

Navigating the Evolving Landscape of Labor Law: Recent and Prospective Developments



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A classroom scene featuring a green chalkboard. At the top, a world map is mounted on a roll. On the left, a wooden ruler stands vertically. At the bottom, a chalkboard eraser is visible. The central focus is a white rectangular area containing a red apple with a pencil and a marker. The text 'ARE YOU SMARTER' is written across the apple. A grey banner with blue text is overlaid on the bottom of the white area.

ARE YOU SMARTER

Than A Labor Lawyer?



Rules

- 1. Like TV show, but with labor law subjects
- 2. Available Cheats
 - Copy
 - Peek
 - Save
- 3. Prizes/Punishment

1,000,000

Are You Smarter Than a Labor Lawyer?

Quickie Elections 501

Fair Choice/Employee Voice 502

Agreements 401

Captive Audience 402

Injunctive Relief 301

Joint Employer 302

Policies 201

NLRB Structure 202

NLRB 101

Labor Unions 102



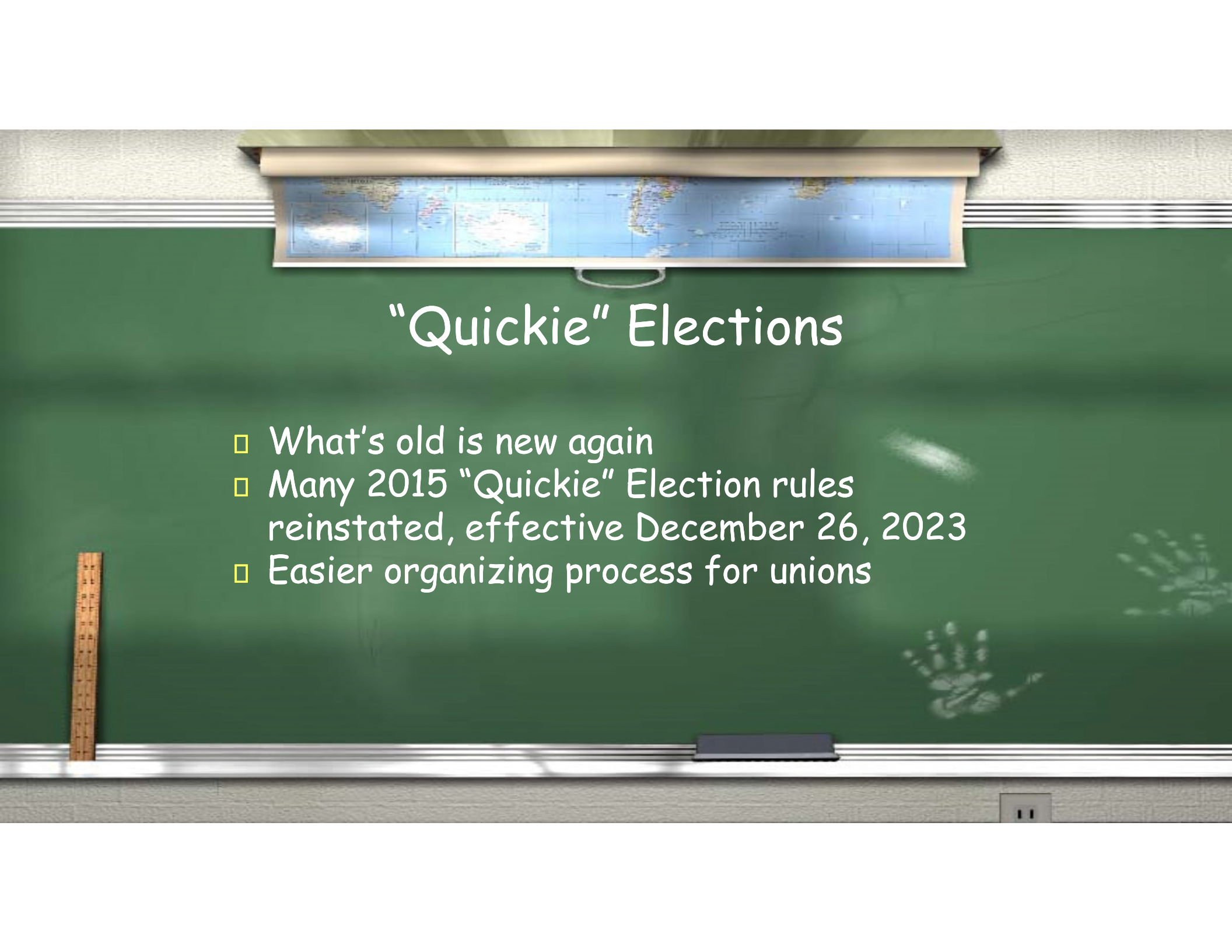
Quickie Elections 501 Question

In what year did the NLRB first introduce "Quickie" elections?




Quickie Elections 501 Answer

2015



"Quickie" Elections

- What's old is new again
- Many 2015 "Quickie" Election rules reinstated, effective December 26, 2023
- Easier organizing process for unions



"Quickie" Elections - *Cemex* (NLRB, 2023)

- Election petitions no longer required
- Recognition solely with majority support representation
- Employer options:
 - Must recognize and bargain; OR
 - Immediately file a RM petition
 - Likely dismissal of RM petition and recognition of union if proven ULP



"Quickie" Elections - Summary of Rules

- Quicker elections
- Prompt pre-election hearings (generally scheduled to open 8 calendar days after petition filing)
- Potential postponement of statement of position
- Responsive statement of position will now be oral
- Faster turnaround for deadlines

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Fair Choice/Employee Voice 502 Question

One of the 3 changes in new Fair
Choice-Employee Voice Rule?



Fair Choice/Employee Voice Charges 502 Answer

1. Blocking charges
2. Voluntary recognition bar
3. Voluntary recognition in construction industry



The Fair Choice-Employee Voice Final Rule - Blocking Charges

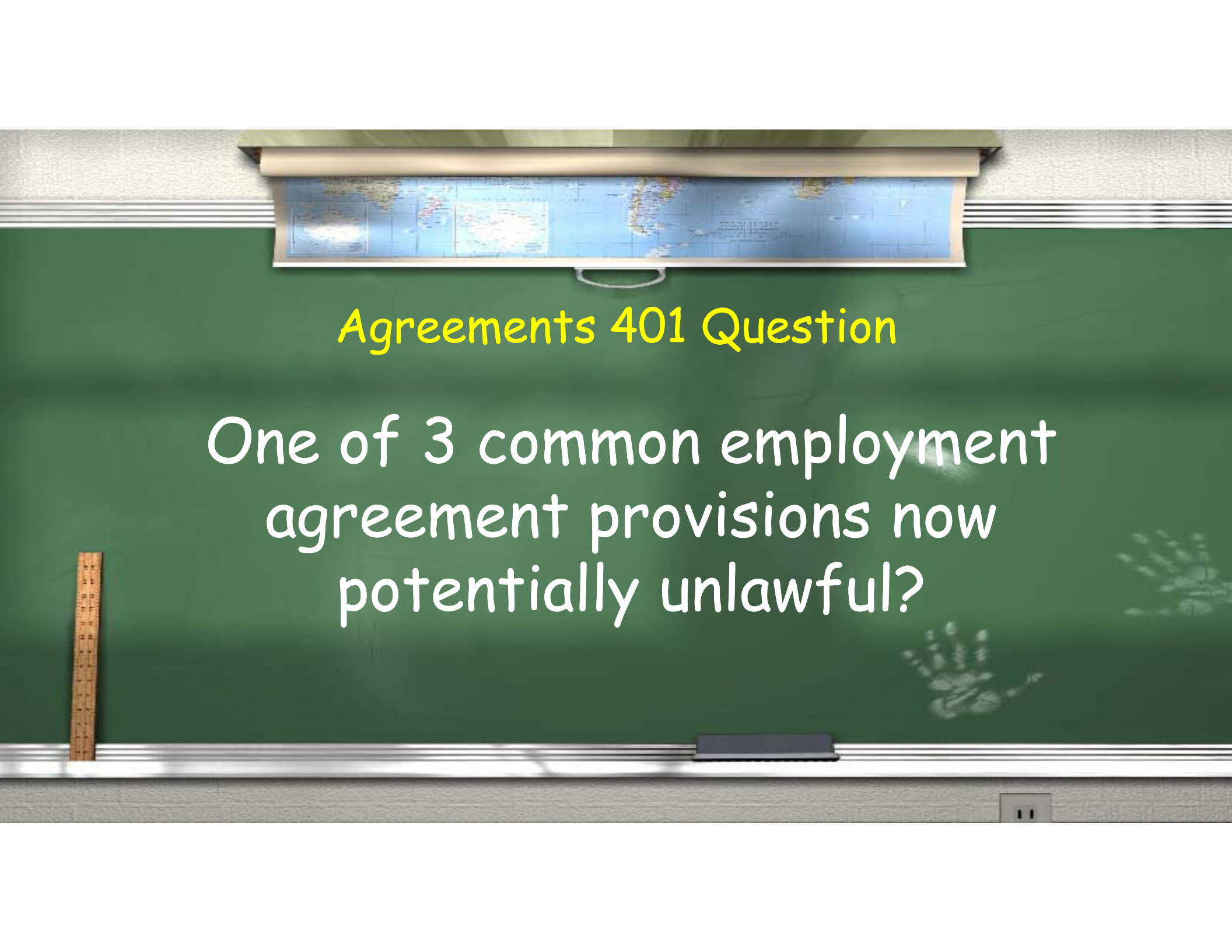
- Effective September 30, 2024
- Rescinded 2020 "Election Protection Rule"
 - Representation elections moved forward while ULP charges pending
- Returned to pre-2020 practice on "blocking" charges before an election
- Restores Regional Director's authority to delay election if alleged ULP threatens/interferes with employee free choice



