

**IN SOLIDARITY: REMOVING BARRIERS
TO UNION ORGANIZING**

HEARING

BEFORE THE

**COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES**

ONE HUNDRED SEVENTEENTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, SEPTEMBER 14, 2022

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IN SOLIDARITY: REMOVING BARRIERS TO UNION ORGANIZING

Wednesday, September 14, 2022

HOUSE OF REPRESENTATIVES,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC.

The Committee met, pursuant to notice, at 10:21 a.m., 2175 Rayburn House Office Building, Hon. Robert C. “Bobby” Scott (Chairman of the Committee) presiding.

Present: Representatives Scott, Courtney, Bonamici, Takano, Adams, DeSaulnier, Norcross, Jayapal, Wild, McBath, Hayes, Omar, Leger Fernandez, Jones, Manning, Mrvan, Bowman, Cherfilus-McCormick, Pocan, Castro, Espaillat, Foxx, Wilson of South Carolina, Thompson, Walberg, Grothman, Allen, Banks, Comer, Fulcher, Keller, Good, Miller, Fitzgerald, Cawthorn, Steel, Jacobs, Finstae, and Sempolinski.

Staff present: Brittany Alston, Operations Assistant; Ilana Brunner, General Counsel; Kyle deCant, Labor Policy Counsel; Rasheedah Hasan, Chief Clerk; Sheila Havenner, Director of Information Technology; Eli Hovland, Policy Associate; Carrie Hughes, Director of Health and Human Services; Stephanie Lalle, Communications Director; Kevin McDermott, Director of Labor Policy; Kota Mizutani, Deputy Communication Director; Max Moore, Staff Assistant; Kayla Pennebecker, Policy Associate; Mason Pesek, Labor Policy Counsel; Veronique Pluviose, Staff Director; Jessica Schieder, Economic Policy Advisor; Dhrtvan Sherman, Staff Assistant; Michele Simensky, Oversight Counsel; Banyon Vassar, Deputy Director of Information Technology; Sam Varie Press Secretary; ArRone Washington, Clerk and Special Assistant to the Staff Director; Tanisha Wilburn, Director of Labor Oversight and Counsel; Cyrus Artz, Minority Staff Director; Caitlin Burke, Minority Professional Staff Member; Michael Davis, Minority Legislative Assistant; Cate Dillon, Minority Director of Operations; Taylor Hittle, Minority Professional Staff Member; Trey Kovacs, Minority Professional Staff Member; Hannah Matesic, Minority Director of Member Services and Coalitions; Audra McGeorge, Minority Communications Director; Ethan Pann, Minority Press Assistant; Gabriella Pistone, Minority Staff Assistant; Krystina Skurk, Minority Speechwriter; Katy Roberts, Minority Staff Assistant; Kelly Tyroler, Minority Professional Staff Member; and Joe Wheeler, Minority Professional Staff Member.

Chairman SCOTT. The Committee will come to order, and before we begin I want to first yield to the Ranking Member to introduce

our two new members. Is the Ranking Member with us? Dr. Foxx— Oh, I am sorry.

Ms. FOXX. Yes, I am here. We only have one of our new Ranking Members with us. The other one is not here right now, but we are very pleased to have Mr. Sempolinski with us. He was sworn in last night, and he made a wonderful speech on the floor about what an honor it is to be in the House of Representatives, and I certainly share his opinion.

I do not believe Mr. Finstad is with us yet, and we will be happy to introduce him at the next opportunity. Thank you, Mr. Chairman.

Chairman SCOTT. Thank you very much. I also want to thank the gentleman from New York, Mr. Morelle of New York's 25th congressional District, for your service on the Education and Labor Committee. He will be regrettably leaving us for what he thinks is a better committee, the Appropriations Committee, and while we know that members there will benefit from the same thoughtfulness and dedication, which he approaches his duties in Congress and on this committee, he will be sorely missed right here.

Joe, your contributions over the years with children, workers, and families, and the good work on legislation and healthcare will be very much missed, but we know you are going to continue, and when we need appropriations we know who to look to. I know you will still be there doing good work on that committee, so Mr. Morelle thank you so much for your service.

As this hearing—we will begin the hearing. One week and a half after the Nation celebrated Labor Day, the committee is meeting today to discuss the growing popularity of unions among the American people, and the steps Congress must take to ensure every worker has an opportunity to reap the benefits of joining a union.

Some of our Nation's greatest advances were made because of the labor movement. Decades ago, the labor movement created the 40-hour work week, curbed dangerous child labor practices, and ensured that workers had a fair minimum wage. Today unions continue to press employers to secure livable wages, better benefits, and safer workplaces for America's workers.

On average a worker covered by a collective bargaining agreement earns more than 10 percent more in wages than a peer with similar education, occupation, and experience in a non-union workplace in the same sector. The private sector workers covered by union contracts are 27 percent more likely to be offered health insurance through their employer, and data also showed that unions close the racial and gender gaps by creating an engine of economic mobility for workers, because under a union contract everyone gets equal pay for equal work.

Ultimately the labor movement built the middle class by giving the workers a voice on the job, and as such it should be no surprise that unions are popular among American people. In fact, according to the recent Gallop poll more than 70 percent, 7–0, 70 percent of the American people approve of unions, the highest approval rate since 1965.

This is a direct result of Americans rejecting practices made worse during the height of the COVID–19 pandemic. As we know too many workers are forced to endure unsafe working conditions,

and now as we've seen workers time and time again, workers are turning to unions to help secure safer workplaces, livable wages, and opportunities for promotion.

According to the Nation's Labor Relations Board, or the NLRB, demand for union representation increased by nearly 60 percent in the first three quarters of 2022, compared to the same period last year. Importantly, unions won 641 elections in the first half of 2022, almost double the victories in all of 2021.

The spike in labor organizing is in part due to several high-profile victories of organizers at Starbucks, Amazon, Apple and Trader Joe's. While the organizers of these campaigns were victorious, they and many others have been met with a slew of unfair labor practices and serious obstacles to reaching the first collective bargaining agreement.

Just recently, the National Labor Relations Board found over 200 violations of the National Labor Relations Act, or the NLRA, at Starbucks locations in Buffalo, New York alone. Violations included: Firing organizers, closing stores, reducing compensation and surveilling workers' organizing activities. The anti-union campaigns conducted by Starbucks represents a growing trend.

For example, for decades unscrupulous employers have eroded unions by taking advantages of the weaknesses in the NLRA. Just between 2016 and 2021, 87 percent of employers conducted anti-union campaigns during union elections, even though the choice of organizing is up to the employee, and the employer is never on the ballot.

While NLRB facilitates union elections and investigates violations, the agency has been put on its back foot with low staffing levels and flat funding. Since 2014, the agency's budget has remained consistent, which accounting for inflation amounts to a 25 percent decrease in funding since Fiscal Year 2010.

This is yet another barrier to supporting workers and holding employers accountable. In response to anti-union campaigns and weaknesses in the NLRB, House Democrats have twice passed the Protecting the Right to Organize Act or the PRO Act. The PRO Act is the most significant upgrade in U.S. labor law in nearly 80 years.

Specifically, this legislation sets meaningful penalties for employers who violate the workers' rights, requires workers whose rights have been violated to be temporarily reinstated while their cases are pending, and ensures that unions can collect a fair share of dues from all workers who they are obligated to represent for their representational obligations—and that does not mean the political activities, or the holiday party, or the summer cookout, just what you are legally obligated to perform.

Also, we remain committed to working with our colleagues in the Biden-Harris Administration to provide the NLRB with the funding it needs to protect workers' rights to organize, and while I am encouraged the House Labor H appropriations includes 319 million for the NLRB, a 45 million dollar increase over its current budget, it is imperative that this increase be actually enacted.

The surge in organizing requires some urgent response from Congress and the administration, and the response is to end the funding crisis that has left the agency straining under the weight of

new caseloads. The history has shown us that when we invest in workers, we build the economy from the bottom up, and the middle out, and so I look forward to delivering on that goal, ensuring that joining a union will be a right and not a fight. With that I yield to the distinguished Ranking Member, Dr. Foxx.

[The statement of Chairman Scott follows:]



OPENING STATEMENT

House Committee on Education and Labor
Chairman Robert C. "Bobby" Scott

Opening Statement of Chairman Scott (VA-03)
Full Committee Hearing
In Solidarity: Removing Barriers to Organizing
Wednesday, September 14, 2022 | 10:15 a.m.

One week and a half after the nation celebrated Labor Day, this Committee is meeting to discuss the growing popularity of unions among the American people and the steps Congress must take to ensure every worker has an opportunity to reap the benefits of joining a union.

Some of our nation's greatest advances were made because of the labor movement.

Decades ago, the labor movement created the forty-hour work week; curbed dangerous child labor practices; and ensured workers made a minimum wage.

Today, unions continue to press employers to secure livable wages, better benefits, and safer workplaces for America's workers.

On average, a worker covered by a collective bargaining agreement earns more than 10 percent more in wages than a peer with a similar education, occupation, and experience in a non-union workplace in the same sector. Private sector workers covered by a union contract are 27 percent more likely to be offered health insurance through their employer. Data also shows that unions close both racial and gender wage gaps, creating an engine of economic mobility for millions of workers because, under a union contract, everyone gets equal pay for equal contract.

Ultimately, the labor movement built the middle class by giving workers a voice on the job.

As such, it should be no surprise that unions are popular among the American people.

In fact, according to a recent Gallup poll, more than 70 percent of Americans approve of unions— the highest approval rating since 1965. This is a direct result of Americans rejecting labor practices made worse during the height of the COVID-19 pandemic. As we know, too many workers were forced to endure unsafe working conditions. Now, as we have seen workers do time and time again, workers are turning to unions to help secure safer workplaces, livable wages, and opportunities for promotion.

According to the National Labor Relations Board, or the N-L-R-B, demand for union representation increased by nearly 60 percent in the first three quarters of 2022 compared to the same period last year. Importantly, unions won 641 elections in the first half of 2022—almost double the victories during **all** of 2021.

The spike in labor organizing is, in part, due to several high-profile victories among organizers at Starbucks, Amazon, Apple, and Trader Joe's.

While the organizers in these campaigns were victorious, they and many others have been met with a slew of unfair labor practices and serious obstacles to reaching a first collective bargaining agreement. Just recently, the National Labor Relations Board found over 200 violations of the *National Labor Relations Act*, or the N-L-R-A, at Starbucks locations in Buffalo, New York alone. Violations included firing organizers, closing stores, reducing compensation, and surveilling workers' organizing activities.

The anti-union campaigns conducted by Starbucks represents a growing trend. For example, for decades, unscrupulous employers have eroded unions by taking advantage of weaknesses in the *N-L-R-A*. Just between 2016 and 2021, 87 percent of employers conducted anti-union campaigns during union elections, even though the choice of organizing is up to the employee and the employer is never on the ballot.

While the NLRB facilitates union elections and investigates violations, the agency has been put on its backfoot with low staffing levels and flat funding. Since 2014, the agency's budget has remained consistent, which, accounting for inflation, amounts to a 25 percent decrease in funding since Fiscal Year 2010. This is yet another barrier to supporting workers and holding employers accountable.

In response to anti-union campaigns and weaknesses in the N-L-R-A, House Democrats have twice-passed the *Protecting the Right to Organize Act*, or the *PRO Act*.

The *PRO Act* is the most significant upgrade to U.S. labor law in nearly 80 years. Specifically, this legislation:

- Sets meaningful penalties for employers who violate workers' rights;
- Requires workers whose rights have been violated to be temporarily reinstated while their cases are pending; and,
- Ensures unions can collect "fair share" dues from all workers they are obligated to represent.

I also remain committed to working with my colleagues and the Biden-Harris Administration to provide the N-L-R-B with the funding it needs to protect workers' right to organize. While I am encouraged that the House Labor-H appropriations includes \$319 million for the N-L-R-B, a \$45 million increase over its current budget, it is imperative that this increase is enacted. The surge in organizing requires an urgent response from Congress and the Administration, and that response is to end the funding crisis that has left the agency straining under the weight of new caseloads.

History has shown us that, when we invest in workers, we build the economy from the bottom up and the middle out.

I look forward to delivering on that goal and ensuring that joining a union is a right, not a fight.

Ms. FOXX. Thank you, Mr. Chairman. Despite Democrats' aggressive attempts to force union representation on workers, republicans are committed to ensuring workers have the freedom to choose whether they want to join a union. I would like to remind my colleagues that Federal law already protects the right of employees to organize, or to refrain from doing so.

Any reforms to our labor laws should help workers inspire economic growth, not exclusively promote the interest of union bosses. There is a reason why the PRO Act cannot clear the Senate. It is a deeply unpopular bill that undermines basic long-standing worker rights and would take a wrecking ball to Main Street.

Republicans just want fair and neutral labor laws. Instead of working together to create a level playing field, Democrats want to pass a union wish list bill to build on what they claim is a historic surge in unionizing. The Democrats are cherry-picking data to sell the narrative that unions are on the rise.

For example, Democrats will likely point out that Workers United has unionized more than 200 Starbucks locations, but they will fail to mention this is less than 3 percent of the company's more than 9,000 wholly owned stores. Not on the list of Democrat talking points is that only one out of 270 Apple stores have voted to unionize.

They will also probably ignore the fact that the private sector union membership rate is the lowest it has ever been. Bottom line,

Democrat claims that interest in unionization is on the rise is another drummed up narrative by the left-wing media and Democrat politicians. If unions want to know why they do not appeal to workers they need to take a long hard look in the mirror.

Most unions spend a significant amount of their money on radical political activity, not advocating for workers. Further, union corruption has been a major issue which previous administrations worked hard to tackle, yet Democrats are in the pocket of big labor, continue to resist transparency measures that would keep workers informed on how their union dues are being spent.

Unions are relying on the Biden Administration to twist the arms of workers into unionizing. President Biden, who promised to have the most pro union administration in history is complying. He established the Task Force on Worker Organizing and Empowerment to mobilize all Federal agencies in his crusade to unionize as many workers as possible.

Many Federal departments are taking this mandate seriously, especially the Department of Labor. For example, Labor Secretary Marty Walsh, a former union boss, marched in the picket line at a Kellogg's plant in Lancaster, Pennsylvania last October. Mr. Walsh apparently forgot that he is supposed to promote the interest of all workers, not act as an activist on behalf of unions.

Perhaps most egregious, the Biden Administration is working to implement provisions of the PRO Act by executive fiat. The radical PRO Union Boss's Act would ban right-to-work laws, forcing workers to pay union dues, even if they object to union representation. If the Democrats had their way free choice would be a thing of the past in the American workforce.

It would also, among other things, undermine the independent contractor and franchise models by codifying the Obama era job killing joint employer standard in California's disastrous ABC test.

To make matters worse for the job creators and workers the National Labor Relations Board, NLRB, is being used as the litigation arm of big labor. Instead of promoting fair labor practices, the NLRB is exhuming decades old policies like the Joy Silk Doctrine, which would allow unions to organize a workplace without ever receiving majority support in a secret ballot election.

Replacing the secret ballot with the card check system would open the door for intimidation and coercion of workers. The Biden appointed NLRB general counsel is also challenging long-standing precedent regarding employer's rights to educate workers on the down side of union representation. This would dramatically infringe on an employer's freedom of speech and deprive workers of hearing both sides of the argument regarding unionization.

To Democrats there is only one choice, unionize or bust. Additionally, the NLRB has yet to answer for its alleged collusion with Workers United during a recent Starbucks union election. According to an NLRB whistleblower, certain NLRB officials colluded with agents of Workers United to arrange for unobserved in person voting in NLRB offices during NLRB ordered mail ballot elections.

NLRB officials also shared voting data with Workers United to increase turnout among pro union employees. Republicans will continue to demand answers and accountability from the NLRB, and I encourage my Democrat colleagues to do the same. Democrats are

beholden to union bosses. Unions send huge portions of their worker funded war chest to democrat political organizations, campaigns, and left-wing organizations.

It is no wonder Democrats cow down to union bosses. Being pro-union does not mean being pro-worker, and in too many instances workers and job creators are being harmed by unions. Republicans will continue to stand for a worker's right to choose. I yield back, Mr. Chairman.

[The statement of Ranking Member Foxx follows:]

09.14.2022 – House Committee on Education and Labor Full Committee Hearing: In Solidarity: Removing Barriers to Organizing

Opening Remarks from FC Ranking Member, Rep. Virginia Foxx:

“Despite Democrats’ aggressive attempts to force union representation on workers, Republicans are committed to ensuring workers have the freedom to choose whether they want to join a union.

I’d like to remind my colleagues that federal law already protects the right of employees to organize, or to refrain from doing so. Any reforms to our labor laws should help workers and spur economic growth, not exclusively promote the interests of union bosses. There is a reason why the PRO Act cannot clear the Senate. It is a deeply unpopular bill that undermines basic, longstanding worker rights and would take a wrecking ball to Main Street. Republicans just want fair and neutral labor laws.

Instead of working together to create a level playing field, Democrats want to pass a union wish list bill to build on what they claim is a historic surge in unionizing. But Democrats are cherry-picking data to sell the narrative that unions are on the rise. For example, Democrats will likely point out that Workers United has unionized more than 200 Starbucks locations, but they will fail to mention this is less than three percent of the company’s more than 9,000 wholly owned stores.

Also, not on the list of Democrat talking points is that only one out of 270 Apple stores have voted to unionize. They will also probably ignore the fact that the private sector union membership rate is the lowest it has ever been. Bottom line, Democrat claims that interest in unionization is on the rise is another drummed up narrative by the left-wing media and Democrat politicians.

If unions want to know why they do not appeal to workers, they need to take a long hard look in the mirror. Most unions spend a significant amount of their money on radical political activity—not advocating for workers. Further, union corruption has been a major issue, which previous administrations worked hard to tackle. Yet Democrats, who are in the pocket of Big Labor, continue to resist transparency measures that would keep workers informed on how their union dues are being spent.

Unions are relying on the Biden administration to twist the arms of workers into unionizing. President Biden, who promised to have the most pro-union administration in history, is complying. He established a Task Force on Worker Organizing and Empowerment to mobilize all federal agencies in his crusade to unionize as many workers as possible.

Many federal departments are taking this mandate seriously, especially the Department of Labor. For example, Labor Secretary Marty Walsh, a former union boss, marched in a picket line at a Kellogg’s plant in Lancaster, Pennsylvania, last October. Mr. Walsh apparently forgot that he is supposed to promote the interests of all workers, not act as an activist on behalf of unions.

Perhaps most egregious, the Biden administration is working to implement provisions of the PRO Act by executive fiat. The radical Pro-Union Bosses Act would ban right-to-work laws, forcing workers to pay union dues, even if they object to union representation. If the Democrats had their way, free choice would be a thing of the past in the American workforce.

It would also, among other things, undermine the independent contractor and franchise models by codifying the Obama-era job-killing joint-employer standard, and California’s disastrous ABC test.

To make matters worse for job creators and workers, the National Labor Relations Board (NLRB) is being used as the litigation arm of Big Labor. Instead of promoting fair labor practices, the NLRB is exhuming decades-old policies like the Joy Silk doctrine, which would allow unions to organize a workplace without

ever receiving majority support in a secret-ballot election. Replacing the secret ballot with a card-check system would open the door for intimidation and coercion of workers.

The Biden-appointed NLRB General Counsel is also challenging longstanding precedent regarding employers' right to educate workers on the downsides of union representation. This would dramatically infringe on an employers' freedom of speech and deprive workers of hearing both sides of the argument regarding unionization.

But to Democrats there is only one choice—unionize or bust.

Additionally, the NLRB has yet to answer for its alleged collusion with Workers United during a recent Starbucks union election. According to an NLRB whistleblower, certain NLRB officials colluded with agents of Workers United to arrange for unobserved, in-person voting in NLRB offices during NLRB-ordered mail-ballot elections. NLRB officials also shared voting data with Workers United to increase turnout among pro-union employees. Republicans will continue to demand answers and accountability from the NLRB, and I encourage my Democrat colleagues to do the same.

Democrats are beholden to union bosses. Unions send huge portions of their worker-funded war chests to Democrat political organizations, campaigns, and left-wing organizations. It's no wonder Democrats kowtow to union bosses.

Yet being pro-union does not mean being pro-worker, and in too many instances, workers and job creators are being harmed by unions. Republicans will continue to stand for a worker's right to choose."

Chairman SCOTT. Thank you. Thank you. I want to remind the members that this is a hybrid hearing. Pursuant to House Resolution 8 and the regulations thereto all microphones, both in the room and on the platform, will be kept muted as a general rule to avoid unnecessary background noise. Members and witnesses will be responsible for unmuting themselves when they are recognized to speak, or when they wish to seek recognition.

When members wish to speak or seek recognition, they should unmute themselves and allow for a pause of 2 seconds to ensure the microphone picks up their speech. I would also ask that members identify themselves before they speak. Members who are participating in person should not be logged onto the remote platform in order to avoid feedback, echoes, and distortion.

Members participating remotely will be considered present in the proceeding when they are visible on camera and be considered not present when they are not visible on camera. The only exception is if you are experiencing technical difficulty and inform the staff, any staff of such difficulty.

If you are experiencing technical difficulties during the hearing, you should stay connected on the platform, and make sure you are muted, and use your phone to immediately contact the committee's IT director whose number was provided in advance. Should the Chair need to step away for any reason, another majority member is hereby authorized to assume the gavel in the Chair's absence.

In order to ensure the Committee's 5-minute rule is adhered to, staff will be keeping track of time using the Committee's digital timer on the remote platform. For members participating in person the timer will be broadcast in the Committee room on the television monitor as part of the platform gallery view, and visible in its own thumbnail window.

The Committee room timer will not be in use for members participating remotely. This will be visible in gallery view in its own thumbnail window on a remote platform. Members are asked to wrap up promptly when your time is expired. Finally, the recent

guidance from the Office of Attending Physician has made mask wearing optional at this time, but please know that there are people who are immuno-compromised, so you should take their situation in consideration.

Pursuant to Committee Rule 8(c), opening statements are limited to the Chair and the Ranking Member, and so those statements have been made, and without objection all other members who wish to insert written statements into the record may do so by submitting them to the Committee Clerk by 5 p.m. on September 28, hopefully in Microsoft Word format.

We will now hear from our witnesses. Dr. Kate Bronfenbrenner is the Senior Lecturer and Director of Labor Education Research at the Cornell University School of Industrial and Labor Relations.

Mark Pearce is the former Chairman of the National Labor Relations Board and Executive Director and visiting professor at Georgetown Law Center's Workers' Rights Institute.

Roger G. King is the Senior Labor and Employment Counsel for the H.R. Policy Association. Ms. Michelle Eisen is a Barista at Starbucks at their Elmwood Avenue location in Buffalo, New York.

We appreciate the witnesses for participating today. We look forward to your testimony. Let me remind the witnesses that your statements will appear in full in the hearing record pursuant to Committee Rule 8(d) of the Committee practice, each of you is asked to limit your oral presentation to a 5-minute summary of your written statement.

Before you begin your testimony, please remember to unmute your microphone. During your testimony, staff will be keeping track of time, and the timer will be visible at the witness table. Please be attentive to time, and wrap up when your time is over, and remute your microphone.

We will let all of the witnesses make their presentations before we move to member questions. When answering a question please remember to unmute your microphone. Witnesses are aware of their responsibility to provide accurate information to the community and therefore we will proceed directly to their testimony. We will first recognize Dr. Bronfenbrenner. You are recognized for 5 minutes.

