, require the Board to establish extensive evidence of outrageous and pervasive employer misconduct.[194] After the *Gissel* decision, NLRB guidance outlined eight factors that need to be addressed to support the imposition of such a remedy, including the probability of future recurrence of ULPs, the possibility of holding a fair election, and the potential effectiveness of other remedies.[195] This level of evidence requires the Board agents to spend massive amounts of time investigating, researching, and preparing litigation materials.[196] Reflective of the significant burden required to obtain a *Gissel* bargaining order, the Board issued an average of fewer than ten bargaining orders annually between 1987 and 1996[197]—many fewer than the 107 bargaining orders the Board issued in 1967 alone.[198]

Under a revitalized *Joy Silk* doctrine, the possibility of receiving a bargaining order incentivizes employers to recognize and bargain with representatives without the need for certification through Board-conducted elections. When a bargaining order is appropriate to the facts of a case, *Joy Silk* greatly reduces the litigation costs for the Board by shifting the burden of production and persuasion onto the employer rather than the GC of the Board. These shifts will, in turn, improve the workload placed on NLRB staff.

D. Growing Pains and Incentives to Comply

If the GC's arguments in favor of reviving the *Joy Silk* doctrine persuades the Board, a case with the pertinent fact-pattern would need to

191. *Cemex Construction* Brief, *supra* note 34, at 36.

192. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 592–93 (1969) (explaining that under the original *Joy Silk* doctrine, the Board had the authority to issue a bargaining order if "the employer had come forward with no reasons for entertaining any doubt" about the union's majority status).

193. Magner, *supra* note 30, at 13.

194. *Id.* at 3.

195. Petruska, *supra* note 42, at 112.

196. *See, e.g.*, FY 2023 BUDGET JUSTIFICATION, *supra* note 8, at 30 (referring to litigation as "costly and time-consuming" and noting that agency staff must devote time and effort to remedy ULPs).

197. Magner, *supra* note 30, at 35–36.

198. *Id.* at 40 n.213.

make its way onto the Board's docket. In June 2022, the NLRB's Regional Director in St. Louis filed a complaint against Starbucks, seeking a bargaining order pursuant to *Joy Silk* to remedy a series of ULPs that Starbucks allegedly committed to disrupt support for Starbucks Workers United.[199] In this case, the Union presented Starbucks with a petition signed by a majority of employees designating the Union as their collective bargaining representative and requested recognition.[200] Starbucks refused to recognize and bargain with the Union in bad faith, a violation of § 8(a)(5).[201] The case's fact-pattern is that of a prototypical *Joy Silk* case. An ALJ issued an opinion on the complaint on October 12, 2022.[202] The ALJ declined to address the GC's arguments challenging existing Board precedent by requesting a *Joy Silk* bargaining order absent an election, because he is bound by current Board law.[203] However, the opinion does "set out the facts relevant to those issues."[204] The ALJ found that "the record as a whole demonstrates that the Union enjoyed the support of an overwhelming percentage of the bargaining unit" and noted that Starbucks knew a majority of its employees at the particular store location desired to be represented by the Union.[205] This case provides an opportunity for the Board to reestablish *Joy Silk* through adjudication.[206]

When, and if, the Board does make a ruling reviving the use of *Joy Silk* bargaining orders, there would likely be challenges to the decision. Litigating the validity of a *Joy Silk* bargaining order in an appellate court may result in an "activation cost" of changing the policy around § 9(a) representatives and employers' § 8(a)(5) duty to bargain.[207] A Board decision restoring the doctrine would be appealable to a U.S. court of appeals,[208] and the Board would have to expend resources defending the

199. Consol. Compl. at 19, Starbucks Corp., N.L.R.B. No. 14-CA-290968 (June 21, 2022).

200. *Id.* at 16.

201. *Id.* at 16–19.

202. Starbucks Corp., N.L.R.B. No. CA-290968 (Oct. 12, 2022).

203. *Id.* at 2 n.2.

204. *Id.*

205. *Id.* at 38–39 n.63.

206. *See Administrative Law Judge Decisions*, NLRB, https://www.nlrb.gov/cases-decisions/decisions/administrative-law-judge-decisions (last visited Feb. 7, 2023) (displaying that the decision is pending Board decision).