The Fair Choice-Employee Voice Final Rule - Voluntary Recognition Bar

- Eliminates 45-day notice-and-election procedure triggered by employer's voluntary recognition
 - Minority employees may not demand election to challenge majority status during 45-day window
- Employees barred from seeking decertification for minimum of 6 months and maximum of 1 year from date of first bargaining session

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Agreements 401 Question

One of 3 common employment agreement provisions now potentially unlawful?



Agreements 401 Answer

1. Confidentiality
2. Non-Disparagement
3. Non-Compete



Agreements - McLaren Macomb (NLRB, 2023)

- Held that employers offering or enforcing severance agreements with overly broad confidentiality and non-disparagement provisions violates the NLRA
- GC Memo 23-05 (YEAR) - Confidentiality clauses must be:
 - "narrowly tailored" to only restrict dissemination of proprietary or trade secret information
 - Restriction period must be based on legitimate business justifications"



Agreements - Non-Competes & "Stay or Pay"

- GC Memo 23-08 (2023) - Nearly all non-compete agreements are unlawful
- GC Memo 25-01 (2024) - Non-competes and "stay or pay":
 - restrict employee mobility, by making resigning from employment financially difficult or untenable; and
 - increase employee fear of termination for engaging in activity protected by the Act
- To be lawful, must be narrowly tailored to minimize Section 7 interference



Agreements - No Poach

- Region 22 Complaint (09/12/24) alleging employee non-hire (or "no poach") provisions in employer's contract with clients violates Act
 - Targets company-to-company agreement restrictions
 - NLRB ALJ hearing set for 11/12/24

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Captive Audience 402 Question

Which state - New York or California - first banned captive audience meetings?



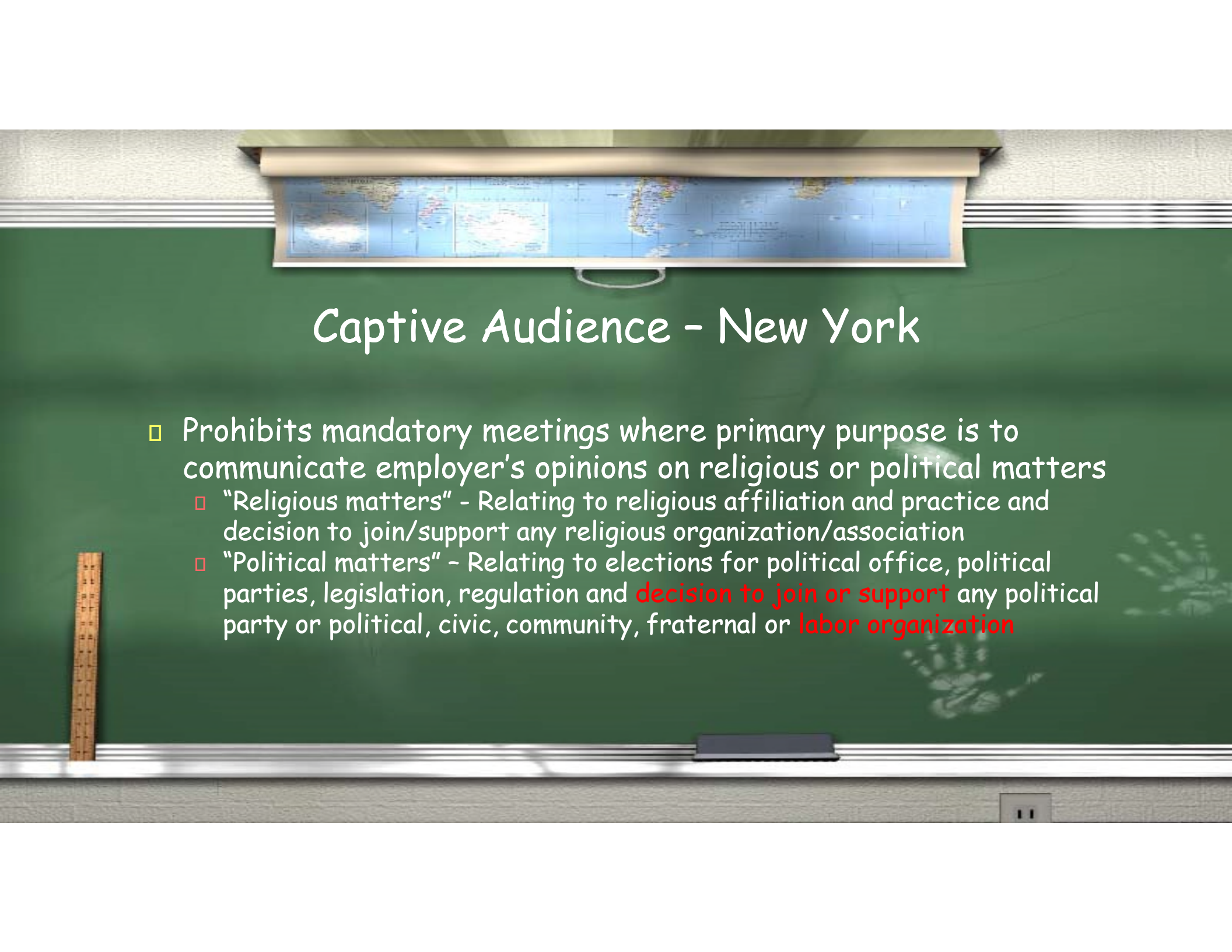
Captive Audience 402 Answer

New York (09/06/23)
California (09/30/24) (eff. 01/01/25)



Captive Audience - NLRB

- Section 8(c) of NLRA expressly permits employers to disseminate their views on unions to employees in the form of so-called captive audience speeches
 - As more states pass legislation, challenges to state authority to overrule federal labor law have followed
- GC Memo 22-04 (2022) outlined the GC's plan to bring a case and advocate the Board ban captive audience meetings nationwide



Captive Audience - New York

- Prohibits mandatory meetings where primary purpose is to communicate employer's opinions on religious or political matters
 - "Religious matters" - Relating to religious affiliation and practice and decision to join/support any religious organization/association
 - "Political matters" - Relating to elections for political office, political parties, legislation, regulation and **decision to join or support** any political party or political, civic, community, fraternal or **labor organization**



Captive Audience - Laws/Bills

□ Laws

- California (eff. 1/01/25)
- Connecticut
- Hawaii
- Illinois (eff. 1/01/25)
- Maine
- Minnesota
- Oregon
- Washington

□ Bills

- Alaska
- Maryland
- Massachusetts
- Rhode Island
- Vermont



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Injunctive Relief 301 Question

Which section of the NLRA provides for injunctive relief?