STATEMENT OF DR. KATE BRONFENBRENNER, DIRECTOR OF LABOR EDUCATION RESEARCH AND SENIOR LECTURER, CORNELL UNIVERSITY SCHOOL OF INDUSTRIAL AND LABOR RELATIONS, ITHACA, NEW YORK.

Ms. BRONFENBRENNER. Thank you, Chairman Scott, Ranking Member Foxx, and members of the Committee for this opportunity to testify before you today about the current wave of union organization and employer opposition. The findings I present today are the latest in a series of studies I have done over the past 30 years on employer opposition to organizing under the National Labor Relations Act.

These studies have found that the majority of employers engage in aggressive opposition to organizing, including coercive and retaliatory practices such as threats of plant closure, interrogation, discharge, bribes, discipline, harassment, and surveillance. Employer opposition has grown in intensity and sophistication over time as

companies have globalized and restructured, and gained access to new tools to monitor and surveil their workers.

As already was mentioned, this is a pivotal moment for worker organizing. In the first half of Fiscal Year 2022, unions won 77 percent of elections, more than any year since 2000, and have organized twice as many workers in the first 6 months of this year as they did in the first 6 months of 2021.

New workers, previously seen as unorganizable, are organizing in retail, non-profits, communications, IT, such as Starbucks, Amazon, Trader Joe's, the Art Institute of Chicago, the Audubon Society, the New York Times and Act Division.

Public approval is at the highest it has been since 1965 at 71 percent. The majority of workers say they would vote for a union if given the opportunity, yet union density remains at 6.1 percent in the private sector, and 10.3 percent overall.

U.S. employers have spent decades protecting an anti-union strategy that works, so much so that unions are shifting their organizing away from traditional sectors in manufacturing, construction and transportation, to front-facing industries and firms in service, retail, and communications, where more coercive and retaliatory tactics may backfire.

They are choosing tactics where they have the power to restrain an employer campaign, so much so that in 13 percent of the sample, employers did not run any campaign at all, primarily because neutrality agreements were negotiated. While employers may adjust the permeation and combination of tactics they use, essential elements remain the same.

Our data show that 74 percent use management consultants, 85 percent use captive audience meetings, 71 percent use supervisor one-on-ones, 44 percent interrogate, 32 percent threaten, 45 percent engage in plant closing threats, 49 percent promote union activists out of the unit, and 16 percent discharge union activists. 23 percent bought or engaged in bribes, and 36 percent used surveillance.

This does not stop with the election. Employer opposition continues to the first contract campaign so that only 38 percent have a first contract within a year, and a third still do not have a contract 3 years after the election. For all of these reasons, it is imperative that there be labor law reform.

Most important is full funding for the NLRB. With the surge of elections and a 16 percent increase in unfair labor practices, the National Labor Relations Board is stretched to the absolute bare bones. When they do not have resources, workers have a delay in their ability to organize.

Second, there must be the passage of the PRO Act and all its components, including outlying captive audience meetings where intimidation and coercion occurs, establishing punitive penalties for labor law violations, with super compounding penalties for multiple labor law violators, and forced first contract arbitration when parties are unable to negotiate a first agreement.

Authorize card check certification and provide for automatic certification and bargaining order in cases where there are multiple serious unfair labor practices. Absent these kind of changes, workers will not be able to exercise their rights to organize in collective

bargaining under the act, which has an adverse effect on our entire society. Thank you very much.

[The prepared statement of Ms. Bronfenbrenner follows:]

Testimony before the United States House Committee on Education and Labor
In Solidarity: Removing Barriers to Organizing
Dr. Kate Bronfenbrenner
Cornell School of Industrial and Labor Relation
September 14, 2022¹

Thank you, Chairman Scott, Ranking Member Foxx, and Members of the Committee for this opportunity to testify before you today about the current wave of worker organizing under the National Labor Relations Act (NLRA) and employer anti-union campaigns. I have recently completed the preliminary findings from my most recent research on the changing climate of organizing, which sheds insight on these recent developments.

My name is Kate Bronfenbrenner. I am a senior lecturer and the Director of Labor Education Research at the New York State School of Industrial Relations, in Ithaca, NY. The research findings I will present today are from the latest in a series of studies I have conducted on employer opposition in private and public sector organizing since 1986, including [No Holds Barred—The Intensification of Employer Opposition to Organizing](#), in 2009 (Bronfenbrenner K. , 1994; 2000; 2004; 2009). The 2009 study found that the majority of employers engaged in coercive and retaliatory practices such as threats of plant closure, interrogation, discharge, bribes, discipline, harassment, surveillance, and alteration of benefits and conditions and that employer opposition was intensifying over time. Employer campaigns grew more aggressive and sophisticated, as companies globalized and restructured, and gained access to new tools to monitor and surveil their workers. Many of you have quoted these findings in your discussions of labor law reform. This year I decided to update my research because of the political, economic, and cultural changes that have taken place in this country since I conducted that research and the importance of the findings for current debates on labor law reform.

The data I present to you today are the first cut descriptive findings of my new study on company characteristics and employer opposition. These data provide insight on whether and how employer opposition to unions has changed in the last two decades, how those changes have impacted union organizing and the implications for labor policy. The new study is a comprehensive analysis of employer behavior in representation elections supervised by the

¹ This study is a project of the Worker Empowerment Research Network (WERN), funded by grants from the WorkRise and Omidyar Foundations and the George Levy Award. The research team includes graduate and undergraduate researchers Ketchel Carey, Pranathi Charasala, Derrick Eckstein, Katy Habr, Tom Hegeman, Melissa Ruiz Hernandez, Natalie McCormick, George Millette, Tyler Pearce, Alejandra Quintero, Anders Rhodin, and Victor Yengle. For further information please contact Dr. Kate Bronfenbrenner at kib23@cornell.edu.

National Labor Relations Board (NLRB), on a random sample of 286 NLRB elections that occurred between January 1, 2016, and June 30, 2021.²

Organizing under the NLRB in 2022

We are at a pivotal moment for worker organizing. In July, the NLRB reported that union representation petitions increased 58 percent from October 1, 2021, to June 30, 2022—up to 1892, from 1,197 during the first nine months of NLRB fiscal year (FY) 2021. By the end of May, FY2022 petitions outstripped the total number of petitions filed by unions in all of FY2021. Unfair labor practices increased by 16 percent during this same period, up from 11,082 to 12,819 (NLRB, 2022). With a win rate of 77 percent in the first six months of 2022, unions are winning more elections than they have in any year since 2000 and organized twice as many workers between January and June 2022 as they did in the first six months of 2021 (Mola, 2022).

Although a decade ago there were more elections and more eligible voters participating in the election, only 62 percent of those who voted in NLRB certification elections were organized, because win rates were lower, particularly in larger units.

Table 1: NLRB Election Statistics, 2011-22

Year	Number of elections	Number of wins	Number of losses	Percent union wins	Number of eligible voters	Number in union wins	Percent of workers organized
2011	1318	870	448	66%	95,810	59,577	62%
2016	1299	935	364	72%	73,982	36,716	50%
2021	1013	764	259	75%	51,019	36,942	72%
The first half of 2022	837	641	196	77%	54,260	43,150	80%

(NLRB, 2022, 2016, 2011)

² The data for this study originate from an in-depth survey of 286 lead organizers, supplemented by unfair labor practice documents and online company research from an initial random sample of 753 NLRB certification elections that took place between January 1, 2016 and June 30, 2021, stratified by union and win rate. The survey return rate was 47 percent for the 610 cases in the sample for which we were able to attain organizer contact information from the union or through our own research. The final sample is representative by union, win-rate, and industry. The results today are preliminary. We still have a few more surveys coming in and will be supplementing the survey data with unfair labor practice document analysis.

The organizing and strike activity occurs at a time when public approval for unions has grown to 71 percent, the highest since 1965. Notably, the approval rate is above 70 percent for all age groups, both white workers and workers of color, and as high as 54 percent for those who identify as conservative (Gallup, 2022).

Recent organizing growth has occurred across a variety of industries, with headline campaigns in giant retail firms, previously thought unorganizable such as Amazon, Chipotle, Starbucks, Dollar General, Trader Joes, REI, and Apple, (Brooks, 2022; Mola, 2022). Since December 2021, Starbucks workers have successfully organized more than 200 stores across the US, with more than 100 petitions still pending. In May, the NLRB issued a complaint against Starbucks, for twenty-nine unfair labor practice violations including more than 200 labor law violations, and there have been many more since (Bloomberg Law, 2022; Rogers, 2022). Retail workers are voting for unionization despite aggressive anti-union tactics such as discharging activists, captive audience meetings, surveillance, threats of wage and benefit cuts, and, in the case of Starbucks, shutting down newly organized stores. Starbucks and Amazon have gone so far as challenging the legitimacy of the NLRB, delaying bargaining of the first contract, while they appeal election certifications through the Board and the courts. (Sainoto, 2022; Sheiber, 2022)

The surge in organizing activity has been fueled by austerity, declining job quality, the COVID-19 pandemic, and the widening gap between worker wages and benefits and corporate profits. As “essential workers” faced the threat of exposure from COVID-19, without adequate PPE, paid leave time, health care, and childcare; interest in unions began to rise. The pandemic, combined with skyrocketing corporate profits, and an increasingly tight labor market created a “hot shop” condition for union organizing, where unorganized workers are contacting unions asking for support in their organizing efforts (Maffie 2022). Unorganized workers have also been inspired by the ongoing strike wave and the resultant bargaining gains in wages, safety and health, and other working conditions from companies whose profits soared during the pandemic (Greenhouse 2021).

Yet even with the surge, organizing gains remain insufficient to stem the tide of union decline and the widening “representation gap” between the percentage of workers who seek union representation and those who can organize. Although recent studies and polls have found that as many as 52 percent of unorganized workers would vote for a union if an election was held at their workplace, and 59 percent would support an increase in unionization at their employer, union density remains only 6.1 percent in the private sector and 10.3 overall (Hertel-Fernandez, 2018; Ewell, 2022; BLS, 2022).

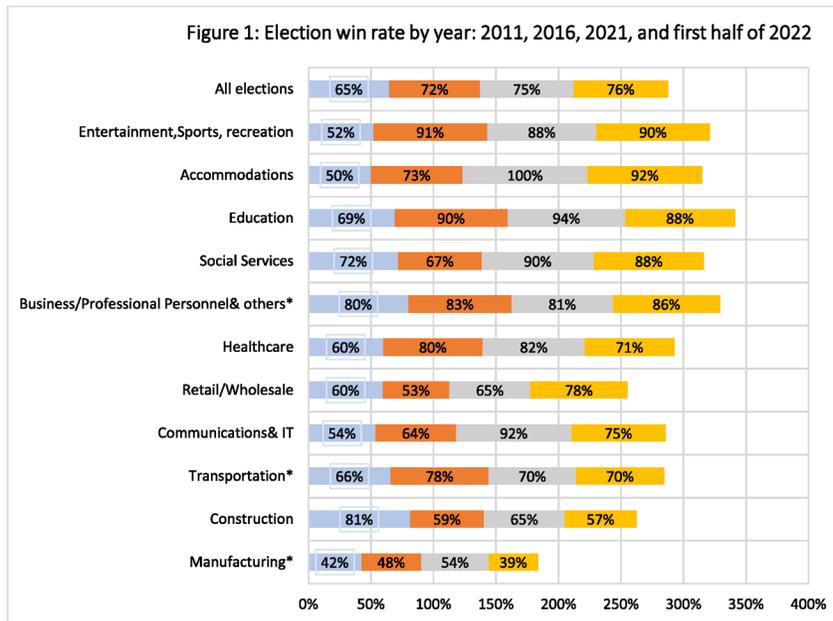
Differences in organizing growth by industry

Organizing growth also varies across industries. Table 1 shows how unions have been shifting their organizing activity over the last decade. The percentage of elections in labor's traditional sectors of manufacturing, construction, and transportation dropped by more than 50 percent. Meanwhile, the percentage of elections increased in retail/wholesale, social services, and education. The growth in social services is in part due to increased focus on museums and grant-funded organizations, particularly by AFSCME and OPEIU. There were only three elections in museums in 2011 and 2016. That number increased to fifteen in 2021, and eight in the first half of 2022. Similarly, the number of campaigns in grant-funded non-profits and other non-governmental organizations (under social services) went from five in 2011 to twenty-nine in 2021, and eleven in the first half of 2022. Due to the burst of organizing at Starbucks, retail organizing surpassed health care, which dominated organizing up until the end of 2021.

Industry	2011		2016		2021		First half 2022	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Manufacturing and mining	177	13%	163	12%	111	11%	51	6%
Construction	129	9%	56	4%	54	5%	28	3%
Transportation, warehousing, & utilities	225	17%	204	15%	156	15%	81	10%
Communications & IT	26	2%	14	1%	26	3%	12	1%
Retail/Wholesale	126	9%	154	11%	148	15%	355	42%
Healthcare	303	22%	261	19%	181	18%	105	12%
Business, professional & other services	278	20%	353	26%	221	22%	118	14%
Social Services	32	2%	45	3%	59	6%	33	4%
Education	29	2%	52	4%	34	3%	32	4%
Accommodations	12	1%	45	3%	13	1%	12	1%
Entertainment, sports, & recreation	25	2%	22	2%	16	2%	21	2%
Total elections	1362	100%	1369	100%	992	100%	849	100%

Elections in retail/wholesale jumped from 148 to 355 in the first half of 2022, most of which were Starbucks elections. In education and accommodations, the number of workers organized in the first half of 2022 is close to the number organized during all of 2021.

For social services and communications and IT, the growth began in 2021 and continued through the first half of this year. Wins in these sectors include victories in museums and other non-profits such as the Art Institute of Chicago, Minnesota Council of Nonprofits, and the Audubon Society (Robinson, 2021; Channick, 2022; CWA, 2021; Bloomberg Law, 2022). In the media, more than 200 firms have been organized since 2015. While more than half of those have been through voluntary recognition, card check, and community monitored elections; NLRB elections in digital media are also on the rise, ranging from the New York Times and MSNBC to Thrillist and Raven/Activision (Fu, 2021; Liao, 2022; Jamieson, 2022).



Industry win rates also have changed over time. As shown in Figure 1, although the overall win rates and the win rate for most industries have been gradually increasing by a few percentage points a year, win rates dropped in manufacturing, construction, health care, and communications and IT. Win rates average above 90 percent in museums and other small non-profits.

Company characteristics

While the corporate structure and characteristics of companies being organized are similar to those we found in our previous research, there have also been some notable changes.

As described in Table 3, NLRB campaigns continue to be concentrated in large, profitable, US-based firms (60 percent) that are subsidiaries of large parent companies (59 percent), with all sites and operations in the US (60 percent). Sixteen percent have annual revenue above \$5 billion. The list of parent companies includes some of the world's most well-known firms such as Compass Group, Sodexo, MGM, HNA, Disney, Cargill, Magna, HCA, NBC Universal, and Comcast.

The percent of foreign-owned companies increased from 11 percent in the mid-1980s to 15 percent in 2021, reflecting the growing number of foreign companies investing in US firms, particularly from Europe and the UK, such as Johnsons Control, Suez, Sodexo, and First Group. The greatest growth was in the percent of elections in non-profit firms, which doubled in the last decade, from 13 percent to 28 percent, and in units where the petitioning union already represents workers at the same location. The gains in the non-profit sector reflect expanded organizing efforts in museums, education, and social services. Win rates for both non-profits and other units organized at the same location, average 86 percent. The lowest win rates are among more mobile and global employers, such as manufacturing companies and multinational firms, where the threat of capital mobility has been shown to have a significant impact on election outcomes (Bronfenbrenner 2000). In contrast, union win rates are much higher in non-profits and companies with all sites and operations in the US. The findings suggest, that as corporate structure changes, unions are shifting their focus towards the kinds of companies

they believe they will have the most success in organizing, and moving away from those that are the most challenging.

Table 3: Corporate structure and company characteristics over time

	NLRB 1986-1987		NLRB 1993-1995		NLRB 1999-2003		NLRB 2016-2021	
	Percent or mean of elections	Win Rate	Percent or mean of elections	Win Rate	Percent or mean of elections	Win Rate	Percent or mean of elections	Win Rate
<i>Manufacturing</i>	.66	.39	.38	.27	.35	.40	.17	.36
<i>A subsidiary of a larger parent company</i>	.55	.42	.56	.39	.60	.46	.59	.65
<i>Non-profit company</i>	.12	0.50	.13	.64	.25	.61	.28	.86
<i>Publicly traded for profit</i>	--	--	.36	.44	.37	.64	.36	.62
<i>Privately held for profit</i>	--	--	.39	.47	.38	.60	.39	.54
<i>All sites and operations in the US</i>	--	--	.52	.39	.61	.54	.60	.75
<i>US-based multinational</i>	--	--	.26	.33	.28	.40	.24	.62
<i>Foreign-based multinationals</i>	--	--	.11	.30	.11	.49	.15	.54
<i>Any other organized sites or locations</i>	.46	0.49	.47	.50	.48	.50	.47	.76
<i>Other organized units at the same site</i>	--	--	.12	.48	.11	.57	.25	.86
<i>Other organized units at different sites</i>	--	--	.42	.40	.43	.43	.37	.71
<i>Annual revenue \$5 bill or more</i>	--	--	.32	.29	.16	.51	.16	.46
<i>Net income \$100 million or more</i>	--	--	--	--	.22	.31	.40	.59
<i>Ownership change before the campaign</i>	.22	0.51	--	--	.12	.58	.18	.79
<i>Pre-campaign employee involvement</i>	.07	0.22	.25	.30	.31	.44	.25	.79
<i>Number of employees in the parent company</i>	--	--		35843.0	35082.4		32565.9	

Bronfenbrenner 1997; 1994; 2009³

Employer opposition

Contemporary employer antiunion campaigns originated in the 1970 and 1980s as the management consultants assembled the key elements of the antiunion tool kit that we are so familiar with today: threats, interrogation, promises, intimidation, coercion, retaliation, communication, and delay. In the years since, employer campaigns have intensified and become much more sophisticated, adapting to a changing political, economic, financial, and

³ Differences in data presented for each of the four time periods are due to differences in data collected in each of the four studies.

regulatory landscape. As unions develop new strategies, employers adapt as well, hoping to blunt the effect of the union initiatives.

Today, as unions organize in new industries with new kinds of employers we see a bifurcation in employer responses. A majority of firms continue to mount aggressive anti-union campaigns, while a smaller number do little or no campaigning against the union. This latter group is concentrated in non-profits, the media, and other front-facing businesses where customers and the community can exert more leverage to restrain an anti-union campaign. As shown in Table 4(a), the percentage of campaigns with neutrality agreements tripled in the last two decades, from 3 percent to 9 percent, while the number of employers who engaged in no opposition, increased from 3 percent to 13 percent. That is not to say there are not non-profits that aggressively oppose unions, particularly in health care and higher education, but rather that unions have had more success in restraining employer opposition in the non-profit sector than in the for-profit sector. Win rates averaged as high as 93 percent for units with neutrality agreements and 86 percent for those that did not mount a campaign. To better assess the impact of this trend, in Tables 4a-d we compare the findings for all elections, including those with no employer opposition, with the elections where the employer mounted a campaign.

Threats, Interrogation, Promises, and Surveillance

There are several distinct stages to a union organizing campaign. First, there is the initial period where the first contact is made between the workers and the union, leaders are identified and an organizing committee is established. The second phase is when the union, through the organizing committee, reaches out to the bargaining unit members and gradually builds up support until the workers are ready to petition for an election. The third phase is the period between the date the petition is filed and the election date. This is when both the union and employer campaigns are most out in the open. Finally, the fourth phase is the period between the date of election and the date of certification, which can include waiting for election objections, ULPs, and possible rerun elections to be resolved (Bronfenbrenner 2009, 2014).

Table 4(a): Employer opposition and election outcome: Threats, interrogation, and promises						
	1999-2003		2016-2021		2016-2021	
					Elections with employer	
	All Elections		All Elections		campaign	
	Proportion of elections	Win Rate ⁴	Proportion of elections	Win rate	Proportion of elections	Win rate
Agreed to neutrality	.03	.82(.48)	.09	.93 (.66)	.06	.87(.64)
No employer campaign	.03	.72(.48)	.13	.90 (.65)	.00	.83(.65)
Employer mounted a campaign	.97	.48(.72)	.87	.65 (.90)	1.00	.65(.00)
Threats and Interrogation						
Hired management consultant	.75	.45 (.63)	.65	.60 (.85)	.74	.60(.82)
Held captive audience meetings	.89	.47 (.72)	.75	.61 (.90)	.85	.60(.82)
Number of meetings	10.36	-	15.42	---	.15.42	--)
More than 5 Meetings	.53	.47 (.48)	.38	.57 (.76)	.43	.61(.89)
Held Supervisor One-on-Ones	.77	.48 (.57)	.62	.62 (.79)	.71	.62(.73)
One-on-Ones at Least Weekly	.66	.47 (.54)	.44	.56 (.79)	.50	.56(.75)
Used them to interrogate workers	.63	.48 (.57)	.39	.61 (.73)	.44	.61(.69)
Used them to threaten workers	.54	.49 (.52)	.28	.60 (.72)	.32	.60(.68)
Threatened cuts in benefits or wages	.47	.49 (.50)	.27	.58 (.72)	.30	.58(.67)
Threatened full or partial closure	.57	.45 (.53)	.39	.63 (.72)	.45	.63(.68)
Closed plant after the election	.15	.74 (.79)	.03	.50 (.69)	.03	.50(.69)
Threatened to outsource work	.20	.51 (.73)	.20	.51(.73)	.23	.51(.70)
Employer threatened to file for bankruptcy	.03	.69 (.49)	.01	.75 (.68)	.02	.75(.65)
Filed for bankruptcy	.00	.33 (.50)	.00	.00 (.69)	.00	.00(.66)
Threatened to report workers to INS	.07	.34 (.51)	.04	.17 (.71)	.05	.17(.68)
Referred workers to INS	.01	.17 (.50)	.01	.00 (.69)	.01	.00(.66)
Made random document checks	.03	.56 (.49)	.02	.00 (.70)	.02	.00(.67)
Promises and improvements						
Made positive personnel changes	.27	.38 (.52)	.22	.57 (.72)	.25	.57(.68)
Made promises of improvement	.46	.47 (.51)	.43	.60 (.75)	.49	.60(.71)
Granted unscheduled raises	.18	.42 (.56)	.16	.53 (.72)	.19	.53(.68)
Distributed union promise coupon books	.22	.45 (.51)	.09	.46 (.71)	.10	.46(.68)
Distributed pay stubs with dues deducted	.23	.43 (.52)	.10	.48 (.71)	.12	.48(.68)
Held raffles relating to union dues	.03	.35 (.50)	.01	.25 (.69)	15.42	.25(.66)
Held company social events	.16	.48 (.50)	.08	.50 (.70)	.10	.50(.67)
Upgraded health & safety conditions	.01	.57 (.50)	.06	.63 (.69)	.06	.63(.66)

Threats, interrogation, promises of improvement, and surveillance are the building blocks of employer anti-union campaigns, starting in the earliest phases of the campaign before the filing

⁴ Numbers in the tables in parenthesis are the win rate when the tactic or characteristic is not present.

of the petition, and continuing through the election and certification. Doled out by managers and supervisors in captive audience meetings, supervisor one-on-ones, letters, leaflets, videos, billboards, social media, and more, by management consultants, managers, supervisors, anti-union committee members, public officials, and community and business leaders—they are effective, albeit illegal, vehicles to intimidate and coerce workers from exercising their rights to organize (Bronfenbrenner K. , 2009).

