UNIFORMITY, *LOPER BRIGHT*, AND THE NATIONAL LABOR RELATIONS BOARD: CAN THE BOARD'S NONACQUIESCENCE POLICY SURVIVE IN A POST-*CHEVRON* WORLD?

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As chairman of the National Labor Relations Board, Donald Dotson was nothing if not controversial. Though he headed the Board for five years, he was never shy about criticizing the Board's practices. He often argued that the Board had skewed its policies toward organized labor and inserted itself in disputes best left to private negotiation.[1] That criticism put him at odds with his fellow Board members and frequently landed him on the wrong side of divided opinions. Even members who shared his core philosophy sometimes shied away from joining his assaults on the Board itself.[2]

So it was on September 10, 1987, when he filed a blistering dissent in *Arvin Industries*.[3] On its face, the case presented a dry question of procedure: if an employee wanted to challenge an agreement between an employer and a union, how long did she have to file her charge?[4] In one sense, the question had already been answered. The employer's

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1 *See, e.g.*, *Dotson Resigning from NLRB*, WASH. POST (Dec. 7, 1987), https://www.washingtonpost.com/archive/politics/1987/12/08/dotson-resigning-from-nlrb/d7170b88-5f56-4ebf-ab3d-8faf1ef0982e/ [https://perma.cc/Z8MY-J9LG] [hereinafter *Dotson Resigning*] (describing controversies during Dotson's term as chair); Steven Greenhouse, *Labor Board Stirs Up a Storm*, N.Y. TIMES (Feb. 5, 1984), https://www.nytimes.com/1984/02/05/business/labor-board-stirs-up-a-storm.html [https://perma.cc/Z94K-LSGG] (same).

2 *See* Dotson Resigning, *supra* note 1 (observing that Dotson often found himself in dissent in latter part of his term).

3 *See* Arvin Indus., 285 N.L.R.B. 753 (1987).

4 *See id.* at 753–54.

plant was in Alabama,[5] and the relevant court of appeals, the Eleventh Circuit, had already found that an employee had six months from the date the agreement was signed.[6] But in *Arvin Industries*, the Board disagreed. The Board thought the better rule was to start the clock anew every time the agreement was applied.[7] So a Board majority disregarded the court's view, followed its own rule, and allowed the complaint to go forward.[8]

Dotson's frustration was palpable. In dissent, he lamented that for decades, the Board had engaged in a policy of "nonacquiescence"—essentially, following the Board's own view of the law even when that view clashed with judicial precedent.[9] In his view, this policy was impossible to square with the relevant statute—the National Labor Relations Act (NLRA). The NLRA gave courts the authority to review the Board's orders and set them aside when necessary.[10] In other words, the statute subordinated the Board to the federal judiciary's view of the law. And no amount of policy or practice could justify ignoring such an explicit statutory command:

> Experience confirms that which is implicit in this grant of [judicial] authority: a Board decision will be enforced by a circuit court only when it accords with circuit precedent. Thus, however attractive the policy of nonacquiescence may have been as a response to the perceived need to promote a national labor policy, the simple fact remains that such a policy is legally untenable. It conflicts with fundamental tenets of our Federal system and ignores the plain language of the statute.[11]

Dotson resigned only three months later.[12] And in separately published articles, he continued to lob criticisms at nonacquiescence.[13] But he never managed to change minds at the Board. Citing a need for national uniformity, the Board has continued to ignore circuit precedent in favor of its own legal views.[14] It has done so even in the

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5 *Id.* at 763.

6 *See* Benson v. Gen. Motors Corp., 716 F.2d 862, 863–64 (11th Cir. 1983) (holding that statute of limitations under 29 U.S.C. § 160(b) started to run when employees should reasonably have learned of the agreement).

7 *See Arvin Indus.*, 285 N.L.R.B. at 753, 755–56.

8 *See id.* at 756.

9 *See id.* at 761–62 (Dotson, dissenting).

10 *Id.* at 761 (citing 29 U.S.C. § 160(e), (f) (2018)).

11 *Id.* at 762 (footnotes omitted).

12 *See Dotson Resigning*, *supra* note 1.

13 *See* Donald L. Dotson & Charles M. Williamson, *NLRB v. the Courts: The Need for an Acquiescence Policy at the NLRB*, 22 WAKE FOREST L. REV. 739 (1987) (calling for an end to nonacquiescence).

14 *See, e.g.*, D.L. Baker, Inc., 351 N.L.R.B. 515, 529 n.42 (2007) (setting out nonacquiescence policy); Pathmark Stores, Inc., 342 N.L.R.B. 378, 378 n.1 (2004) ("It has been the

face of scholarly criticism,[15] judicial rebukes,[16] and sanctions for bad-faith litigation.[17] Even today, it asserts the right to ignore judicial decisions in favor of its own views of the law.[18]

But now, that policy may face its biggest challenge to date. In one of the last decisions of the 2024 term, *Loper Bright Enterprises v. Raimondo*, the U.S. Supreme Court made clear that on questions of law,

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Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise." (quoting Iowa Beef Packers, Inc., 144 N.L.R.B. 615, 616 (1963))); Gas Spring Co., 296 N.L.R.B. 84, 97 (1989) (rejecting employer's argument based on a circuit case denying enforcement because the court's decision did not reflect "Board law"); *see also* W. Cab Co., 365 N.L.R.B. 761, 761 n.4 (2017) (criticizing administrative law judge for applying circuit rather than Board precedent).

15 *See, e.g.*, Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 77–78, 101–109 (2003) (criticizing Board for using nonacquiescence to impose remedies it could not otherwise impose under applicable circuit law); Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801, 814–20 (1990) (concluding that Board's nonacquiescence policy could not be justified in terms of venue uncertainty and uniformity, but instead, appears to reflect Board's wishes to impose its own view of the law). *But see* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 724–25, 739 (1989) (arguing that Board's policy could be justified in some cases under principles of deference to administrative agencies under now-defunct *Chevron* doctrine).

16 *See, e.g.*, Heartland Plymouth Ct. MI, LLC v. NLRB, 838 F.3d 16, 23–29 (D.C. Cir. 2016); NLRB v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 561 (6th Cir. 2015) (McKeague, J., dissenting); Douglas Foods Corp. v. NLRB, 251 F.3d 1056, 1067 (D.C. Cir. 2001); Glenmark Assocs., Inc. v. NLRB, 147 F.3d 333, 345 (4th Cir. 1998); NLRB v. Ashkenazy Prop. Mgmt. Corp., 817 F.2d 74, 75 (9th Cir. 1987); Beverly Enters. v. NLRB, 727 F.2d 591, 592–93 (6th Cir. 1984); Kitchen Fresh, Inc. v. NLRB, 716 F.2d 351, 357 & n.12 (6th Cir. 1983); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979); *see also* Scott Kafker, *Nonacquiescence by the NLRB: Combat Versus Collaboration*, 3 LAB. LAW. 137, 137 (1987) ("The response of the courts has been unanimous, unequivocal condemnation.").

17 *See Heartland Plymouth*, 838 F.3d at 27, 20–29 (awarding fees under Equal Access to Justice Act for bad-faith nonacquiescence) ("[T]he Board's candor-free approach to nonacquiescence asks this Court to let the Board do what no private litigant ever could: make legal contentions not warranted by existing law and supported by no argument for modifying, reversing, or establishing new law. This is intolerable."); Enerhaul, Inc. v. NLRB, 710 F.2d 748, 751, 750–51 (11th Cir. 1983) (awarding Equal Access to Justice Act fees when Board sought to enforce order based on a legal theory "that ha[d] been clearly and repeatedly rejected" by the Eleventh Circuit).