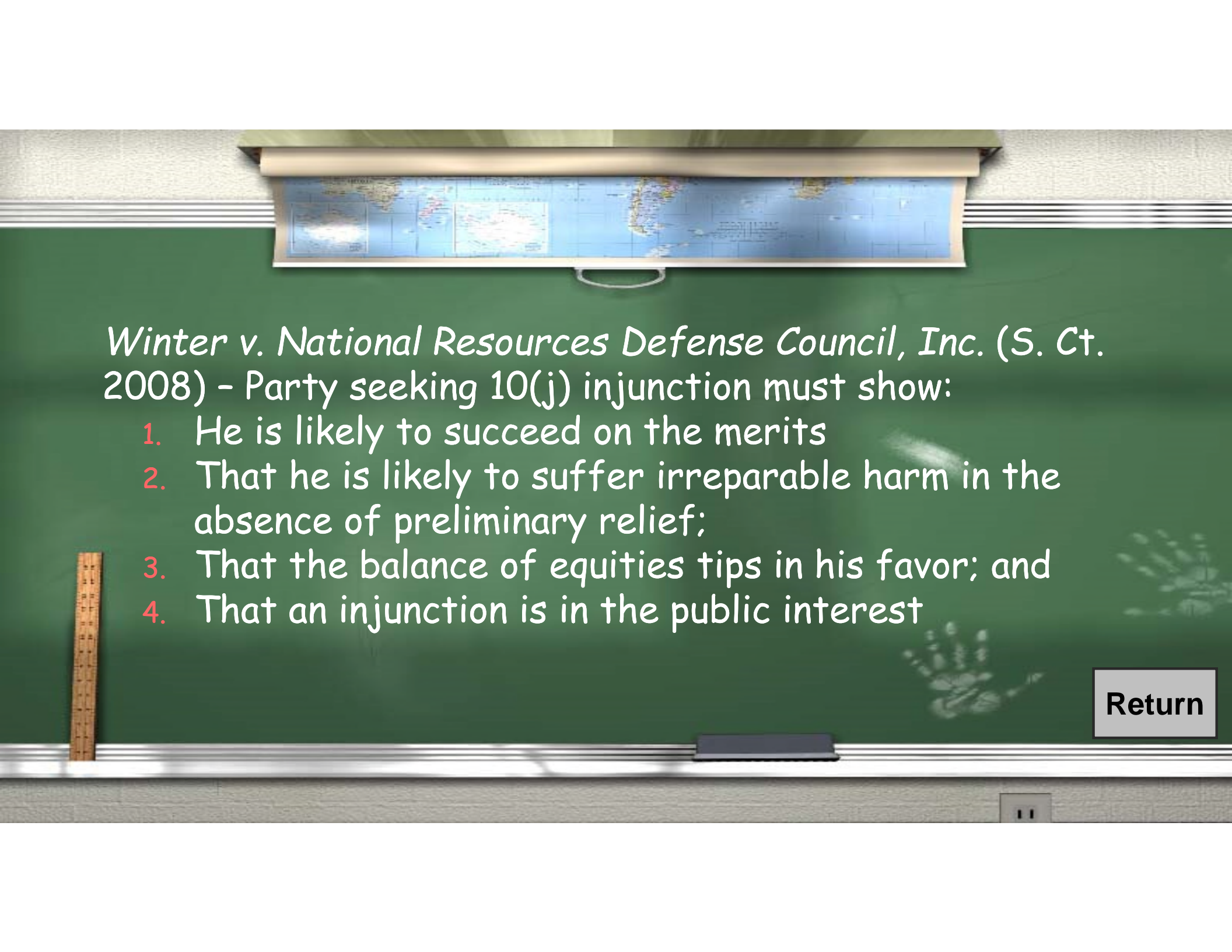
Injunctive Relief 301 Answer

Section 10(j)



Injunctive Relief - *Starbucks v. McKinney* (S. Ct. 2024)

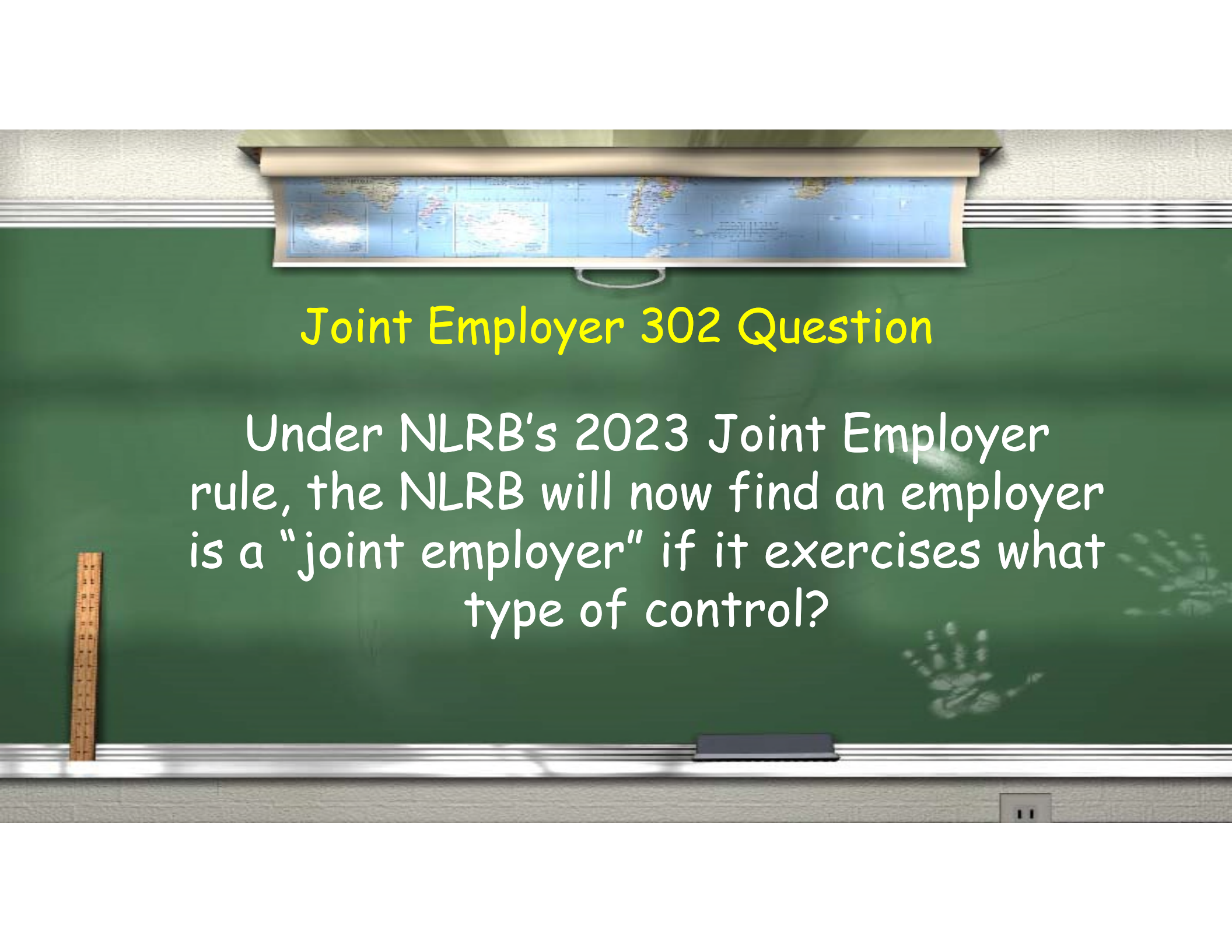
- Section 10(j) authorizes NLRB to seek injunctive relief in federal district court before making final determination on ULP
- In *Starbucks*, SCOTUS clarified Section 10(j) standard
 - Will apply 4-part test from *Winter v. National Resources* (S. Ct. 2008)
 - Will make it more difficult for NLRB to obtain injunctive relief while an ULP claim is being litigated



Winter v. National Resources Defense Council, Inc. (S. Ct. 2008) - Party seeking 10(j) injunction must show:

1. He is likely to succeed on the merits
2. That he is likely to suffer irreparable harm in the absence of preliminary relief;
3. That the balance of equities tips in his favor; and
4. That an injunction is in the public interest

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Joint Employer 302 Question

Under NLRB's 2023 Joint Employer rule, the NLRB will now find an employer is a "joint employer" if it exercises what type of control?