Our new data suggest that these tactics continue to be a pervasive and effective element of employer anti-union strategies. In those elections where the employer mounted a campaign, 74 percent of elections utilized one or more management consultants to lead the campaign. Eighty-five percent of the employers held mandatory captive audience meetings, where workers were forced to listen to management anti-union messages during work time. We found an average of 16 captive meetings per campaign, up from ten meetings two decades ago. Seventy-one percent used supervisor one-on-one meetings with workers. Half held them at least weekly. Forty-four percent used supervisor meetings to interrogate workers about their union activity and just under a third used them to threaten workers. if they supported the union.

Employers threatened workers in thirty percent of elections with loss of wages and benefits, 40 percent with full or partial plant closings, and 23 percent with outsourcing. Threat rate rates are lower than they were 20 years ago. This is not surprising given the shift in organizing to firms with all sites and operations in the US, away from more mobile industries such as manufacturing to less mobile firms in retail, education, and social services, with director worker-customer engagement.

In the early 2000s, employers responded to increased organizing activity by putting more emphasis on threats and retaliation, moving away from tactics such as promises of improvement and promotion of union activists (Bronfenbrenner, 2009). Today as unions shift into new industries, employers are once again embracing softer tactics that are less disturbing

to customers and funders. These include positive personnel changes (25 percent), promises of improvement (25 percent), unscheduled raises (19 percent), company social events (10 percent), and upgrading health and safety (6 percent) are at the same levels or slightly higher than they were in the 2000s. Except for threats of bankruptcy, all of these tactics are associated with win rates ten to forty points lower than in campaigns where they are not used.

Surveillance

Employer use of surveillance more than doubled, going from 14 percent to 32 percent of all elections and 36 percent of elections where the employer mounted a campaign.

Table 4(b) Employer opposition and election outcome: Surveillance						
	1999-2003		2016-2021		2016-2021	
	All Elections		All Elections		Elections with employer campaign	
	Proportion of elections	Win Rate*	Proportion of elections	Win rate	Proportion of elections	Win rate
All types of surveillance	.14		.32	.59 (.73)	.36	.56(.68)
Surveilled workers' social media	NA		.13	.63(.69)	.14	.63(.66)
Surveilled workers' phones and key cards	NA		.04	.60 (.69)	.04	.60(.66)
Surveilled workers using cameras	NA		.18	.65 (.69)	.20	.65(.66)
			.00			
Used electronic surveillance	NA	11		.61(.69)	.12	.59(.69)
Employee key cards			.05	.50(.69)	.06	.50(.66)
Employee ID badges			.05	.57(.69)	.06	.57(.66)
Employee phones or app technologies			.03	.79(.68)	.04	.77(.65)
Computer log-in authentication			.03	.86(.68)	.04	.89(.65)
Employer computer or phones			.02	.66(.68)	.03	.86(.64)
Searches upon exits and entry			.02	.33(.69)	.02	.33(.66)
Worker footsteps or movements			.03	.75(.68)	.03	.75(.65)
Wearable devices that monitor speed			.01	1.00(.68)	.01	1.00(.65)
GPS technology that monitors the location			.02		.03	
				.43(.69)		.43(.66)

The increase in workplace surveillance is likely a consequence of developments in electronic surveillance and the widespread use of social media. Fourteen percent of employers who mounted campaigns surveilled social media, and 20 percent used cameras to spy on their employees. Twelve percent used a combination of electronic surveillance techniques such as employee key cards, ID badges, phone and computer apps, GPS location devices, and tracking of movements, speed, and exit and entry. Given the ability of firms to use surveillance without the knowledge of workers or the union, it is likely that these statistics greatly undercount the use of surveillance.

	1999-2003		2016-2021		2016-2021	
	All Elections		All Elections		Elections with employer campaign	
	Proportion of elections	Win Rate*	Proportion of elections	Win rate	Proportion of elections	Win rate
Discharged Union Activists	.34	.54 (.47)	.14	.54 (.71)	.16	.54(.68)
Number Discharged	2.38	--	3.66	---	3.66	---
Other Harassment and Discipline of Union Activists	.41	.49 (.50)	.25	.61 (.71)	.28	.61(.67)
Promoted pro-Union activists	.11	.38 (.51)	.06	.50 (.70)	.07	.50(.67)
Transferred activists out of the unit	.05	.58 (.49)	.03	.56 (.69)	.04	.57(.66)
Made unilateral changes	.22	.48 (.50)	.15	.57 (.71)	.18	.57(.67)
Tried to infiltrate the organizing committee	.28	.44 (.51)	.16	.38 (.75)	.19	.36(.71)
Used guards, security fencing, or cameras	.14	.49 (.50)	.07	.57 (.69)	.08	.57(.66)
Brought police into the workplace	.21	.46 (.51)	.08	.33 (.72)	.10	.33(.69)
Employer instigated violence and blamed the union	.07	.49 (.50)	.02	.80 (.68)	.02	.80(.65)
Used bribes and special favors	.22	.49 (.50)	.20	.56 (.72)	.23	.56(.58)
Assisted anti-union committee	.30	.40 (.54)	.25	.47 (.76)	.28	.47(.52)
The number on the antiunion committee	NA	--	9.65	--	16	--
Downgraded health & safety conditions	.07	.34 (.51)	.01	.50 (.69)	.01	.50(.66)
Laid-off bargaining unit members	.03	.77 (.49)	.05	.85 (.68)	.05	.85(.64)
Number laid off	31.73	-	12.55	-	12.55	-
Contracted out bargaining unit work	.41	.39 (.57)	.02	.80 (.68)	.02	.80(.65)
Number of jobs contracted out	37.50	-	15.67	-	15.67	-
Employers used 9/11 or national security	.03	.59 (.49)	0.01	.50 (.69)	.01	.50(.66)
Involved community leaders/ politicians	.06	.47 (.50)	.02	.00 (.70)	.02	.47 (.50)
The employer used an NLRB-like front group	.11	.54 (.49)	.13	.58 (.70)	.14	.54 (.49)
Filed ULP charges against the union	.03	.77 (.49)	.02	.40 (.69)	.02	.77 (.49)

Coercion and retaliation

Employers continue to try to thwart union organizing efforts through a combination of retaliatory and coercive actions such as discharges (16 percent), layoffs (5 percent), unilateral changes in conditions (18 percent), and transfers (4 percent), but at a much lower rate than in previous years. A small number of employers also continue to use more extreme tactics such as bringing police into the workplace (10 percent), using security guards, fencing and/or cameras (8 percent), instigating violence, and then blaming the union (2 percent).

As described in Table 4 c) above, these more coercive tactics are being used with less frequency than they were in previous years. The exception is bribes and special favors (23 percent), promoting union activists (7 percent), and assisting the anti-union committee (28 percent), which have remained constant.

Employer communications

Employers begin communicating their anti-union message from the earliest days of the organizing campaign, as soon as they are aware of any union activity in the workplace. Although most communications are in person-to-person at the workplace in supervisor one-on-ones and captive audience meetings, companies turn to a variety of other mediums to put out their message. Forty-three percent use email, 18 percent use texts, 3 percent use the internet or social media, and 19 percent used DVDs and videos. This compares to 1999-2003 when smartphones and social media were not yet ubiquitous among the workforce, and only 3 percent used email, and none of the Employers begin communicating their anti-union message from the earliest days of the organizing campaign, as soon as they are aware of any union activity in the workplace. Although most communications are in person-to-person at the workplace in supervisor one-on-ones and captive audience meetings, companies turn to a variety of other mediums to put out their message. Forty-three percent use email, 18 percent use texts, 3 percent use the internet or social media, and 19 percent used DVDs and videos. This compares to 1999-2003 when smartphones and social media campaigns used text messaging or social media. The email

appears to have supplanted more traditional methods of communication, as the use of media dropped from 12 percent to 5 percent. Fewer employers are mailing letters (39 percent) and leaflets (27 percent) than they did in the past.

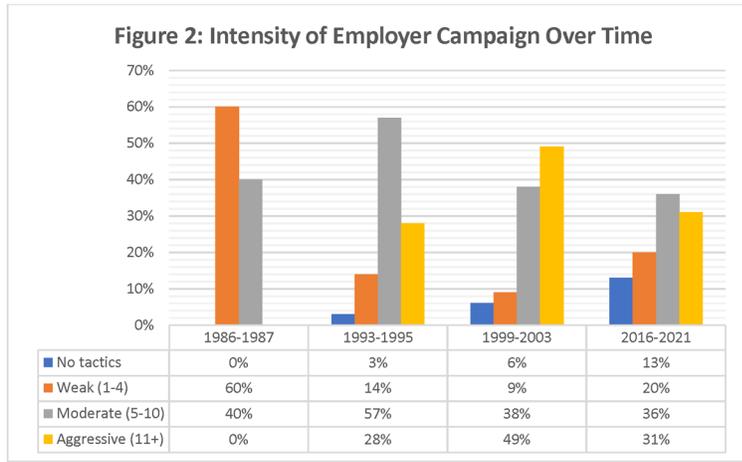
Table 4 d) Employer Oppositions: Communications

	1999-2003		2016-2021		2016-2021	
	All Elections		All Elections		Elections with employer campaign	
	Proportion of elections	Win Rate*	Proportion of elections	Win rate	Proportion of elections	Win rate
Employer communications with workers						
Used E-mail communications	.07	.49 (.50)	.38	.72 (.67)	.43	.72(.61)
Sent personal text messages	NA	--	.16	.76 (.67)	.18	.76(.63)
Used internet or social media	NA	--	.03	.71(.69)	.03	.74(.65)
Conducted home visits	NA	--	.01	.25 (.69)	.02	.25(.66)
Established employee involvement program	.15	.39(.50)	.55	.70	.09	.55(.66)
Ran media campaign	.12	.43(.51)	.05	.71 (.68)	.06	.71(.65)
Use free mass media	.03	.41 (.50)	.05	.69 (.69)	.05	.69(.65)
Purchased time on paid media	.05	.50 (.50)	.01	1.00 (.68)	.01	1.00(.65)
Used anti-union DVDs/videos/Internet	.41	.07 (.25)	.19	.56 (.72)	.22	.56(.68)
Mailed anti-union letters	.70	.46 (.59)	.39	.59 (.75)	.45	.59(.71)
Number of letters	6.54	-	18.43	-	18.43	-
More than 5 letters	.28	.49 (.45)	.07	.57 (.69)	.08	.57(.66)
Distributed anti-union leaflets	.74	.46 (.59)	.53	.60 (.78)	.60	.60(.73)
Number of leaflets	16.19	-	61.65	-	61.65	-
More than 5 leaflets	.61	.45 (.51)	.24	.53 (.73)	.27	.53(.70)

Campaign intensity over time

To better understand the evolution of employer opposition we also examined the change in campaign intensity over time. Previous research has shown that the probability of union success declines with each additional anti-union tactic used (Bronfenbrenner K. &, 2004; Bronfenbrenner K. , 1994). Figure 2 presents the number of tactics for each of our studies, showing aggressive (more than ten tactics), moderate (five to ten tactics), weak campaigns (one to five), as well as campaigns where the employer did not mount a campaign (no tactics).

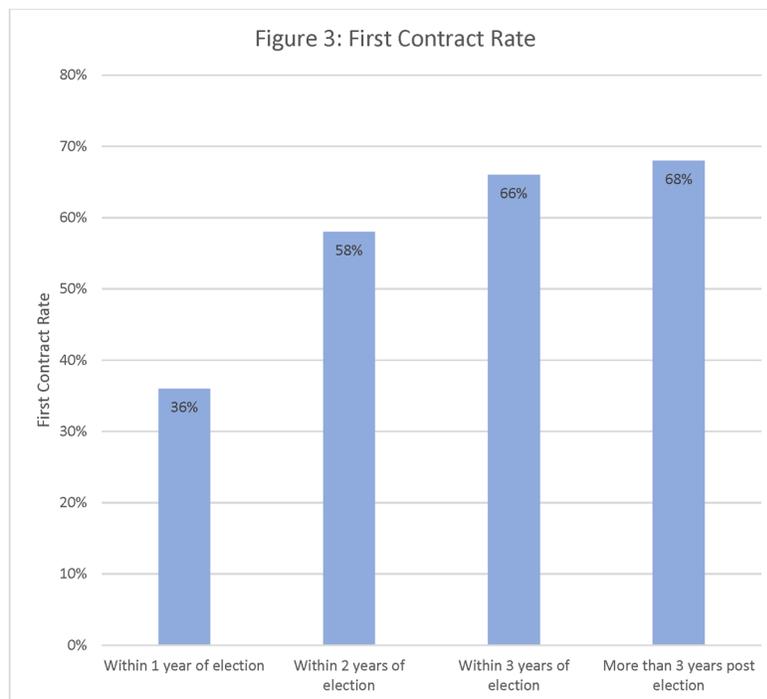
In the 1980s, 60 percent of employers ran weak campaigns, while 40 percent ran moderate campaigns. In subsequent decades, fewer employers ran moderate and weak campaigns and more ran aggressive campaigns or no campaigns at all. In our current study, these trends changed again. The percent running aggressive campaigns dropped to 31 percent and the percent running no or moderate campaigns increased to 13 percent and 20 percent, respectively. Again, this drop reflects unions shifting organizing targets away from industries and firms where employer opposition is highest.



First Contracts

Unions won 69 percent of the elections in our sample, but winning the election is only the first step of the organizing process. Election wins must be certified by the NLRB and then the parties must bargain a first agreement. As shown in Figure 3 below, only 36 percent of elections result in a first contract within one year, 56 percent gained contracts in two years, 66 percent in three years, and 68 percent in more than three years. That means that 44 percent of the workers who

voted in the election still do not have a union. First contract rates have dropped since our last study, down from 48 percent within a year, 63 percent within two years, 70 percent within three years, and 75 percent in more than three years. The longer bargaining time may be a consequence of the many construction, manufacturing, and transportation unions, responding to more aggressive anti-union campaigns in their sectors by moving to firms and industries where they had less bargaining power and influence to negotiate a first agreement.



Conclusion

US employers have spent decades perfecting an anti-union strategy that works, so much so that unions are shifting their organizing to industries and firms where more coercive and retaliatory

tactics may backfire. More unions are also choosing targets where they have the power to restrain the employer campaign, enough so that in 13 percent of the campaigns in our sample the employer did not run any campaign at all. While this may be a smart organizing strategy for unions, it means that workers in the industries and sectors where employer opposition is highest, are left waiting to organize.

While employers may adjust the permutations and combination of tactics in their toolkit to adapt to a changing economic or political environment and new union organizing targets, the essential elements remain the same. Our data show that in elections where the employer mounted a campaign:

- 74 percent brought in one or more management consultants to run the campaign
- 85 percent forced workers to attend mandatory captive audience meetings during work hours
- 71 percent had supervisors regularly talk with workers one-on-one about the campaign
- 44 percent used the meetings to interrogate workers about their or other's support for the union
- 32 percent used them to interrogate workers
- 45 percent threatened workers with plant closings, outsourcing, or contracting out of their work
- 49 percent made promises of improvement in return for not supporting the union
- 36 percent surveilled workers using cameras, social media, phones, and key cards
- 23 percent offered bribes to worker
- 16 percent discharged union activists
- 31 percent ran an aggressive campaign using ten or more tactics
- 42 percent of workers in units where the election was won by the union, still do not have a first contract four years after the election

Many of these tactics are blatant violations of labor law⁵ and are associated with win rates 10 to 40 percent lower than in elections where they are not used. Singly and in combination they effectively thwart workers' attempts to exercise their rights to organize under the NLRA. The current NLRB is making a courageous effort to restrain the most egregious violators but they have neither the funding nor the enforcement powers to curtail illegal behavior or deal with the influx of new petitions, elections, and first contract disputes.

Although unions have seen an increase in their NLRB election wins these past recent years, this does not mean workers in the US do not continue to face numerous major barriers to organizing at the hands of their employers. Because there is an influx of workers organizing, these protections must be strengthened by legally binding and true financial penalties for employers who are found to violate workers' rights to organize. For all of these reasons, Congress must pass the Pro-Act as swiftly as possible. The following labor reforms are imperative:

- Either outlaw captive audience meetings or allow unions equal time in meetings
- Establish punitive penalties for labor law violations, with super-compounding penalties for multiple labor law violations and violations of multiple labor and employment laws
- Enforce first contract arbitration where parties are unable to negotiate a first contract within a year of the election
- Provide full and adequate funding to the NLRB
- Authorize card certification
- Provide for automatic certification and bargaining order in cases when there are multiple serious Unfair Labor Practice violations

⁵ In a later version of this paper we will update our findings with data from our FOIA request on ULP violations.

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Chairman SCOTT. Thank you.
 Mr. Pearce.

STATEMENT OF MARK PEARCE, VISITING PROFESSOR/EXECUTIVE DIRECTOR WORKERS' RIGHTS INSTITUTE, GEORGETOWN LAW SCHOOL, SILVER SPRING, MARYLAND

Mr. PEARCE. Thank you, Chairman Scott and Ranking Member Foxx for the opportunity to testify before you today at this hearing In Solidarity: Removing Barriers to Organizing. This is a special privilege for me having spent practically half my 43-year career with the National Labor Relations Board, first as a lawyer, and then ultimately as a Board Member and Chairman.

The National Labor Relations Board is the agency charged with enforcing the foremost labor law in the country, the National Labor Relations Act, and the Act because of its inadequacy and its remedies—inferior remedies and other enforcement mechanisms—has become regrettably inadequate to deal with the labor relations issues of today.

Compounded with that is the inadequate funding that this agency has been given in order to effectively do its job. The National Labor Relations Act has among its fundamental purposes, the encouragement of collective bargaining, and the protection of workers' rights to organize.

The NLRA, also known as the Wagner Act, was passed by Congress in 1935 out of recognition that workers' rights were fundamental rights, and despite its many flaws the National Labor Relations Act was the first law to provide these protections—even with

the exclusion of agricultural and domestic workers, the majority of whom were people of color.

The substantial decrease in union density that we have experienced over time as compared to the one-third of the workforce that we experienced in the mid-40's has resulted in a vast inequality of labor and wealth in this country.

While union density has yet to show signs of improvement, perceptions and reception has decidedly changed. Last month a Gallup poll as was indicated in prior testimony shows 71 percent of Americans now approve of labor unions. These numbers are up from 64 percent before the pandemic, and is the highest Gallup has recorded since 1965.

There are many reasons for this. I will just mention a few that I think are most significant. During the pandemic corporate profits—corporations profited exponentially while workers were left behind. The shareholders of 22 of the Nation's best-known companies employed more than 7 million frontline workers in sectors spanning retail, delivery, fast food, hotels, entertainment.

It grew by 1.5 million dollars, and it made those shareholders that rich while 7 million workers received additional pay equally less than 2 percent of the shareholder's gain. More than half of these workers were non-white. The pandemic exposed workers' vulnerability and corporate insensitivity. Various industries like computer chip manufacturers, fast food and medical services experienced guidelines and directors that weakened protections for frontline workers during the height of the pandemic.

However, it is the meat packing industry that is the prime example. 59,000 workers at five of the companies controlling the lion's share of U.S. meat market were infected by the Coronavirus. During the pandemic's first year, at least 269 workers across these meat packing companies died of Coronavirus between February and March 2020.

That is in a workplace that is made up of over 50 percent immigrants. The previous administration's failure to provide essential workers with basic protections during the Coronavirus pandemic has underscored the importance of unions. The United Food and Commercial Workers secured increased pay and benefits for workers for more than a dozen meat packing and food processing companies, as well as premium pay for thousands of grocery store employees.

The UAW persuaded General Motors, Ford and Fiat, Chrysler to shut down operations for 2 weeks to slow the spread of the virus. They negotiated that the companies provide all workers with protective gear, including masks. Let us not forget the Communications Workers of America. We secured additional paid, sick, and family leave for unionized Verizon workers, including 26 weeks of paid sick leave for those diagnosed with COVID-19, and 8 weeks of paid leave for those caring for individuals medically diagnosed with that disease.

Chairman SCOTT. Mr. Pearce, your time is just about over.

Mr. PEARCE. Okay. Well, if I could end by saying this. Everything does not have to be that way. The Microsoft approach is indicative of that. They have had an agreement for card check recognition and giving the employees the opportunity to make free

choice unencumbered by employer influences. I thank you for this opportunity, and I look forward to your questions.
[The prepared statement of Mr. Pearce follows:]

TESTIMONY BEFORE THE
HOUSE COMMITTEE ON EDUCATION AND LABOR September 14, 2022

Mark Gaston Pearce

Former Chairman, National Labor Relations Board
Executive Director, Visiting Professor
Workers' Rights Institute, Georgetown Law Center

Thank you for this opportunity to testify before you today in this hearing "*In Solidarity: Removing Barriers to Organizing*." This is a special privilege for me because I have spent practically half of my forty-three-year career working with the National Labor Relations Board (NLRB or "the Board"), first as a lawyer, then ultimately as Board Member and Chairman.

The NLRB is the agency charged with enforcing the foremost labor law in the country, the National Labor Relations Act (NLRA or "the Act"). As the country is experiencing a surge in labor organizing, the NLRB continues to be hampered in effectively enforcing the NLRA because of the inadequacy of its remedies and other enforcement mechanisms, as well as inadequate funding to effectively do its job.

My first legal position after law school was in the NLRB's Buffalo, New York, Regional Office. For the better part of fifteen years I conducted representation elections for workers as an NLRB agent. I presided at administrative hearings and made determinations regarding objectionable conduct affecting an election, and, as a Field Attorney and District Trial Specialist, I investigated and prosecuted violations of the NLRA. I was privileged to represent workers and unions at two private law firms in Buffalo, one of which I was a founding partner. I was counsel to numerous local unions and several national unions in a variety of industries. In April of 2010, I was honored to be appointed by then-President Barack Obama to the NLRB as Board Member, and later, designated Chairman. I served in these positions for over eight years. I am now a director of the Workers' Rights Institute and visiting professor teaching labor related courses at Georgetown Law Center as well as a labor arbitrator.

As I will fully discuss in my testimony, although labor organizations are currently enjoying a resurgence in popularity, my experience has made me certain our current system is not working, and all workers need greater rights to organize and have a voice in their wages and working conditions.

The NLRA has, as among its fundamental purposes, the encouragement of collective bargaining and the protection of the worker's right to organize.

Congress passed the NLRA, also known as the Wagner Act, in 1935 out of recognition that workers' rights were fundamental rights. Despite its many flaws, the NLRA was the first law to provide these protections - even if not for all workers.

Section 1 of the NLRA declares that it shall be the policy of the United States to encourage "the practice and procedure of collective bargaining" and to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing,

for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”¹

The NLRA was established to achieve workplace democracy.