18 *See, e.g.*, Airgas USA, LLC, 373 N.L.R.B. No. 102, at *1 n.2 (Sept. 18, 2024) (refusing to change approach to remedies after rejection in circuit court "under the Board's long-established policy of nonacquiescence"); NAT'L LAB. RELS. BD., BENCH BOOK: AN NLRB TRIAL MANUAL § 13-100 (Jeffrey D. Wedekind et al. eds., 2023) https://www.nlrb.gov/sites/default/files/attachments/pages/node-174/april-2023-bench-book.pdf [https://perma.cc/HFJ6-ZHUF] ("Administrative law judges must follow and apply Board precedent, notwithstanding contrary decisions by courts of appeals, unless and until the Board precedent is overruled by the Supreme Court or the Board itself.").

the buck stops with federal courts.[19] The Court overturned decades of precedent that required lower courts to defer to agency interpretations of ambiguous statutes.[20] It also made clear that federal courts, not agencies, have the authority to say what the law is.[21] Once a court has interpreted a statute, it is not an agency's job to second-guess that interpretation. It is the agency's job to execute the law as authoritatively interpreted by the court.[22]

To be sure, *Loper Bright* focused on a different issue—deference. But its logic also requires a new look at nonacquiescence. The best argument for nonacquiescence has always been uniformity: While a circuit court can announce a rule for only a single jurisdiction, an agency can announce a rule nationwide.[23] So the agency is theoretically better positioned to create a uniform national policy.[24] *Loper Bright*, however, demoted uniformity to a second-class value. It acknowledged that uniformity might be better than the alternative; all things being equal, it's better to have one law for both Athens and Rome.[25] But a uniform law has no value if it's wrong.[26] The first value of legal interpretation is correctness; statutes should always be given

19 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

20 *See id.* (overruling Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

21 *Id.* at 2273 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

22 *See id.* ("[C]ourts need not and under the APA may not defer to an agency interpretation of the law."); *see also id.* at 2267 ("Congress expects courts to handle technical statutory questions.").

23 *See* D.L. Baker, Inc., 351 N.L.R.B. 515, 529 n.42 (justifying nonacquiesence as necessary for nationwide uniformity); Ins. Agents' Int'l Union, 119 N.L.R.B. 768, 773 (1957), *vacated by* Ins. Agents' Int'l Union v. NLRB, 260 F.2d 736 (D.C. Cir. 1958), *aff'd by* 361 U.S. 477 (1960) (same); *see also* Johnson v. U.S. R.R. Ret. Bd., 969 F.2d 1082, 1092 (D.C. Cir. 1992) (considering uniformity argument in context of nonacquiescence by Railroad Retirement Board) ("[A]gencies have argued that their responsibility to formulate 'uniform and orderly national policy in adjudications' allows them to refuse to acquiescence in the conflicting views of U.S. Courts of Appeals." (quoting S & H Riggers & Erectors, Inc., v. Occupational Safety & Health Rev. Comm'n, 659 F.2d 1273, 1278 (5th Cir. Unit B Oct. 1981))).

24 *See Ins. Agents*, 119 N.L.R.B. at 773 ("Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.").

25 *See Loper Bright*, 144 S. Ct. at 2267; *see also* Laird v. Tatum, 409 U.S. 824, 837–38 (1972) (Rehnquist, J.) (mem.) (declining to recuse himself when doing so would affirm lower court's decision by an equally divided Supreme Court, causing different rules applying in different circuits) ("[A]ffirmance of each of such conflicting results by an equally divided Court would lay down 'one rule in Athens, and another rule in Rome' with a vengeance.").

26 *See Loper Bright*, 144 S. Ct. at 2267 ("[T]here is little value in imposing a uniform interpretation of a statute if that interpretation is wrong.").

their "best meaning."[27] And finding that meaning is the job of courts, not agencies—not even the Board.[28]

Nonacquiescence has therefore become a jurisprudential non sequitur. Under *Loper Bright*, the Board has no more right to disagree with a circuit court on federal law than it does with the universe on the law of gravity.[29] The Board cannot simply disagree, respectfully or otherwise, with a court on the meaning of a federal statute.[30] Nor can it justify its long-running interpretive insubordination on uniformity alone. No interest in uniformity can trump correct legal interpretation.[31] And without uniformity to fall back on, the Board may find itself out of excuses. Its nonacquiescence policy may, as Chairman Dotson once hoped for, finally come to an end.

I. THREE FLAVORS OF NONACQUIESCENCE

At a high level, nonacquiescence is when an agency ignores a court's interpretation of a statute in favor of its own view of the law.[32] But not all nonacquiescence is the same. It comes in three distinct flavors: intercircuit, intracircuit, and venue uncertainty.[33]

Intercircuit nonacquiescence is when an agency ignores a court's view outside the court's jurisdiction.[34] This kind of nonacquiescence stems from the structure of lower federal courts. There are thirteen circuit courts, twelve of which cover a specified geographical

27 *Id.* at 2266.

28 *See id.* (stating that the same rules of statutory interpretation apply in agency cases as in any other); *see also* Rieth-Riley Constr. Co. v. NLRB, 114 F.4th 519, 528 (6th Cir. 2024) (stating that *Loper Bright* requires courts to afford no deference to the Board and to interpret the NLRA for themselves) (citing *Loper Bright*, 144 S. Ct. at 2262); Hudson Inst. of Process Rsch. Inc. v. NLRB, 117 F.4th 692, 700 (5th Cir. 2024) ("[W]e do not simply defer to an agency's interpretation of 'ambiguous' provisions of their enabling acts.").

29 *See Loper Bright*, 144 S. Ct. at 2257 (describing judiciary's historical primacy in interpreting statutes); *see also id.* at 2274–75 (Thomas, J., concurring) (describing primary role of courts in interpreting statutes).

30 *Id.* at 2258 (majority opinion) (explaining that the Court has "made clear, repeatedly, that '[t]he interpretation of the meaning of statutes, as applied to justiciable controversies,' [is] 'exclusively a judicial function'" (quoting United States v. Am. Trucking Ass'ns, 310 U.S. 534, 544 (1940))).

31 *See id.* at 2267.

32 *See* BENJAMIN M. BARCZEWSKI, CONG. RSCH. SERV. R47882, AGENCY NONACQUIESCENCE: AN OVERVIEW OF CONSTITUTIONAL AND PRACTICAL CONSIDERATIONS 1–2 (2023) [hereinafter CRS REPORT] (describing practice across several agencies).

33 *Id.* at 3. *But see* Davies, *supra* note 15, at 65, 82–83 (describing three types and suggesting there may be a fourth—remedial nonacquiescence—typified by the Board's own practice).

34 *See* Davies, *supra* note 15, at 98.

territory.[35] Within each circuit court's assigned territory, the court is authoritative; it is effectively the territory's highest authority on questions of federal law.[36] But outside that territory, its decisions have no precedential power: other courts are free to develop their own views.[37] That structure—a kind of jurisdictional Balkanization—creates room for nonacquiescence.[38] It allows an agency to ignore a circuit court's precedent when it's outside the circuit court's reach.[39] The agency can, for example, apply the First Circuit's law when it's in Boston and Bangor; but while it's in Newark and New York, it can apply a different policy.[40]

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35 *See Court Role and Structure*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/court-role-and-structure [https://perma.cc/C3TC-WK5J].

36 *See, e.g.*, Gonzalez v. Arizona, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (explaining that "a published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body competent to do so'" (quoting Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001))); Tolliver v. Sheets, 594 F.3d 900, 916 n.6 (6th Cir. 2010) ("We are bound by prior Sixth Circuit determinations that a rule has been clearly established." (citing Smith v. Stegall, 385 F.3d 993, 998 (6th Cir. 2004))); *see also* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 491 (2016) ("A federal district court or (with rare exceptions) a circuit panel must follow decisions of the court of appeals in the same circuit in preference to the decisions of all other courts, state or national, unless there is a contrary decision by the U.S. Supreme Court."); Davies, *supra* note 15, at 88–89 (explaining that law-of-the-circuit doctrine derives from Judiciary Act of 1891, 26 Stat. 826 (codified as amended at 28 U.S.C. §§ 41–49, 1291–94 (2000)), and describing circuit courts as "regional Supreme Courts" given the unlikelihood of Supreme Court review, *id.* at 89).