Joint Employer 302 Answer

Indirect control



Joint Employer - NLRB's Joint Employer Standard - 2023 Final Rule

- NLRB may consider 2 or more entities joint employers of a group of employees if:
 - each entity has an employment relationship with employees; and
 - entities share or co-determine 1 or more of employees' essential terms and conditions of employment



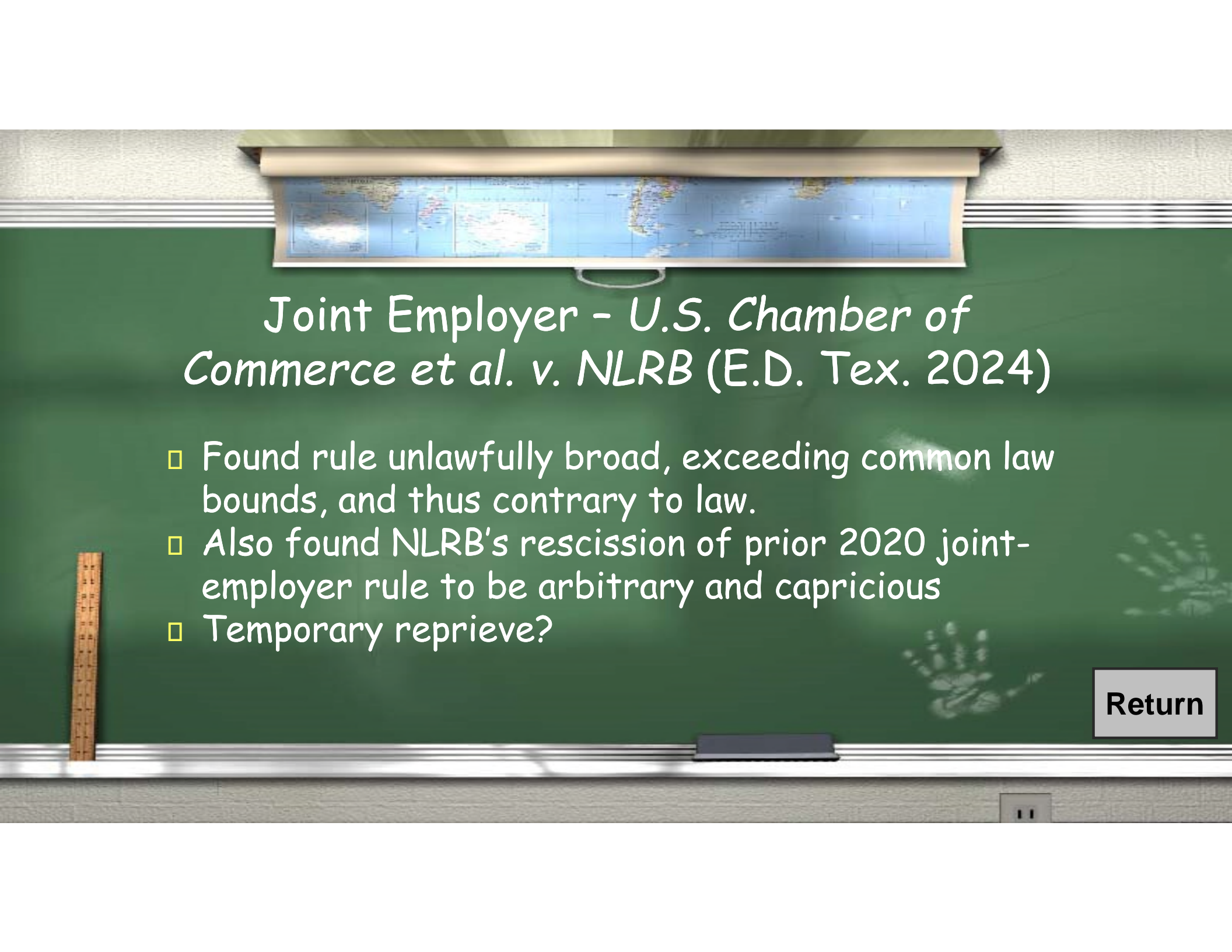
Joint Employer - 2020 vs. 2023 Rules

□ 2020

- “substantial direct and immediate control” over essential terms of conditions of employment

□ 2023

- Authority to control essential terms and conditions of employment, regardless of whether exercised and whether such exercise of control is direct or indirect



Joint Employer - *U.S. Chamber of Commerce et al. v. NLRB* (E.D. Tex. 2024)

- Found rule unlawfully broad, exceeding common law bounds, and thus contrary to law.
- Also found NLRB's rescission of prior 2020 joint-employer rule to be arbitrary and capricious
- Temporary reprieve?

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Policies 201 Question

A workplace policy is "presumptively unlawful" if it does this?



Policies 201 Answer

Has "reasonable tendency to chill"
exercise of Section 7 rights



Policies - *Stericycle* (NLRB, 2023)

- Overturned *Boeing Co.* (NLRB, 2017)
- Revived *Lutheran Heritage* (NLRB, 2004)
- Held workplace rule will be “presumptively unlawful” if it has a “reasonable tendency to chill” exercise of Section 7 rights
 - Employer may rebut presumption:
 - Prove rule advances legitimate and substantial business interest;
AND
 - Unable to advance that interest with more narrowly tailored rule



Policies - NLRB GC & PCA

- NLRB GC seeking to expand PCA scope to include social justice and certain “political statements”
 - GC Memo 23-04 (2023) cites *Tesla, Inc.* (NLRB, 2022) and “the return to longstanding precedent holding that employer attempts to impose any restrictions on the display of union insignia, including apparel, are presumptively unlawful absent special circumstances”
 - Denied enforcement (5th Cir. 2023)



Policies - Dress Codes

- 3 NLRB cases reviewing whether employer dress code can prohibit "BLM" or "Black Lives Matter"
- In 2 of 3, NLRB held "BLM" PCA
- 1 case remaining