Historic employer practices of union-busting and refusal to bargain collectively agitated workers, leading to strikes and increased industrial unrest - and burdening commerce in the process. Two months ago was the 87th anniversary of the Wagner Act. The drafters of that profound piece of legislation believed that improved industrial democracy, achieved by codifying the rights to bargain collectively and organize for mutual aid or protection, would “eliminate the causes of certain substantial obstructions to the free flow of commerce.”² By encouraging accessible democratic processes in the workplace, the Wagner Act gave employees the power to influence the terms and conditions of their employment and address the inherent inequality in bargaining power between a sophisticated employer and an employee acting alone. The drafters intended for more democracy in the workplace to lead to less wage depression and increased wage-earner purchasing power, thereby eliminating (or at least softening) the underlying economic conditions that drove workers to strike and to violence in the pre-Wagner era.³

The non-economic impact of industrial democracy mattered too; the creation of private law through worker-led collective bargaining showed good faith government support of a central tenet of the labor movement—dignity at work.⁴ Industrial democracy is the means through which industrial peace may be achieved. Correspondingly, cases from different eras demonstrated how courts were using various manifestations of industrial democracy to improve the experiences of employees. The Supreme Court, when it upheld the establishment of the NLRA in *NLRB v. Jones and Laughlin Steel Corp.*,⁵ drew heavily from the Commerce Clause to uphold the constitutionality of the NLRA, while also acknowledging the plight of workers and Congress’ intent to use industrial democracy to protect employees.⁶

The Court’s protection of collective bargaining was a key signal that endorsed it as a means through which workers, who in this case were being discriminated against by an employer that disapproved of union association, could achieve an industrial workplace democracy.⁷ Decades later in 1962, the Supreme Court would recognize that under the NLRA, even employees with no union and no spokespersons still had voice through the exercise of the right to walk out of their workplace rather than be subjected to the bitterly cold conditions of an unheated Baltimore factory.⁸ Still later in 1984, the Court recognized an individual’s worker’s right to complain and assert the authority of the negotiated collective bargaining agreement, *the law of the workplace*,⁹ as justification for a refusal to drive an unsafe truck. See, *NLRB v. City Disposal Systems, Inc.*¹⁰ Through

¹ 29 U.S.C. § 151.

² 29 U.S.C. § 151.

³ 29 U.S.C. § 151. See also Kenneth G. Dau-Schmidt, et al., *Labor Law in the Contemporary Workforce* 40, 47 (3rd ed. 2019).

⁴ Dau-Schmidt, et al., at 48.

⁵ *NLRB v. Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁶ *Id.* at 33.

⁷ *Id.* at 22.

⁸ *NLRB v. Washington Aluminum*, 370 U.S. 9, 17 (1962).

⁹ www.jwj.org/collective-bargaining-101.

¹⁰ 465 U.S. 822 (1984).

collective-bargaining, workers had a voice and formed into unions, which built the middle class and in so doing, raised standards for all workers.

The NLRA has not been meaningfully amended since 1947 and is in dire need of reform.

Core provisions of the NLRA have been eroded by overly narrow NLRB and court interpretations which frustrate the Congressional intent behind the creation of the NLRA. The right to engage in protected concerted activity has withered away over decades of judicial attack and the policies of labor-hostile NLRB majorities. From 1980 until its recent 2018 temporary spike¹¹, the worker's statutory right to strike over working conditions and for mutual aid and protection has been curtailed almost to the point of ineffectiveness by policies that allow employers to permanently replace economic strikers without a showing of exigency.

The recent increase in organizing and other labor activism

A report authored by a group with which my co-panelist Kate Bronfenbrenner is associated, the Worker Empowerment Research Network, points out that during the decade following passage of the NLRA, union membership grew to approximately one-third of the workforce in the mid-1940s. This ten-year period was also associated with a rapid fall in income inequality and an increase in the labor share of national income. In subsequent years, private sector union membership declined slowly through the 1960s and precipitously since 1980—with 6.1% union density in 2021. The consequences of this has been an ever-widening wage gap between high- and middle-wage workers. For the “typical” or median worker, declining unionization translates to a loss of \$1.56 per hour worked, the equivalent of \$3,250 for a full-time, full-year worker.¹²

The most recent Gallup poll as of August 2022 reports that seventy-one percent of Americans now approve of labor unions. These numbers are up from sixty-four percent before the pandemic and is the highest Gallup has recorded on this measure since 1965.¹³

There are many factors that account for the increase in labor organizing, but I will focus my comments on a significant few.

During the pandemic, corporations profited while workers were left behind.

The Brookings Institution recently reported¹⁴ the pay practices and financial outcomes of the past two years, for twenty-two of the nation's best known companies, employing more than seven million frontline workers in sectors spanning retail, delivery, fast food, hotels, and entertainment—more than half of whom are nonwhite. The shareholders of these companies grew \$1.5 trillion richer, while their 7 million workers received additional pay equaling less than 2% of shareholders' gains. At seven of these companies, the wealth of 13 billionaire founders and heirs alone would have grown by nearly \$160 billion since the start of the pandemic—more than 12 times all extra pay to the 3.4 million U.S. workers those companies employed.

¹¹ <https://www.marketwatch.com/story/strikes-are-up-but-union-membership-is-down-and-that-could-be-a-good-sign-for-the-economy-2020-02-13>.

¹² [The enormous impact of eroded collective bargaining on wages Report • By Lawrence Mishel • April 8, 2021](#)

¹³ [U.S. Approval of Labor Unions at Highest Point Since 1965 - Gallup News, August 30, 2022](#)

¹⁴ [Profits and the pandemic: As shareholder wealth soared, workers were left behind by Molly Kinder, Katie Bach, and Laura Stalder Brookings Metro, Brookings Institution April 21, 2022](#)

Pandemic exposure of worker vulnerability and corporate insensitivity.

According to a report of a House subcommittee released in October of 2021, at least 59,000 workers at Tyson Foods, Smithfield Foods, JBS, Cargill, and National Beef—companies that control the lion's share of the U.S. meat market—were infected with the coronavirus during the pandemic's first year.¹⁵ "Workers are getting sick and dying, and the government agency that they have turned to for forty years to protect them from everything from chemicals in the workplace to unguarded machines to the H1N1 pandemic has said, 'Sorry, you're on your own,'" said Debbie Berkowitz, a former top OSHA policy adviser and now a fellow at the Kalmanovitz Initiative at Georgetown University.¹⁶

The disparate impact on immigrants and people of color, in particular, has been huge. According to the Nebraska Department of Health and Human Services, Hispanics accounted for sixty percent of COVID-19 cases in the summer of 2020 despite only comprising eleven percent of the overall state population. This was largely due to the spread in meatpacking plants, whose workforce is made up of over fifty percent immigrants.¹⁷ At least 269 workers across these meatpacking companies died of COVID-19 between February and March of 2020.¹⁸

Similarly, various industries like computer chip manufacturing, fast food, and medical services, experienced guidelines and directives that weakened protections for frontline workers during the height of the pandemic.¹⁹

Unions protected workers *during* the pandemic.

Gallup further reports that among union members, two in five (40%) rate their membership as "extremely important." Among the reasons why members rate the importance of their membership so high are the demonstrated protections labor unions provided for exempt and essential workers during critical points in the pandemic.

During the height of the pandemic, when jurisdictions were being fully or partially shut down, employers claiming exempt or essential status had the obligation under the National Labor Relations Act to meet and confer with the unions representing the workers and respond to relevant information requests. The unions had the right to ask for verification and negotiate safety conditions.

The previous administration's failure to provide essential workers with basic protections during the coronavirus pandemic has underscored the importance of unions. With a union, workers

¹⁵ Covid cases and deaths grossly underestimated among meatpackers, House investigation finds

¹⁶ <https://www.propublica.org/article/millions-of-essential-workers-are-being-left-out-of-covid-19-workplace-safety-protections-thanks-to-osha/3/11>

¹⁷ Testimony of Rose Godínez, Interim Legal Director, American Civil Liberties Union of Nebraska [HOW THE MEATPACKING INDUSTRY FAILED THE WORKERS WHO FEED AMERICA - HEARING BEFORE THE SELECT SUBCOMMITTEE ON THE CORONAVIRUS CRISIS OF THE COMMITTEE ON OVERSIGHT AND REFORM HOUSE OF REPRESENTATIVES OCTOBER 27, 2021](#)

¹⁸ *Id.*

¹⁹ *Id.*

have negotiated additional pay²⁰, health and safety measures,²¹ paid sick leave, and job preservation.²² Furthermore, unionized workers have felt more secure speaking out about the hazards they face.²³

On November 5, 2021, the U.S. Department of Labor issued an Emergency Temporary Standard to Protect Workers from Coronavirus (ETS). Five days later, the NLRB advised workers that employers still had certain bargaining obligations. Memorandum OM 22-03²⁴, informed the public that although an employer may be relieved of its duty to bargain where a specific change in terms and conditions of employment is statutorily mandated, the employer may not act unilaterally so long as it has some discretion in implementing those requirements.²⁵

Labor shortages, worker leverage, and the so-called “Striketober”

The Great Resignation

In 2021, according to the U.S. Bureau of Labor Statistics, over 47 million Americans voluntarily quit their jobs—an unprecedented mass exit from the workforce, spurred on by COVID-19, that is now widely being called “the Great Resignation.” But workers were not just resigning in the abstract or solely because of COVID-19; this was a trend that began prior to the pandemic.²⁶ While one survey found that low pay and lack of opportunities for advancement were prominent causes for the so-called great resignation in 2021, 57% cited a feeling that they are disrespected in the workplace.²⁷ Another reason for the resignation was the fact that workers were not willing to risk their lives and that of their family members for an in-person work environment that did not feel safe.

Striketober

According to the Economic Policy Institute, workers essentially have two sources of potential power vis-à-vis their employers: a union, or the implicit threat that they can quit and take another job. As stated previously, employers have been forced to compete for workers in a way that has not happened since the end of the 1990s. Workers gained leverage because the American Rescue Plan Act has generated a strong recovery from the COVID-19 downturn with substantial demand for workers, at the same time that millions of workers are out of the labor force due to health and safety concerns or pandemic-related care responsibilities. As a result of this increased

²⁰ The United Food and Commercial Workers secured increased pay and benefits for workers in more than a dozen meatpacking and food-processing companies. The commitments include \$2 per hour premium pay for workers at Campbell’s Soup, a \$1,500 bonus for workers at Smucker Foods, and a 15% pay increase for workers at Danone North America. In addition, the United Food and Commercial Workers won premium pay for thousands of workers at Kroger, Giant, Safeway, and Shoppers. As of July 2020, all stores had eliminated premium pay for front-line workers. See UFCW 2020 and UFCW Local 400 2020.

²¹ The United Auto Workers persuaded General Motors, Ford, and Fiat Chrysler to shut down operations for two weeks to slow the spread of the virus, and they negotiated with the companies to provide all workers with protective gear, including masks. See UAW 2020 and Engdahl 2020.

²² The Communications Workers of America secured additional paid sick and family leave for unionized Verizon workers. The agreement includes 26 weeks of paid sick leave for individuals diagnosed with COVID-19 and eight weeks of paid leave for those caring for an individual medically diagnosed with COVID-19. See CWA 2020.

²³ Economic Policy Institute August 25, 2020 “Why unions are good for workers—especially in a crisis like COVID-19”

<https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/>

²⁴ [NLRB, Operations-Management Memorandum, Responding to ...](#)

²⁵ This principle is supported by long standing Board precedent, e.g., *Trojan Yacht*, 319 NLRB 741, 743 (1995) (rejecting employer’s defense that unilateral freeze of benefit accruals was required by revised tax statute, as employer “had some choices over which the parties could have bargained”)

²⁶ [The Great Resignation Didn’t Start with the Pandemic by Fuller and Kerr, Harvard Business Review March 23, 2022](#)

²⁷ [Pew Research Center - Majority of Workers Who Quit a Job in 2021 Cite Low Pay, No Opportunities for Advancement, Feeling Disrespected - March 8, 2022](#)

leverage, workers have seen strong wage growth and have been able to quit jobs in record numbers and take jobs that are better for them.²⁸

Many who could not resign became activists for change in working conditions. When labor agreements expired, unions and their membership had a clear vision of their needs and what had to be demanded. They had leverage and were willing to go to the line for it through strikes and job actions.

Data from the Bureau of Labor Statistics (BLS) show the number of workers involved in major work stoppages (strikes and similar activities) was about three times as high in 2021 as in 2020. In 2021, as the COVID-19 pandemic continued to disrupt the U.S. economy and labor market, 80,700 workers were involved in major work stoppages. However, this 2021 figure does not even include the numerous examples of workers demanding fair pay and safe working conditions and engaging in work stoppages involving fewer than 1,000 workers.

Why did so many workers take to the streets? Because companies failed to read the room. Workers suffered during the pandemic. Quality of life, security, and health are extremely important issues for workers. 32,000 Kaiser Permanente essential frontline workers—i.e., nurses and other medical workers in California and Oregon—were on the verge of striking before reaching a last second deal on a collective bargaining agreement. Whereas, more than 2,000 hospital employees in Buffalo, New York had to hit the bricks in order to reach agreement. In 2021, 10,000 John Deere farm equipment strikers cited the company's record-breaking \$4.7 billion in profits, poor treatment by management, and the contract offer's failure to include post-retirement healthcare and other benefits requested by the union as reasons for the decision. In October of the same year, roughly 1,400 cereal factory workers struck Kellogg's plants in Omaha, Nebraska; Battle Creek, Michigan; Lancaster, Pennsylvania; and Memphis, Tennessee, over the loss of premium health care, holiday and vacation pay and reduced retirement benefits and were threatened with the transfer of their jobs to Mexico if they did not conform to the Kellogg's outrageous proposals and unsafe proposals that would take away protections those workers had had for decades. Benjamin Sachs, Harvard Professor of Labor and Industry observed, "We are seeing workers across the economy expressing their unwillingness to work under intolerable conditions and their growing willingness to fight for a better life."²⁹

A Surge in Organizing

The wave of union organizing rapidly spreading across the country is taking place not just at large companies like Amazon that employ thousands of employees in a single location, but also at corporate chains like Starbucks, Chipotle, REI,³⁰ and Trader Joe's that own and operate multiple stores, each employing smaller workforces. Additionally, technological companies like Apple and Activision Blizzard are experiencing active organizing.³¹ In July of this year, Blizzard quality assurance testers moved to form a union and although Blizzard hired a law firm to stifle unionization and organizing effort in one of their subsidiaries, workers organizing at another

²⁸ [EPI Latest data release on unionization is a wake-up call to lawmakers We must fix our broken system of labor law Report • By Heidi Shierholz, Margaret Poydock, John Schmitt, and Celine McNicholas • EPI, January 20, 2022](#)

²⁹ [US workers gain muscle with biggest strike wave in decades](#)

³⁰ In March of 2022, REI workers voted 88-14 to select the Retail, Wholesale and Department Store Union as their collective bargaining representative at the company's Manhattan NY store. This was followed by Workers at an REI store in Berkeley, California, voting to be represented by the United Food & Commercial Workers in August, 2022, making that store the company's second unionized location.

³¹ In June, 2022 the first Apple Store in the country, in Towson, Maryland, voted to unionize.

subsidiary, “Call of Duty Studio,” prevailed before the NLRB -making the first-ever union at a major gaming company in North America.³²

Starting on August 30, 2021, when three Starbucks in the area of my second hometown Buffalo, New York, filed union petitions with the NLRB, close to 250 Starbucks stores around the country have followed suit—driving a surge in union petitions which have contributed to the 57% increase in such filings with the NLRB compared to the same period in the previous year. Organizing has migrated across various industries - from manufacturing to non-profits, healthcare, entertainment, and even tech with workers generally in their twenties and thirties.

Amazon is one of the top five corporations whose profits increased by 41% during the pandemic and experienced two highly publicized organizing campaigns. In Bessemer, Alabama, the Retail, Wholesale and Department Store Union (RWDSU) filed a petition last year (2021) for a bargaining unit of over 6,000 workers who had been experiencing low wages and unsatisfactory working conditions. Workers were subjected to captive audience meetings, surveillance and the power of a company that during a mail ballot election, could order the US postal service to place in front of its facility a mailbox that managers could watch. A company so powerful it could order a municipality to change the timing of traffic lights so organizers would not be able to talk to workers in stopped cars.

The RWDSU initially appeared to have lost the election by a margin of almost two to one. This, of course, made national news. After the initial results of the Bessemer Alabama election were reported, I was approached by a reporter from the Wall Street Journal who sought to have me agree that this result is indicative of how workers in America currently view unions and as such, is a stake in the heart of any attempts for union growth in this country. I said, “On the contrary, when a union has attempted to organize in the South, in a right-to-work state, with inadequate labor law protections, against a corporation with more money than God, this is not a stake in the heart, it’s a shot across the bow.” (Somehow that quote did not make it to print.) Subsequently, because of Amazon’s unlawful interference with the election process, a new election was ordered in Alabama, the results of which have not been determined because of allegations of continued interference by Amazon management and the high number of determinative challenged ballots.

The Amazon warehouse in Staten Island was a different story. This was a homegrown campaign by terminated workers, thought by Amazon management to be too dumb to be successful. Well this turned out to be a great success story despite the prevalence of unfair labor practices and high employee turnover. According to Chris Smalls, former Amazon warehouse supervisor and current president of the Amazon Labor Union (ALU), it was the union’s actions that demonstrated true care for the workers in a way that Amazon was failing to do. He described this culture as resonating across the country. Accordingly, Amazon is experiencing walkouts protesting the working conditions in other warehouses in Atlanta, Georgia and Queens, NY among other locations. The union is helping workers at other locations stay resilient as they face tactics like captive audiences, isolation, and being vilified. Amazon filed objections to the results of that election; however, an NLRB hearing officer recently issued a report finding that the election results should stand.

The surge in organizing has been met with increased ULPS.

³² [Call of Duty Studio Workers: Historic Win in Vote - Protocol](#)

With a few exceptions, the response of most companies experiencing these publicized organizing campaigns has not been welcoming. Instead of recognizing their employees' right to join a union guaranteed under the National Labor Relations Act, companies like Starbucks, Chipotle, Trader Joe's,³³ REI,³⁴ and others, are responding with a litany of retaliatory tactics including threats, intimidation, firing union organizers and closing stores.

Union Busting

The union avoidance industry (union busters) is estimated to make \$340 million per year advising corporations on how to prevent their employees from unionizing. Shuttering workplaces amid union organizing drives comes straight out of the union busting playbook. It is an effective strategy to suppress workers' rights because it not only displaces pro-union employees, but it also chills the exercise of workers' Section 7 rights to unionize at the company's other locations. Displaced pro-union employees are often not offered employment elsewhere in the company. In one instance, Chipotle closed one of its locations in Augusta, Maine on the day the workers were set to schedule their union election and blacklisted those workers from working at other store locations in the region.

Chipotle

The July 2022 Chipotle store closing in Augusta Maine is an insidious example of the anti union tactics currently being used by employers in response to worker organizing efforts.³⁵ It also illustrates how the labor laws are not adequate protection for workers seeking to unionize.

On June 14, 2022, a group of workers at Chipotle's store in Augusta, Maine spontaneously walked off the job to protest safety issues at the store including unsafe equipment and inadequate staffing, which impaired safe food preparation. The following day, workers met with Chipotle management and detailed these concerns. In response, Chipotle temporarily closed the store to adequately train employees, hire additional employees, and correct some of the safety issues.

On June 22, 2022, workers filed a petition with the NLRB seeking representation by Chipotle Workers United, an independent union. The NLRB scheduled a hearing on the representation petition on July 19. In the interim between the filing of the petition and the scheduled hearing, Chipotle hired additional new employees, increasing its overall workforce at the Augusta store by approximately 25%, and a new general manager and shift manager began working at the store. Another employee began training as a kitchen manager.

Several hours before the scheduled hearing on July 19, Chipotle sent an email to all the Augusta employees announcing that it was closing the store. Chipotle claimed it was doing so due to inadequate staffing, even though it had hired additional employees for the store. Other stores in Maine which were not organizing employ similar staffing, and Chipotle never asked its existing employees whether they could work more hours. Chipotle offered the displaced employees outplacement services but did not offer them work at its other Maine locations. That same morning,

³³ Workers at Trader Joe's successfully won union elections this year at stores in Hadley, Massachusetts, and Minneapolis, Minnesota, but workers now have numerous filed unfair labor practice charges against the specialty US supermarket chain, alleging the company has violated labor laws in trying to prevent further stores from unionizing. One such charge 27-CA-301841 was filed against a Trader Joe's in Boulder Colorado. Another ULP was filed in NYC in response to Trader Joe's closing its wine store just before an organizing petition was to be filed. [Trader Joe's shuttered NYC wine store to snuff out union drive](#)

³⁴ REI, which touts itself as progressive publicly opposes unions for its workers "We respect the rights of our employees to speak and act for what they believe — and that includes the rights of employees to choose or refuse union representation...However, we do not believe placing a union between the co-op and its employees is needed or beneficial." by Sarah Todd, Senior reporter, Quartz and Quartz at Work, January 28, 2022, Last updated July 20, 2022

³⁵ [Chipotle closes a Maine store, and workers say it's because of a union drive by Noam Schreiber NYT July 20, 2022](#)

McNease spoke with the district manager, who told her that she was eligible for rehire but did not offer her work elsewhere.

On August 3, roughly two weeks after Chipotle abruptly closed its Augusta store, employees discovered Chipotle was advertising on social media sites for workers at its Auburn, Maine restaurant, about 45 minutes away from the Augusta store. Brandi McNease, one of the leaders of the organizing drive at Augusta, and other Augusta employees attempted to apply for the jobs using their existing email addresses that they had used while employed in Augusta. When they did so, they found that they could not apply.

McNease then used a different email address and was able to apply. She received a call back from the manager at the Auburn store who scheduled an interview for McNease the next day. However, the morning of the scheduled interview, the manager canceled the appointment. She told McNease that the district manager had directed her not to interview McNease because she allegedly had attendance issues and because she was “part of that group.” McNease never had been counseled, let alone warned, about any attendance issues and disputes that there were any such issues.

Chipotle Workers United has filed unfair labor practice charges with the NLRB regarding the store closing and the blacklisting. Region 1 of the NLRB is currently investigating those charges.

Current remedies under the NLRA are inadequate to discourage this rash of store closings. Even if the employer ultimately is forced to provide back pay for displacing employees, that is a small price to pay when employees elsewhere become reluctant to organize for fear of losing their jobs. Moreover, because of the passage of time before a case is adjudicated, the affected employees typically have moved on with their lives, making reinstatement impractical. And, following the Supreme Court’s *Darlington Mills*³⁶ decision, the courts have been hostile to and made it virtually impossible to require employers to reopen shuttered businesses.

Starbucks

From its first successful organizing drive in Buffalo NY to the campaigns across the country, Starbucks workers have sent a clear message that a unionized workforce collective bargaining for better working conditions is what they want. But with organizing successes came a proliferation of labor law violations perpetrated by Starbucks management. As of August 18, 2022, the NLRB had 284 open ULP charges against Starbucks spread across twenty-eight states. In Buffalo alone, the NLRB regional director found Starbucks committed almost 300 violations of federal labor law during its anti-union campaign.

A. Store Closures

Starbucks announced in July 2022 that it was closing 16 US stores purportedly over concerns about crime and other community safety issues, including two stores that are unionized and one that had scheduled a union election. The company announced the closure of the unionized store in Ithaca, New York, in June, 2022, citing concerns about the store’s faulty grease trap as well as problems with staffing. Starbucks union organizers say the closures are an excuse to shut down recently unionized stores. It is noteworthy that at the Ithaca, NY location, union organizing and an employee walkout was precipitated by the very working conditions (faulty grease trap and staffing) that the employer now asserts as

³⁶ [Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 \(1965\)](#)

its basis for closing the location. It was reported that these conditions existed since 2018.³⁷ Since its July, 2022 announcement of store closures, Starbucks has in fact, closed 19 stores - 42% of which had union activity. Among those slated for closure was the second busiest store in Kansas City, Missouri and another in Starbucks' hometown of Seattle. Both of these stores had just filed petitions of election with the NLRB.