37 *See, e.g.*, United States v. Guerrero, 19 F.4th 547, 559 n.5 (1st Cir. 2021) ("We know that '[t]he law of the circuit rule does not depend on whether courts outside the circuit march in absolute lockstep with in-circuit precedent.'" (quoting United States v. Lewis, 517 F.3d 20, 24 (1st Cir. 2008))); United States v. Glaser, 14 F.3d 1213, 1216 (7th Cir. 1994) ("Nothing the eighth circuit decides is 'binding' on district courts outside its territory."); Hillman Power Co. v. On-Site Equip. Maint., Inc., 582 F. Supp. 3d 511, 515–16 (E.D. Mich. 2022) ("[A] district court is not bound by decisions of . . . other circuits." (quoting Hall v. Eichenlaub, 559 F. Supp. 2d 777, 782 (E.D. Mich. 2008))).

38 *See* CASA de Md., Inc. v. Trump, 971 F.3d 220, 260–61 (4th Cir.), *reh'g en banc granted*, 981 F.3d 311 (4th Cir. 2020) (explaining that intercircuit nonacquiescence "flows directly" from the limited territorial jurisdiction of circuit courts, *id.* at 260); *cf.* Davies, *supra* note 15, at 93 (explaining that nonacquiescence stems from "substantial intercircuit inconsistency"); *see also* Estreicher & Revesz, *supra* note 15, at 735–36 (observing that intercircuit nonacquiescence is enabled by "the lack of intercircuit stare decisis," *id.* at 735).

39 *See CASA de Md.*, 971 F.3d at 260–61.

40 *See id.* (explaining that "[t]he doctrine of intercircuit nonacquiescence" allows an agency "to continue enforcing a policy outside of a circuit in which it has been invalidated"); *cf.* Estreicher & Revesz, *supra* note 15, at 735–36 (arguing that intercircuit nonacquiescence should be allowed because it flows from design of federal court system). Another contributing factor is that litigants cannot use nonmutual collateral estoppel (i.e., one-sided issue preclusion) against the federal government. *See* United States v. Mendoza, 464 U.S. 154, 162 (1984).

The second flavor of nonacquiescence, "intracircuit," is more controversial.[41] It means that an agency ignores a court's precedent even when it's inside the court's jurisdiction.[42] When agencies are bold enough to try this kind of nonacquiescence, they usually defend it on grounds of uniformity.[43] They say that they have a duty to administer nationwide programs; and for those programs to work, the agencies have to apply nationwide rules.[44] The only bodies with jurisdiction to establish nationwide rules are the U.S. Supreme Court and the agencies themselves.[45] So until the Supreme Court declares an authoritative rule, agencies should be able to follow their own views—even when the relevant circuit court has taken a different one.[46]

The third kind of nonacquiescence, "venue choice," is something of a misnomer. It is less nonacquiescence than nonprescience. It happens when a statute allows for review in multiple circuits.[47] Since circuit courts don't have to follow each other's precedents, some of them may take different views of the law.[48] And since the agency doesn't known which circuit's precedent will apply, the agency has no choice but to pick one rule and hope for the best.[49] Its chosen rule may differ from the one adopted by the ultimate reviewing court, in which case the agency has technically failed to follow the court's precedent.[50] But

41 *See* Johnson v. U.S. R.R. Ret. Bd., 969 F.2d 1082, 1091 (D.C. Cir. 1992) ("Intracircuit nonacquiescence has been condemned by almost every circuit court of appeals that has confronted it.").

42 *See* CRS REPORT, *supra* note 32, at 15, 19 (describing intracircuit nonacquiescence and constitutional questions raised by it).

43 *See, e.g.*, *id.* at 9, 21; *Johnson*, 969 F.2d at 1091–93 (rejecting agency's uniformity defense); Heartland Plymouth Ct. MI, LLC v. NLRB, 838 F.3d 16, 18, 21 (D.C. Cir. 2016) (same); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 967–70 (3d Cir. 1979) (same).

44 *See* CRS REPORT, *supra* note 32, at 9, 21; *see also* Ins. Agents Int'l Union, 119 N.L.R.B. 768, 773 (1957), *overruled by* NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477 (1960); *Johnson*, 969 F.2d at 1092.

45 *See Ins. Agents*, 119 N.L.R.B. at 773.

46 *See id.*; *see also* Estreicher & Revesz, *supra* note 15, at 694–95 (citing *Social Security Disability Insurance Program: Hearing Before the S. Comm. on Fin.*, 98th Cong. 115 (1984) (statement of Carolyn B. Kuhl, Deputy Assistant Att'y Gen., Civil Division)).

47 *See, e.g.*, CRS REPORT, *supra* note 32, at 11 (describing venue-choice nonacquiescence); *Heartland Plymouth*, 838 F.3d at 22–23 (same); Davies, *supra* note 15, at 88 (same).

48 *See, e.g.*, Bernie Pazanowski, *Circuit Splits Reported in U.S. Law Week—March 2024*, BLOOMBERG L. (Apr. 4, 2024, 7:00 PM EDT), https://news.bloomberglaw.com/us-law-week/circuit-splits-reported-in-u-s-law-week-march-2024 [https://perma.cc/4H8M-WWYZ] (listing recent disagreements among circuit courts).

49 *See* CRS REPORT, *supra* note 32, at 11; Estreicher & Revesz, *supra* note 15, at 741.

50 *See* Estreicher & Revesz, *supra* note 15, at 741–42 (noting that a statute may allow appeal to one circuit that has accepted the agency's position and one that has not). *But see* CRS REPORT, *supra* note 32, at 7 & n.56 (noting that some statutes limit appeal to D.C. Circuit, giving that court effective nationwide jurisdiction (citing 42 U.S.C. § 7607(b) (2018 & Supp. IV 2023))).

the agency hasn't really thumbed its nose at the court; it has simply guessed wrong.[51]

II. NONACQUIESCENCE AT THE BOARD

All of these flavors have been tried at one point or another by the Board. Like many federal agencies, the Board has nationwide jurisdiction.[52] It administers the NLRA,[53] the country's main labor law. The NLRA assigns the Board two basic jobs: overseeing union elections[54] and remedying unfair labor practices.[55] And while the Board's election decisions can't be appealed anywhere (at least not directly),[56] its unfair-labor-practice decisions can be appealed to multiple circuits.[57] Parties have three options for appeal: (a) any circuit where an "aggrieved" party does business, (b) any circuit where an unfair labor practice took place, and (c) the D.C. Circuit.[58] That's a broad selection; it means that any given Board decision can be reviewed in a variety of circuits.[59] It also means that the Board comes into regular contact with nearly every circuit court in the country.[60]

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51 *See* Estreicher & Revesz, *supra* note 15, at 742–43 (observing difficulties agency faces in conforming its policy to circuit precedent when appeal may lie in multiple circuits); *see also* Airgas USA, LLC, 373 N.L.R.B. No. 102, at *1 n.2 (Sept. 18, 2024) (arguing that nonacquiescence was particularly justified when decision could be reviewed in multiple circuits, at least one of which had signaled acceptance for agency's policy). *But see Heartland Plymouth*, 838 F.3d at 23 (observing that agency's claim of venue uncertainty is implausible when losing party can petition for review in at least one circuit that has rejected agency's position and is therefore almost certain to do so).

52 *See* 29 U.S.C. § 160(a) (2018) (authorizing Board to prevent unfair labor practices "affecting commerce"); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242 (1959) (describing Congress's intent to centralize labor policy in one national agency).

53 *See* 29 U.S.C. §§ 151–69 (2018).

54 *See id.* § 159.

55 *See id.* § 160.

56 *See* Am. Fed'n of Lab. v. NLRB, 308 U.S. 401, 409 (1940) (explaining that the Board's decision to certify an election under section 9 of the NLRA is not a final order and therefore cannot be reviewed by a circuit court under section 10(f)); *see also* Michael C. Harper, *The Case for Limiting Judicial Review of Labor Board Certification Decisions*, 55 GEO. WASH. L. REV. 262, 271–72 (1987) (explaining that employers can obtain review of a certification decision indirectly through unfair-labor-practice proceedings stemming from a refusal to bargain after the election).

57 *See* 29 U.S.C. § 160(e), (f) (2018).