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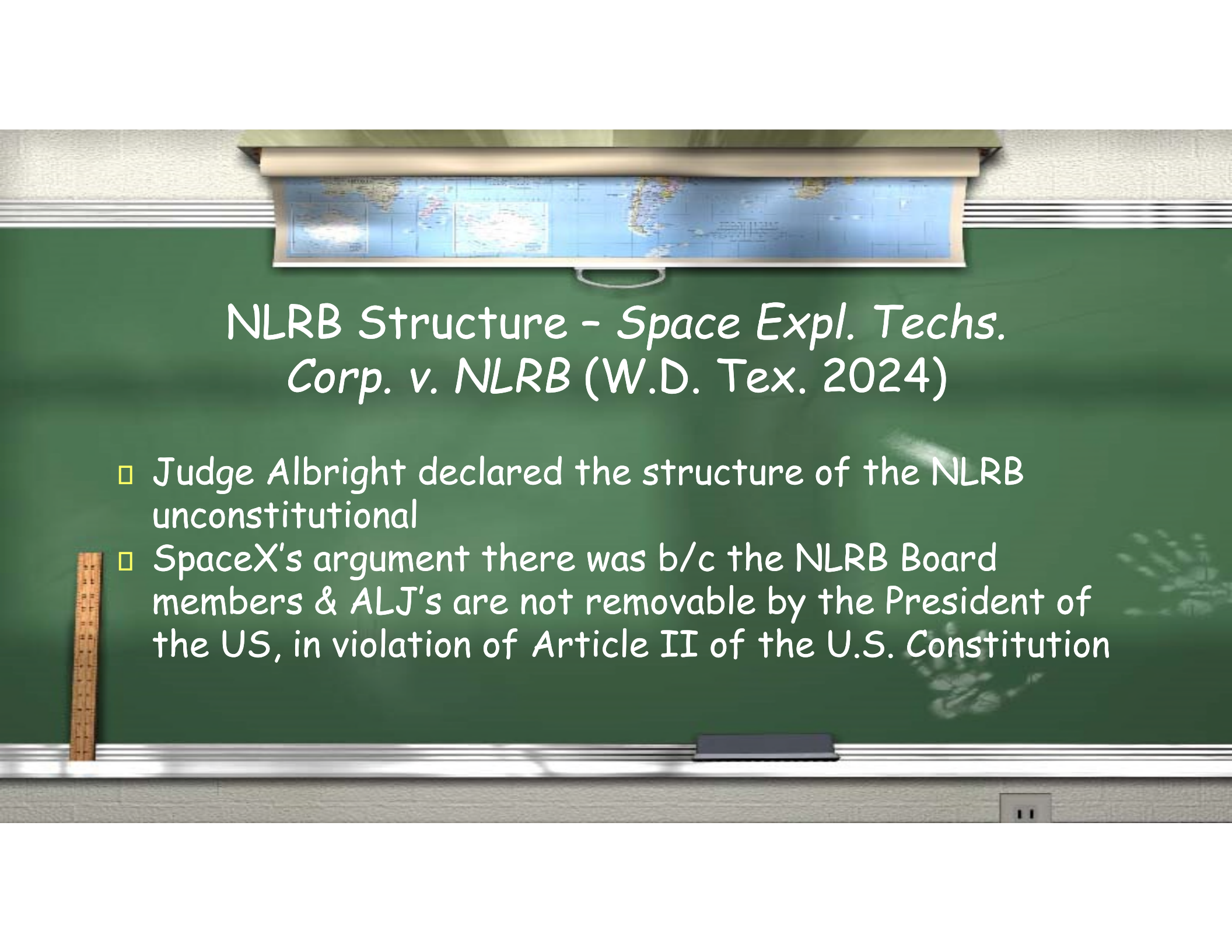
NLRB Structure 202 Question

Is the NLRB
Constitutional?



NLRB Structure 202 Answer

Depends who you ask!



NLRB Structure - *Space Expl. Techs. Corp. v. NLRB* (W.D. Tex. 2024)

- Judge Albright declared the structure of the NLRB unconstitutional
- SpaceX's argument there was b/c the NLRB Board members & ALJ's are not removable by the President of the US, in violation of Article II of the U.S. Constitution



NLRB Structure - *Space Expl. Techs. Corp. v. NLRB* (W.D. Tex. 2024) (cont.)

- Judge issued an injunction relying in part on holding by U.S. Court of Appeals for the Fifth Circuit where the court found SEC ALJ's are unconstitutional b/c of statutory removal restrictions
- Amazon, Trader Joes, and Starbucks are also challenging the constitutionality of the NLRB

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NLRB 101 Question

Name 1 of the 2 primary functions of the National Labor Relations Board.



NLRB 101 Answer

1. Secret ballot elections
2. Prevent and remedy ULPs



NLRB 101 - NLRB's Mission Statement

- "Protecting workplace democracy and the rights of employees, unions and employers under the National Labor Relations Act in order to promote commerce and strengthen the Nation's economy"



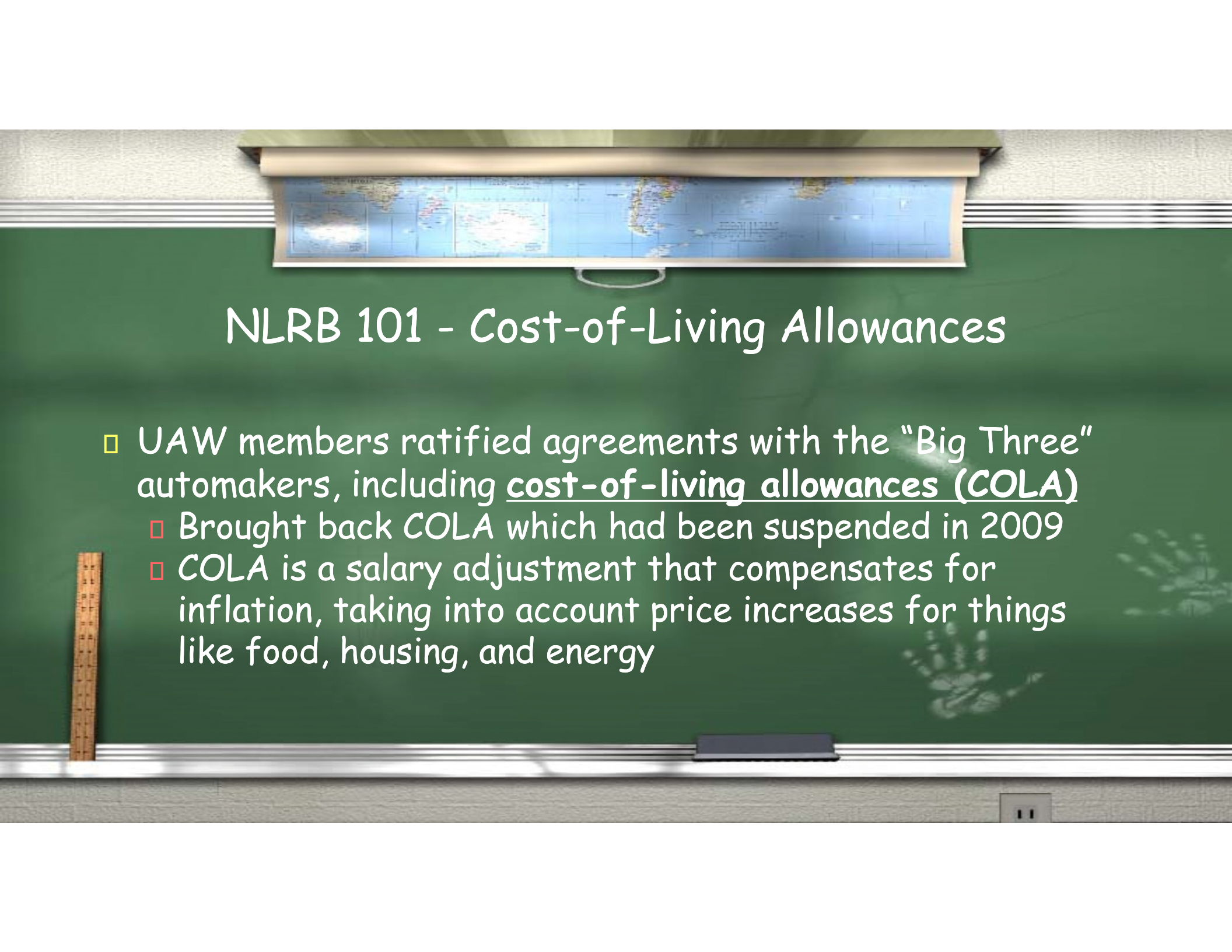
NLRB 101 - Organization & Responsibilities

- Office of General Counsel
 - Chiefly prosecutorial with authority delegated to Regional Directors
- National Labor Relations Board
 - Adjudicative