B. The Memphis Seven

One study has found that nearly 1 in 5 rank-and-file, pro-union worker activists are fired during unionization drives.³⁸ In February of this year, Starbucks fired seven workers at a Memphis café for supposedly violating their store's rules—those seven were nearly everyone on that store's union organizing committee. Asserting that those seven firings constituted illegal retaliation, the National Labor Relations Board (NLRB) went to federal court to seek an emergency injunction to win those workers' reinstatement and won.³⁹ This win came on the heels of Starbucks' attack on the integrity of the NLRB by way of a letter accusing the agency of colluding with unions to organize its stores.⁴⁰ This begs the question as to whether the District Court was part of this collusion?

While union petition filings increased by 57% compared to last year, interim Starbucks CEO, Howard Schultz's recent threat not to give raises and benefits to unionized Starbucks workers appears to have scared many workers and slowed the unionization drive. As reported by Peoples Policy Project, in July, 2022, workers at only 14 Starbucks stores petitioned for union elections, down from 29 in June and 46 in May. The number of union victories also declined, to 23 in July, down sharply from 80 in June and 62 in May. Significantly, union victories in July were far less than 90 percent of the unionization votes in prior months. It is reasonable to conclude that unfair labor practices and store closings contributed to this decrease.⁴¹

The Pro Act would make the Persuader Rule Law.

The Persuader Rule, initially proposed by the Obama DOL in 2011, would expand a disclosure requirement under the Labor-Management Reporting and Disclosure Act of 1959 to apply to circumstances where lawyers or consultants are advising the employer on how to engage with employees, as well as additionally cover “planning or conducting employee meetings; training supervisors or employer representatives to conduct meetings; coordinating or directing the activities of supervisors or employer representatives; establishing or facilitating employee committees; drafting, revising or providing speeches; developing employer personnel policies designed to persuade employees; and identifying employees for disciplinary action, reward, or other targeting.”

The ABA argues this could chill the confidential lawyer-client relationship, but legal experts dispute whether this is the case. Matthew Stephenson, a professor of anti-corruption law at Harvard, called the ABA's argument “self-serving and intellectually bankrupt.”⁴² The rule was repealed by the Trump administration, but a version of the rule has been included in the PRO Act.

³⁷ [Cornell's Starbucks Workers Strike after Grease Trap Failure, The Ithacan, April 22, 2022](#)

³⁸ [Dropping the Ax: Illegal Firings During Union Election Campaigns, 1951-2007 John Schmitt and Ben Zipperer, March 2009](#)

³⁹ [NLRB Files in Federal Court Seeking Immediate Reinstatement for Seven Starbucks Workers in Memphis](#)

⁴⁰ [Starbucks Dials Up Anti-Union Heat by Accusing NLRB of Collusion](#)

⁴¹ [Starbucks Union Drive Slowed Down in July, People's Policy Project, August 4th, 2022](#)

⁴² [Union Busters Operate in Secret — And Want to Keep It That Way](#)

The Microsoft Approach - Good but not Perfect.

Not all employers greeted the prospect of a union organizing their workforce with hostility. In June of 2022, the Communications Workers of America (CWA) and Microsoft announced they have entered into a ground-breaking labor neutrality agreement, the first of its kind in the technology industry. The agreement will apply at video game company Activision Blizzard beginning 60 days after Microsoft's acquisition of Activision closes. Quality Assurance workers at Activision's Raven Software video game studio had already won an election to be represented by the CWA last month. The company has almost 7,000 employees in the United States, most of whom will be eligible to unionize under the new agreement. This agreement includes a commitment by Microsoft to take a neutral approach when employees covered by the agreement express interest in joining a union. Covered employees will be able to freely communicate with other employees and union representatives about union membership. Employees will have access to an innovative technology-supported and streamlined process for choosing whether to join a union. Employees can maintain confidentiality and privacy of that choice if they wish. Unresolved disagreement between the CWA and Microsoft under the agreement, will be resolved through an expedited arbitration process.

Even with this groundbreaking effort at cooperation, however, challenges still remain. The agreement between Microsoft and Blizzard is projected to close by the end of their fiscal year, i.e., June 30, 2023. This allows time for a lot more to happen that could interfere. Although workers in its Albany, New York subdivision have chosen to unionize and its quality assurance testers at another subsidiary won a union election, Activision Blizzard continues to oppose their efforts and has retained union avoidance counsel to do so.⁴³

The Current Union Organizing Wave and Worker Protections are Being Held Back by an Underfunded NLRB.

"The NLRB is processing the most cases it has seen in years with the lowest staffing levels in the past six decades." - General Counsel Jennifer

With an agency designed to be reactive rather than proactive, many workers simply don't know their rights. Efforts by the NLRB to require an employer to post a notice of employee rights in the same way other labor laws require were struck down by the courts because the statute would have to be amended for such a mandate to take effect. Regional offices of the NLRB are often placed in facilities where immigrant and other low wage workers cannot access because they either require identification to enter, are invisible to the public due to lack of signage,⁴⁴ or because of the closure of resident offices, are too distant from the worker's locale. In addition, longstanding budgetary freezes and the NLRB's mismanagement under the prior Administration have left the Board's Regional Offices understaffed and under-resourced for their critical mission.

Moreover, as has been recently demonstrated by the actions of the prior General Counsel, Peter Robb, the NLRB is susceptible to diminished effectiveness by a labor hostile administrator. A

⁴³ [Activision Blizzard will fight new Albany union, even after Microsoft said it would stay neutral](#)

⁴⁴ Even the national headquarters of the NLRB was required to be relocated to a privately owned building in Washington, DC where external agency signage is prohibited.

not so [new report](#)⁴⁵ by the nonpartisan US Government Accountability Office (GAO) found that Robb was dismantling the agency from the inside. He reduced staff size, destroyed employee morale, and failed to spend the money appropriated by Congress. This all occurred while Robb was pursuing what many in labor described as an anti-worker, pro-corporate [agenda](#).⁴⁶ The NLRB's staffing fell 26 percent between fiscal year 2010 and fiscal year 2019, from 1,733 to 1,281. The personnel losses were disproportionately in the NLRB's field offices, where unfair labor practice charges are investigated, and union representation elections are held. The staffing problem was greatly exacerbated during Robb's time in office. For the eight years preceding Robb, the agency filled 95 percent of vacancies in the headquarters and 73 percent in the field offices. But under Robb, staffing in the field dropped by 144 people, and only 13 people—a mere 9 percent—were hired to fill these vacancies.

The NLRB's budget in Fiscal Year(FY) 2022 was \$274.2 million, which is the same amount as FY 2021 and 2020 under the prior administration. It is noteworthy that the NLRB has not received a funding increase since 2014, when Republicans took control of Congress. What's worse, when one adjusts for inflation, the Agency's budget has decreased 25% since FY2010. Shrinking budgets lead to increased workloads and backlogs. ⁴⁷Since FY2002 *field staffing, which is at the heart of the agency's election and investigation process, has shrunk by 50%*. Meanwhile, in the first nine months of FY 2022, filed union representation petitions have increased 58% and unfair labor practice charges have increased 16%.

Need for the ProAct

The Need to Strengthen Protections during the Bargaining Process

What is happening after workers are unionizing? A 2009 study by the Economic Policy Institution (EPI) found that after winning a union election, 52 percent of the time those workers didn't have a first contract a year later and 37 percent of the time they didn't have a contract two years later.⁴⁸ Starbucks has been denying unionized workers raises while they've dragged out the bargaining process.

Employer unfair labor practices that aim to undermine employees' chosen bargaining representatives can have corrosive effects in the workplace that linger for years. As my co-panelist Kate Bronfenbrenner's research has shown, within one year after an election, only 48% of newly organized units have obtained first collective bargaining agreements. By two years, that number rises to 63%, and by three years to 70%. Even after three years, only 75% of units have reached a first contract. During my time at the NLRB, I frequently encountered stories that demonstrated an urgent need for better protection for workers during their first-contract negotiations. One representative example is a case called *Somerset Valley Rehab Center and Nursing home*⁴⁹— the employer would not bargain and deprived employees of a collective bargaining agreement for 7 years after the union was certified as the representative of the employees. It took many legal proceedings and enforcement by the Third Circuit. Recently on August 11, 2022, a unanimous panel of the Ninth Circuit held that The National Labor Relations Board may make employers that

⁴⁵ [GAO-21-242, NATIONAL LABOR RELATIONS BOARD: Meaningful Performance Measures Could Help Improve Case Quality, Organizational Excellence, and Resource Management](#)

⁴⁶ [Unprecedented: The Trump NLRB's attack on workers' rights | Economic Policy Institute \(epi.org\)](#)

⁴⁷ [GAO NATIONAL LABOR RELATIONS BOARD Meaningful Performance Measures Could Help Improve Case Quality, Organizational Excellence, and Resource Management](#)

⁴⁸ [NO HOLDS BARRED The Intensification of Employer Opposition to Organizing](#)

⁴⁹ 1621 Route 22 West Operating Co., LLC d/b/a Somerset Valley Rehabilitation and Nursing Center v. NLRB, 3d Cir. No. 12-1031, March 14, 2018.

undermine contract negotiations cover attorney fees unions incur during bargaining, enforcing a \$2 million order against a California newspaper publisher over a host of unfair labor practices.⁵⁰ While this may appear to be progress, the holding is as a result of 10 years of litigation and the Court made clear that the litigation costs are not part of the remedy.

I welcome the PRO Act's proposal to strengthen protections for employees when they are in the vulnerable position of negotiating a first contract.

Procedural Obstacles to Relief

During my tenure with the NLRB's regional office as well as my period of private practice, I spent a significant amount of my time advising the public and clients who had been subjected to unfair labor practices. I would advise workers of their rights under the NLRA and the consequences of their employers' conduct. In every instance, I encouraged workers to rely on the Act's protections despite employer intimidation, misrepresentation, and abuse. All too often, because of a protracted process and virtually toothless respondent sanctions for unfair labor practices, victimized workers seeking and awaiting justice would pay the heavy price of retaliation and job loss. Workers might be blackballed and forced to go through extended periods without income. They would lose the support of their friends. Their families would suffer and become dysfunctional. Ultimately, these victimized workers lose hope.

After I became a Board Member, I observed how cases would be tied up for years on appeal, how vacancies on the Board would cause case processes to grind to a halt, and how efforts to provide the public with relief during periods of loss of quorum and political gridlock were curtailed and often reversed as a result of judicial intervention.

As I expressed previously, when workers file charges with the NLRB, they are often left to wait for a significant period of time. Proving that an employer has unlawfully terminated an employee or otherwise significantly interfered with that employee's rights under the NLRA can be a very lengthy process. Ordinarily, such charges must be investigated by an NLRB regional office, after which there is a hearing before an administrative law judge. After the administrative law judge renders a decision, employers typically file appeals and await decisions by the NLRB, after which they often refuse to comply with the Board's orders and appeal those orders to the federal Courts of Appeals. By the time the Board's order is enforced, several years may have elapsed, and a fired worker has frequently found a new job. For this reason, although 1,270 employees were offered reinstatement in fiscal year 2018, only 434 accepted such offers.⁵¹

Even though Section 10(j) of the NLRA permits the Board to seek an injunction in Federal district court when an employer fires workers for organizing a union or engaging in protected concerted activity, the Board only uses this authority sparingly.⁵² In fiscal year 2018, the Board only authorized 22 injunctions, despite employers' frequent interference with employees' right to organize unions.⁵³ By contrast, during my years as Chairman, the Board authorized an average of 43 injunctions per year. In addition, the NLRA requires the Board to seek an injunction whenever a union engages in unlawful picketing or strike activity.⁵⁴

⁵⁰ *NLRB v. Ampersand Publishing, LLC DBA Santa Barbara New-Press*, No. 21-71060 Ninth Cir., Aug 11, 2022

⁵¹ See <https://www.nlr.gov/news-outreach/graphs-data/remedies/reinstatement-offers> (last accessed 4/30/19).

⁵² 29 U.S.C. § 160(j).

⁵³ See <https://www.nlr.gov/sites/default/files/attachments/basic-page/node1674/nlrbrpar2018508.pdf> (last accessed 4/30/19).

⁵⁴ See 29 U.S.C. § 160(l).

Sadly, what I have just described often represents the best-case scenario for a worker who must go through the full process of litigating an unfair labor practice charge. In recent years, procedural infirmities at the NLRB itself have all too frequently compromised its ability to act, further prolonging the delay workers must endure before finally enjoying the remedies they are due. Political gridlock has often prevented the NLRB from operating with the full five-member complement contemplated by the statute.

I commend the ProAct for attempting to create greater parity and predictability by making injunctive relief in the event of employer unfair labor practices mandatory in a greater number of cases.

In closing, I'd like to share a bit of my Labor Day reading. A portion of a great opinion piece by Washington Post journalist, E.J. Dionne called "Unions are on a roll. And they unite a divided nation." Mr. Dionne states in pertinent part that,

*"... Labor Day is a celebration of workers and of their dignity. This makes it a good time to consider whether our country's discontents have to be channeled through culture wars and racial prejudice. The surge in support for unions points down a different path, a practical quest to ease day-to-day burdens by improving wages, benefits and working conditions."*⁵⁵

Thank you very much for giving me the opportunity to testify before the Committee today. I applaud you for thinking carefully about how best to ensure that working people in this country can enjoy full freedom of association.

⁵⁵ Opinion Unions are on a roll. And they unite a divided nation. E.J. Dionne Jr. Washington Post September 4, 2022 <https://www.washingtonpost.com/opinions/2022/09/04/labor-day-unions-resurgence-popularity/>

Chairman SCOTT. Thank you.
Mr. King.

**STATEMENT OF MR. ROGER KING, SENIOR LABOR AND
EMPLOYMENT POLICY COUNSEL, H.R. POLICY ASSOCIATION**

Mr. KING. Chairman Scott. Best of health to you. Nice to be with you again albeit by a virtual connection this morning. Ranking Member Foxx, Dr. Foxx, great to see you, great to be with you again, and new members of the Committee welcome.

I am appearing here this morning not in my capacity as Senior Labor and Employment Counsel of the H.R. Policy Association. Timing just did not permit me to vet the testimony your various organizations that I know otherwise I would be appearing on behalf of.

I do want to level set the testimony I am about to give. I am not appearing here this morning on behalf of Starbucks. Starbucks is not a member of our trade association. I have had no contact whatsoever with the company preparing my testimony. With that said, I am deeply troubled by the attacks on that company and other employers in this country.

The so-called public shaming, incorrect information, misleading information is very troubling. As many have noted Starbucks yes, has received increased union activity, but Dr. Foxx, as you have mentioned when you look at their—look at the stores, less than 3 percent of Starbucks employees have decided, at least at this point, that they desire union representation.

When you put into that mix the licensed stores it is less than 1 percent. We do not see that in the media. Furthermore, thousands of workers of Starbucks have rejected union representation. What you do not see are the elections that the union did not prevail in.

In all due respect to my fellow witness thousands of workers at Starbucks do not desire union representation. Let us take these so-called allegations also for what they are worth. Virtually every union organizing campaign, many unfair labor practice charges are filed, but later dismissed. Indeed, the dismissal factor is 70, 80, 90 percent.

There has been no final adjudication that I am aware of finding Starbucks in violation of our Nation's labor laws. Just let us make that clear. Just on a personal note, my wife and I go to Starbucks stores all over the country. I think they are well-run, they are clean, they are efficient. I like the Wi-Fi service. The coffee is great.

By the way, the internet service is great. Let us stop publicly shaming a company that has provided thousands and thousands of jobs in this country, and has provided good community relations, and has been a leader in benefits. That should not happen.

Second, on a general note other employers in this country seem to be publicly shamed inappropriately. We have particularly new companies that are providing thousands and thousands of jobs in this country, good-paying jobs.

The litmus test apparently is if they speak out at all on a different perspective of whether unionization makes sense at all, they are publicly shamed or criticized and that is wrong.

The narrative clearly appears to be to muzzle the employer community, not permit them to have any voice whatsoever in this discussion of whether it makes sense or not, and unions may have a place in certain instances. Unions have new leadership and Ms. Shuler, she is a very bright lady, maybe they will change some of their approaches.

Let us not publicly shame the job providers in this country that have provided literally thousands of jobs. You should not be a second-class citizen in this country because you are one of 94 percent that do not work under a union contract in the private sector. Employers that employ those 94 plus percent of our population should not be publicly shamed.

They are providing jobs to this country. We have got the narrative all wrong. Just a few points in my written testimony that I would like to review. First, as noted by Chairman Scott, and also by you Dr. Foxx, approval rating of unions just are generally in the 70-percentile pursuant to a recent Gallop poll.

What is not noted is that only about 11 percent of the polling individuals really expressed an interest in joining the union, and perhaps even more importantly, 58 percent said they had no interest in specifically becoming a union member.

Now why is that? There are a number of reasons, but according to polling of American Compass and other organizations, workers in this country if they are going to be represented, do not want a union that is adversarial, and I am quite concerned about the potential pending rail strike, by the way that could shut down this country.

They do not want confrontation. They do not want adversarial unions. They do not want their unions going out on political and social ventures. They want them to represent their interest and voice. For reasons I have stated in my testimony, unions do not appear to be doing that.

They have lost sight of their central function. As stated in my testimony, unions are not going after their potential population of growth. Indeed, their spend on traditional union organizing activity is very low.

Now they can speak for themselves why that is, but when they come to the halls of Congress and want you to pass the PRO Act, the worst—and I will stand by this statement, and I know others will, the worst one-sided proposal in labor relations ever in the halls of this Congress.

It is so tilted in one matter that it really does not deserve much time or attention, but unfortunately I guess we will have to talk about it under the heated political rhetoric that we are seeing today. Specifically, I hope the committee will look deeply at any allegations of employer misconduct.

Ms. Bronfenbrenner's testify should be looked at under the guise of footnote 2. She has all these statistics, but she does disclose, to her credit, that they are the result of interviewing professional union organizers. It is a very one sided study. It has been discredited continually.

I do not give any credit whatever to that data. If you are going to have a full and complete study you need to talk to all individuals

involved in organizing. Certainly, union organizers have a perspective. I respect that. It is not an accurate or an objective perspective.

Chairman SCOTT. Mr. King, you are running a little over.

Mr. KING. Just one final point and I will quit. Mr. Pearce, who I have great respect for, properly stated that the policy of this country is to promote collective bargaining. He is right. What he did not share with you is that employees first have to decide whether they wish to have union representation.

The Act is very clear on that. We need to preserve our right by secret ballot elections. I think we have got the cart before the horse here. Let us make sure employees have an uncoerced, fair and ample opportunity to hear both sides, and then make a decision. Thank you very much.

[The prepared statement of Mr. King follows:]

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Testimony of

G. Roger King¹

For the

HOUSE COMMITTEE ON EDUCATION AND LABOR

Hearing on

“IN SOLIDARITY: REMOVING BARRIERS TO ORGANIZING”

Wednesday, September 14, 2022

¹ Mr. King is a graduate of Miami University (1968) and Cornell University Law School (1971). Mr. King is a member of the District of Columbia and Ohio Bar Associations, and his professional experience includes serving as a legislative staff assistant to Senator Robert Taft Jr. and professional staff counsel to the United States Senate Labor Committee (1971-1974), associate and partner with Bricker & Eckler (1974-1990), partner and of counsel at Jones Day (1990-2014), and Senior Labor & Employment Counsel at HR Policy Association (2014-Present). Mr. King acknowledges the assistance of Gregory Hoff, Associate Counsel, HR Policy Association, and Anthony Berberich, Legal Intern, HR Policy Association, in the preparation of his testimony. Mr. King's testimony is being presented on his own behalf and not on behalf of any other party.

Chairman Scott, Ranking Member Foxx, and Members of the Committee:

Thank you for the opportunity to testify before the Committee this morning. I serve as the Senior Labor and Employment Counsel for the HR Policy Association, but due to the short timeframe available to prepare my testimony for this hearing I am appearing today in my personal capacity. My biographical information is attached to my written testimony. I respectfully request that my written testimony be included as part of the record of this hearing.

Mr. Chairman and Dr. Foxx, it is my understanding that the subject matters to be covered in this hearing include the following: 1) the state of union organizing in the country; 2) the potential for the National Labor Relations Board (“NLRB” or “Board”) to utilize electronic voting procedures in representation elections; and 3) issues pertaining to the Protecting the Right to Organize Act (PRO Act, H.R. 842). My comments regarding such issues are as follows.

State of Union Organizing Activity

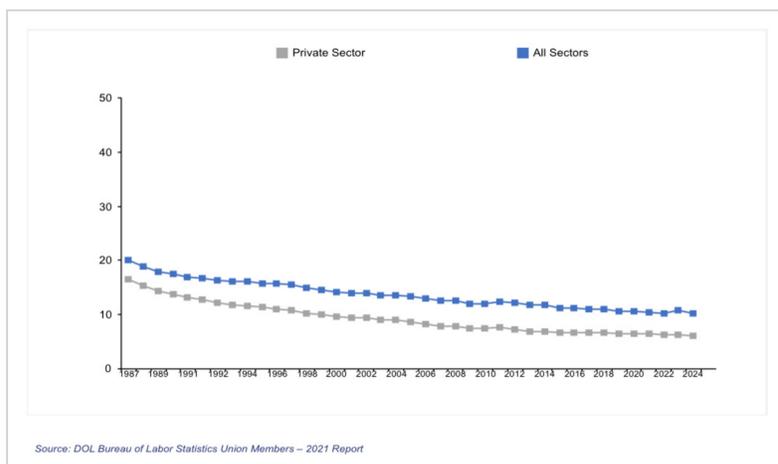
A recent Gallup poll found that 71% of Americans were generally positive toward unions, which was the highest level in Gallup polling dating back to 1965.² There also has been highly publicized union organizing activity among workers at Starbucks, Apple, Chipotle, and among other employers that have not traditionally been subject to concentrated union activity. Indeed, Worker’s United, the union that has been engaged in organizing efforts at Starbucks locations – with the apparent significant financial support from Service Employees International Union - has successfully organized a number of Starbucks locations. These organizing initiatives have been the subject of considerable media attention and have also resulted in conjecture and speculation that the union movement has been reenergized in the country and is undergoing a type of “renaissance.”

Yet, unions only sought to represent less than one half of one percent of potential private sector members in the country in 2021. Regarding Starbucks in particular, despite extensive press coverage only about three quarters of one percent of its locations have currently been unionized. Indeed, a review of the available data suggests that conjecture and speculation of a large-scale unionization movement may be premature for the following reasons:

- First, as illustrated below, the total union representation in the private sector in the country has been declining for years and continues to be no higher than

² Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022) <https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx>

approximately 6%.³ When public sector workers are included, the percentage of union density in the country increases to only 11-12%.