58 *Id.*

59 *See id.*; *see also* Davies, *supra* note 15, at 88 (noting that NLRA provides "broad venue choice").

60 *See Appellate Court Briefs Filed by the Board in Enforcement and Review Cases*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/cases-decisions/decisions/appellate-court/appellate-court-briefs [https://perma.cc/9FD4-46MR] (collecting Board's court filings and petitions in enforcement in circuits across the country); *see also* Sidney W. Jacobson, Comment,

The Board has dealt with these courts mostly in the same way: it has ignored them.[61] Like other agencies, it has disregarded circuit precedent in cases arising outside the relevant circuit (i.e., intercircuit nonacquiescence).[62] But it has also disregarded circuit precedent in cases arising within a circuit.[63] It has disregarded circuit precedent even when it knows its decision will be reviewed in that circuit.[64] And it has even disregarded circuit precedent on remand from that same circuit court.[65] In fact, even after losing in court, it has insisted on its right to "respectfully disagree" with the court's view of the law.[66]

The Board rarely bothers to justify this practice explicitly.[67] Instead, it usually just disregards circuit precedent and applies its own legal interpretation—sometimes without even acknowledging that that's what it's doing.[68] But when it does deign to justify itself, it usually offers one of two reasons: venue uncertainty or uniformity.[69]

The venue-uncertainty argument stems from the NLRA's multivarious review provisions. Again, the NLRA offers multiple avenues for review, including any circuit where the "aggrieved" party does

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Jurisdiction of the National Labor Relations Board, 1 LA. L. REV. 430, 430 (1939) (noting that even early in its history, the Board often saw its orders reviewed in a variety of circuit courts).

61 *See Davies*, *supra* note 15, at 98 (citing the Board as a particularly aggressive example of nonacquiescence).

62 *See, e.g.*, Airgas USA, LLC, 373 N.L.R.B. No. 102, at *1 n.2 (Sept. 18, 2024) (applying Board precedent instead of Fifth Circuit precedent in case arising out of California).

63 *See* Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 968–70 (3d Cir. 1979) (criticizing Board for disregarding Third Circuit precedent in case involving a hospital in Pennsylvania); Kitchen Fresh, Inc. v. NLRB, 716 F.2d 351, 357 n.12 (6th Cir. 1983) (describing as "particularly disturbing" Board's refusal to apply Sixth Circuit precedent to cases arising within its jurisdiction).

64 *See* Heartland Plymouth Ct. MI, LLC v. NLRB, 838 F.3d 16, 19–20 (D.C. Cir. 2016) (noting that Board refused to apply D.C. Circuit precedent even though review in that court was "pre-ordained").

65 *See id.* at 19.

66 *See* NLRB v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 561, 560–61 (6th Cir. 2015) ("[T]he Board also noted its prerogative, pursuant to its 'nonacquiescence policy,' to respectfully disagree with the Tenth Circuit."); *see also Airgas*, 373 N.L.R.B. at *1 n.2 ("Pursuant to the Board's nonacquiescence policy, the Board respectfully regards an adverse court decision as only 'the law of that particular case.'" (quoting D.L. Baker, Inc., 351 N.L.R.B. 515, 529 n.42 (2007))).

67 *See Heartland Plymouth*, 838 F.3d at 27 (criticizing Board for silently implementing nonacquiescence policy).

68 *See id.* ("[T]he Board's candor-free approach to nonacquiescence asks this Court to let the Board do what no private litigant ever could: make legal contentions not warranted by existing law and supported by no argument for modifying, reversing, or establishing new law."); *see also* Davies, *supra* note 15, at 100–01 (observing that the Board often refuses to acquiesce without saying so (citing S.M.S. Auto. Prods., Inc., 282 N.L.R.B. 36, 37 (1986))).

69 *See, e.g.*, *D.L. Baker*, 351 N.L.R.B. at 529 n.42 (uniformity); Sunbelt Rentals, Inc., 372 N.L.R.B. No. 24, at *25 n.40 (Dec. 15, 2022) (venue choice).

business.[70] In the modern integrated economy, many parties do business in multiple states. So in any given case, there may be a variety of courts with possible jurisdiction.[71] The Board might have no way to predict which of those courts will ultimately review its decision. So, the Board argues, it has no choice but to apply its own rules.[72]

Though sometimes plausible, venue uncertainty usually plays only a supporting role. More often, the Board cites the need for national uniformity.[73] It argues that when Congress passed the NLRA, it meant to create a coherent national labor policy.[74] And no circuit court has the sheer geographic reach to set national rules.[75] Only the Board, with its nationwide jurisdiction, can articulate rules for the whole country.[76] So the Board has to follow its own rules even when those rules conflict with judicial precedent in some circuits.[77] Nothing else, it says, would accomplish Congress's goal.[78]

Unsurprisingly, that argument has proven unpopular in court. Nearly every circuit court has criticized the Board's aggressive form of

70 *See* 29 U.S.C. § 160(f), (e)–(f) (2018).

71 Davies, *supra* note 15, at 88 (observing breadth of potential reviewing courts).

72 *See, e.g.*, *Sunbelt Rentals*, 372 N.L.R.B. at *25 n.40 (applying nonacquiescence policy in face of adverse circuit precedent when decision could theoretically be appealed to multiple circuits, including the D.C. Circuit, which had approved the Board's interpretation); Manor W., Inc., 311 N.L.R.B. 655, 667 n.43 (1993) ("[E]ven though this case arises in the Sixth Circuit, there is no guarantee that a review proceeding will take place in that jurisdiction. . . . Thus, the Board might guess, but is not in a position to anticipate with precision the locus of appellate jurisdiction.") *overruled by* Manor W., Inc. v. NLRB, 60 F.3d 1195 (6th Cir. 1995).

73 *See* Airgas USA, LLC, 373 N.L.R.B. No. 102, at *1 n.2 (Sept. 18, 2024); *D.L. Baker*, 351 N.L.R.B. at 529 n.42; Ins. Agents' Int'l Union, 119 N.L.R.B. 768, 773 (1957), *vacated by* Ins. Agents' Int'l Union v. NLRB, 260 F.2d 736 (D.C. Cir. 1958), *aff'd by* 361 U.S. 477 (1960).

74 *See Ins. Agents*, 119 N.L.R.B. at 773.

75 *See id.*

76 *Id.*

77 *See id.*

78 *See id.* ("Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.").

nonacquiescence.[79] They have called it "unacceptable,"[80] "contumacious,"[81] and "outside the law."[82] One court even described it as a "symbolic bookburning."[83] And in fact, several courts have awarded sanctions for frivolous litigation.[84] Though these courts may always not be uniform in their views of labor law,[85] they have been monolithic in their condemnation of the Board's policy.[86]

Similar disapproval has echoed through the academic literature. Scholars have pointed out that neither of the Board's main defenses holds up under scrutiny.[87] For one, the venue-uncertainty argument is overstated.[88] Though the NLRA does offer multiple avenues of review, the Board usually knows when a party can (and therefore will) petition a court that has taken a different view of the law.[89] In that kind of case, it's irrational (and maybe even spiteful) for the Board to insist on its

79 *See, e.g.*, Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (1979) ("Congress has not given to the NLRB the power or authority to disagree, respectfully or otherwise, with decisions of this court."); Ithaca Coll. v. NLRB, 623 F.2d 224, 228 (2nd Cir. 1980) ("While deference is to be given to an agency's interpretation of the statute it administers, . . . it is the courts that have the final word on matters of statutory interpretation." (citations omitted)); *see also* Estreicher and Revesz, *supra* note 15, at 710, 710–11 & n.164 (noting that "virtually every circuit" has issued an opinion critical of the Board's nonacquiescence policy). *But see* Yellow Taxi Co. v. NLRB, 721 F.2d 366, 384 (D.C. Cir. 1983) (Skelly Wright, J., concurring) (defending nonacquiescence as a way to develop a "uniform and orderly national policy" (quoting S & H Riggers & Erectors v. Occupational Safety & Health Rev. Comm'n, 659 F.2d 1273, 1278 (5th Cir. Unit B Oct. 1981))).

