No. 26-84

IN THE
Supreme Court of the United States

GARTEN TRUCKING LC,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,

Respondents.

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

BRIEF OF THE MANHATTAN INSTITUTE AND YUGO COLLINS, PLLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Manhattan Institute (MI) is a nonprofit policy research foundation that works to keep America and its great cities prosperous, safe, and free. MI develops and disseminates ideas that foster individual freedom and economic choice across multiple dimensions. To that end, it produces scholarship and files briefs supporting constitutionally limited government and the rule of law, ensuring that administrative agencies are kept within their constitutionally delineated role.

Yugo Collins, PLLC is a Virginia law firm focusing on labor and employment law, whistleblower protection, and constitutional disputes with administrative agencies. The firm frequently represents American workers in sensitive employment matters in federal court. It has successfully tried numerous cases to verdict and served as appellate counsel in other major disputes implicating the Non-Delegation Doctrine, the Major Questions Doctrine, and the overreach of administrative agencies.

SUMMARY OF ARGUMENT

This case presents a vehicle to resolve a circuit split on an important issue affecting millions of American workers and businesses. Whether the NLRB is a special agency insulated from this Court's decision in *Loper*

1. All parties received timely notice of the filing of this brief. Pursuant to Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

Bright Enterprises v. Raimondo, 603 U.S. 369 (2024) depends on which circuit answers the question. The D.C., Sixth, and Fifth Circuits apply *Loper Bright* to exercise independent judgment (at least nominally) in deciding whether the agency acted within its statutory authority. But the Fourth, Third, and Ninth Circuits disagree. There, the traditional deference afforded to the NLRB survives *Loper Bright* intact because that deference predates *Chevron*. So, while the D.C. Circuit applies the new standard of review in union cases, the Third Circuit declares it "an open question" whether *Loper Bright* affects the NLRB at all. Here, the Fourth Circuit did not even mention *Loper Bright* in the decision below, while the Sixth Circuit emphasizes its applicability. Thus, in some regions of the country, the Board is given great deference when deciding such major questions of great economic and political significance. In others, courts exercise independent review in obedience to *Loper Bright*. The result is a jumbled assortment of mixed results where the fate of millions of Americans to bargain (or refrain from bargaining) rests entirely on where they live.

This national turmoil over the proper level of deference afforded to the NLRB is now heightened by the emergence of the even more lenient *Cemex* standard—a new rule that makes bargaining orders the default remedy for unfair labor practices during an election campaign.

Moreover, under the Major Questions Doctrine, the Board never had authority to issue bargaining orders in the first place. When the Board orders a remedy that the statute does not allow, that action is *ultra vires* and therefore void *ab initio*. The plain text of the enabling legislation is silent or ambiguous (at best) as to whether the Board has the power to issue bargaining orders as a remedy for unfair labor practices. Certainly, the enumerated forms of relief interpreted under the doctrine of *ejusdem generis* suggest it does *not*. This Court's precedents in *Franks*, *Lorillard, and Gissel* declare the blanket authority simply "too plain for anything but statement" and cite 29 U.S.C. § 160 (a) and (c) of the National Labor Relations Act (NLRA) as the statutory basis for such expansive agency power. But the NLRA never authorized the Board to issue bargaining orders as a remedy for violations. The Act authorizes the Board to fashion specific forms of relief to *individuals* who were victims of specific violations and to restrain individual violators. Notably, reinstatement, back pay, cease and desist orders, and periodic reports to show compliance by violators are all enumerated forms of relief in § 160 (c). Bargaining orders are not.