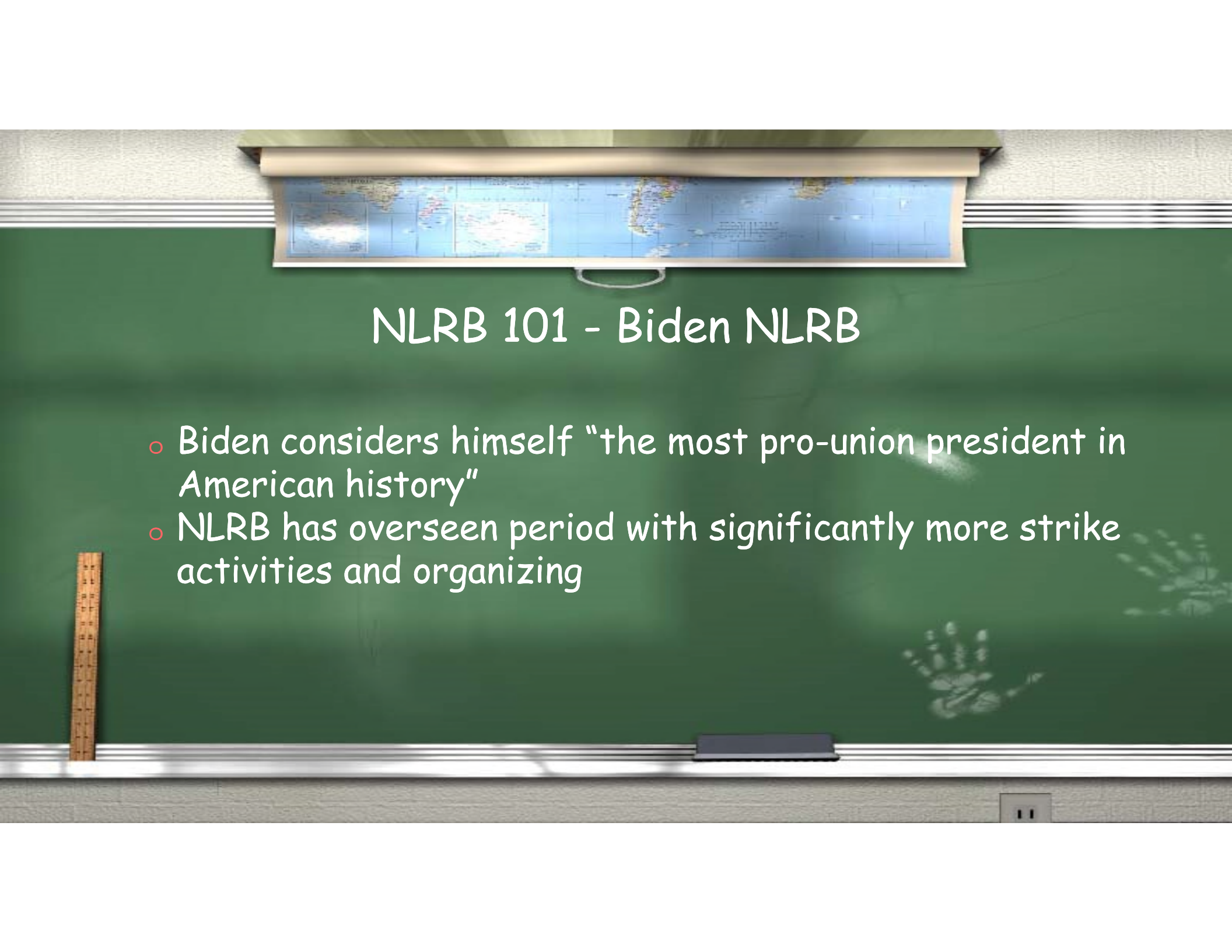
NLRB 101 - Level of Activity

- Union election petitions (RC)
 - FY 2023: 2,115
 - FY 2022: 2,072
- Complaint and Charges (ULP)
 - FY 2023: 19,869
 - FY 2022: 17,998



NLRB 101 - Cost-of-Living Allowances

- UAW members ratified agreements with the “Big Three” automakers, including cost-of-living allowances (COLA)
 - Brought back COLA which had been suspended in 2009
 - COLA is a salary adjustment that compensates for inflation, taking into account price increases for things like food, housing, and energy



NLRB 101 - Biden NLRB

- Biden considers himself "the most pro-union president in American history"
- NLRB has overseen period with significantly more strike activities and organizing



NLRB 101 - Biden's NLRB and 2024 Election

- Even if Trump wins, democrats may keep control into 2026
 - Senate adjourned for recess (09/25/24) and not set to return before election
 - Senate did not vote on 2 of Biden's nominees for NLRB: Board Chair, Lauren McFerran and Seyfarth Shaw partner, Joshua Ditelberg
 - December 2024- McFerran's term expires- her confirmation is necessary for keeping a Democratic majority on the Board

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Labor Unions 102 Question

Is union approval up or down since last year?



Labor Unions 102 Answer

Up




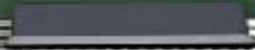

Labor Unions - Union Approval %

	Approve	Disapprove	No opinion
	%	%	%
2024 Aug 1-20	70	23	7
2023 Aug 1-23	67	29	4
2022 Aug 1-23	71	26	3
2021 Aug 2-17	68	28	4
2020 Jul 30-Aug 12	65	30	5
2019 Aug 1-14	64	32	5
2018 Aug 1-12	62	30	8
2017 Aug 2-6	61	33	5
2016 Aug 3-7	56	36	8
2015 Aug 5-9	58	36	7
2014 Aug 7-10	53	38	10
2013 Aug 7-11	54	39	7
2012 Aug 9-12	52	42	6
2011 Aug 11-14	52	42	6
2010 Aug 5-8	52	41	7
2009 Aug 6-9	48	45	7
2008 Aug 7-10	59	31	10

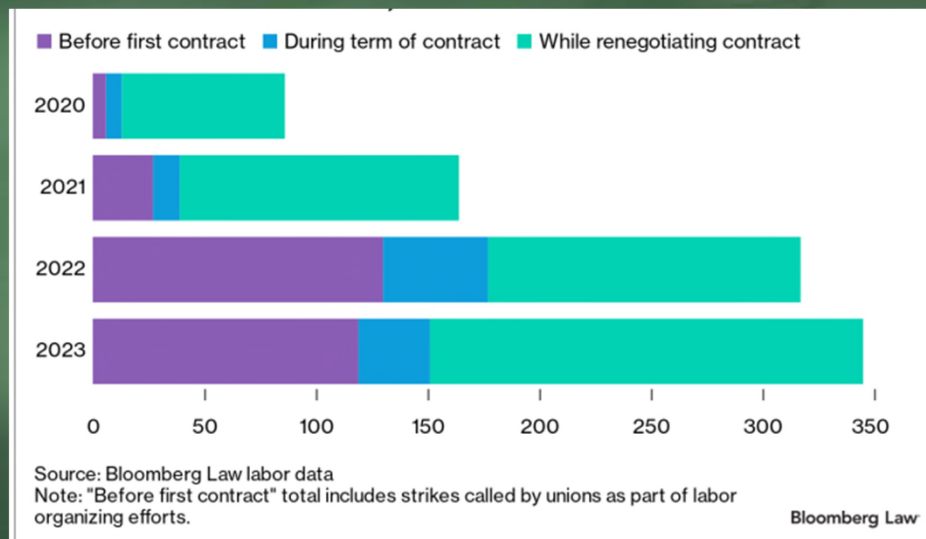
Source: [Gallup](#)



Labor Unions - *American Steel Construction, Inc.* (NLRB, 2022)

- Unions can more easily seek smaller bargaining units, called “micro units”
 - Easier for unions to organize and win elections
 - Employers disputing unit’s appropriateness must overcome NLRB’s “overwhelming community of interest” standard
 - Employers must show that excluded employees share an “overwhelming” community of interest with the petitioned-for unit
- 
- 
- 

Labor Unions - Timing of Strikes



Source: [Bloomberg Law](#)

Labor Unions - Striking Workers



396,346
2020-2022



530,287
2023

Source: Bloomberg Law labor data

Bloomberg Law

Labor Unions - Top 10 Striking Unions

Union	Strikes Called	Workers Involved	Avg. Strike Size
SEIU	99	181,754	1,836
IBT	43	12,377	288
NEA and/or AFT	34	100,217	2,948
UFCW	25	5,516	221
UAW	24	63,494	2,646
CWA	19	4,923	259
UNITE HERE	18	21,530	1,196
NNU/CNA*	12	14,815	1,235
IAM	11	7,046	641
IUOE	6	8,219	1,370

Source: Bloomberg Law labor data
 Note: Strikes called by multiple unions are added to the totals for each union.
 *Totals for NNU/CNA include state and other affiliate unions.