80 NLRB v. Ashkenazy Prop. Mgmt. Corp., 817 F.2d 74, 75 (9th Cir. 1987).

81 Beverly Enters. v. NLRB, 727 F.2d 591, 593 (6th Cir. 1984).

82 *Allegheny Gen. Hosp.*, 608 F.2d at 970.

83 NLRB v. E. Smelting & Refin. Corp., 598 F.2d 666, 670 n.7 (1st Cir. 1979), *overruled by* NLRB v. Wright Line, 662 F.2d 899 (5th Cir. 1981), *abrogated by* NLRB v. Transp. Mgmt. Corp., 462 U.S. 393 (1983), *abrogated by* Dir., Off. of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267 (1994).

84 *See* Heartland Plymouth Ct. MI, LLC v. NLRB, 838 F.3d 16, 28–29 (D.C. Cir. 2016); Enerhaul, Inc. v. NLRB, 710 F.2d 748, 751 (11th Cir. 1983).

85 *See, e.g.*, Nathan Katz Realty, LLC v. NLRB, 251 F.3d 981, 986–87 (D.C. Cir. 2001) (disagreeing with Second Circuit on how to determine when a union abandons an issue in bargaining); Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1158 (7th Cir. 2016) (disagreeing with Fifth Circuit on whether NLRA guarantees an employee the right to proceed collectively in court despite arbitration agreement), *rev'd*, 138 S. Ct. 1612 (2018); *see also* Davies, *supra* note 15, at 91 (collecting examples of circuit splits involving federal labor law).

86 *See* Kafker, *supra* note 16, at 137 ("The response of the courts has been unanimous, unequivocal condemnation.").

87 *See, e.g.*, Diller & Morawetz, *supra* note 15, at 812–25; *see also* Estreicher and Revesz, *supra* note 15, at 710 n.164 (collecting critical articles).

88 *See* Davies, *supra* note 15, at 101 (concluding that Board's desire to achieve policy goals, not its uncertainty about venue, is the true source of its aggressive form of nonacquiescence).

89 *See Heartland Plymouth*, 838 F.3d at 22 (concluding that Board's concerns about venue uncertainty are often not genuine, but rather, an excuse for implementing its preferred policies).

own views.[90] Doing so merely forces the party to waste time and money in "useless litigation" appealing to a circuit court.[91]

Scholars have likewise found the uniformity argument unpersuasive. Yes, the Board can announce a nationwide rule. But that rule is uniform only at the administrative level.[92] On review, courts will still apply their own precedent.[93] That means the Board's rule will be "uniform" only for parties without the financial means to appeal.[94] Rather than one law for both Athens and Rome, we have one law for Bob Cratchit and another for Mr. Scrooge.[95]

These criticisms, however, haven't persuaded the Board. Since at least the 1950s, the Board has followed its nonacquiescence policy in an unbroken and unabated string of decisions.[96] It has insisted that

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90 *See Heartland Plymouth*, 838 F.3d at 26–27 ("[T]he Board cross-petitioned for enforcement here. This was punitive. The Board chose to put its Order on a suicide mission without our precedent simply to lock horns with Heartland. The Board was the perpetrator here, not venue uncertainty.").

91 Dotson & Williamson, *supra* note 13, at 747; *see also* Beverly Enters. v. NLRB, 727 F.2d 591, 593 (6th Cir. 1984) (finding that Board's "indifferent attitude" toward court's decisions caused "the expenditure of considerable time and cost in a useless second full briefing and oral argument on the petitions"); Davies, *supra* note 15, at 98 ("The NLRB's long tradition of nonacquiescence is perhaps best viewed as a by-product of the Board's commitment to act on its own interpretation of the federal labor laws, come what may from the federal courts of appeals.").

92 Dotson & Williamson, *supra* note 13, at 745 (noting that twenty-five years of nonacquiescence had not produced uniformity but, instead, disuniformity between the judicial and administrative levels); Diller & Morawetz, *supra* note 15, at 825 (observing that nonacquiescence raises serious access-to-justice concerns); *see also Heartland Plymouth*, 838 F.3d at 18 (describing Board's nonacquiescence practice as "an instrument of oppression, allowing the government to tell its citizens: 'We don't care what the law says, if you want to beat us, you will have to fight us'").

93 *See* Diller & Morawetz, *supra* note 15, at 814 (reasoning that any savings from uniformity at administrative level are illusory because those costs will be consumed by subsequent litigation under judicial standards).

94 *See* Dotson & Williamson, *supra* note 13, at 745–47 (arguing that nonacquiescence works only to deny judicially determined standards to parties without the means to appeal); *cf.* Johnson v. U.S. R.R. Ret. Bd., 969 F.2d 1082, 1092 (D.C. Cir. 1992) ("The Board, in the end, can hardly defend its policy of selective nonacquiescence by invoking national uniformity. The policy has precisely the opposite effect, since it results in very different treatment for those who seek and who do not seek judicial review.").

95 *See Johnson*, 969 F.2d at 1093 ("It is a peculiar view of fairness . . . that treats all claimants equally poorly by depriving them of benefits they will eventually receive if they have the fortitude to run an administrative gauntlet.").

96 *See, e.g.*, Airgas USA, LLC, 373 N.L.R.B. No. 102, at *1 n.2 (Sept. 18, 2024); Sunbelt Rentals, Inc., 372 N.L.R.B. No. 24, at *25 n.40 (Dec. 15, 2022); D.L. Baker, Inc., 351 N.L.R.B. 515, 529 n.42 (2007); Ins. Agents' Int'l Union, 119 N.L.R.B. 768, 773 (1957), *vacated by* Ins. Agents' Int'l Union v. NLRB, 260 F.2d 736 (D.C. Cir. 1958), *aff'd by* 361 U.S. 477 (1960); *see also* Estreicher and Revesz, *supra* note 15, at 706 & n.147 (tracing policy to *Insurance Agents* and perhaps earlier).

Congress wanted a uniform national labor policy. And by its telling, only the Board can supply one.[97]

III. UNIFORMITY AND *LOPER BRIGHT*

But that argument may now have hit its biggest roadblock yet—*Loper Bright*. *Loper Bright* wasn't technically about nonacquiescence. Rather, it focused on how courts should review agencies' legal interpretations. In 1984's *Chevron U.S.A., Inc. v. NRDC*, the Court had articulated a broad principle of deference.[98] It had said that when a statute was ambiguous, courts should assume that Congress wanted the ambiguity resolved by an agency.[99] And when the agency resolved the ambiguity in a reasonable way, courts should defer.[100] But in *Loper Bright*, the Court treated that rationale as a category error. It explained that courts could not "defer" to agencies on questions of law.[101] Courts had a duty to interpret statutes for themselves.[102] They had to exercise their "independent judgment" and give statutes their "best meaning," even if the agency had a different view.[103]

While deconstructing the concept of deference, *Loper Bright* also offered a few words about uniformity. It noted that the government had defended *Chevron* as a pro-uniformity precedent.[104] The government said that by requiring courts to defer to agencies, *Chevron* had promoted consistency across the circuits.[105] But the Court dismissed that "virtue" out of hand.[106] Even if *Chevron* promoted uniformity, uniformity wasn't necessarily a good thing. Uniform rules had little value if they were wrong: "[T]here is little value in imposing a uniform interpretation of a statute if that interpretation is wrong. We see no

97 *See Ins. Agents*, 119 N.L.R.B. at 773 ("Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved."). *But see Airgas*, 373 N.L.R.B. at *12 (Kaplan, dissenting in part) (arguing that there is no "reasonable legal justification" for nonacquiescence in face of adverse circuit authority).

98 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984). *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

99 *See id.* at 843–44.

100 *See id.*

101 *Loper Bright*, 144 S. Ct. at 2273 ("[C]ourts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.").

102 *See id.*

103 *Id.* at 2273, 2271; *see also id.* at 2266 ("[S]tatutes, no matter how impenetrable, do—in fact, must—have a single, best meaning.").

104 *See id.* at 2267.