The Board—seeking to maximize its authority—interpreted the phrase "affirmative action" in § 160 (c) of the NLRA to give itself the power to issue bargaining orders nationwide, thus wielding a power of vast economic and political significance. That provision does not mention bargaining orders. It states, in relevant part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including

> reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

29 U.S.C. § 160 (c). The phrase "affirmative action" in that sentence was soon interpreted to encompass bargaining orders. In the 1940s, this Court in *Lorillard* and *Franks* upheld the Board's interpretation of its own statutory authority during a time when government expansion ran rampant and many constitutional limits on unions and union activity had yet to be established. Thus, "affirmative action" in § 160 (c) became an omnipotent catch-all used to force an unwilling majority of company employees to unionize, all to punish the actions of an individual company representative. This agency-invented remedy comes at the expense of employees' freedom of association and self-organization for millions of Americans who never voted for union representation. Yet, under *Franks*, bargaining orders are a necessary evil the Board can dispense at will to protect union stability and punish bad behavior.

But Congress never said that, explicitly or implicitly. As the D.C. Circuit recently explained, the NLRA was enacted to protect *employees*, not unions. Its goal is to protect employee choice, not expand union membership. Indeed, such an expansive statutory interpretation would require isolating the vague phrase "affirmative action" from the rest of the text. This Court's recent decisions confirm that sweeping agency authority cannot be rooted in ambiguous language. The phrase "affirmative action" in the Act is not a blank check to use whatever means necessary to achieve a stated objective.

Under well-established rules of statutory construction, a general term like "affirmative action" is limited by the specific words around it. So, for example, in a law mentioning "chickens, cows, donkeys, and other animals," the general phrase "other animals" is restricted to farm animals, not a pet parakeet. The general term should only be understood to include things of the same kind or category as those specifically mentioned. Here, an order that forces businesses to bargain with unions that lack majority support is not the same kind or category of relief as what Congress specifically enumerated in the statute. Nor can the Board's self-serving interpretation of the statute be insulated from judicial review. Because it afforded broad deference to the Board's statutory interpretation of an issue on which the statute is silent or ambiguous, the Fourth Circuit was wrong to ignore *Loper Bright* and not exercise independent judgment.

The Petition should be granted to resolve the circuit split and overturn *Lorillard*, *Franks*, and *Gissel*, which are plainly inconsistent with this Court's more recent, controlling precedent. After all, one ought not add more boxes to a train that has derailed. This train has tumbled downhill, and this case presents a vehicle to put that train back on track.

ARGUMENT

I. The Petition is an Ideal Vehicle to Resolve the Circuit Split Affecting Millions of Workers and Businesses in America.

While the Fourth Circuit did not mention *Loper Bright* in the decision below and accorded "due deference" to the Board "regardless of whether we might have reached a different conclusion in the first instance," the

D.C. Circuit just did the exact opposite. Compare *Garten Trucking LC v. NLRB*, 2026 U.S. App. LEXIS 4796, at *7 (4th Cir. 2026), with *Hosp. Menonita de Guayama, Inc. v. NLRB*, 2026 U.S. App. LEXIS 21642 (D.C. Cir. 2026). Following a vacatur order from this Court to reconsider its decision to uphold the successor bar specifically in light of *Loper Bright*, the D.C. Circuit reasoned it had an "independent obligation" <u>not</u> to defer to the NLRB's interpretation of the scope of its statutory authority. *Hosp. Menonita de Guayama*, 2026 U.S. App. LEXIS 21642, at *2. Reviewing the issue anew "without deference to the Board," it concluded "the successor bar is inconsistent with the Act." *Id*. Because the bar was created by the agency to protect union stability at the expense of employee choice, the D.C. Circuit reversed course and held the Board lacked statutory authority to create the bar in the first place. *Id*. at 20 ("But the Board has no authority to favor incumbent unions at the expense of the statutory protections for employees, because the Act 'confers rights only on *employees*, not on unions.'") (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992)).

The Fourth Circuit, meanwhile, ignored *Loper Bright* entirely. Instead, it afforded the NLRB "broad discretion" because it concluded the agency "'draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts'" *Garten Trucking,* 2026 U.S. App. LEXIS 4796, at *15-16 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)).