Bloomberg Law



Labor Unions - Strike Issues

- Writers Guild- After their strike, union secured terms that offer guardrails for use of AI in the writing process
- Longshoremen's Union- Demand for total ban on automation of gates, cranes, and container-moving trucks in its ports



Labor Unions - Historic Wage Increases

- An average workers annual compensation, including benefits increases to \$170,000 from \$145,000.



Long Shoremen President Harold Daggett on
the Ports Strike:

"...and let's get a contract and let's move on
with this world. In today's world, I'll cripple
you. I will cripple you and you have no idea
what that means- nobody does"

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Million Dollar Question
Labor Law LLM

Does the NLRA apply to
non-unionized employees?



Million Dollar Answer
Labor Law LLM

The NLRA applies to most
employees, regardless of
whether they are in a union!



Thanks for Playing!



ARE YOU SMARTER
Than A Labor Lawyer?

Workplace Investigations Case Study

Greg Keating and Lydia Pincsak, *Epstein Becker Green*

October 22, 2024

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Intro Scene: CONTEXT MATTERS

- What have we learned FACTUALLY that is significant to the Investigation?
- How do those FACTS implicate a potential investigation in terms of LEGAL LIABILITY RISK?

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GREEN

Scene 1: The Complaint

- Anonymous Complaints
 - How to handle?
 - - Should you reach out to the person if possible and ask if they would come forward?
 - - Should Mark or anyone engage in efforts to discover who it is?
 - Discuss legal issues
 - What About the Alleged Wrongdoer? What do we Know?
 - Social Media?
 - Retaliation?
- Discuss what else EFC should do now to get ahead of this.
 - Who is right person to investigate?
 - Contact regional and local managers.
 - Forensic review of classes held for charities.
 - Does company have policy on running classes for charities and were channels followed?

EPSTEIN
BECKER
GREEN

Scene 2: The Initial Inquiry

- Does Bryson have a right to take leave AND be left utterly undisturbed?
 - Can the company insist that he provide documentation regardless of his status on leave?
 - Can the company take adverse action against him if he refuses to respond?
 - If so, what kind of adverse action? Pros/cons?
- Now is the time to expand the team and get crisis communications professionals on board.
 - What steps should EFC take after consulting with the communications expert?
 - No comment? Try and buy more time? Media Statement?
 - THIS IS WHY YOU NEED EXPERTS!

EPSTEIN
BECKER
GREEN

Scene 3: This Space is Getting Hot

- Liability Risk Assessment
 - Liability to local charities?
 - Liability to members?
 - Liability to Bryson Britt (defamation)?
- Reputational Risk
 - How does *messaging* impact the outcome of a crisis?
 - How can this crisis present an opportunity?
- Impact of Social Media
- Police Report
- Reporter at KQED

EPSTEIN
BECKER
GREEN

Scene 4: Effective Action: Investigation

- Next Steps
 - Prompt and thorough Investigation
 - Challenges present opportunities.
 - Discuss recent comments from GC forum on this.
 - Discuss recent developments impacting “prompt” obligation– DOJ ANNOUNCEMENT.
 - Build a strong team.
 - Discuss constituents and real examples in this case as well as other scenarios.
- Discuss Steps Taken and Coordination
- Critical to have these resources at the ready *before* the situation explodes.
 - If you are in “react” mode, it is often too late, and you find yourself pushing the proverbial rock up the hill.

EPSTEIN
BECKER
GREEN

Scene 5: All's Well That Ends Well

- Challenges present *opportunities*, provided they are handled effectively.
 - Look for the possible “Tylenol Moment” and take advantage.
- Exercise care in sending communications.
- The best offense is a strong defense.
 - Critically important to be *prepared* and have policies, procedures, and resources in place *before* a storm descends.
- ANY QUESTIONS OR COMMENTS?

EPSTEIN
BECKER
GREEN

ACC Chicago - The New Playbook: What the Supreme Court's Rulings on Agency Power Mean for Governmental Action Challenges

October 14, 2024

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Agenda



1. Supreme Themes: Theories Emerging from Supreme Court Rulings on the Power of Administrative Agencies
 - *Chevron* Overruled: Deference Diminished
 - Resetting the Clock
 - Agency's Rulemaking Record Matters
 - Administrative Tribunals Limited
 - Major Questions
2. Identifying Regulatory Challenges Exercise
3. Key Takeaways and Tips for Identifying Agency Action Challenges
4. Questions?



Supreme Themes: Theories Emerging from Supreme Court Rulings on the Power of Administrative Agencies

Chevron Overruled - Deference Diminished

Background: *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

- Bedrock of Administrative Law jurisprudence for almost forty years
- Established a two-part test for deciding when a judicial determination must be deferential to an agency interpretation of a statute.
 - The first step requires determining whether Congress directly addressed the precise issue before the court. If the statute is clear, the court must follow the statute.
 - If the statute is ambiguous, the court must consider whether the agency's interpretation is a permissible one. If the court determines that the agency's interpretation is permissible, it must defer.
- The court reasoned that Congress may not have the technical expertise to fill in all the details in setting its regulatory policy and that the judiciary was similarly unequipped to fill those gaps.

Chevron Overruled - Deference Diminished Cont'd

Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024)

- Owners of fishing vessels brought action against Secretary of Commerce and National Marine Fisheries Service (NMFS) alleging Magnuson-Stevens Fisher Conversion and Management Act (MSA) did not authorize Service to promulgate final rule requiring Atlantic herring fishing boats to fund costs for on-board observers.
- The Supreme Court overruled *Chevron* and held that the APA requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and **courts may not defer to an agency interpretation of the law simply because a statute is ambiguous.**
- The Court observed that *Chevron's* presumption is misguided because "agencies have no special competence in resolving statutory ambiguities. **Courts do.**"
- **New Standard:** The weight of an agency interpretation depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.
- No Retroactivity

Supreme Theme: Resetting the Clock

Corner Post, Inc. v. Board of Governors of the Federal Reserve System, 144 S. Ct. 2440 (2024)

Corner Post: Holding

- Under the APA, cause of action accrues for purposes of the 6-year statute of limitations when the Plaintiff is injured by the final agency action (not when the rule first becomes final).
 - The Court reasoned that the APA permits only persons injured by a final agency action to obtain judicial review of a regulation.
 - Because litigants can bring a civil action against the government challenging the regulation under the APA, only after they are injured, their claims cannot accrue before that date.

Corner Post: Overview

- 2011: Federal Reserve Board promulgated a Regulation.
- 2011: Four months later, a group of trade associations sued the Board, claiming that the Regulation violated the underlying statute. The Associations were not successful.
- 2018: Plaintiff Corner Post) opened its doors in 2018: after the Regulation was promulgated and after the Associations' unsuccessful challenge in 2011.
- 2021: Plaintiff Corner Post filed a separate suit challenging the Regulation under the APA. District court dismissed Corner Post's suit as time-barred and Eighth Circuit affirmed holding the statute of limitations for facial claims regarding the enforcement of a regulation began to accrue when the regulation was *promulgated*.
- Supreme Court reversed. Plaintiff's APA claims were not time barred because Plaintiff was not injured by the Board's Regulation until it opened and began incurring fees under the Regulation in 2018.