105 *See id.* (reciting government's argument).

106 *See id.* at 2267–68.

reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts."[107]

In other words, under *Loper Bright*, uniformity is at best a second-order value. Uniformity might be desirable in the abstract; it's probably better to have one rule than twelve. But that benefit comes in second place to correct legal interpretation.[108] And correct interpretation is not to be found in agency decisions, regulations, or guidance. It is to be found in the opinions of Article III courts.[109]

IV. NONACQUIESCENCE IN A POST-*LOPER BRIGHT* WORLD

Given *Loper Bright*'s treatment of uniformity, what is left of the justifications for nonacquiescence? The short answer is not much. To start, to the extent that courts and scholars ever accepted nonacquiescence, they did so in part because of *Chevron*.[110] *Chevron* stood for the idea that agencies were the primary interpreters of their respective statutes; courts deferred to agencies, even when they disagreed with the agencies' views, because agencies were presumed to have special expertise.[111] But *Loper Bright* blew that paradigm up. It held that courts should not—indeed, cannot—defer to agencies on legal questions.[112] They must interpret statutes for themselves.[113] And that conclusion knocks out one of the few, wobbly pegs that were still propping up nonacquiescence.[114]

Loper Bright also spelled trouble for the uniformity argument. Again, the Board has long defended nonacquiescence as a way to develop a coherent national policy.[115] But under *Loper Bright*, that kind

107 *Id.* at 2267.

108 *See id.* ("[T]here is little value in imposing a uniform interpretation of a statute if that interpretation is wrong.").

109 *See id.* at 2257 (reiterating that it remains the "province and duty of the judicial department to say what the law is" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

110 *See* NLRB v. Webcor Packaging, Inc., 118 F.3d 1115, 1123 n.8 (6th Cir. 1997) (deferring to Board under *Chevron* despite split between Board and circuit precedent).

111 *See id.* (noting that even if the court agreed with evidently conflicting circuit precedent, it would still be bound to accept the Board's "reasonable" interpretations under *Chevron*).

112 *See Loper Bright*, 144 S. Ct. at 2273.

113 *See id.*

114 *See* Davies, *supra* note 15, at 94 (observing that nonacquiescence was bolstered by *Chevron*, under which "an agency's interpretation of the federal law for which it is responsible has a least as much authority in any given court of appeals as the interpretation of that same law by a neighboring court of appeals"); *see also* CRS Report, *supra* note 32, at 20 (making the same observation); Estreicher and Revesz, *supra* note 15, at 724 (same).

115 *See* D.L. Baker, Inc., 351 N.L.R.B. 515, 529 n.42 (2007); Ins. Agents' Int'l Union, 119 N.L.R.B. 768, 773 (1957), *vacated by* Ins. Agents' Int'l Union v. NLRB, 260 F.2d 736 (D.C. Cir. 1958), *aff'd by* 361 U.S. 477 (1960).

of pro-uniformity argument is a nonstarter. National coherence takes a back seat to interpretive accuracy.[116] And interpretive accuracy comes not from agency policy, but from judicial precedent.[117] The Board is just as bound by that precedent as anyone else—whether or not the courts themselves have uniform views.[118]

The venue-uncertainty argument fares only a little better. Again, the Board usually knows when an adverse circuit will review its decision.[119] And when the Board knows where a case will land, it has no excuse for ignoring circuit law.[120] *Loper Bright* leaves it with no room to simply "disagree" with controlling precedent.[121] Like everyone else, it has to recognize the primacy of judicial interpretation.[122]

V. NONACQUIESCENCE AND WORKABILITY

One might think that this all leaves the Board in an untenable position. While *Loper Bright* made clear that courts have the final legal word, it did nothing to expand those courts' jurisdiction. Each circuit court still sits over (at most) a handful of states. And circuit courts will inevitably disagree on some questions of labor law.[123] So at least in

116 *See Loper Bright*, 144 S. Ct. at 2265–68; *see also id.* at 2273–74 (Thomas, J., concurring) (concluding that deference to agencies on questions of law would violate the constitutional separation of powers).

117 *See id.* at 2273.

118 *See id.*; *see also* Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3rd Cir. 1979) ("[T]he Board is not a court nor is it equal to this court in matters of statutory interpretation."); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1570 (2008) (explaining that the supposed benefits of uniformity are often unexamined and in some cases unfounded) ("At least in some categories of cases, judicial disagreements over the meaning of federal law have few, if any, negative consequences.").

119 *See* Dotson & Williamson, *supra* note 13, at 745–47; *see also* Heartland Plymouth Ct. MI, LLC v. NLRB, 838 F.3d 16, 22–23 (D.C. Cir. 2016) (explaining that Board's venue-uncertainty claims are "implausible" when all possible reviewing courts have taken a position contrary to the Board's, the Board rejects a single court's position on remand, or when an aggrieved party has the option to seek review in a circuit with caselaw adverse to the Board's position).

120 *See Heartland Plymouth*, 838 F.3d at 19, 27, 26 (criticizing Board for refusing to apply D.C. Circuit law even when it was "pre-ordained" that the case would come back to the D.C. Circuit) ("The Board was the perpetrator here, not venue uncertainty."); *see also* Kitchen Fresh, Inc., v. NLRB, 716 F.2d 351, 357 (6th Cir. 1983) (criticizing the Board for refusing to apply circuit law to cases arising within the circuit); Dotson & Williamson, *supra* note 13, at 746 (rejecting claims of venue uncertainty because "it cannot be argued seriously that this concern in any way warrants adherence to a policy which is essentially ultra vires").

121 *See Loper Bright*, 144 S. Ct. at 2267, 2265–68, 2273 (explaining that courts have the last word on the meaning of federal law).

122 *See id.* at 2258; *see also* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (stating that it is a "basic principle" that "the federal judiciary is supreme in the exposition of the law of the Constitution").

123 *See* Davies, *supra* note 15, at 91 (cataloguing circuit splits).

some cases, the Board will face a genuine split in authority. It will not know which court's precedent to apply. What is it supposed to do?

The problem is real, not intractable. To start, genuine circuit splits are rare. Out of the tens of thousands of decisions announced by circuit courts each year, only a tiny fraction—usually less than a hundred—could be described as reflecting a real split.[124] More often, what seem like splits are really differences in how courts articulate the same basic principles.[125] For example, courts may fashion multi-part balancing tests with different factors; or they may emphasize different factors in the same list.[126] But even then, they usually agree on the main focus of the analysis.[127] In that kind of case, the Board isn't dealing with a true split; it's dealing with the kind of uncertainty inherent in a precedent-based system.[128] Precedents aren't always uniform; they can seem to diverge and differ at the edges. The Board's task is to harmonize those differences into a coherent rule. And while that task is by no means easy, it's the kind of thing lawyers are trained to do.[129] It's also

124 *See* Michael John Garcia, Craig W. Canetti, Alexander H. Pepper, & Jimmy Balser CONG. RSCH. SERV., THE UNITED STATES COURTS OF APPEALS: BACKGROUND AND CIRCUIT SPLITS FROM 2023, at 11 (2024), [hereinafter U.S. COURTS OF APPEALS] (finding only four decisions in 2023 indicating a circuit split in labor-law matters); ADMIN. OFF. OF THE U.S. CTS., A JOURNALIST'S GUIDE TO THE FEDERAL COURTS 33 (noting that circuit courts handle more than 50,000 cases per year).

125 *See, e.g.*, Care One, LLC v. NLRB, No. 23-cv-00831, 2023 WL 6457641, at *1, *4 (D. Conn. Oct. 4, 2023) (rejecting argument based on alleged circuit split over appointment of Board ALJs without directly conflicting authority from sister circuits); Kerwin v. Starbucks Corp., 657 F. Supp. 3d 1002, 1008 n.2 (E.D. Mich. 2023) (observing that courts had taken different views of the factors to consider when deciding whether to issue an injunction under 29 U.S.C. § 160(j)), *appeal dismissed and remanded*, No. 23-1187, 2024 WL 1495038 (6th Cir. 2024).