But the Fifth and Sixth Circuits have reached the opposite conclusion. If Garten's challenge had been filed there or in Washington, D.C., it would have received a different standard of review, which is why this entrenched split should be resolved by granting certiorari.

In *NLRB v. Starbucks Corp.*, 159 F.4th 455 (6th Cir. 2025) and *United Nat. Foods, Inc. v. NLRB*, 138 F.4th 937 (5th Cir. 2025), the sister circuits took seriously this Court's mandate in *Loper Bright* and explicitly cited the new standard of review requiring independent judgment. In *Starbucks Corp.*, the Sixth Circuit held the Board did *not* have unlimited power to fashion *any* form of "make-whole relief" it desired and thus exceeded its statutory authority when it ordered unauthorized relief to remedy unfair labor practices. 159 F.4th at 479–80 (6th Cir. 2025). The Sixth Circuit correctly described such a remedy as "a Carl-Lewis sized leap" from the Board's statutory authority in the plain text of § 10 (c). *Id.*

The court reasoned that "affirmative action" in 29 U.S.C. § 160 (c) "accommodates some forms of relief—such as reinstatement—while foreclosing others—such as consequential damages." *Id*. at 478. Reinstatement is a specific kind of relief that is enumerated in the plain text and therefore "expressly permitted under § 10 (c)." *Id*. But the Board cannot interpret the phrase "affirmative action" to expand its own powers. Such expansion, according to the Sixth Circuit, would constitute "judicial guesswork about Congress's hypothetical intent over statutory text, which is the definitive expression of Congress's will." *Id*. (cleaned up). Citing *Loper Bright*, the Sixth Circuit arrived at this conclusion by applying independent judgment in deciding whether the Board acted outside its statutory authority when issuing this form of "relief" to punish Starbucks for unfair labor practices. *Id*. at 479. Notably, the court opined that independent judicial review in such cases was especially important given that agencies like the NLRB "have a tendency to swell, not shrink, and are likely to have an expansive view of their mission." *Id.* (internal citations omitted).

Likewise, the Fifth Circuit in *United Nat. Foods, Inc. v. NLRB* (*UNFI*) also cited *Loper Bright's* new mandate, explaining "whereas previously we could defer to NLRB's reasonable interpretation, we must instead, following *Loper Bright*, 'exercise [our] independent judgment in deciding whether [NLRB] has acted within its statutory authority.'" 138 F. 4th at 946 (citing *Loper Bright*, 603 U.S. at 412). Interestingly, the dissent in *UNFI* did not think the majority obeyed *Loper Bright* at all. Instead, Judge Oldham argued the majority merely paid lip service to *Loper Bright* while "recycling the same reasons it provided two years ago to justify deferring to the Board." *Id.* at 953 (Oldham, J., dissenting). The result is that "the same judges who might otherwise say 'we defer to the agency' might now be tempted to say 'the agency's reading of the statute is the best and only permissible one.'" *Id.* at 954. Unless this Court steps in to resolve this confusion, Judge Oldham's concern may come to fruition; *Loper Bright* may be "underruled" or "narrowed from below" by inferior courts who continue to delegate judicial power to administrative agencies despite *Chevron's* demise. *Id.* But, lip service or not, the Fifth Circuit panel was united in recognizing that *Loper Bright should* apply, at least nominally, to union cases and that it altered the level of deference given to the NLRB.

In contrast, the Third Circuit declares it "an open question" whether the NLRB is affected at all. *Alaris Health at Blvd. E. v. NLRB*, 123 F.4th 107, 121 (3rd

Cir. 2024). It considers the NLRB a standalone agency insulated from *Loper Bright* because the "judicial deference to the Board's classifications of the 'terms and conditions of employment' under the Act is distinct from *Chevron* deference, as the Supreme Court's decisions developing that deference to the Board predate *Chevron*." *Id*. at 121. This "open question" is primed for this Court to resolve.