Supreme Theme: Agency's Actions During Rulemaking Matter

Ohio v. EPA, 144 S. Ct. 2040 (2024)

Ohio v. EPA: Holding

- Under the APA, an agency's action is "arbitrary or capricious" if it is not "reasonable and reasonably explained." When an agency fails to provide a reasoned response to comments during the rulemaking process, an agency's final rule is not "reasonably explained."
 - *The opinion is the Court's strongest pronouncement regarding an agency's obligation to "consider and respond to **significant** comments received during the period for public comment."*

Ohio v. EPA: Overview

- Petitioners, a coalition of states and industry groups, challenged EPA's Rule on the federal implementation plan (FIP) under the Clean Air Act (CAA), which imposed emissions-control measures on 23 states.
- During public comment period, commenters expressed concern that the FIP would not obtain the same emissions-control measures if fewer than all 23 states participated in the FIP. The EPA did not directly respond to this comment.
- Petitioners argued EPA's Final FIP is "arbitrary or capricious" under APA because the agency's action is not "reasonable and reasonably explained."
- Supreme Court agreed, holding Petitioners are likely to prevail on the merits of their claim that the EPA's Final FIP was not reasonably explained.
- Supreme Court reasoned, "[a]lthough commenters posed this concern to EPA during the notice and comment period...EPA offered no reasoned response" and "the agency failed to supply a satisfactory explanation for its action."

Supreme Theme: Administrative Tribunals Limited

SEC v. Jarkesy, 144 S. Ct. 2117 (2024)

- Plaintiffs, an investment advisor and his firm, petitioned for review of final order of Securities and Exchange Commission, affirming administrative law judge's imposition of civil penalty of \$300,000 for fraud under the Securities Act of 1933, Securities Exchange Act of 1934, and Investment Advisers Act of 1940.
- Fifth Circuit granted petition and vacated final order, and Supreme Court affirmed.
- Supreme Court held that because the monetary penalties at issue were a legal remedy, the SEC's claims were subject to the Seventh Amendment's right to a jury trial in suits at common law.
- The Court also determined that the "public rights" exception to adjudication by Article III courts under the Seventh Amendment did not apply to the SEC's claims.
- **What is Next?**
 - Supreme Court holding in *Jarkesy* could open the door to arguments that administrative agency enforcement action for civil penalties based on common law must be brought in federal court, where the defendant has a right to a jury trial.
 - Justice Sotomayor observed that "more than two dozen agencies [] can impose civil penalties in administrative proceedings."



Supreme Theme: Major Questions (Congress Speak Clearly)

West Virginia v. EPA, 597 U.S. 697 (2022)

- Supreme Court for the first time articulated the “major questions” doctrine, which limits administrative agencies from regulating on issues of “vast economic and political significance” absent a clear legislative statement from Congress authorizing such agency action.
 - *Where an agency seeks to take action in an “extraordinary case” the agency must point to “clear congressional authorization” for the power it claims.*
- Major Questions Doctrine Applied:
 - OSHA lacked authority to issue rule that required employers either to require their employees to be tested for COVID or to be vaccinated for COVID. *See National Federation of Independent Business v. Occupational Safety and Health Administration, 595 U.S. 109 (2022)*
 - EPA lacked statutory authority to issue the Clean Power Plan requiring electricity-generating plants to switch to low-carbon or carbon-free sources of fuel to reduce pollution. *See West Virginia v. EPA, 598 U.S. 697 (2022)*
 - Department of Education lacked authority to forgive \$435 billion in student loans under the HEROES Act. *See Biden v. Nebraska, 143 S. Ct. 2355 (2023).*





Identifying Regulatory Challenges Exercise

Exercise #1

Identifying Regulatory Challenges Exercise

- **Facts:** You run a restaurant and apply the tip credit toward your servers' wages. The FLSA permits employers to pay tipped employees \$2.13 per hour. If employees do not make up the difference between the tip credit wage and the federal minimum wage (\$7.25) in tips, employers must make up the difference so that employees are paid at least the minimum wage. The FLSA defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips." The DOL published a Final Rule in 2021 creating new tasks and time limitations prohibiting employers from taking the tip credit in any workweek where an employee either (1) spends more than 20% of his or her working time not actively pursuing tips, or (2) spends 30 or more continuous minutes not actively pursuing tips.
- **How would you challenge the 80/20/30 Final Rule under the APA?**

Exercise #2

Identifying Regulatory Challenges Exercise

- **Facts:** You are a trade association concerned with a Final Rule promulgated by the DOL allowing Employee Retirement Income Security Act (ERISA) fiduciaries to consider environmental, social, and governance (ESG) objectives when making investment decisions on behalf of pension plans. ERISA requires, in relevant part, that fiduciaries "discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries" and "for the exclusive purpose of providing benefits to participants and their beneficiaries." You submitted significant comments during the notice and comment period and do not believe that the agency adequately responded to them.
- **How would you challenge the Final Rule under the APA?**

Exercise #3

Identifying Regulatory Challenges Exercise

- **Facts:** You opened a convenience store in 2023, and you believe that the interchange fees you incur when customers use debit or credit cards are unreasonable. The Federal Reserve Board promulgated the Rule determining the fees in 2010 and a coalition of trade associations unsuccessfully challenged the Rule that same year.
- **Is your claim under the APA time barred?**

Key Takeaways and Tips for Identifying Potential Agency Action Challenges



Key Takeaways and Tips for Identifying Potential Regulatory Challenges

Has your Company been harmed by an agency's action?



If you are harmed by a regulation (even an old regulation), a challenge could be possible!

Agencies still have power, but Agencies need to act within boundaries.

- *Read the Statute!*
 - *Exceeding bounds of statutory authority, ripe for a challenge.*
-

Courts can no longer reflexively defer to an agency interpretation where ambiguity exists in the statute.

- *Is the agency action, rule, or regulation consistent with the statutory text?*

Key Takeaways and Tips for Identifying Potential Regulatory Challenges

Has your Company been harmed by an agency's action?



Active participation in rulemaking is important.

- Agency must articulate a reasoned explanation for its action and respond to significant comments during rulemaking.

Team Approach: National, State, Local Trade Associations and Chambers of Commerce.

- Tracking federal, state, and local regulations.
- Strategic challenges to state and federal regulations that impact members: being the Plaintiff in litigation and/or amicus support.

AACT

Epstein Becker & Green's Agency Action Challenges Team

- The AACT comprises members with extensive experience working at key agencies, including the U.S. Department of Health and Human Services (HHS), the U.S. Department of Labor (DOL), the National Labor Relations Board (NLRB), the U.S. Food and Drug Administration, the Federal Trade Commission (FTC), and the U.S. Department of Justice, as well as in state governments. Our team also includes seasoned litigators with significant experience challenging agency actions in courts nationwide.
 - Successfully challenged DOL wage and hour regulations, including a ruling in August 2024 by the U.S. Court of Appeals for the Fifth Circuit in *Restaurant Law Center and Texas Restaurant Association v. U.S. Department of Labor, et al.* vacating the 80/20/30 tip credit regulation.
 - Successfully challenged Medicare coverage policies that conflicted with the Medicare statute or national coverage determinations.
 - Obtained injunctive relief for a hospital that allowed it to remain in a federal health care program.
 - Prepared an amicus brief in support of challenges to FTC regulations affecting employers.
 - Obtained a final order from CMS overturning an initial decision to deny approximately \$5 million in Medicare reimbursement to a hospital.
 - Brought litigation challenging a long-standing DOL Fair Labor Standards Act interpretation, ultimately leading to a legislative compromise embodying the change our clients sought.
 - Successfully challenged the revocation of a Medicare supplier's billing privileges.



Questions?