126 *See* NLRB v. Pier Sixty, LLC, 855 F.3d 115, 122–23 (2d Cir. 2017) (observing growing disagreement in circuit courts about Board's multi-factor test for determining when certain otherwise concerted activity is "abusive" and so unprotected).

127 *See id.* at 122; *see also* Starbucks Corp. v. McKinney, 144 S. Ct. 1570, 1575 (2024) (noting that circuit courts had differed over whether to apply a two- or four-factor test to determine whether an injunction was "just and proper" under 29 U.S.C. § 160(j)).

128 *See* U.S. COURTS OF APPEALS, *supra* note 124, Summary (explaining that differences among circuit courts are a byproduct of "both the design and the historical evolution of the federal judiciary").

129 *See* David D. Garner, *The Continuing Vitality of the Case Method in the Twenty-First Century*, 2000 BYU EDUC. & L.J. 307, 307 (tracing case method of legal education to the 1870s, as developed by Christopher Columbus Langdell, then-dean of Harvard Law School); *see also* Charles W. Tyler, *Common Law Statutes*, 99 NOTRE DAME L. REV. 669, 671–72 (2023) (describing the Labor Management Relations Act as a "common law statute[]" whose meaning has been developed through accretion of thousands of decisions defining its terms); *cf.* Sunbelt Rentals, Inc., 372 N.L.R.B. No. 24, at 23 n.9 (Dec. 15, 2022) (Kaplan & Ring, dissenting) (arguing that when majority of courts had rejected the Board's view, the Board should adopt that view, even when some courts had not explicitly rejected the Board's view or had even signaled acceptance of it).

well within the capabilities of agency administrators. For example, the U.S. Department of Labor based its recent independent-contractor rule on a survey of federal caselaw.[130] And the Board itself considered a broader array of judicial sources for its 2023 joint-employer rule.[131] There's no reason the Board couldn't take the same approach to everyday questions of labor law.[132]

To be sure, that approach won't solve true circuit splits. Sometimes circuit courts do disagree on basic premises.[133] But even when facing a real split, the Board has options short of nonacquiescence. For one, it can follow the precedent of the court most likely to review its decision—usually the one sitting over the place where the unfair labor practice happened.[134] If the case is then appealed to a different circuit, the Board can ask that circuit court to transfer the case back to the original circuit.[135] And if the court refuses that request, the Board can seek higher review. It can ask the circuit court to review its own

130 *See* Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1638 (Jan. 10, 2024) (deriving six-factor classification test from body of judicial caselaw under the FLSA).

131 *See* Standard for Determining Joint Employer Status, 88 Fed. Reg. 73946, 73948 (Oct. 27, 2023) (defining "joint employer" by distilling body of nationwide common law under traditional agency principles). *But see* Chamber of Com. v. NLRB, 723 F. Supp. 3d 498, 517 (E.D. Tex. 2024) (vacating joint-employer rule because the Board misinterpreted the common law when designing its test).

132 *See* Atlanta Opera, Inc., 372 N.L.R.B. No. 95, at *1–*5 (June 13, 2023) (applying common law principles to develop test for defining "employee" under the NLRA).

133 *See, e.g.*, Duffy Tool & Stamping, LLC v. NLRB, 233 F.3d 995, 997 (7th Cir. 2000) (observing split between Fifth Circuit and other circuits, as well as the Board, over whether an employer can unilaterally implement a final offer on individual terms (as opposed to the entire package) at impasse).

134 *See* Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 968–70 (3d Cir. 1979) (stating that Board could have avoided nonacquiescence by applying law of circuit where alleged unfair labor practice occurred); Kitchen Fresh, Inc. v. NLRB, 716 F.2d 351, 357 (6th Cir. 1983) (same).

135 *See* 28 U.S.C. § 2112(a) (2018) (permitting transfer to another circuit when an agency petitions for enforcement in that other circuit); Estreicher & Revesz, *supra* note 15, at 709–10 (arguing that ability to transfer can help the Board avoid seeking to enforce an order in a circuit that rejects its view of the statutory issue involved); s*ee also* Heartland Plymouth Ct. MI, LLC v. NLRB, 838 F.3d 16, 26 (D.C. Cir. 2016) (criticizing Board for moving to enforce its order instead of seeking transfer to a circuit that accepted its legal view).

precedent en banc.[136] It can also petition the U.S. Supreme Court for certiorari.[137] It doesn't have to just make up its own rules.[138]

True, petitioning the Supreme Court is hardly a panacea. The Supreme Court takes only a few cases; its docket is small and growing smaller.[139] But the Court is more likely to take a case involving a genuine circuit split.[140] And as a national litigator, the Board is uniquely positioned to call those splits to the Court's attention. Even better, by proceeding through the standard litigation process, the Board can promote uniformity without arrogating interpretive power to itself.[141]

Beyond circuit splits, the Board will occasionally encounter truly novel issues.[142] The Board has to address those issues in the first place on its own, with no guidance from a court.[143] And suppose that the

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136 *See, e.g.*, FED. R. APP. P. 35 (permitting petition for rehearing en banc); D.C. CIR. R. 40 (same).

137 *See* Johnson v. U.S. R.R. Ret. Bd., 969 F.2d 1082, 1092 (D.C. Cir. 1992) ("When an agency honestly believes a circuit court has misinterpreted the law, there are two places it can go to correct the error: Congress or the Supreme Court."); *see also* Ithaca Coll. v. NLRB, 623 F.2d 224, 228 (2d Cir. 1980) (stating that if the Board disagrees with circuit law, it can petition the Supreme Court, but it cannot just ignore the court and apply its own law) ("This is intolerable if the rule of law is to prevail.").

138 *See* Dotson & Williamson, *supra* note 13, at 746 (rejecting claim that forum shopping justifies nonacquiescence because "it cannot be argued seriously that this concern in any way warrants adherence to a policy which is essentially ultra vires").

139 U.S. SUP. CT., 2023 YEAR END REPORT ON THE FEDERAL JUDICIARY 8 (2023) (observing that of 1,252 cases filed with the Supreme Court in 2022, only sixty-eight were argued and only sixty-six were disposed of in signed opinions, both declines from prior year); *see also* Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1419–20 (2020) (observing that while the Supreme Court issued between 150 and 200 written opinions per term in the 1930s, it now issues about seventy per term).

140 *See* SUP. CT. R. 10 (stating that the Court will grant a petition for certiorari only for "compelling reasons," including to resolve a "conflict" among circuit courts "on the same important matter"); *see also* Frost, *supra* note 118, at 1569 (noting that 70% of the Supreme Court's docket consisted of cases in which lower courts had split over a legal issue).

141 *See Ithaca Coll.*, 623 F.2d at 228 (stating that if the Board disagrees, it should seek cert, and it can even suspend proceedings in other cases raising the same issue while it seeks cert; any other approach would be "intolerable if the rule of law is to prevail").

142 *See, e.g.*, United Food & Com. Workers, Loc. No. 1996, 336 N.L.R.B. 421 (2001) (confronting novel issue of whether section 8(b)(4)(ii)(B) prevented a union from picketing one employer to pressure a different employer into recognizing and bargaining with it); Hughes Tool Co., 104 N.L.R.B. 318, 329 (1953) (observing that the case before it was one of "first impression").

143 *See, e.g.*, 29 U.S.C. § 160(a), (e), (f) (2018) (contemplating that unfair labor practices will be adjudicated first before the Board and only later reviewed by courts); s*ee also* United Ass'n of Journeymen, Loc. 342 v. Valley Eng'rs, 975 F.2d 611, 613 (9th Cir. 1992) (observing that under the "primary jurisdiction" doctrine, Congress meant "to have matters of national labor policy decided in the first instance by the National Labor Relations Board." (quoting Glaziers & Glassworkers Loc. Union No. 767 v. Custom Auto Glass Distribs., 689 F.2d 1339, 1342 (9th Cir. 1982))).

first court to review the issue disagrees with the Board's approach.[144] Does the Board have to accept that court's interpretation for the whole country?