Now, the NLRB has adopted the even more lenient *Cemex* standard that makes bargaining orders the default remedy for unfair labor practices. *See Cemex Construction Materials Pacific, LLC,* 372 NLRB No. 130 (2023). The Board declared "we will no longer look to *Gissel* bargaining orders" because they are "insufficient" to protect free choice and deter "employer misbehavior." *Id.* at *27. The Board's latest self-serving statutory interpretation further expands its power and has triggered havoc across the country.

In March 2026, the Sixth Circuit invalidated the *Cemex* standard as unlawful "rulemaking under the guise of an adjudication." *Brown-Forman Corp. v. NLRB*, 169 F.4th 646, 667 (6th Cir. 2026) (holding "the *Cemex* Board exceeded its adjudicatory authority in creating the *Cemex* standard for issuing bargaining orders"). The court reasoned the Board "made it clear that its new standard was not remedial in nature—contravening the essence of its adjudicatory authority." *Id*. at 666. And because "deterrent effect on future, hypothetical preelection violations of the Act," is not the purpose of the NLRA, it held that "the *Cemex* Board created the *Cemex* standard as a new rule of general applicability that did not adhere to the core limitation Congress placed on adjudicatory authority[.]" *Id*. at 666-67. As a result, *Cemex* bargaining orders are unenforceable in certain states.

Not so in the Ninth Circuit, where the traditional *Chevron*-like deference to the NLRB remains intact. It recently upheld a *Gissel* bargaining order against Cemex Construction Materials Company, affording "exceedingly broad" deference to the Board in the "selection of appropriate remedies." *Int'l Bhd. of Teamsters v. NLRB*, 2026 U.S. App. LEXIS 11277, at *22 (9th Cir. 2026). And, like the Fourth Circuit here, the Ninth Circuit completely ignored the effect of *Loper Bright*. This widening circuit split surrounding bargaining orders is likewise primed for resolution by this Court.

Only this Court can resolve this confusion on such a major question of immense economic and political significance. Moreover, this Court's recent precedent suggests the Board *never* had the authority to issue bargaining orders in the first place.

II. The Major Questions Doctrine Does Not Authorize the use of Bargaining Orders and Prohibits the Board's Self-Serving Statutory Interpretation.

The Major Questions Doctrine applies where, as here, the statute is silent or ambiguous on an issue of economic and political significance. *West Virginia v. EPA*, 597 U.S. 697 (2022). The plain text of 29 U.S.C. §§ 160 (a) and (c) shows that Congress never used the words "bargaining order" as an authorized form of mass relief to punish individual violators. While some courts have called a bargaining order equitable relief, its nature is punitive, not remedial. *See, e.g., Koons Ford of Annapolis, Inc. v.*

NLRB, 1987 U.S. App. LEXIS 18752, *6-7 (4th Cir. 1987) (noting that a bargaining order is an equitable remedy); *Kerwin v. Trinity Health Grand Haven Hosp.*, 174 F.4th 942, 954 (6th Cir. 2026) (holding that "affirmative action" is a "broad grant of equitable power" that authorizes "an array of remedies" including bargaining orders). *But see Starbucks Corp.*, 159 F.4th at 478 (holding "affirmative action" is a limited term and the Board lacks power to order consequential damages). The enumerated categories of relief in § 160 (c) suggest Congress intended the remedies to be targeted to *individual* forms of equitable relief, not sweeping agency authority that strips millions of Americans of their freedom of association in the name of union stability. *See id.* (holding that "affirmative action" in § 160 (c) is limited to *some* forms of *equitable* relief like reinstatement, not all-encompassing *legal* remedies or any form of "make-whole" relief).

The decision below relies on *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) to authorize bargaining orders without majority support. *Gissel* declares "[w]e have long held that the Board . . . has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status." *Id.* at 610. *Gissel* relies on three cases to support this "long-held" belief: footnote 16 of *NLRB v. Katz*, 369 U.S. 736 (1962), *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944), and *NLRB v. P. Lorillard Co.*, 314 U.S. 512 (1942).