207. *See* 29 U.S.C. § 160(f) ("Any person aggrieved by a final order of the Board . . . may obtain a review of such order in any United States court of appeals"); *see also* Jeffrey M. Hirsch, *Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeals*, 5 FIU L. REV. 437, 438–39 (2010) (recognizing the high stakes of litigating a contentious NLRB case in a federal court of appeals).

208. 29 U.S.C. § 160(f).

decision. Although courts are substantially deferential to the NLRB's interpretation of the NLRA,[209] it is uncertain whether the federal courts of appeals would uphold the imposition of a bargaining order under the *Joy Silk* doctrine, as opposed to the more stringent *Gissel* standard. Although every federal court of appeals in the country accepted the *Joy Silk* doctrine prior to *Gissel* in 1969,[210] much has changed in the last fifty years.[211]

An entirely separate article could be written to analyze the interaction between the courts and the NLRB, but—to paint in the broadest strokes possible—of the 543 Board decisions that were appealed from fiscal year 2013 through fiscal year 2022, reviewing courts enforced nearly seventy percent (67.6%) with only 20.6% remanded in full.[212] The reviewing courts partially remanded or enforced with modifications the remaining 11.8%.[213] Although these numbers, on their face, seem to indicate that courts of appeals would likely uphold a Board decision reviving *Joy Silk*, such a decision would signify a significant policy change for the NLRB, and evidence suggests that courts may be less deferential to the Board in more contentious cases involving controversial policies.[214] In the face of unfavorable appellate court decisions, the NLRB has a tradition of insisting on its interpretation of the NLRA, going as far as ignoring the "law of the circuit" in its decisions until the issue attracts the attention of the Supreme Court.[215] In recent years, the Supreme Court has demonstrated its willingness to reject the Board's interpretation of the NLRA and to issue decisions unfavorable to the labor community.[216] Although the Board's interpretation of the NLRA under *Joy*

209. *See* cases and sources cited *supra* note 150.

210. *See* Petruska, *supra* note 42, at 137 (providing a list of cases to support the assertion).

211. *See generally* Henry S. Farber & Bruce Western, *Accounting for the Decline of Unions in the Private Sector, 1973–1998*, 22 J. LAB. RSCH 459 (2001) (presenting reasons for the sharp decline in private sector union membership in the latter decades of the twentieth century).

212. *Appellate Court Decisions (10 Years)*, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/litigation/appellate-court (last visited Feb. 7, 2023); *see, e.g.*, NLRB v. Noah's Ark Processors, LLC, 31 F.4th 1097 (8th Cir. 2022) (affirming that the Board is entitled to enforcement against the private company for violations of § 8(a)(1) and (5) of the Act).

213. *Appellate Court Decisions (10 Years)*, *supra* note 212.

214. *See* Hirsch, *supra* note 207, at 438, 439 n.12 ("[I]t is the controversial or close cases in which a judge's predilection against unionism appears to raise its head most often.").

215. *See* Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 98–101 (2003) (discussing the NLRB's tradition of asserting its view of the NLRA regardless of contrary circuit precedent).

216. *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (rejecting the NLRB's argument that class and collective action suits fall within employees' right to engage in concerted activities protected by § 7 of the NLRA); Janus v. AFSCME, Council 31, 138 S. Ct.

Silk was considered an acceptable construction of the Act for two decades, it is uncertain whether a decision reviving *Joy Silk* would be affirmed if appealed to a U.S. court of appeals or subsequently reviewed by the Supreme Court.

If the Board's revival of the *Joy Silk* doctrine is approved by the courts of appeals, however, employers approached by majority-backed representatives may not immediately appreciate the possibility of a bargaining order if they refuse to voluntarily recognize the representative. Management will likely alter its behavior in relation to labor once *Joy Silk* bargaining orders have been litigated and upheld by courts of appeals in a handful of highly-visible, emblematic cases.[217] The immediate proliferation of ULPs after the *Gissel* decision illustrates that employers respond quickly to changes in NLRB policy and the legal incentives to comply (or not comply) with the NLRA.[218] If the Board makes clear its willingness to issue *Joy Silk* bargaining orders, quasi-voluntary recognition may become a standard process for establishing a collective bargaining relationship. Ultimately, reviving the *Joy Silk* doctrine will reduce the frequency of NLRB-conducted union elections—without hindering employees' ability to unionize—and reduce the incidence of ULPs during union election drives. These changes will reduce the workload placed on regional NLRB staff and reduce overall costs for the Board.

