No. 09-95

In the Supreme Court of the United States

GRENADA STAMPING AND ASSEMBLY INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board's twenty-year-old case law requiring employers to give the incumbent union reasonable advance notice of an impending poll is rational and consistent with the National Labor Relations Act and relevant Supreme Court case law.

2. Whether substantial evidence supports the National Labor Relations Board's finding that petitioner unlawfully polled its employees about their continued support for the Union when it failed to provide reasonable advance notice of the poll to the Union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is not published in the *Federal Reporter* but is reprinted in 322 Fed. Appx. 404. The decision of the National Labor Relations Board (Pet. App. 13-150) is reported at 351 N.L.R.B. 1152.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2009. The petition for a writ of certiorari was filed on July 22, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Labor Relations Act (Act) guarantees that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit." 29 U.S.C. 159(a). It is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," 29 U.S.C. 158(a)(5), or "to interfere with, restrain, or coerce employees in [their] exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 158(a), including "the right * * * to bargain collectively through representatives of their own choosing," 29 U.S.C. 157.

A union that has been "designated or selected for the purposes of collective bargaining by the majority of the employees," 29 U.S.C. 159(a), is usually entitled to a conclusive presumption of majority support for one year following certification and during the term of a collective bargaining agreement (up to three years), and a rebuttable presumption of majority support thereafter. *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 785-786 (1996); *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 38 (1987) (explaining that the presumption of majority status is based on a policy determination that it "promot[es] stability in collective-bargaining relationships, without impairing the free choice of employees") (citation omitted).

As the National Labor Relations Board (Board) has recognized, employers may have legitimate reasons to poll their employees to ascertain continuing support for the incumbent union when the presumption of majority status becomes rebuttable. See *Texas Petrochems. Corp.*, 296 N.L.R.B. 1057, 1061 (1989), enforced in rele-

vant part, 923 F.2d 398 (5th Cir. 1991) (*Texas Petrochems.*). At the same time, the Board "believes that employer polling is potentially 'disruptive' to established bargaining relationships and 'unsettling' to employees." *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 364 (1998) (*Allentown Mack*) (quoting *Texas Petrochems.*, 296 N.L.R.B. at 1061). To balance these competing interests, the Board permits employer-sponsored polling but defines the circumstances (both substantive and procedural) under which an employer may conduct such a poll.

First, an employer can lawfully conduct a poll of its employees about their support for an incumbent union only if it has a good faith reasonable doubt (meaning uncertainty) as to the union's majority status. See *Allentown Mack*, 522 U.S. at 367, 380. Second, the employer must ensure that: (1) the purpose of the poll was to determine the truth of a union's claim of majority support; (2) that purpose was communicated to the employees; (3) assurances against reprisal were given; (4) the employees were polled by secret ballot; and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. *Struksnes Constr. Co.*, 165 N.L.R.B. 1062, 1062-1063 (1967) (*Struksnes*). Third, employers must provide the union with advance notice of the time and place of the poll. *Texas Petrochems.*, 296 N.L.R.B. at 1064; *Henry Bierce Co.* v. *NLRB*, 23 F.3d 1101, 1108-1109 (6th Cir. 1994).

The advance notice requirement, the only requirement at issue here, has been in place since the early 1980s and was adopted by the Board in *Texas Petrochemicals,* 296 N.L.R.B. at 1063-1064. See *Texas Petrochems. Corp.* v. *NLRB*, 923 F.2d 398, 403 & n.7 (5th Cir. 1991) (explaining that the Fifth and Ninth Circuits

adopted an advance notice requirement in 1981 and 1984, respectively, and the Board referred to advance notice in 1982); see also *Henry Bierce Co.*, 23 F.3d at 1108-1109. Advance notice to an incumbent union is "critical" because the union "could be legitimately stripped of recognition as [the employees'] collective bargaining representative based on the results of such a poll," *Texas Petrochems.*, 296 N.L.R.B. at 1064; and it is particularly important when a successor employer, soon after taking over the business, seeks to poll its employees, *Texas Petrochems. Corp.*, 923 F.2d at 403. Providing such notice enables the union and the employer to present arguments for and against continued representation, and provides employees with the necessary tools to make a fully informed decision. *Ibid.* Advance notice also allows the union time to review the polling arrangements, designate an observer, be present when the votes are tallied, and "make certain that as many eligible voters as possible will have the opportunity to vote." *Texas Petrochems.*, 296 N.L.R.B. at 1074.