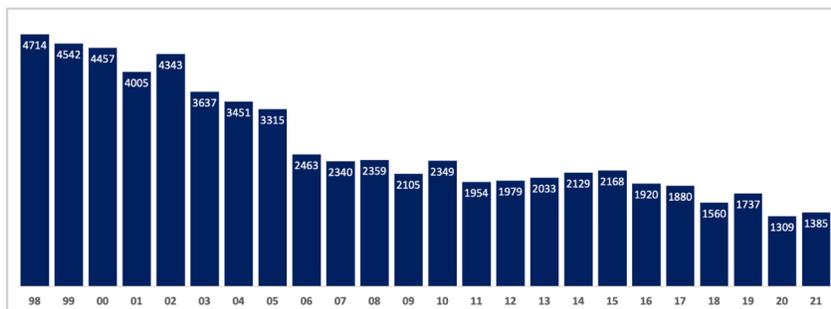
- Second, pursuant to the above noted Gallup poll, only approximately 11% of the respondents stated that they were interested in joining a union. Additionally, 58% of respondents stated that they were “not interested at all” in joining a union.⁴ These findings are consistent with other recent polling data. For example, polling by American Compass also found that employees, for a variety of reasons, do desire a voice in the workplace but are dissatisfied with traditional union representation.⁵
- Third, union activity in the country - as measured by petition activity compared to potential new members - remains low. In FY 2021 there were 103.5 million potential private sector employees available for organizing in the country under the NLRA. The number of employees petitioned-for, in that same year, according

³ See also Glenn Spencer, *Data on Union Elections Obscures Long-Term Decline in Membership*, U.S. CHAMBER (Aug. 30, 2022), <https://www.uschamber.com/employment-law/unions/data-on-union-elections-obscures-long-term-decline-in-membership>

⁴ See above *U.S. Approval of Labor Unions at Highest Point Since 1965*, (2022)

⁵ *Not What They Bargained For: A Survey of American Workers*, AMERICAN COMPASS (Sep. 06, 2021), <https://americancompass.org/essays/not-what-they-bargained-for/>

to NLRB statistics, was only 46,880. Accordingly, unions only sought to represent 0.453% of potential private sector members in the country.

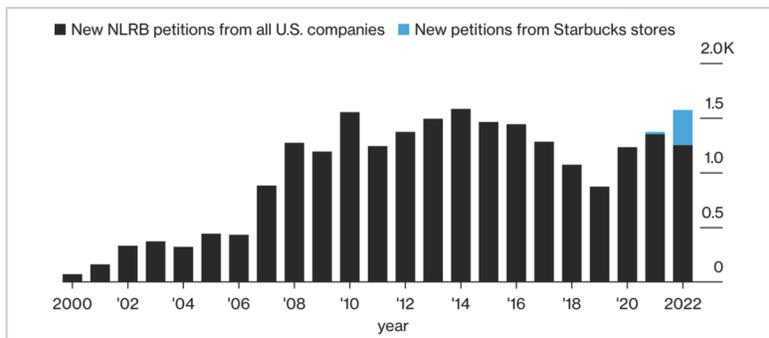


U.S. Department Bureau of Labor Statistics

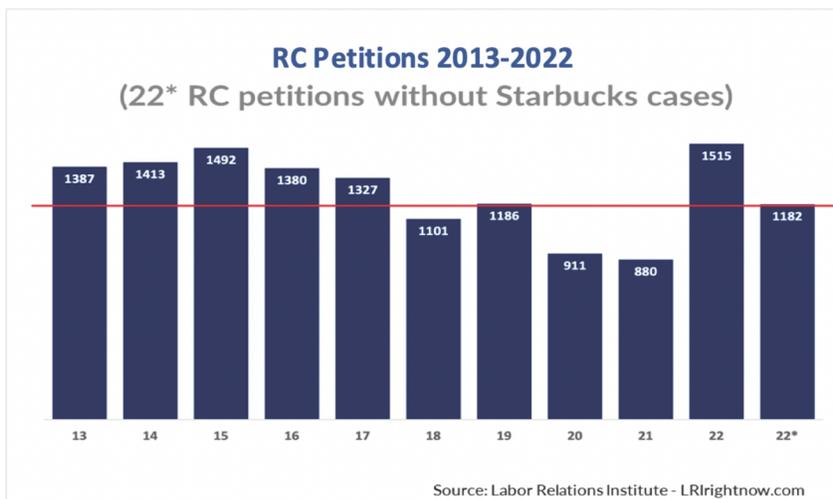
- Fourth, a closer examination of the Starbucks union petition activity also needs to be undertaken. While there have been numerous petitions filed by Workers United, the Union also has also been rejected in a number of NLRB elections or withdrawn their petition. For example, there have been 337 petitions filed by the Union seeking representation rights at Starbucks facilities and the Union has only prevailed in 192 NLRB elections. Further, the successfully organized Starbucks stores have a relatively small number of employees with the average bargaining unit size of approximately 27 employees.⁶ Finally, it should be noted that Starbucks has over 15,528 locations and that only 0.73% of its approximately 279,037 employees have been organized.
- Fifth, while there has been increased overall union activity in the last nine months in the country and a corresponding increase in petitions for elections, such activity is relatively consistent with the union activity in prior years when Starbucks petitions are removed.

The following graphs illustrate this point:

⁶ Robert Combs, *Analysis: Biggest Influx of Union Workers Isn't From Starbucks (1)*, BLOOMBERG LAW (Aug. 23, 2022), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-biggest-influx-of-union-workers-isnt-from-starbucks>



Source: Bloomberg News analysis of National Labor Relations Board filings
 Note: Totals for 2022 are through July 31



Source: Labor Relations Institute - LRIrightnow.com

- Sixth, another area that should be examined is the amount of resources labor organizations are devoting to organizing activity. For example, the number of petitions filed by unions with the National Labor Relations Board fell 63% from 5,000 in 1997 to 1,854 in 2017. A review of recent data confirms this trend as union spending remains at a relatively low level.

Union	Overall Disbursements	Representational Activities	% on Representational Activities
Service Employees (SEIU)	\$333,366,216	\$133,010,854	40%
Office and Professional Employees (OPEIU)	\$12,806,398	\$4,012,079	31%
UNITE HERE	\$140,401,365	\$39,713,883	28%
Int'l Association of Machinists and Aerospace Workers (IAM)	\$184,340,281	\$44,003,198	24%
Teamsters (IBT)	\$212,010,163	\$46,856,917	22%
Communications Workers (CWA)	\$261,920,581	\$43,634,408	17%
Steelworkers (USW)	\$544,596,022	\$84,882,237	16%
Sheet Metal Workers (SMART)	\$131,799,332	\$17,101,382	13%
Operating Engineers (IUOE)	\$93,207,012	\$11,093,637	12%
United Food and Commercial Workers (UFCW)	\$385,898,241	\$41,625,523	11%
AFL-CIO	\$149,539,563	\$16,090,702	11%
Laborers (LIUNA)	\$117,288,140	\$11,974,813	10%
Electrical Workers (IBEW)	\$1,432,581,124	\$61,162,930	4%
Carpenters (CJA)	\$141,108,294	\$2,642,645	2%

[^]See also Glenn Spencer, *Data on Union Elections Obscures Long-Term Decline in Membership* (2022)

AFL-CIO Disbursements by Category (Information from the AFL-CIO's Form LM-2 FY 2021):

Representational Activities: \$16,090,702

Political Activities and Lobbying: \$37,564,681

Contributions, Gifts, and Grants: \$1,595,683

General Overhead: \$16,220,225

Union Administration: \$3,547,819

Benefits: \$19,138,343

Per Capita Tax: \$2,734,264

Purchase of Investments and Fixed Assets: \$8,521,014

To Affiliates of Funds Collected on Their Behalf: \$40,802,475

Direct Taxes: \$3,326,663

Subtotal: \$149,541,869

The percentage of the AFL-CIO's total disbursements dedicated to "representational activities" is 10.76 percent.

Accordingly, notwithstanding increased union activity involving certain employers and activity in certain industries in the country, it appears there has not been a substantial movement of the "needle" regarding the percentage of union density.

Electronic Voting

An initial question that must be discussed and answered with respect to electronic voting: what is the objective of proposals for the NLRB to utilize such procedures in representation elections? If the objective is to increase employee participation in the election process, such a premise is highly questionable. Indeed, as noted below, employee participation in NLRB conducted secret ballot collections on an employee on-site basis is exceedingly high. Is the objective to make the NLRB more efficient and reduce its operational expenses? Perhaps implementation of such a system could reduce Board personnel expenditures by requiring less staff but it is doubtful that supporters of electronic voting are in favor of a reduction in the number of Board personnel. Is the objective to make the election process more fair and more acceptable to all stakeholders? This rationale is also doubtful, as the mechanics of the NLRB secret ballot on-site election process are widely accepted by unions, employers, and employees.

At present, the National Labor Relations Board is prohibited from expending any funds to explore or implement electronic voting procedures. Such restriction is as follows:

SEC. 407. None of the funds provided by this Act or previous Acts making appropriations for the National Labor Relations Board may be used to issue any new administrative directive or regulation that would provide employees any means of voting through any electronic means in an election to determine a representative for the purposes of collective bargaining.⁷

There have been various proposals made over the years for the Board to utilize electronic voting procedures. One currently pending proposal is an amendment to the House Labor, Health and Human Services, Education, and Related Agency appropriations bill for fiscal year ending September 30th, 2023. Such proposal would allocate to the Board “no less than a million dollars” to establish an electronic voting procedure for union elections.

Another proposal has been offered by Congressman Levin of this Committee, H.R. 308, the Secure and Fair Elections for Workers Act. This bill would, among other provisions, permit the NLRB to proceed to implement electronic voting procedures in representation elections.

These proposals, however, would appear to be questionable solutions looking for a problem. The Board has fairly and efficiently conducted representation elections for decades. The Board has consistently received high marks in this area. Further, the Board has established thoughtful and comprehensive procedures to conduct such elections and

⁷ *Consolidated Appropriations Act of 2021*, H.R. 133, 116th Cong. § 407 (2020)
<https://www.congress.gov/116/plaws/publ260/PLAW-116publ260.pdf>

Board personnel are well-trained to carry out such secret ballot elections on an employer on-site basis. Additionally, decades of Board case law have resolved virtually all questions and issues regarding manual on-site secret ballot elections. Most importantly, however, such on-site, in-person elections have resulted in exceptionally high employee voter turnout – an objective one would think all stakeholders would strive for in this area. Indeed, maximum employee participation certainly is the fairest way to resolve questions concerning union representation. The high voter turnout in manual on-site Board conducted elections was illustrated and emphasized in a recent NLRB decision that compared voter turnout in mail ballot elections which were heavily utilized during the pandemic – a good comparator to potential electronic voting - to traditional manual on-site elections. As the Board stated:

Internal Board statistics reflect that from October 1, 2019 through March 14, 2020, the Board conducted 508 manual elections in which 85.2 percent of eligible voters cast a ballot; during that same period, the Board conducted 48 mail-ballot elections in which only 55.0 percent of eligible voters cast a ballot. Similarly, from March 15 through September 30, the Board conducted 46 manual elections in which voter turnout was 92.1 percent and 432 mail-ballot elections in which turnout was 72.4 percent. Although these statistics reflect that the mail-ballot participation rate has increased during the Covid-19 pandemic, they also reflect that the mail-ballot participation rate continues to lag significantly behind the manual election participation rate (30% lower before March 15, 20% lower since).⁸

There are also numerous problems with electronic voting procedures. A number of these deficiencies have been identified in a recent study by the Coalition for the Democratic Workplace (CDW).⁹

The CDW study identified the following problems with electronic voting:

- Authorizing Online Voting Would Break with NLRB Precedents;
- Online Voting Increases the Risk of Coercion and Fraud in Elections;
- Online Voting Presents Serious Cybersecurity Concerns; and
- The Cost of Administering and Securing Online Voting Systems Would Not Be an Efficient Use of NLRB Resources.

⁸ *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020) at 2.

⁹ *Online voting in Union Representation Elections: The Latest Attempt to Eliminate Workers' Right to Secret Ballots*, COALITION FOR A DEMOCRATIC WORKPLACE (Jul. 12, 2022) http://myprivateballot.com/wp-content/uploads/2022/07/Online-Voting-in-Union-Representation-Elections_Latest-Attempt-to-Eliminate-Secret-Ballots_July-2022.pdf

Technological, security, and other practical problems also arise with electronic voting, in any form. As recently noted in an article by Vincent Vernuccio, tests of such voting procedures have revealed they can be potentially easily “hacked” or have other related technological problems. As Mr. Vernuccio stated:

Before Washington, D.C., implemented an electronic voting system in 2010, it invited hackers to find vulnerabilities in the system. A student did, causing it to play “Hail to the Victors,” his university fight song. The D.C. Board of Elections did not use the system in the general election that year, as it had hoped.¹⁰

Finally, the recent experience of the National Mediation Board (NMB) illustrates the problem with electronic voting in union representation elections. Although the NMB had utilized electronic voting in previous years, it recently found it difficult to identify any vendor that has the requisite technological expertise to continue such a procedure and, therefore, the NMB has had to abandon this procedure. At last report, the NMB is not in a position to reinstate electronic voting in the near future.

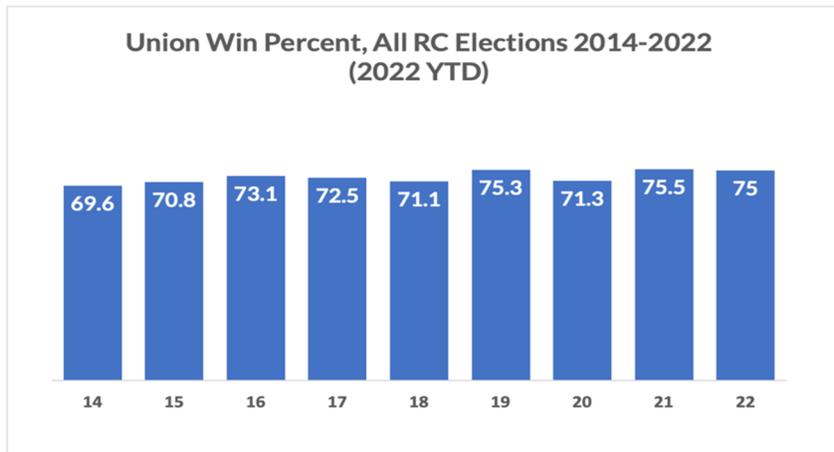
Accordingly, it would appear that no compelling case can be made for the expenditure of public funds to implement electronic voting procedures at the National Labor Relations Board, and that such proposals from a fiscal, practical, and technological perspective have little, if no, merit.

¹⁰ F. Vincent Vernuccio, *Electronic Voting Means More Attacks on Worker Privacy*, THE HILL (Jul. 16, 2022), <https://thehill.com/opinion/finance/3560354-electronic-voting-means-more-attacks-on-worker-privacy/>

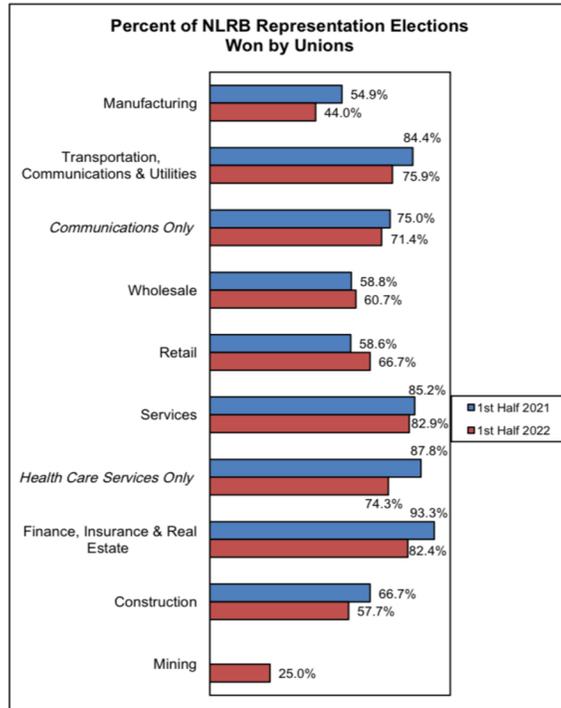
The PRO Act

The proponents of the PRO Act have generally attempted to have the narrative regarding this legislative proposal to concentrate on the alleged merits of unionization to increase the number of individuals in the “middle class” in the country and, therefore, decrease the gap between the wealthiest and other individuals in our society. Proponents of the PRO Act, as a general rule, have attempted to avoid discussions of specific proposals contained in this legislation. Although an argument certainly can be made that union representation can be a contributing factor for economic prosperity for certain individuals, it certainly is not the only factor that should be considered when analyzing economic disparities in the country. Many other factors need to be considered in this discussion, including increased and effective job training and upskilling.

Certain proponents of the PRO Act and other commentators discussing low union density in the country, however, argue that the NLRA is “broken” and that unions cannot have organizing success under the current structure of the Act. This argument is easily rebutted by the above recent data with respect to organizing success that unions have had at certain Starbucks locations and with other employers. Further, the union win rate in NLRB conducted elections as demonstrated in the charts below is quite high and ranges from 69.6% in 2014 to over 75% in 2021, as shown below:



Additionally, the union win rate is even higher in certain industries and for example reached 87% in healthcare facilities elections in 2020, as shown below:



In short, the NLRB and the NLRA are not broken and arguments that the NLRA needs to be radically changed should be viewed with great skepticism and at a minimum closely scrutinized before our nation's labor laws are radically changed.

The PRO Act is not the answer to solving economic disparities in the country. This proposal is an unprecedented and radical approach to change our labor laws without any objectively based policy and legal rationale. The fundamental objective of the PRO Act would appear to increase union density in the country by federal government regulatory intervention. Government regulatory entities, and especially the NLRB, should be neutral in the election process in related areas with respect to enforcement of the provisions of the NLRA. Employees should not be subject to coercion, pressure, or threats from

employers' unions and any other third party should be able to decide whether they desire union representation. The PRO Act is an attempt to tilt the NLRA significantly in favor of unions and have the Board be at least a procedural ally with organized labor in the election process and related areas of the NLRA.

One example of the overreach of the PRO Act is the elimination of any protection for any employer, whether union represented or not, from secondary boycott activity. Secondary pressure can improperly involve any neutral, large or small, union or nonunion employer and immerse that neutral employer into a dispute a union has with another entity. Such secondary disputes can result in substantial economic harm to the neutral employer and, in certain cases, can cause small and medium sized employers to go out of business. This approach makes no economic, practical, or legal sense and is one of the many extremely harmful parts of this proposed legislation.

In addition to the secondary boycott issue, the PRO Act contains many questionable provisions, a great number of which deserve close individual scrutiny by Congress before radically changing this nation's labor laws. Specific objections to the PRO Act include the following:

Specific Objections to H.R. 842

- **Section 101 – Establishment of a New Joint Employer Standard**

This Section of H.R. 842 adopts the widely criticized standard established in *Browning-Ferris Indus.*, 362 NLRB No. 186 (2015) – and expanded upon by a recent NLRB proposed rulemaking – to determine joint employer status under the NLRA.¹¹ Like the Board's current proposed rule, this provision in fact goes beyond the holding in the *Browning-Ferris* case, by stating that joint employer status can be established under the NLRA based solely on "indirect or reserved control." This proposal inappropriately expands the definition of joint employer status, which would result in unnecessary protracted litigation and potential liability for many business entities. Under this framework, companies could become liable for labor law violations committed by suppliers, franchisees, or any other third-party entity, even where a company has not exercised any control over the employees of such entities. In other words, companies could become responsible for labor law violations that they had nothing to do with. In particular, this joint employer framework has the potential to destroy the franchisor and franchisee model that has led to the creation of millions of jobs in this country and the development of hundreds of thousands of successful small business entities.¹²

¹¹ *Browning-Ferris Indus.*, 352 NLRB No. 186 (2015)

¹² For a comprehensive analysis detailing the negative economic consequences of an overly expansive joint employer standard, see International Franchise Association, Comment Letter on Proposed Rule on the Standard for Determining Joint Employer

- **Section 101 – Definition of Employee Status**

This Section of the legislation essentially adopts the “ABC” test developed by the California Supreme Court.¹³ If adopted, it would invalidate decades of legal precedent regarding the definition of independent contractor status and make it far more difficult for workers to establish independent status, as evidenced by California’s struggle to codify the standard into law without creating multiple carve outs. The test creates an unsurmountable burden for employers to establish that a worker is an independent contractor and not an employee. In particular, the fact that a worker performs work that is within the “usual course” of a company’s business should not alone be indicative of employee status – under this reasoning, thousands of work arrangements clearly designed and intended by both the employer and the worker to be a contractor basis would be inappropriately converted into full employment. The rigidity created by the ABC test would reduce or remove the flexibility specifically sought by thousands of independent contractors. At minimum, radical reformulations of independent contractor status or joint employer liability should not be tucked into a larger bill but be the subject of their own legislation or rulemakings.

- **Section 101 – Definition of a Supervisor Under the NLRA**

While there is merit to clarifying the definition of a supervisor under the NLRA, the definition in H.R. 824 is unreasonably narrowed. There is no factual or legal basis to support the proposed amendments to Section 2(11) of the NLRA contained in this bill. It is critical that employers have the ability to rely upon the requisite number of supervisors and managers to run their business. Finally, this proposal would unnecessarily, and improperly overrule decades of NLRB case law established under both Democrat and Republican Boards regarding the definition of supervisory status under the NLRA.

- **Section 104 – Prohibition on Employer Hiring Permanent Replacements in Economic Strike Situations**

Supreme Court precedent clearly permits employers to continue their operations during economic strikes by hiring replacement workers.¹⁴ The right of unions to strike and the right of employers to hire permanent replacements is an important balance of interests under federal labor law and permits both unions and employers to engage in “economic warfare” if disputes cannot otherwise be resolved. By eliminating an employer’s ability to hire replacement workers to keep its operations running, this provision upsets this careful balance by essentially putting a large thumb on the scales in favor of unions.

Status (Jan. 28, 2019); see also Brief of Amicus Curiae The International Franchise Association in Support of Defendant, *Roman et al. v. Jan-Pro Franchising Int’l, Inc.*, No. 3:16-cv-05961 (9th Cir. 2019).

¹³ *Dynamex Operations W. v. Superior Court*, 232 Cal.Rptr.3d 1 (2018).

¹⁴ *Hoffman Plastic Compounds, Inc., v. NLRB*, 533 U.S. 137 (2002).

- **Section 104 - Prohibition on Lockouts**

Similarly, prohibiting employers from locking out employees prior to a strike removes another economic weapon supported by long-standing legal precedent and again upsets the careful balance between the rights of unions and employers contemplated by the NLRA. In conjunction with the prohibition against hiring replacements, employers would be rendered powerless in a labor dispute, while unions would continue to be able to apply significant economic pressure through strikes and other means.

- **Section 104 – Employer Speech Restrictions**

H.R. 842 makes it an unfair labor practice for an employer to hold mandatory employee meetings in the workplace in union campaign settings (“i.e., so-called captive audience speeches”). There is no need to further restrict lawful employer speech in such contexts, given that an employer is already considerably restricted in what it can say in such meetings. For example, election objections can be successfully pursued by a union or unfair labor practices charges could be successfully filed against an employer if, in such meetings, the employer threatens employees who support unionization, or the employer promises better benefits to employees if they oppose unionization. Further, pursuant to Section 8(c) of the NRA employers have a free speech right to communicate in an uncoercive manner with their employees. This section is in direct conflict with Section 8(c) and the general free speech rights of employers.

Finally, H.R. 842 further restricts employer speech by prohibiting employers from explaining to independent contractors that they are excluded from coverage of the NLRA. There is simply no justification for prohibiting an employer from communicating a legal fact.

- **Section 104 – Forced Arbitration of an Initial Collective Bargaining Agreement**

H.R. 842 imposes strict timeframes on the collective bargaining process and potentially will impose the terms of important first contracts on both parties by the involvement of government-appointed arbitrators. Specifically, the bill requires both parties to begin bargaining within 10 days after an election is certified. If parties cannot reach an agreement within 90 days, parties may request federal mediation assistance. Should mediation fail, the parties will have all provisions of their first collective bargaining agreement imposed upon them by a panel of three arbitrators. In essence, three individuals with no firsthand knowledge of the business operations in question and without a true understanding of the bargaining interests of either party will be empowered to write a contract that is binding upon both parties for up to two years. Finally, this interference in parties’ first collective bargaining experience is especially troubling as such contracts serve as a basis for succeeding contracts between the parties for many years.