But neither *Franks* nor *Lorillard* explains where the statutory text authorized this specific type of sweeping power in the first place. *Lorillard* is a one-paragraph opinion from 1942 affirming the Board's decision to issue a bargaining order. *See Lorillard*, 314 U.S. at 513. It does not discuss how the Board derived that authority. Footnote 16 in *Katz* likewise offers no insight into the matter. It merely opines that "inordinate delay" is "regrettable" but does not matter and cites to *Franks* and *Lorillard*. *Katz*, 369 U.S. at 748n.16. Nor does it tell us where the statutory authority came from. *Franks*, another WWII-era decision, declares itself to be conclusory by "arguing" that the agency's purported power to issue bargaining orders is self-evident:

> That the Board was within its statutory authority in adopting the remedy which it has adopted to foreclose the probability of such frustrations of the Act seems **too plain for anything but statement**. See 29 U. S. C. § 160 (a) and (c).

Franks, 321 U.S. at 705 (emphasis added). Under *Franks*, this major power that affects millions of workers and billions of dollars in commerce nationwide is so obvious it needn't be explained at all. And yet, this broad grant of authority is anything but *plain*. Where does the text authorize that type of mass remedy? The language in §§ 160 (a) and (c) does not mention bargaining orders. So, how did the Board get this authority? And if it is indeed obvious, shouldn't we be able to quickly point to a clear grant of authority in the text that authorizes it? If Congress took the time to specify certain forms of *individual* relief like reinstatement, back pay, and cease and desist orders, it follows that Congress could have easily listed "bargaining orders" as well, especially where the latter form of relief implicates the rights of millions in the name of punishing the few. But Congress *didn't* do that, explicitly or implicitly. The power emerged from the ambiguous phrase "affirmative action" in § 160 (c) because it was *read into* the law, and the Court in *Franks*, *Lorillard*, and *Gissel* simply deferred to the Board's self-serving statutory interpretation. Indeed, in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), the Court left the matter of ambiguous statutory interpretation entirely to the agency's discretion. 313 U.S. at 196 ("All we are entitled to ask is that the statute speak through the Board where the statute does not speak for itself."). Such broad deference cannot be reconciled with the Major Questions Doctrine.

Those days are gone. The Court's current textual approach prohibits broad deference to an agency's aggrandizing interpretations of its own enabling legislation. Under the Major Questions Doctrine, Congress must give agencies like the NLRB clear authority to act on decisions of great magnitude. *West Virginia*, 597 U.S. at 735. Where the agency authority in question involves a "major question" of "economic and political significance," this Court's precedent provides "a reason to hesitate before concluding that Congress meant to confer such authority." *Id.* at 721. Indeed, such important delegations affecting millions of people cannot be read into ambiguous language but must be delegated clearly and expressly in the authorizing text. *Id.* at 721–23 (explaining that the separation of powers and "a practical understanding of legislative intent" prohibit "read[ing] into ambiguous statutory text" delegations implicating such sweeping power). Today, an "agency must point to clear congressional authorization for the power it claims." *Id.* (internal quotations omitted).

The NLRB is no exception. The power to control wages, terms, and conditions of employment for Americans nationwide is indeed a significant power that affects billions of dollars in commerce. *See Biden v. Nebraska,* 600 U.S. 477 (2023) (applying the Major Questions Doctrine to invalidate the mass debt cancellation program); *King v. Burwell,* 576 U.S. 473, 517 (2015) (applying the Major Questions Doctrine to reject the IRS's interpretation of a healthcare statute because the provision at issue affects "billions of dollars in spending each year" and "the price of health insurance for millions of people."). Because the agency's interpretation in *King* was a question of "deep economic and political significance," the Court "would not assume that Congress entrusted that task to an agency without a clear statement to that effect." *Biden*, 600 U.S. at 506 (citing *King*, 576 U.S. at 473). Similarly, the right to bargain (or be free from bargaining) is an essential component of Americans' freedom of choice and right of association for millions of people.