2. On March 10, 2005, petitioner acquired the assets of its predecessor, Grenada Manufacturing, LLC. Pet. App. 17; see *id.* at 13 n.3. At that time, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial, and Service Workers International Union (Union) represented the company's employees. *Id.* at 12, 16-17. The Union's contract had expired approximately one month earlier. *Id.* at 17.

On March 16 or 17, petitioner hired an attorney to poll the employees regarding their continued support for the Union. Pet. App. 69. Approximately one week later, at around 1:30 p.m. on the afternoon of March 23, petitioner met with Union officers (who were also employees) and informed them that there would be a poll held

the following morning at 7:00 a.m., approximately 18 hours later. *Id.* at 9, 70-75. When the officers objected, petitioner assured them that "[i]t's just a poll," there was nothing "to be concerned about," and "[i]t doesn't mean anything." *Id.* at 70-71, 76. Only after that meeting (*i.e.*, later on the afternoon of March 23) did petitioner post a notice informing employees of the poll scheduled for the following morning. *Id.* at 77-78. Given the timing, Union officers had no opportunity to discuss the poll with their co-workers before leaving work at the end of their shift, and no ability to seek legal advice from Union attorneys who were already leaving for the day. *Id.* at 74-77.

The result of the poll was 67 against union representation, and 46 for the Union. Pet. App. 87. Citing the poll as evidence of actual loss of majority support, petitioner withdrew recognition of the Union. *Id.* at 99. Thereafter, petitioner altered numerous terms and conditions of employment, including, *inter alia*, implementing a new Section 401(k) plan, health-care benefit plan, and retirement-incentive plan. *Id.* at 107-108.

3. Acting on unfair labor practice charges filed by the Union, the Board's General Counsel issued a complaint alleging, among other things, that petitioner violated Section 8(a)(1) and (5) of the Act by conducting a poll of its employees and relying on that poll to support its withdrawal of recognition. Pet. App. 30-31. After a hearing, the administrative law judge (ALJ) held that petitioner committed unfair labor practices by conducting the poll without providing the Union with reasonable advance notice as required by *Texas Petrochemicals*, *supra*, and by failing to provide employees with assurances against reprisals and access to a secret ballot, and by creating a coercive atmosphere, all contrary to the

dictates of *Struksnes*, 165 N.L.R.B. at 1062-1063. Pet. App. 115-127.

The Board affirmed, adopting the ALJ's findings that the poll violated Section 8(a)(5) and (1) of the Act because petitioner failed to comply with the reasonable advance notice requirement, and Section 8(a)(1) because petitioner failed to poll employees by secret ballot. Pet. App. 13 & n.4, 22.

4. The Board petitioned for enforcement of its order. In an unpublished, *per curiam* opinion, the court of appeals granted the petition for enforcement on one ground: there was "substantial evidence in the record to support the conclusion of the ALJ, as affirmed by the [Board], that [petitioner] failed to give the Union reasonable advance notice of the poll." Pet. App. 7. The court of appeals accepted the Board's concession that petitioner had a "good faith basis" for polling its employees, and did not consider any other grounds urged for affirmance. *Id.* at 6-7.

At the outset, the court of appeals acknowledged polling as "an important tool" to help employers "gauge a union's majority support" and "avoid liability for bargaining with a union that does not in fact enjoy majority support." Pet. App. 5. Expressly limiting its opinion to "the discrete facts of this case" (*id.* at 10-11), the court of appeals held that notifying the Union "mid-afternoon on the day before the 7:00 a.m. commencement of voting," when an attorney was retained and the poll planned "no less than a full week prior," left "no serious question that the notice was not furnished a reasonable time in advance." *Id.* at 11. This "scant 18 hour[]" notice made it "virtually impossible" for the Union "to seek legal guidance, communicate with the employees, or arrange for the presence of observers or third-party ad-