On one hand, we might think the answer is no.[145] Circuit courts still sit over limited jurisdictions.[146] Outside their jurisdictional borders, their decisions still have no formal precedential weight.[147] For its part, the Board still operates in every circuit in the country.[148] So we might think that in circuits where no court has addressed the issue, the Board can still follow its own view of the law; it doesn't have to take the first court's interpretation as authoritative.[149]

But under *Loper Bright*, the better answer is yes. *Loper Bright* establishes that agencies have no special competence in statutory interpretation.[150] They have no authority to second-guess the interpretations of courts.[151] So once a court has said "what the law is," the Board should treat that interpretation as legally binding until overturned.[152]

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144 *See* Nielsen Lithographing Co. v. NLRB, 854 F.2d 1063, 1066–67 (7th Cir. 1988) (observing that although the Seventh Circuit had disagreed with the Board, no other circuit had yet accepted or rejected the Seventh Circuit's opinion).

145 *See id.* (suggesting that the Board could have applied its own view outside the Seventh Circuit or asked for a transfer to a different circuit (yet, inexplicably, moved to enforce its order in the Seventh Circuit)).

146 *See* U.S. COURTS OF APPEALS, *supra* note 124, at 4 fig.I (chart of geographic jurisdictions).

147 *See* Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900) (holding that rules of "comity" do not require circuit courts to follow one another's opinions); Benenson v. Comm'r, 887 F.3d 511, 516 (1st Cir. 2018) ("A circuit need not follow other circuits' decisions where 'there appear cogent reasons for rejecting them.'" (quoting Popov v. Comm'r, 246 F.3d 1190, 1195 (9th Cir. 2001))); *see also* Sassman, *supra* note 139, at 1430–31 (discussing *Stover Manufacturing* and its effect on circuit splits).

148 *See* N.Y. Tel. Co. v. N.Y. State Dep't of Lab., 440 U.S. 519, 527–29 (1979) (recognizing that Congress intended to give Board nationwide jurisdiction to develop coherent labor policy).

149 *See* Sunbelt Rentals, Inc., 372 N.L.R.B. No. 24, at *25 n.40 (Dec. 15, 2022) ("[T]he Board 'is not obliged to accept [a circuit court's] interpretation' and may 'refus[e] to knuckle under to the first court of appeals (or the second, or even the twelfth) to rule adversely to the Board,' because only the Supreme Court is 'the supreme arbiter of the meaning of the [Act].'" (alterations in original) (quoting *Nielsen Lithographing Co.*, 854 F.2d at 1066–68)); Estreicher & Revesz, *supra* note 15, at 684–85, 727–30 (arguing that inapplicability of nonmutual collateral estoppel, intermediate status of courts of appeals, and principles of deference justify intercircuit nonacquiescence).

150 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2267 (2024) ("[W]hen the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority." (quoting Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019))).

151 *See id.*

152 *See* NLRB v. Ashkenazy Prop. Mgmt. Corp., 817 F.2d 74, 75 (9th Cir. 1987) (stating that Board is bound to follow circuit precedent until that precedent is overturned through traditional channels); Rieth-Riley Constr. Co. v. NLRB, 114 F.4th 519, 528 (6th Cir. 2024)

The Board can, of course, try to get it overturned: the Board can still petition the court for rehearing or seek certiorari with the Supreme Court.[153] But it cannot just ignore the court's decision and continue to apply its own brand of the law.[154] If *Loper Bright* made anything clear, it is that this kind of disregard isn't just a difference of opinion between institutional equals; it is lawless behavior by a subordinate body.[155]

The Board might call this state of affairs unworkable. But it's not. It's not even exceptional. Every day, thousands of private businesses operate across state lines. These businesses deal with a kaleidoscope of state laws, ranging from employment law to tax law and everything in between.[156] Somehow, they manage to cope with the complexity. If private companies can deal with a diverse system, why can't the Board? After all, our federal legal system has always tolerated a certain amount of disagreement.[157] Diversity and discourse are baked into its structure.[158] Like any other national organization, the Board can learn to

(citing *Loper Bright*, 144 S. Ct. at 2262) (explaining that under *Loper Bright*, the Board gets no deference on questions of law).

153 *See Ashkenazy*, 817 F.2d at 75 (observing that Board is free to petition Supreme Court to challenge circuit precedent).

154 *See id.* ("Administrative agencies are not free to refuse to follow circuit precedent in cases originating within the circuit, unless the Board has a good faith intention of seeking review of the particular proceeding by the Supreme Court.").

155 *See Loper Bright*, 144 S. Ct. at 2268 ("[R]esolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an 'agency to fall back on.'" (quoting *Kisor*, 139 S. Ct. at 2415)); *see also id.* at 2274 (Thomas, J., concurring) (explaining that only courts can exercise "judicial power" under Article III, and deference to agencies on questions of law therefore violates the constitutional separation of powers); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979) ("[T]he Board is not a court nor is it equal to this court in matters of statutory interpretation.").

156 *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1152 (2023) (observing that states have "substantial leeway to adopt their own commercial codes").

157 *See* Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900) (recognizing that the federal court system is structured to allow some disagreement among lower federal courts).

158 *See* New York v. Pruitt, No. 18-cv-1030, 2018 WL 2411595, at *4 (S.D.N.Y. May 29, 2018) ("It is a bedrock principle of our federal court system that the adjudication of novel and difficult issues of law is best served by letting questions percolate among the lower federal courts, even at the cost of short-term disuniformity." (citing *Stover Mfg. Co.*, 177 U.S. at 488)); *see also Nat'l Pork Producers*, 143 S. Ct. at 1156 (observing that it is a "feature of our constitutional order that allows 'different communities' to live 'with different local standards'" (quoting Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989))).

live within that system.[159] In fact, it not only can, it has to—*Loper Bright* leaves it no choice.[160]

VI. NONACQUIESCENCE AT THE TWILIGHT

Nonacquiescence has been the Board's policy for at least seventy years.[161] The policy has survived scholarly critique and judicial rebuke.[162] It has proven impervious to criticism, persuasion, or even sanction.[163] Yet now, finally, it may have its comeuppance. Its best defense has always been uniformity; the Board has justified it as the only way to promote a coherent national labor policy.[164] But under *Loper Bright*, uniformity takes second place to judicial finality.[165] The meaning of the NLRA is a question of law, and questions of law are the province of courts.[166] It is courts, not the Board, who say what the law is.[167]

Somewhere, Chairman Dotson must be smiling.

159 *See* Dotson & Williamson, *supra* note 13, at 743–747 (arguing that Board could continue to promote national policy after abandoning nonacquiescence by following accepted litigation paths, rather than thumbing its nose at courts).

160 *See Loper Bright*, 144 S. Ct. at 2273 ("[C]ourts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.").

161 *See* Ins. Agents' Int'l Union, 119 N.L.R.B. 768, 773 (1957), *vacated by* Ins. Agents' Int'l Union v. NLRB, 260 F.2d 736 (D.C. Cir. 1958), *aff'd by* 361 U.S. 477 (1960).

162 *See, e.g.*, Davies, *supra* note 15, at 88–98; Dotson & Williamson, *supra* note 13, at 743–47.

163 *See, e.g.*, Heartland Plymouth Ct. MI, LLC v. NLRB, 838 F.3d 16, 21–26 (D.C. Cir. 2016); NLRB v. Ashkenazy Prop. Mgmt. Corp., 817 F.2d 74, 75 (9th Cir. 1987); Ithaca Coll. v. NLRB, 623 F.2d 224, 228 (2d Cir. 1980); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 968–70 (3d Cir. 1979).

164 *See* D.L. Baker, Inc., 351 N.L.R.B. 515, 529 n.42 (2007).

165 *See Loper Bright*, 144 S. Ct. at 2267.

166 *Id.* at 2273.

167 *See id.*; *see also* Rieth-Riley Constr. Co. v. NLRB, 114 F.4th 519, 528 (6th Cir. 2024) ("We do not defer to the NLRB's interpretation of the NLRA, but exercise independent judgment in deciding whether an agency acted within its statutory authority." (citing *Loper Bright*, 144 S. Ct. at 2262)).