Starbucks v. McKinney, 602 U.S. 339 (2024) confirmed that the NLRB is not a standalone agency exempt from rules that govern all others. As this Court pointed out in *McKinney*—issued the same month as *Loper Bright*—the Board would never lose "if courts deferentially ask only whether the Board offered a minimally plausible legal theory, while ignoring conflicting law or facts." *McKinney*, 602 U.S. at 350. There, the Court explained that setting a lower bar for the NLRB would be "rendering the court more a spectator than a referee when it comes to matters of equity." *Id*. And yet, some circuits still treat the NLRB differently because *Franks*, *Lorillard*, and *Gissel* point to § 160 (c) as silently authorizing sweeping powers because of the phrase "affirmative action."

This Court's recent decisions confirm that the phrase "affirmative action" is not a permissible "catch-all" delegation. However noble the objective, that phrase cannot be interpreted as a blank check to the agency. Nor is there any indication in the plain text that Congress even hypothetically intended the phrase "affirmative action" to delegate to the Board such sweeping power to issue bargaining orders.[2] In fact, "it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia*, 597 U.S. at 721. So, the ambiguous phrase "affirmative action" cannot be viewed in a vacuum. Under *ejusdem generis*, a general term is understood to include only things of the same kind or category as those specifically mentioned. So, in a law mentioning "chickens, cows, donkeys, and other animals," the general phrase "other animals" is restricted to farm animals, not house pets. Here, the general term "affirmative action" is informed by the specific words around it: reinstatement, backpay, and cease-and-desist orders. 29 U.S.C. § 160 (c). Those enumerated forms of relief are *equitable* remedies directed at *individuals* meant to restore the status quo. *See Phelps Dodge Corp.*, 313 U.S. at 188 (holding that "affirmative action" in § 10 (c) of the Act authorized the Board to order reinstatement for purposes of "undoing the discrimination" that occurred). So, a barista who was fired should be reinstated. A factory worker who lost wages should be awarded backpay. A wrongdoer who committed unfair labor practices should be ordered to cease-and-desist and submit periodic

2. Even if, *arguendo*, Congress intended to give the NLRB such a blank check, that delegation would be prohibited under the Non-Delegation Doctrine.

reports verifying compliance. These remedies are aimed at one thing: preserving the ability of employees to decide, absent outside pressure, whether they want to belong to a union.

A bargaining order is not the same kind or category of relief. It is punitive in nature. A bargaining order forces collective bargaining (even without majority support) all in the name of punishing wrongdoers and deterring future misconduct. That is not remedial because it does not *restore* the status quo. It *alters* the status quo in favor of union stability and strips employee choice in the process. Rather than protecting employees, a bargaining order tips the scales in favor of the union at the *expense* of employee choice. That defeats the purpose of the Act. The NLRA was enacted to protect *employees*, not unions. Its goal is to secure employee choice, not expand union membership. *Hosp. Menonita de Guayama*, 2026 U.S. App. LEXIS 21642, at *20 ("But the Board has no authority to favor incumbent unions at the expense of the statutory protections for employees, because the Act 'confers rights only on *employees*, not on unions.'") (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992)). A bargaining order thus violates both the spirit and the letter of the law.

The rationale offered in *Franks*, *Lorillard, Gissel,* and subsequent progeny for this well-camouflaged authority to issue bargaining orders is that it must be authorized to punish bad behavior and deter future misconduct. *Franks*, 321 U.S. at 704 (explaining employers cannot be permitted to "profit from their own wrongful refusal to bargain"). The overarching fear—understandably—was that, without this authority, the employer would profit from its misconduct and indefinitely delay compliance with the Act. *Id.* at 705; *Lorillard*, 314 U.S. at 513; *Gissel*, 395 U.S. at 610. Every case identifies no clear statutory authorization and offers the same explanation for why the power must be read into the vague language of the Act.