ministrators before the poll became a fait accompli." *Id.* at 7-8. Petitioner's failure to give reasonable notice eliminated "any chance that the Union might otherwise have had to contact its members or take steps to ensure that the poll would be conducted in compliance with the [other procedural] requirements * * * and in such a manner as not to constitute an unfair labor practice." *Id.* at 11. That was particularly troublesome, the court explained, because petitioner was a successor employer seeking to poll its employees shortly after taking over. *Id.* at 10. The court of appeals concluded that the policy behind requiring advance notice—"allowing a union time to have contact with the employees and to disseminate information"—was "certainly not furthered by the very short time in which to act that [petitioner] afforded the Union." *Ibid.*

The court rejected petitioner's contention that two prior Board cases (decided approximately twenty years apart) compelled a different outcome or required a remand for the Board to reconcile its precedents. Pet. App. 8-9. The court found both decisions distinguishable on their facts. In *Unifirst Corp.*, 346 N.L.R.B. 591 (2006) (*Unifirst*), unlike the instant case, the union was informed of the poll a "few days" before, and employees were informed at a company-wide meeting several days in advance. Pet. App. 8. In *Boaz Carpet Yarns, Inc.*, 280 N.L.R.B. 40 (1986) (*Boaz Carpet*), the Board found one-day advance notice to be sufficient where (unlike here) the union had been aware of the employees' dissatisfaction for an entire month (a substantial majority of employees had signed a petition) and where the employ-

ees received three days advance notice. Pet. App. 8-9.[1] Although petitioner argued that the same knowledge could be imputed here, because the good faith basis to question majority support was undisputed, the court refused to "eviscerate the advance-notice requirement by equating the belief that an employer must hold before conducting a poll with notice to the union." *Id.* at 9 n.19. Finding "no viable argument in support of [petitioner's] contention that its notice to the Union was reasonable" under these circumstances, the court of appeals granted the Board's petition for enforcement. *Id.* at 7-8.

ARGUMENT

The court of appeals decision does not conflict with any decision of this Court or any other court of appeals. The Board has required employers to provide reasonable advance notice to incumbent unions in these circumstances for two decades with court approval and without significant controversy. The court of appeals' unpublished, *per curiam* decision was case- and fact-specific, holding only that substantial evidence supported the ALJ's finding that 18 hours "advance" notice of polling under circumstances where the Union had no opportunity to react did not qualify as reasonable advance notice. That holding was correct and does not implicate any of the larger policy issues raised in the petition. The question of what qualifies as "reasonable" notice is rarely litigated (at the Board or the court of appeals level), and this Court's intervention is not warranted.

1. Contrary to petitioner's contentions (Pet. 7), this case presents no important question concerning legal

[1] The court also questioned whether *Boaz Carpet* remained good law, given that it pre-dated *Texas Petrochemicals*—the Board's "first clear statement" of the advance notice requirement. Pet. App. 9 n.18.

requirements governing polling under the Act. It would not afford this Court an opportunity to decide questions purportedly left open by *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U.S. 359 (1998). Pet. 7, 16-17. Nor does this case, as petitioner asserts (Pet. 18-20), provide a vehicle for this Court to examine the Board's polling policies under the First Amendment or Section 8(c) of the Act. There is also no occasion to do so. Petitioner points to no court of appeals decision, including the decision below, that has considered the question of whether procedural safeguards applied by the Board to employer-sponsored formal polls of the kind at issue in this case raises issues under Section 8(c) of the Act, 29 U.S.C. 158(c), or the First Amendment.

Petitioner's invocation (Pet. 7-10, 23) of the Board's decision in *Levitz Furniture of the Pacific, Inc.*, 333 N.L.R.B. 717 (2001) (*Levitz*), which changed the substantive standard for employer withdrawal of recognition (not polling), is equally unavailing. This case has nothing to do with the continuing validity of the "good-faith reasonable doubt," *Allentown Mack*, 522 U.S. at 380, standard for polling. All parties agree that petitioner had a good faith basis to poll here, and the court of appeals' decision rested on that premise. Pet. App. 6-7. This case is thus an inappropriate vehicle to address any such broader issues.[2]

The sole ground on which the court of appeals found petitioner's poll to be unlawful was its failure to give the

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[2] In any case, that issue is not sufficiently developed for this Court's review. In *Levitz,* the Board left for "a later case whether the current good-faith doubt (uncertainty) standard for polling should be changed." 333 N.L.R.B. at 723. Until the Board decides that issue, and its decision has been subjected to review in the courts of appeals—neither of which has occurred—review by this Court is especially unwarranted.