- **Section 104 – Restriction on Employer Prohibitions on Employee Class or Collective Action Filings**

This provision would invalidate the U.S. Supreme Court’s decision in *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018), which held that employers can place restrictions on employees’ class or collective action filings.¹⁵ The approach of this legislation ignores the sound reasoning of the Supreme Court’s majority in *Epic Systems* and also undermines substantial legal precedent regarding the Federal Arbitration Act that encourages nonjudicial resolution of workplace disputes. Class action litigation has exploded over the last decade to the enrichment of only the plaintiffs’ bar – numerous studies show that arbitration is more likely to produce faster resolutions and also higher awards for employees. Alternative dispute resolution procedures should be highlighted as a less expensive, faster, and more successful solution to workplace disputes, rather than restricted.

- **Section 104 – Union Access to Employee Personal Information**

This provision represents a substantial invasion of an employee’s personal privacy and security. The provision requires employers to provide petitioning unions access to employee names, home addresses, work locations, shifts, job classifications, personal telephone numbers, and personal email addresses. This significant furnishment of personal employee information is serious invasion of personal privacy from which there is no opt out opportunity for employees. If employees seek union representation, they will readily provide on a voluntary basis their necessary personal information to a petitioning union. Employees should not be forced by the government to provide personal and private contact information to petitioning unions – such a requirement only opens up employees to the potential for continued harassment by union representatives, including in their own home and in the use of their personal communication devices.

- **Section 104 – Removal of Prohibition on Secondary Boycotts**

This provision removes the NLRA’s prohibition on secondary boycotts by unions. This provision is a radical change to federal labor law that would significantly contribute to increased labor unrest throughout the country, in direct contravention of the NLRA’s stated purpose of promoting industrial peace and labor relations stability in the country. Allowing secondary boycotts would embroil neutral employers in labor disputes which they have nothing to do with. Neutral employers, including unionized employers, could be picketed or boycotted at great loss of business despite having no relation to the labor dispute in question. There is no rationale to support this potential lethal economic weapon to unions.

¹⁵ *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018).

- **Section 105 – Prohibition on Employer Party Status in NLRB Representation Proceedings**

This provision essentially eliminates the employer from any participation in NLRB representation proceedings in direct violation of an employer’s due process rights. Employers have compelling interests in such proceedings including which employees should be in a proposed voting unit, which employees should be considered supervisors and managers, and when and how the election will be held. It would be unthinkable to hold a trial in which only one party is able to argue its case and present evidence in furtherance of such – with this provision, H.R. 842 has essentially done so with election proceedings – no less a legal process than a civil or criminal trial.

- **Section 105 – Card Check Bargaining Orders**

This provision of H.R. 824 would essentially allow a union to be certified to represent employees even if it loses an election based potentially on unproven allegations of employer interference. This is radical subversion of the democratic secret ballot election process and awards unions not for winning elections but for merely filing unproven allegations of employer misconduct. Such allegations are often never proven. For example, in FY 2021, nearly 97% of unfair labor practice charges filed with the Board were either dismissed, withdrawn, or resolved through settlement.¹⁶ This provision would incentivize unions to file frivolous complaints against employers so as to subvert the secret ballot election process and become certified on the basis of card check alone.

- **Section 105 – NLRB Election Rules and Timelines**

H.R. 842 significantly shortens the timeframe within which the election process is conducted. This reduces the ability of both parties to make their respective cases to employees on the implications of unionization, and most importantly reduces an employee’s ability to obtain important information to make an informed decision on unionization. The compressed timeframe also reduces the ability of either party to adequately prepare for hearings as well as the logistics of the election itself.

- **Sections 108 and 109 – Establishment of NLRB Civil Fine Remedies and Increased NLRB Injunction Authority**

H.R. 842 contains numerous subsections that establish civil fines for employer violations of the NLRA and permits NLRB representatives to obtain expedited injunctive relief in federal district courts. There are no similar provisions imposed on unions. There are also numerous other problems with this approach, including most

¹⁶ *Disposition of Unfair Labor Practice Charges per FY*, NLRB, <https://www.nlr.gov/reports/nlr-case-activity-reports/unfair-labor-practice-cases/disposition-of-unfair-labor-practice>.

importantly the impact of changing the NLRA from a remedial statute to a statutory framework that will become highly adversarial and punitive in nature. First, in the 84-year history of the NLRA and its predecessor, there has never been a procedure that imposed fines and penalties on parties to Board proceedings. If the NLRA is to be restructured in this way, rogue unions that violate the NLRA should also be subject to the same type of civil fines and injunctive procedures. The PRO Act, in its one-sided approach, ignores union misconduct altogether and excludes labor organizations from any type of civil fines and expedited injunctive relief. More fundamentally, this legislative approach is based on the false premise that there are a large number of NLRA violations that merit this type of remedy. As noted above, very few unfair labor practice cases ever reach the Board level and the courts for resolution. Of the cases that do require full NLRB and judicial attention, a very small number involve serious and repeated alleged violations of the Act. Cases that do reach the Board and court level often involve policy issues and close call factual situations as to whether the NLRA has been violated. Civil fines simply are not necessary as a remedy to such a small percentage of cases. In any event, if civil fines are to be included in the NLRA, both rogue employer and rogue unions should be equally subject to such sanctions.

- **Section 109 – Director and Officer Liability**

The PRO Act also extends civil penalties even further by imposing liability on company directors and officers even in cases where such individuals have no direct connection to the misconduct in question. This provision contains the same deficiencies as the extension of civil penalties generally as outlined above, and again excludes union leadership roles from such personal liability.

- **Section 109 – Assessment of Attorneys’ Fees and Punitive Damages**

H.R. 824 also provides for recovery by employees and unions of their attorneys’ fees and punitive damages for violations of the NLRA. Again, the legislation does not provide that unions who also violate the NLRA would have any such legal exposure. In any event, for reasons stated above, these non-traditional remedies are not appropriate to be included in the NLRA, and there has been no case made that the NLRA should be amended to include them.

- **Section 109 – Private Right of Action for NLRA Violations**

This provision would create a private right of action for NLRA violations for the first time in the history of federal labor law. Employees would be given the right to file a complaint alleging an unfair labor practice in federal court. This allowance is in direct contravention of the purpose of the NLRA and the NLRB, which was created to establish a specialized forum for labor cases heard by judges with specialized

knowledge of the issues presented in such cases. Federal courts are already facing an overwhelming backlog of cases of all kinds, with civil actions in particular exploding over the last decade. Adding labor cases to the mix would only further increase this overload and logjam, and would considerably delay the resolution of labor disputes. The current NLRB process provides a swift and effective way to resolve alleged violations, avoiding prolonged litigation in the courts. It also ensures that allegations without merit are quickly dismissed. There is simply no rationale for providing for a private right of action for NLRA claims.

- **Section 110 –Intermittent Work Stoppages**

H.R. 842 would permit unions and employees acting in concert to engage in frequent work stoppages and strikes. These express permissions to engage in protected activity presumably would also include worker slowdowns, “work to rule” employee actions, frequent filing of 10-day strike notices directed against healthcare employers under Section 8(g) of the NLRA, and other union tactics intended to disrupt an employer’s operations. This provision is particularly harmful given that under H.R. 842 employers are prohibited from hiring replacement workers.

- **Section 111 – Right-to-Work Laws Eliminated**

This provision allows unions to require all employees in a bargaining unit to contribute dues and fees as a condition of employment, and would nullify right-to-work laws in more than half of the states. Employees who do not wish to be represented by a union should not be forced to pay union dues and fees to obtain and retain an employment position.

Finally, I would command to the Committee’s attention a thoughtful and exhaustive study of the deficiencies of the PRO Act undertaken by the U.S. Chamber of Commerce.¹⁷

¹⁷ *Labor’s Litany of Dangerous Ideas: The PRO Act 2021 Update*, U.S. CHAMBER OF COMMERCE, (Apr. 12, 2021), https://www.uschamber.com/assets/documents/024112_emp_pro_act_report_2021_update.pdf

Mr. Chairman, Ranking Member Dr. Foxx, and other Member of the Committee, that concludes my testimony. I will be happy to respond to any questions that you may have.

Roger King

Senior Labor and Employment Counsel
HR Policy Association

Roger King's career spans more than 40 years and includes serving as a partner with the Jones Day law firm. He now serves as Senior Labor and Employment counsel for HR Policy Association.

After graduating from Cornell University Law School, he was a Captain and Legal Services Officer in the United States Air Force, on the Staff of United States Senator Robert Taft, Jr. and, subsequently, was appointed as Professional Staff Counsel to the United States Senate Labor Committee.

Roger has testified before various Congressional Committees, is a fellow of the College of Labor and Employment Lawyers, and is a past president of the Ohio State Bar Association Labor and Employment Section. He is a nationally recognized author/speaker on employment matters and has represented employers regarding labor and employment issues both before administrative agencies and in federal and state courts.

He has represented the U.S. Chamber of Commerce, the Society for Human Resource Management (SHRM), the HR Policy Association (HRPA), the National Manufacturers Association (NAM), the American Hospital Association (AHA), the Coalition for a Democratic Workplace (CDW), and the Retail Industry Leaders Association (RILA) in federal courts regarding numerous labor law issues.

Roger specializes in labor and employment matters, collective bargaining, contract administration and representation campaigns. Roger represented the winning side as co-counsel in the landmark U.S. Supreme Court case known as Noel Canning, which successfully challenged President Obama's authority to make recess appointments to the National Labor Relations Board.

Chairman SCOTT. Thank you. Ms. Eisen, you are recognized for 5 minutes.

**STATEMENT OF MS. MICHELLE EISEN, BARISTA, STARBUCKS,
BUFFALO, NEW YORK**

Ms. EISEN. Chairman Scott, Ranking Member Foxx, and members of the Committee, thank you for the opportunity to testify today. My name is Michelle Eisen, and I am a barista at the Starbucks on Elmwood Avenue in Buffalo, New York. The first Starbucks to unionize.

I began my career with Starbucks in 2010. I needed a part-time job that would provide me with health benefits, and also complement my other career as a theatrical stage manager. Starbucks offered both of those things, as well as the opportunity to work for a company that had the reputation of being progressive, caring about its communities and most importantly, taking care of its employees.

For a time I felt that to be true. Unfortunately, over the last several years things began to shift within the company. The cost of the benefits increased while the coverage decreased, and wages did not keep up. Other benefits were completely taken away without warning or explanation.

The clearest difference was the overall decline in the everyday working conditions on the floors of the cafes. This decline became drastic during the COVID-19 pandemic when Starbucks boasted record profits, but simply treated us, its workers, as disposable.

This nearly led to me leaving a company I devoted over a decade of my life to, but instead I was presented with the opportunity to try to unionize my store. The company's response to our organizing campaign was not at all what I expected. I realize now how naive that was, but I truly believed that Starbucks was at heart the progressive company it proclaimed itself to be.

We were simply expressing our desire for reasonable improvements to our working conditions, particularly when it came to our health and safety. The only way to accomplish this was to make sure we had a true voice in the company policies that affected us.

Within 2 weeks of filing our first petitions with the NLRB, the company shut down two stores it perceived had strong union support, one permanently and the other for months. They also quickly shipped in over 100 out of town managers and upper level corporate to infiltrate our cafes, surveil and intimidate workers, and shut down our stores in order to hold anti-union meetings, which workers needed to attend in order to get paid.

They went from offering us the world if we voted no, to threatening to take away our benefits if we voted to unionize. When that did not work, and we want our union anyway, they began to discipline us, then fire us, then permanently close our stores. As our campaign moved from Buffalo to a national scale, so did Starbucks's union busting.

That behavior has only increased tenfold since the return of Howard Shultz as interim CEO in April of this year. Starbucks has fired over 100 union leaders and supporters to date, many just in the previous weeks. Starbucks has no regard for our legal rights, and they will never stop on their own.

In the last year the union has filed over 350 unfair labor practice charges against Starbucks with the NLRB. The NLRB has so far issued administrative complaints against Starbucks and almost 100 ULPs alleging over 600 legal violations.

Some of these alleged violations affected every Starbucks worker in the country, and Starbucks workers are not alone in this struggle. Workers involved in other large organizing efforts at places such as Amazon, Chipotle, Trade Joe's and Apple have faced very similar union busting from their companies.

Despite this overwhelmingly negative response from Starbucks, we find ourselves at the forefront of a new labor movement. Over 6,300 Starbucks workers have unionized at over 237 locations across the U.S. so far.

These victories are due entirely to the courage of these workers in the face of this abusive conduct by the company. It should not take an act of bravery to ensure that you have a voice at work. We need Starbucks to recognize our desire to organize, which the NLRB explicitly states is our right. We need Starbucks to stop mistreating the workers it claims to care about, and to fulfill its legal obligation to come to the table and negotiate with us in good faith.

We are tired of fighting a company that can afford to do better by its hourly workers. We are tired of listening to billionaire CEOs take sole credit for the billions of dollars of profit made off our labor. We are tired of watching Starbucks continue to violate workers' rights knowing that the law will fail to offer any meaningful consequences. Most of all, we are tired of fighting Howard Shultz's ego.

We need people in power to call Starbucks out for this repulsive behavior because worker rights are human rights. We need labor law reform like the PRO Act, so that the laws work to protect the people they were put in place for. We need better funding for the NLRB so that the agency has the resources it needs to enforce the law. We need you to stand with us as the American labor movement does what it always has: fight for a future that is just, and works for all of us. Thank you. I look forward to taking your questions.

[The prepared statement of Ms. Eisen follows:]

Michelle Eisen
House Committee on Labor and Education Testimony
In Solidarity: Removing Barriers to Organizing
September 14, 2022

Chairman Scott, Ranking Member Foxx, and members of the Committee, thank you for the opportunity to testify today. My name is Michelle Eisen and I am a Barista at the Starbucks on Elmwood Avenue in Buffalo, NY, the first Starbucks to unionize.

I began my career with Starbucks in August of 2010. I needed a part time job that would provide me with health benefits and complement my other career as a theatrical stage manager. Starbucks offered both of those things as well as the opportunity to work for a company that had a reputation of being progressive, caring about their communities, and most importantly taking care of their employees. And for a time, I felt that to be true. Unfortunately, over the last several years things began to shift within the company. The cost of benefits increased, while the coverage decreased, and wages did not keep up. Other benefits were completely taken away without warning or explanation. The clearest difference was an overall decline in everyday working conditions on the floors of the cafes. This decline became drastic during the Covid 19 pandemic, when Starbucks boasted record profits but simply treated us, their workers as disposable. This all led to me nearly leaving the company that I had devoted over a decade of my life to. But then I was presented with the opportunity to try to unionize my store.

The company's response to our organizing campaign was not at all what I was expecting. I realize now how naïve I was, but I honestly believed that Starbucks was at heart the progressive company it proclaimed itself to be. We were simply expressing a desire for reasonable improvements in working conditions, particularly when it came to our health and safety, and the only way to accomplish that was to have a real voice in the company policies that affected us. We believed this aligned with Starbucks' own mission and values, and would ultimately make the company better.

Within two weeks of us filing our first petitions with the NLRB, the company shut down two stores it perceived had strong union support, one permanently and the other for months. They also quickly shipped in over a hundred out of town managers and upper level corporate to infiltrate our cafes, surveil and intimidate workers, and close our stores in order to hold anti-union meetings, which workers had to attend in order to get paid. They went from promising us the world if we voted no, to threatening our benefits if we voted to unionize. And when that didn't work and we were able to win our union anyway, they started to discipline us, then fire us, then fire us en masse. Then they permanently closed our stores, then they permanently closed our stores en masse. As our campaign moved from Buffalo to a national scale, so did Starbucks' union busting. And this behavior has only increased ten- fold since the return of Howard Schultz as interim CEO in April of this year. Starbucks has fired over 100 union leaders and supporters to date, many just in the previous weeks.

Starbucks has no regard for our legal rights, and it will never stop on its own. In the last year, the Union has filed over 350 Unfair Labor Practice charges against Starbucks with the NLRB. The NLRB has so far issued administrative Complaints against Starbucks for almost 100

ULP charges, alleging over 600 legal violations. Some of those alleged violations affected every Starbucks worker in the country. And Starbucks workers are not alone in this struggle. Workers involved in other large organizing efforts at places like Amazon, Chipotle, Trader Joes and Apple have also faced very similar union busting from their companies.

Despite this overwhelming negative response from Starbucks, we have found ourselves at the forefront of a new labor movement. Over 6,300 Starbucks workers have unionized at over 237 locations across the U.S. so far. But those victories are due entirely to the courage of those workers in the face of this abusive conduct by the company. It should not take an act of bravery to ensure that you have a voice at work.

What we want is for Starbucks to recognize our desire to organize, which the NLRA explicitly says is our right, for Starbucks to stop mistreating the workers it claims to care about, and to fulfill its legal duty to come to the table and negotiate with us in good faith. We are tired of the relentless abuse and delay tactics. We are tired of fighting a company that can afford to do better by its hourly workers. We are tired of listening to billionaire CEOs take sole credit for the billions of dollars of profit made off our labor. We are tired of watching Starbucks continue to violate workers' rights, knowing the law will fail to offer meaningful punishment. And most of all we are tired of fighting Howard Schultz's ego.

We need people in power to call Starbucks out for their repulsive behavior, because worker rights are human rights. We need labor law reform like the PRO Act, so that these laws actually work for the people they were put in place to protect. We need better funding for the NLRB, so that the agency has the resources it needs to enforce the law. We need you to stand with us as the American labor movement does what it always has: fight for a future that is just and works for all of us.

Thank you and I look forward to taking your questions.

Starbucks' Unfair Labor Practices in Buffalo

When Starbucks began its anti-union campaign in Buffalo, it engaged in a variety of ULPs throughout the area, some of which acted as a template for the company's continued violations of the law nationally. I relate my personal experience with the company's conduct here, all of which has been submitted to the NLRB in Case Nos. 03-CA-285671 et al.

The organizing committee went public with its organizing campaign on Monday, August 23. This letter, among other things, asked Starbucks to abide by fair election principles. I believe that Starbucks became aware of our organizing campaign on either the evening of Saturday, August 21 or the morning of Sunday, August 22. The Committee never received any response from Johnson to this letter or acknowledgment that this letter had been received. The Committee also activated its Twitter, Instagram, and Facebook accounts on August 23.

I worked at the Elmwood store on August 23. Store Manager Patty Shanley typically spends most of each Monday categorized as being on administrative time to handle payroll and

other administrative tasks. On August 23, Shanley spent most of the day on her computer with headphones in. I could not hear what she was doing or listening to because Shanley was wearing headphones. I learned from an employee at another store that the Store Managers in the Buffalo area were called into an emergency Zoom meeting to discuss the organizing drive. My understanding is that this employee's Store Manager was not wearing headphones and, when the employee came within earshot, the employee could tell that this was the purpose of the meeting.

The same week that we announced our organizing drive, our District Manager, David Lafrois, showed up at the Elmwood store several times. This was the first time I had seen Lafrois in the Elmwood store in a while. In fact, I cannot remember the last time I had seen him in the store before that week. Lafrois did not talk to me about the organizing drive. I did not see Lafrois talk to any other employees about the organizing drive.

On August 25, Starbucks announced that it was going to hold "listening sessions." As I will describe below, these were not sessions for Starbucks's representative to listen to us, but a method for them to provide us with anti-union talking points. I use the term "listening session" in this testimony because that is what Starbucks called these meetings. The first listening sessions were held on September 2 and September 3. Two were held each day, with all meetings taking place at Starbucks's store located on Main Street in Williamsville. I was not able to attend any of these sessions. My understanding, based on conversations with employees that attended these sessions, is that the Union was not mentioned. These first two listening sessions were not broken down by store location; in other words, any employee from a store in the Buffalo area could attend any one of these meetings. After these meetings, Starbucks's next listening sessions were broken down by store location.

Our petitions for elections at three stores, including the Elmwood store, were filed with the NLRB on August 30.

I was not scheduled to work on Saturday, September 4, but I came into the Elmwood store as a customer that morning. When I arrived, the store was very busy. This was not unusual. The store is located less than a block away from a large farmer's market that takes place each Saturday and the neighborhood in which the store is located is otherwise very busy on Saturdays. The store was not unreasonably busy and, although customers may have had to wait a few minutes longer for their orders than they would have on a less busy day, it did not seem as though any customers were upset by this. This was the first time I witnessed Rossann Williams, Allyson Peck, and Deanna Pusatier in the Elmwood store. Williams is Starbucks' President of North America. Peck is a Regional Vice President. Pusatier is the Regional Director of the Buffalo-area stores. Pusatier is new to her position as our Regional Director. Williams was handing out gift cards to the customers who were waiting and apologizing to them for how long they had to wait. Even though I was not working, I thought that was insulting. As I said, the store was not unreasonably slow in fulfilling customers' orders that day. When I talked about this with several other coworkers, they told me that they were also insulted by Williams doing this.

Prior to announcing our organizing drive, I had never seen Williams or any management official at her level visit a store in which I was working. Peck has been with Starbucks for less

than two years. Prior to our organizing drive, I had seen Peck in person once, shortly after we reopened in 2020 after the onset of the COVID-19 pandemic. She visited our store to congratulate us on our high Customer Connection Scores after reopening. In my 11 years with Starbucks, which includes time in stores in Hawaii, I have seen a Regional Director visit a store in which I am working approximately three times.

The Elmwood store has a large, carpeted meeting room in the back of the store. My understanding is that this room was originally conceived by a District Manager to have district-wide meetings with Store Managers. However, that District Manager left before the room was completed, and the next District Manager decided to use hotel conference rooms for districtwide meetings. Over time, the employees at the Elmwood store have turned the room into a mix of breakroom and supply storage area. The carpet has become a little worn and dirty, but it was not something that employees had complaints about. Once the Union organizing drive started, Starbucks decided that the carpet needed to be removed. During the week of Labor Day, we were unable to use that room while the carpet was being removed. We were originally told that this would take 24 hours, but it took virtually the entire week of Labor Day. I remember this because on Friday, September 10, we received our large order for the week. We would usually put some of the boxes from that order in the carpeted room, but we could not because the room was not finished.

On September 8, Starbucks sent out a letter saying that Lafrois had left Starbucks. The letter thanked Lafrois for his years of service and was framed as though Lafrois had left voluntarily. It is my belief, based on the timing of this announcement and the comments made in several listening sessions that I attended, that Lafrois was fired by Starbucks because of our organizing drive. Shelby Young was the District Manager of the other district in the Buffalo area, but she was “reassigned” around the same time that Lafrois was let go. I believe Young was reassigned, like Lafrois, because she had not done enough to stop our organizing drive from happening.

The first listening session that I attended was held on September 10. This meeting was held at the Courtyard Marriott near the Buffalo airport. Employees at the Elmwood store were given the option of showing up for a meeting on September 9 or September 10. It was up to the individual employee which meeting they attended. Attendance was either mandatory or effectively mandatory, since workers were told to come, their stores were shut down, and the only way they could get paid was to attend the meeting. This meeting was supposed to be held from 4:00 p.m. – 5:00 p.m. When I and several other employees arrived for the meeting, however, it became clear that the Starbucks officials holding the meetings had forgotten it was scheduled for that time. The three management officials present were Peck, Williams, and Pusatier. They were surprised to see us when we came into the hotel for the meeting. There were about seven employees present for this meeting, including me. The meeting lasted about an hour. I recorded this meeting using my Apple watch.