But this rationale suggests that intelligent, hardworking Americans—our factory workers, baristas, waiters, servers, truck drivers, men and women on the assembly line—are weak-minded, impressionable people unable to think or speak for themselves when casting votes in an election. Under this paternalistic approach, they need an unelected Board to speak for them. Such rationale runs contrary to the foundational principles of this country, of which the right of association and freedom of choice are paramount.

Neither the Board nor the courts can bestow upon the Board powers Congress did not delegate. U.S. Const., Art I, § 1; *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) ("*All* legislative Powers herein granted shall be vested in a Congress."). And if the Board ordered a remedy the statute did not allow, that agency action was *ultra vires* and therefore void *ab initio*. Such an encroachment would violate the separation of powers, which allows only Congress—not agencies or courts—to wield legislative power. The Federalist No. 51, at 321. (James Madison) (Clinton Rossiter, ed., 1961); *Dept. of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 68 (2015) (Thomas, J., concurring) ("When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it."). The separation of powers was so vital to the republic that Madison argued "this structure represented the 'great security' for liberty in the Constitution." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring) (citing The Federalist No. 51, p. 321 (C. Rossiter ed. 1961)). As Montesquieu warned, "power should be a check to power" lest the legislature "soon destroy all the other powers." *Id*. at 117 (citing Montesquieu, Spirit of the Laws bk. XI, ch. 6, pp. 150–57 (O. Piest ed., T. Nugent transl. 1949)). Thus, the Framers intentionally prohibited one branch from usurping power from another. *See* 1 William Blackstone, Commentaries on the Laws of England 150–51 (William S. Hein & Co., Inc. 1992) (1765); John Locke, The Second Treatise of Government 82 (Thomas P. Peardon ed., Prentice-Hall, Inc. 1997) (1690).

Here, there is no clear or express grant of authority to the Board authorizing the use of bargaining orders in 29 U.S.C. § 160 (a) or (c). By issuing these orders, the NLRB is effectively wielding a major power of immense economic and political significance without explicit authorization from Congress. *See Learning Res., Inc., v. Trump*, 607 U.S. 229, 248 (2026) ("It is in precisely such cases that we should be alert to claims that sweeping delegations—particularly delegations of core congressional powers—'lurk[ ]' in 'ambiguous statutory text.'"). This immense power was "read into" the statute by the Board and then adopted in *Lorillard* and *Franks* during a difficult period for this country when the world was at war and the separation of powers took a back seat. The broad level of deference afforded to the Board in *Phelps Dodge Corp.*, *Lorillard*, *Franks*, and *Gissel* cannot be reconciled with today's textual approach that requires clear Congressional authorization for such sweeping powers. However well-intentioned, "there is no major questions exception to the major questions doctrine." *Learning Res., Inc.*, 607

U.S. at 248. *Franks*, *Lorillard*, and *Gissel* are plainly at odds with recent precedent from this Court reminding us that "extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle devices.'" *West Virginia*, 597 U.S. at 723 (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)). Today, this Court "presume[s] that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id*. (internal citations omitted). As it did in *West Virginia*, *Learning Res., Inc.*, *Biden*, and *King*, the Court should likewise apply the Major Questions Doctrine to the NLRA to rein in the NLRB's power to issue bargaining orders under either *Gissel* or *Cemex* because there is no clear statement from Congress to that effect.

If Congress wanted to give the Board the authority to issue bargaining orders without majority support to punish bad behavior and deter future misconduct, Congress would have said so. It didn't. The Board read that power into the Act—and in so doing violated the Major Questions Doctrine.

CONCLUSION

The Court should grant the Petition to resolve the circuit split and overturn *Lorillard*, *Franks*, and *Gissel*, which are plainly inconsistent with this Court's more recent, controlling precedent.

Respectfully submitted,

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