Union reasonable advance notice of the time and place of the poll. That entirely reasonable procedural requirement for employer-sponsored polling has engendered minimal litigation and has produced no circuit conflict. This case is not a proper vehicle to resolve the broader array of procedures and policies that predominate the petition, but that played no part in the decision below.

2. a. The only procedural safeguard at issue is the requirement that an employer give the incumbent union advance notice of the time and place of a scheduled poll. As petitioner concedes (Pet. 10), that has been the Board's rule for two decades. See pp. 3-4, *supra*. During this time only two courts of appeals have directly addressed the propriety of this requirement—both with express approval. In *Texas Petrochemicals Corp.* v. *NLRB*, 923 F.2d 398, 403 (1991), the Fifth Circuit recognized the benefits of providing advance notice and enforced the Board's decision finding that a poll conducted without advance notice constituted an unfair labor practice. The Sixth Circuit likewise agreed that a poll of employees concerning their support for the incumbent union should be held unlawful when the employer fails to provide reasonable advance notice. *Henry Bierce Co.* v. *NLRB*, 23 F.3d 1101, 1108-1109 (1994) (holding that because the employer "did not give advance 'time and place' notice to the union * * * its poll therefore constituted an unfair labor practice"); see *Allentown Mack*, 522 U.S. at 383 (Rehnquist, C.J., concurring in part and dissenting in part) (recognizing Board's "additional requirement of advance notice of the time and place of the poll"); *Wagon Wheel Bowl, Inc.* v. *NLRB*, 47 F.3d 332, 335 (9th Cir. 1995) (recognizing that employer can poll its employees "if it has given the union notice of the time and place of

the poll") (quoting *Mingtree Restaurant, Inc.* v. *NLRB*, 736 F.2d 1295, 1299 (9th Cir. 1984)).

In the absence of any circuit conflict, petitioner asserts (Pet. 10) that "the Board has rendered a variety of inconsistent and irreconcilable decisions on this topic" which "demonstrate that the Board's policy regarding advance notice of polling is irrational." The "variety" of purported "inconsistent and irreconcilable decisions" consists of three cases (including the decision below) over the course of two decades. All three embrace an advance notice requirement and thus cast no doubt on the policy underlying the requirement itself. To the extent petitioner is instead arguing that the Board has been inconsistent in determining what qualifies as "reasonable" advance notice, and what does not, this Court's review is not warranted on that subsidiary detail.

As the court of appeals held, the other two Board decisions—*Unifirst Corp.*, 346 N.L.R.B. 591 (2006), and *Boaz Carpet Yarns, Inc.*, 280 N.L.R.B. 40 (1986)—are distinguishable on their facts. In *Unifirst*, the employer sent notice to the union four days prior to the scheduled poll, and held a meeting for all employees the following day (three days before the poll). 346 N.L.R.B. at 606. The ALJ found this to be sufficient advance notice. *Id.* at 607. In *Boaz Carpet*, a case predating *Texas Petrochemicals*, the union had notice of employees' dissatisfaction one month before the poll and, while the union received notice of the poll only one day prior, employees were informed three days in advance through a posting at the facility. 280 N.L.R.B. at 44-45. The Board held that "under the circumstances" the Union was "on notice generally" well in advance of the poll. *Id.* at 45.

In contrast, petitioner (a recent successor) provided the Union only 18 hours notice at a time of day (shortly

before the end of the shift) when an effective response was virtually impossible and with false assurances suggesting an expedited call to action was unnecessary. These distinctions do not violate the duty of "reasoned decisionmaking," see Pet. 12, nor does this rarely litigated issue warrant this Court's attention.

b. Petitioner also claims (Pet. 15-16) that the Act does not "sanction[]" invalidating a poll on the basis of an inadequate, one-day notice without an independent showing that the lack of notice restrained or coerced an employee's exercise of his or her Section 7 rights or that invalidation would protect such rights.