To best effectuate the *Joy Silk* doctrine, the NLRB could issue a document providing guidance to employers who are approached by majority-backed union representatives seeking recognition. The Board utilizes Office of General Counsel memoranda to provide policy guidance for employers, employees, and labor organizations.[219] If the courts of appeals enforce a Board decision imposing a bargaining order pursuant to *Joy Silk*, a guidance memo should focus on the *Joy Silk* good faith doubt standard. If an employer is approached by a representative with evidence of majority support, the employer must be able to establish a valid reason for rejecting a request for recognition.[220] If the employer demands the union be certified through an election, the Board will determine whether the employer did so in order to gain time to undermine support for the union. Evidence that the employer

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2448 (2018) (overturning Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977) thereby prohibiting the practice of requiring non-union public employees who are represented by a collective bargaining representative to pay fees to subsidize the union).

217. *Cf.* Bisom-Rapp, *supra* note 167, at 985 (explaining that employers utilize "litigation avoidance strategies" to avoid the "intrusion" of legal regulation).

218. *See* Magner, *supra* note 30, at 58.

219. *General Counsel Memos*, NLRB, https://www.nlrb.gov/guidance/memos-research/general-counsel-memos (last visited Feb. 7, 2023).

220. *In re* Joy Silk Mills, Inc., 85 N.L.R.B. 1263, 1264 (1949), *aff'd*, 185 F.2d 732 (D.C. Cir. 1950).

committed any ULPs would support a conclusion that the employer acted in bad faith when demanding an election and would justify a bargaining order.[221] Prior to a court of appeals or Supreme Court ruling on the issue, the Board could emphasize that committing ULPs during a union organization campaign risks a bargaining order under the *Gissel* standard or other remedies available to the Board.[222]

CONCLUSION

While the recent escalation in union activity is cause for excitement and even celebration for labor advocates, it also strains limited NLRB resources and increases the burden on NLRB staff, particularly the Board's regional staff. Demands on the staff are unsustainable because of the increases in election petitions and ULP charges,[223] but the potential for increased NLRB funding from Congress is doubtful. The GAO recommends that the Board evaluate pressure on personnel and make necessary resource adjustments.[224] Without these adjustments to reduce "excessive pressures" on staff, the NLRB risks overburdening its employees and compromising the quality of its work.[225]

The Board could, and should, utilize an upcoming case, such as the Complaint issued by the St. Louis Regional Director against Starbucks,[226] to reestablish the *Joy Silk* doctrine through adjudication. Reinstating the *Joy Silk* doctrine would be a cost-saving initiative and would have the dual effect of reducing the frequency of ULPs and offering an alternative path to union recognition without the need for certification through a Board-conducted election. The NLRB's primary purpose is to protect employees' full freedom of association and to prevent ULPs.[227] *Joy Silk*'s policy better protects workers' ability to unionize by reducing the frequency of ULPs committed during union organizing drives.[228] Even a marginal reduction in representation elections and ULP charges from this policy change would not only provide relief to NLRB staff, but also allow the NLRB to better serve its purpose.

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221. *Id.*

222. 29 U.S.C. § 160(j).

223. NLRB Press Release, *supra* note 3.

224. GAO REPORT, *supra* note 5, at 34.

225. *Id.* at 33.

226. Consol. Compl. at 19, Starbucks Corp., N.L.R.B. No. 14-CA-290968 (June 21, 2022) (requesting a bargaining order pursuant to *Joy Silk* to remedy violations of the NLRA).

227. 29 U.S.C. §§ 151, 160(a).

228. *See* Petruska, *supra* note 42, at 101 (arguing that readopting the *Joy Silk* doctrine would result in a substantial reduction in ULPs).