This argument is not properly before the Court. Petitioner failed to raise it before the Board and is now jurisdictionally barred from doing so. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This Court has enforced that provision strictly, holding that Section 10(e) is jurisdictional and that the failure to present an issue to the Board precludes subsequent judicial consideration of that issue. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982). In addition, petitioner did not raise this argument before the court of appeals, and the court did not decide it. See *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992) (Court ordinarily will not consider issues neither raised nor resolved by the court of appeals.); *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988) (Court "usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court.").

Even if this Court could reach the issue, petitioner's argument provides no basis for review. Section 8(a)(5) of the Act gives the Board authority to proscribe conduct by an employer that constitutes a "refus[al] to bargain collectively with the representatives of his employees." 29 U.S.C. 158(a)(5). Section 8(a)(1), 29 U.S.C. 158(a)(1), likewise confers authority on the Board to adopt procedural safeguards for the manner in which an employer may poll its employees about their continued support for a union. Even Chief Justice Rehnquist's concurring and dissenting opinion for four Justices in *Allentown Mack*, which questioned the Board's authority to regulate polling through a substantive standard, recognized and accepted its authority to impose procedural safeguards, including advance notice, to protect employee rights. See 522 U.S. at 383 (Rehnquist, C.J., concurring in part and dissenting in part) (explaining that the "requirement of advance notice of the time and place of the poll * * * make[s] coercion or restraint of employees highly unlikely"). Petitioner points to no court that has held otherwise.

c. Equally unavailing is petitioner's assertion (Pet. 16-17)—also raised neither to the Board nor to the court of appeals—that the Board's polling policy conflicts with this Court's precedent by emphasizing stability in collective-bargaining relationships and failing to "factor the principles of employee free choice or majority representation into its analysis of polling." For the reasons stated above (p. 12, *supra*), the Court is barred from considering that argument.

It is also unclear whether petitioner's argument is aimed at the Board's reasonable advance notice requirement specifically, or at the Board's polling policies more generally. The latter are not at issue in this case. See

pp. 8-10, *supra*. And the former argument is without merit. In *Allentown Mack*, this Court recognized that the Board had "chosen to limit severely the circumstances under which [employer-sponsored polling] may be conducted" based on its belief "that employer polling is potentially 'disruptive' to established bargaining relationships and 'unsettling' to employees." 522 U.S. at 364-365 (quoting *Texas Petrochems. Corp.*, 296 N.L.R.B. 1057, 1061 (1989), enforced in relevant part, 923 F.2d 398 (5th Cir. 1991)); see *Texas Petrochems.*, 296 N.L.R.B. at 1061-1062 (explaining that by "reasonably limiting the range of circumstances under which an employer may lawfully conduct such polls, the potential for disruption of collective-bargaining relationships is limited, without unreasonably impairing * * * the employees' right freely to choose whether or not to be represented"). And Chief Justice Rehnquist's concurring and dissenting opinion in *Allentown Mack* expressed the view that "[a] poll *conducted in accord with the Board's substantial procedural safeguards*," including "advance notice of the time and place of the poll," "would not coerce employees in the exercise of their rights." 522 U.S. at 383 (Rehnquist, C.J., concurring in part and dissenting in part) (emphasis added). Petitioner proffers no substantial reason why simply requiring advance notice (as the Board has done for two decades) would unduly infringe on employee free choice or majority rule.

3. Finally, petitioner contends (Pet. 21-22) that the court of appeals erred in holding that substantial evidence supports the Board's factual findings. As this Court has explained:

> Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the

> Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

Universal Camera Corp. v. *NLRB*, 340 U.S. 474, 491 (1951).

The court of appeals did not "misapprehend" or "grossly misappl[y]" the substantial evidence standard. Rather, the court reasonably found "no viable argument" to support petitioner's contention that the 18 hour notice was reasonable, where the "scant" notice made it "virtually impossible for the Union to seek legal guidance, communicate with its employees, or arrange for the presence of observers or third party administrators before the poll became a fait accompli." Pet. App. 7-8. This decision was correct, and there is no reason to review the court's substantial evidence determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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