Shortly after the organizing drive went public, Starbucks brought in “support managers” to work in the Elmwood store. I do not remember the exact date that I saw a support manager in the Elmwood store. At first we had two support managers: Dustin Taylor and Matt. Taylor is a Store Manager in Georgia. Matt is a Store Manager in Boston. After some time, the Elmwood

store was assigned two additional support managers. During the listening sessions, we were informed that the support managers were brought in to support our Store Manager, Shanley, who Starbucks said was falling short of expectations. I and several other employees repeatedly told Starbucks officials during these listening sessions that Shanley was terrific and that our issues with Starbucks were not related to her performance.

The clear purpose of the support partners is to intimidate and watch the employees during the organizing drive. As I stated above, I usually start my workday at 5:00 a.m. with another employee. Matt is usually in the store from 7:00 a.m. – 3:00 p.m., and Dustin usually covers the later portion of the day, until the store closes. There has been at least one support manager at the Elmwood store for every single shift that I have worked since they were first assigned to the store. These support managers do not appear on the original version of our schedule; they will usually scribble their name and hours worked on the Daily Coverage Report (“DCR”). When this happens, the shift supervisor has to try and figure out where to schedule the support manager. Some of the support managers are not skilled at any of the stations and end up being more in the way than anything else. I also have witnessed support managers following Shanley around during her shift and telling her how to do her job better though, as I said, Shanley is the best Store Manager that I’ve ever worked with. We were told that the support managers were staying for about three months, meaning they would allegedly leave in early December.

The presence of the support managers had an immediate and negative impact on the ability to discuss the Union or the organizing drive between employees. Given the small size of the Elmwood store, it is very difficult to have a conversation that will not be overheard by someone else behind the counter or working in the café. Several employees at the Elmwood store who wore union pins before the support managers were brought in stopped wearing them after the support managers started working at the store. At least four of them told me that their decision to stop wearing the pins was because they didn’t want to advertise their support for the Union in front of the support managers. I personally have not had conversations at work about the Union when the support managers are present. I am very open and vocal about being pro-union but I do not want to put other employees who are less comfortable or still deciding about the Union in an awkward or uncomfortable position. Before the support managers were brought in, I would have no issues discussing the union drive with other employees, though I usually did so out of Shanley’s presence because I wanted to avoid making her uncomfortable.

To the best of my knowledge, every store in the Buffalo market was sent at least one support manager. It seems, based on my conversations with other employees, that the three stores that are currently voting have more support managers at them than the other Buffalo-area stores. I have never, in my career with Starbucks, heard of a “support manager.” I have also never seen managers from other stores be brought in to other stores on such a widespread and lengthy basis. Presumably, those managers’ original stores now need to have someone else cover them while these support managers are in Buffalo. It makes no sense to me that this would be a normal process that Starbucks would follow on a regular basis.

Starting on August 26, Starbucks began having higher-level managers set up shop in the Elmwood store. These included Williams, Peck and Pustatier, but also included other individuals that I did not recognize and who did not necessarily introduce themselves to me or other

employees. There would usually be between 3-6 of these higher-level managers in our café at any given time, and they would usually set up at a café table for several hours at a time. On one such occasion, the date of which I do not recall, I was working the front register and four of these officials came into the store. Usually when a Starbucks employee buys something, regardless of their level within the company, the employee gives their partner number, which entitles them to a discount. These four individuals did not give me their partner numbers, but I noticed them talking to Shanley and MK, the District Manager who replaced Lafrois, about a remodel for the Elmwood store. I do not recall MK's full name at this time. After I overheard them talking about Starbucks business with Shanley and MK, one of them ordered another item. I asked the person if they wanted to use their partner number, but they declined.

I would be surprised if Starbucks's corporate officials do not visit the Elmwood store on a daily or near-daily basis. I believe that Starbucks chooses to have these officials visit when I and other vocal union supporters are not working. I believe this because I often receive text messages from less openly pro-union employees telling me that these visitors are at the store, sometimes hanging out in the lobby of the café and sometimes working right next to employees. For instance, on November 16, I was not scheduled to work but I came into the Elmwood store between 12:30 p.m. and 1:00 p.m. When I got to the store, I saw three corporate officials who I did not recognize. One was in our handoff position, where items are handed to customers. Another was at the bar, and I do not recall what the third official was doing.

On September 19, I attended another listening session. This session was specific to employees at my store. Starbucks held three listening sessions on September 19 for employees at my store: at 8:00 a.m., 12:00 p.m., and 4:00 p.m. These meetings were held at the Wyndham Garden Downtown hotel. I attended the 8:00 a.m. meeting. Shanley was still responsible at that time for scheduling employees for these meetings and she asked me what time worked best for me. Jaz Brisack, another vocal union supporter and member of the organizing committee, split ourselves up so that we could represent as many people as possible during these meetings. Brisack went to the 12:00 p.m. listening session. This meeting was again held by Williams, Peck, and Pusatier. I recorded this meeting on my Apple watch.

After the September 19 meeting ended, I went to the Elmwood store and sat at a high-top table with Brisack to discuss what had been said during my morning meeting. Neither of us were scheduled to work that day. Starbucks had scheduled employees from the Niagara Falls Boulevard store to work at our location while it held these meetings.

Brisack and I sat at a café table near the front entrance. Within 10 minutes of my arrival at the store, Peck, Pusatier, and Williams entered through the Elmwood Avenue entrance of the store. They did not appear to see either me or Brisack when they first came into the store. We watched Peck and Pusatier try to help employees behind the counter and Williams was sweeping the floor. None of their apparel that day met Starbucks's dress code. Most of the corporate officials who have spent time at the Elmwood store have not adhered to Starbucks's dress code. For the first few weeks they were at the store, they wore fancy suits and clothing. This changed after a few weeks and they started wearing Starbucks sweatshirts and hoodies, but they still were not complying with the dress code. Most of the support managers are usually in compliance with the dress code, although not always. Specifically, there have been issues with the

female-identifying support managers' decisions to wear nail polish and bracelets while working, both of which are against the dress code. I have had different conversations with Anna and Kelly, two of the support managers that have worked at my store, about wearing nail polish and while handling food and drinks. I also witnessed Michael Donovan, a coworker and shift supervisor, approach a corporate official named Michaela and another corporate official whose name I do not know and inform them that they were not in compliance with the dress code. Donovan was told that this was not his concern, that he needed to stay in his lane, and that the dress code didn't apply to them based on their positions within the company. I did not physically overhear this conversation, but I covered Donovan's position at the bar while he talked to them, and he informed me of what he had been told immediately after he returned from speaking with them.

I attended the videoconference NLRB hearing that covered my store and the other two stores. On some of the days that the hearing was in session, I worked from 5:00 a.m. – 8:00 a.m. and was otherwise present in the store at odd times throughout the day. From my observation and discussions with coworkers, it did not seem that the presence of the support managers and the corporate officials at the Elmwood store lessened at all while the hearing was underway.

I attended a listening session on October 1 that took place at the Elmwood store. This was the first session I attended that Starbucks closed the store early to hold. The meeting was scheduled for 5:00 p.m., and the store closed at 3:00 p.m. The normal time for the store to close is 9:00 p.m. This is the first time I have ever been aware of a store closing early to hold a meeting. I know of stores closing early because of emergencies, such as power outages or something similar, but not for non-emergency meetings. This meeting was run by Peck, Mark, and Chris Stewart. Mark is the interim District Manager who replaced Shelby Young. Stewart is from Partner Resources, Starbucks's human resources department. I recorded this session on my Apple watch. There were between 15-20 employees present at this meeting.

In the second week of September, after the Union had filed its petitions, Starbucks announced that it was going to close the Elmwood store for renovations. Shanley told us that the reason that Denise, one of Starbucks's corporate officials, was at the store was to oversee the Elmwood store's renovation. Starbucks had been pushing back any renovations to our store for at least two years before this. The store was closed beginning on October 11 and reopened for business on October 17. During the time the store was closed, none of the employees who normally worked at the Elmwood store were scheduled to work at that store. We were given three options: to pick up shifts at another store, to use vacation time, or to take unpaid time off for the week. As I mentioned in the NLRB hearing, many if not most of the employees at the Elmwood store do not have their own means of transportation and working at another store is not a realistic option for these employees. At the time of the renovation, I estimate that about 60% of the employees working at the Elmwood store did not have their own transportation. I believe that less than 25% of employees at the Elmwood store picked up shifts at other stores. Most of us, including me, took vacation time for the week that the store was closed.

The renovation itself was spent pushing the counter out about 12 inches from its previous location, which created slightly more room behind the counter for employees. My understanding is that the store was originally designed, it was at a time when the location was much less busy. At that time, five or six employees worked behind the counter at any given time. Currently, the

store is so busy that 10 employees could be working behind the counter at any given time. We had also complained for several years that the layout of the work area behind the counter had too many dangerous obstacles and equipment, and that there weren't enough sinks. Starbucks's renovation alleviated some of those issues, although moving the counter 12 inches did not allow for much overall improvement.

One of the support managers assigned to our store, Dustin, called the October closure a "fake renovation." We also were told that the Elmwood store would be undergoing a more substantial renovation in February 2022. We were given no explanation why Starbucks chose to close our store for a week in October when it planned a larger renovation only a few months later. I believe the true purpose of this renovation was to slow the momentum of the organizing drive, but in reality, it gave us some time away from Starbucks's constant surveillance and intimidation.

The October closure was the first time since I started working at the Elmwood store that it has been closed for renovations. Starbucks had done several "refreshes" over the time I have worked there, but this was work that was performed overnight while the store was closed.

I attended a listening session that took place on October 20. This meeting took place at the Hampton Inn in downtown Buffalo. Each employee received a letter informing them what time we were supposed to attend a meeting. I had been assigned to a meeting that was supposed to start at either 8:00 p.m. or 8:30 p.m. I was scheduled to work at the Elmwood store at 5:00 a.m. the next day. I decided to show up to the 6:00 p.m. meeting instead. I explained to the people holding the meeting that I had to work early the next morning and asked to attend the 6:00 p.m. meeting. I was told that was fine. I recorded this meeting with my Apple watch. Peck and Ana Gutierrez (Regional Operations Coach) were also present for this meeting. Part of the presentation was a PowerPoint presented by a Starbucks representative going through the Workers United constitution and some of the Union's financial statements.

The last listening session that Starbucks held for employees at the Elmwood store was on November 8. There were two meetings scheduled for that evening: one at 5:00 p.m. and the other at 7:30 p.m. Starbucks closed the store early to have these meetings. I was told that I was supposed to attend the 7:30 p.m. meeting. I was scheduled to open the store the next day on a shift starting at 5:00 a.m., which meant I needed to wake up at 4:00 a.m. I had heard from several employees who were scheduled for the 5:00 p.m. meeting that they would not be attending, so I knew there would not be any legitimate issue with me attending. I parked in the parking lot at the back of the store and walked toward the back entrance. The back door was locked. I recorded my interaction with Pusatier and support manager Kelly, both of whom were present for this meeting. I was not allowed to attend, with the only reason given that there were capacity issues with my attendance. As I stated above, this was untrue. The attendees at this meeting were mostly new employees and I believe Pusatier did not want me to attend because I am a strong pro-union voice. Because I was not allowed to attend the November 8 meeting, I was originally not going to be paid. However, another employee told Shanley that I had been turned away from the meeting, and she added the hours to my pay for that week.

The second round of our filings for elections with the NLRB included a store located at Walden and Anderson in Cheektowaga (“the Walden and Anderson store”). We had overwhelming support at that store when the petition was filed. Shortly after that petition was filed, Starbucks shut down the Walden and Anderson store and dispersed the employees who worked there to other stores in the Buffalo area. I do not know the exact date that this occurred. Around the same time, Starbucks also took all of the hiring decisions out of the store managers’ hands. We were told that this was to fix staffing and training issues that Starbucks claimed it had uncovered right around the time the organizing drive was announced. The Walden and Anderson store was closed to the public and the new employees who were hired were trained in a closed environment, never dealing with real customers. This meant that when these new hires were sent to open stores for the first time, we had to re-train them. All of the new employees at the Elmwood store who were trained at Walden & Anderson are terrific in terms of their attitude toward the job, but they are not prepared to serve customers when they first arrive at the store. I know this because several of these newer employees have told me this personally. I believe Starbucks intended to cause tension between the existing employees and the newer employees by sending untrained employees to our stores.

In addition to having new employees trained at this store, Starbucks has also removed from Store Managers the ability to interview or hire employees for their stores. I know that Shanley has been locked out of the hiring portal that Starbucks uses, and that the first time she interacts with a new Elmwood store employee is when that employee starts working at the store after being trained at the Walden and Anderson store.

Starbucks has also used its training center to drill anti-union content into new employees before sending them to our store. I know this because several new employees, seeing that I was wearing a union pin or knowing that I was on the organizing committee, sought me out when they first came to the store to discuss what they had heard during these training sessions.

Typically, new employees are trained by barista trainers, who are compensated financially for training new employees. Since Starbucks moved all training to the Walden and Anderson store, none of the in-store barista trainers have been paid for training new employees, even though many of them end up training these new employees on the fly for the reasons I have stated above.

I am not aware of any other time since I started working for Starbucks that a store has been turned into a market-wide training center. In my experience, both in the Buffalo and Hawaii stores in which I have worked, Starbucks has always trained employees in the stores in which they were hired to work.

My understanding is that the Walden and Anderson store reopened as a regular store on November 8. From what I have heard, Starbucks claims that it has fixed the staffing issues in the market and no longer needs a training center. This does not make sense – if Starbucks had issues with training of new hires, and this training center was designed to train employees more properly, then the training store should remain as it was to train new employees as they are hired. Some of the employees who worked at the Walden and Anderson store before it was shut down were brought back after it reopened, but not all of them. Some of them transferred permanently

to other locations. Starbucks also added a large number of employees to that store. Before it was turned into a training center, there were about 25 employees who worked at the store. Now, there are about 40 employees assigned to that store. It is clearly an attempt by Starbucks to dilute the Union's support at the store.

Starbucks has flooded stores throughout the Buffalo market with new employees, just like it has at the Walden and Anderson store. For instance, at the Elmwood store, we have had about seven or eight new employees assigned to our store since the union campaign was announced. We have repeatedly told Starbucks officials, including at the listening sessions, that our store is not understaffed. Most of these employees were added to the Elmwood store during the week of October 25, which I believe was an attempt by Starbucks to get these employees in the voting group for our store.

The addition of these new employees has had two effects: first, the number of hours available to all employees has been cut down, and so we're receiving fewer hours per week. For instance, during the week of November 15, I was only scheduled for 15 hours of work. I had asked for one day off, but I would normally have been scheduled for 24 hours in a similar week. I was able to pick up an additional shift by talking to Shanley, who was unaware that I had been scheduled less than normal. This leads me to believe that Starbucks has removed Shanley's scheduling responsibilities.

Starbucks scheduled more employees than are necessary on many shifts. This, plus the constant presence of the support managers, means that there are far more workers in the store than are necessary at any given time. In the NLRB hearing that I attended and testified in, Starbucks made a big deal about the Playbuilder tool that it claims is used to help decide where to put employees on a shift. The Playbuilder tool only has 11 openings for a drive-thru store, and not all of these would need to be filled at every moment. Recently, a local Starbucks store that has a drive-thru had 16 people working at once, well in excess of any reasonable need. I have two examples from my store that show how overstaffed our store is. Normally, if someone is assigned to work on the register, and that employee rings up a black coffee or tea for a customer, the register employee will pour that drink for the customer. We had so many employees working on a recent shift that I was specifically assigned to pour the black coffee and tea. On another recent shift, I was working in the customer support role, which partially involves tidying up the lobby area. Part of the job involves sanitizing door handles and tables. I started to go do that and the shift supervisor stopped me, telling me that he had already assigned another employee, Blue, to just wipe down the tables and door handles. I asked if that was all Blue was assigned to do that day. The shift supervisor told me yes and that he didn't know what else to do with that many people.

Starbucks has an emergency text message service. Until very recently, Starbucks only used this to contact employees about emergencies, like major snowstorms or at the beginning of the COVID-19 pandemic. In late October and early November, Starbucks began using this service to send us anti-union propaganda and information about anti-union meetings. The day

before ballots were mailed out in our election, we received a link to a video urging us to vote no in the election.

Starbucks usually gives out raises in January of each year. Before the Union announced its organizing drive, Starbucks announced that it was moving up our raises so they would take effect at the beginning of October instead of January. However, on October 27, Starbucks announced that it was going to start providing seniority pay to employees based on years of service. This was something that Starbucks has never done before. It was also the subject of employee complaints at many of the listening sessions in September and October. As an 11-year employee, I only make \$0.16 an hour more than a new employee hired off the street. Starbucks's announcement excluded employees who had worked for it for less than six months. Employees working for the company for less than three years would not receive a seniority pay raise. An employee working for Starbucks for at least three years would receive up to a 5% raise. Employees with at least five years of service would receive up to a 10% raise. Starbucks also claimed that it would start giving out these raises in January 2022 and that it would take until summer to roll all of them out. In my opinion, this is a PR stunt so that Starbucks could say that it was giving raising to employees.

Starbucks's conduct throughout this organizing drive has had a negative impact on my health. As I stated above, I have an Apple Watch. I have had the watch since July 4, 2020, and the Health app on the phone tracks my heart rate. During the listening sessions held on September 19, October 1, and October 20, I received a warning from the Health app that a high heart rate had been detected. The app will only alert me about a high heart rate if my heart rate is elevated for more than 10 minutes. This is the first time I've received a warning from the Health app about having a high heart rate. The final day of the NLRB hearing that I attended and testified in, I had bloodwork scheduled based on an annual physical. I have no known health issues and have a low resting heart rate. I had this bloodwork scheduled for 5:00 a.m. on September 30, the last day of the hearing. When I received my results, four days later, I had an exaggerated thyroid-stimulating hormone. The normal level is 4.5 and my level was eight. I was told that this was either evidence of a thyroid problem or that I was being affected by stress. My doctor scheduled me for additional tests to see if the issue was stress and not a thyroid problem. I was recently retested and the results were normal. That shows to me that Starbucks's actions are causing me stress and affecting my health. I also lost 10 pounds between mid-September and mid-October 2021, which I also believe was from stress. I know of several employees on leaves of absence for their health, and multiple employees have taken days off because they need a break from Starbucks's intimidation and coercion. I am aware of a number of employees taking advantage of Starbucks's mental health counseling service that is usually conducted by telephone. There was such an uptick in requests for this counseling that Starbucks actually brought a counselor into our store.

These categories of violations of the Act are all currently the subject of a months-long trial before an NLRB Administrative Law Judge (Case No. 03-CA-285671 et al.):

- Closing locations temporarily or permanently which Starbucks perceived to be hotbeds of union organizing, likely based on the names of workers who signed a public letter to then-CEO Kevin Johnson when the campaign went public;

- Transferring workers in a store with particularly high union support out of the store for months, presumably in order to break the momentum of their organizing;
- Refusing to hire new employees at my store, the first to unionize in the U.S., for a period of months, in retaliation for our organizing;
- Creating new policies or enforcing existing policies in a far stricter way than before the union campaign started, in order to create a disciplinary record that would allow for the termination of union leaders and supporters;
- Eventually terminating union leaders and supporters in large numbers, and ensuring they do not receive unemployment benefits;
- Engaging in widespread surveillance of union supporters through the presence of out-of-town managers and executives, particularly in Starbucks locations where the company perceived strong support for the union. Managers were ordered to ensure they were present during all operating hours in order to stop workers from discussing organizing a union;
- Holding numerous anti-union meetings that were mandatory or effectively mandatory, usually resulting in closing an entire store for a part of the normal operating hours;
- Making widespread and persistent coercive statements regarding the perils of unionizing, both regarding the potential loss of benefits, and regarding internal Union matters. After the union elections took place, the majority of the out-of-town managers left abruptly, never following up on the promises they made while the elections were ongoing; and
- Soliciting issues from workers in order to know what improvements they sought, then promising those benefits or actually granting them during the time leading up to union votes.

Starbucks' Unfair Labor Practices Generally

As the effort to unionize Starbucks became a national movement, the company's tactics, including its violations of the law, expanded and evolved. In addition to the categories of conduct described above, the company has engaged in the following, all of which are the subject of ULP charges filed by the Union. This list is non-exhaustive, given the unprecedented scale of the company's disregard for the law:

- Widespread terminations of union leaders based on the thinnest of pretexts. As of now, there have been at least 100 terminations of union leaders and supporters. A partial list of terminated Starbucks workers, their locations, their tenure with Starbucks, and case numbers of NLRB cases concerning their termination, is attached as **Attachment A**;
- Temporarily and permanently closing Starbucks locations based on perceived support for the Union;

- CEO Howard Schultz announcing a host of new and improved benefits, explicitly threatening not to implement those benefits at stores that have unionized or even where workers are organizing (despite the Union waiving any legal obstacle to such implementation), then carrying through with that threat and refusing to apply the benefits to unionized or unionizing workers;
- Cutting hours of Starbucks workers nationally;
- Refusing to bargain with the Union regarding locations where it has been certified by the NLRB as workers' collective bargaining representative;
- CEO Howard Schultz making numerous coercive statements which were broadcasted to all Starbucks workers, including statements regarding the futility of organizing a union;
- Changing store operating hours nationally so workers must arrive at work by the unprecedented time of 4:00 a.m.; and
- Making frivolous and absurd claims about the NLRB and Union colluding to engage in union election fraud in a publicized letter, and broadcasting the letter to all Starbucks workers nationally, with the clear aim of undermining workers' confidence in the NLRB and stopping workers from organizing through the agency's infrastructure.

In total, the Union has been forced to file over 350 ULP charges against Starbucks, many of which are national in scope, and many of which involve multiple allegations of legal violations. A partial list of administrative Complaints issued by the NLRB on these charges so far, encompassing approximately 100 ULP charges, is attached as **Attachment B**.

ATTACHMENT A

	Name	City	State	Date of Firing	NLRB Case Number	Tenure with Starbucks
1	Garrett Ellison	Scottsboro	AL	07/23/2022		
2	Noah Witting	Birmingham	AL			
3	Preston Ritter	Scottsboro	AL	7/23/2022		
4	Alyssa Sanchez	Phoenix	AZ	1/22/2022		
5	Laila Dalton	Phoenix	AZ	4/4/2022		3yrs
6	Milyanna Romero	Avondale	AZ	6/2/2022		1 year
7	Savannah Dorton	Avondale	AZ			1 year
8	Tyler Gillette	Phoenix	AZ	3/10/2022		2.5yrs
9	Cristobal Emilio Benavid	Anaheim	CA			
10	Emma Chambers	Los Angeles	CA			
11	Krystal Garcia	Anaheim	CA			
12	Alex Prado	Denver	CO	5/20/2022	27-CA-296209	
13	Cole Spadafore	Denver	CO	5/20/2022	27-CA-296209	3.5yrs
14	Courtney McVeigh	Denver	CO			
15	Graham Gjermie	Denver	CO	5/27/2022	27-CA-296692	
16	Hannah Mehlman	Denver	CO	6/21/2022	27-CA-298017	5 years
17	Kory Lindholm	Denver	CO			
18	Monique McGeorge	Denver	CO	5/24/2022	27-CA-296692	
19	Olivia Martinez	Denver	CO	5/30/2022	27-CA-296772	2yrs
20	Omar Alvarez	Denver	CO			
21	Ryan Dinero	Denver	CO	6/17/2022	27-CA-297804	3.5yrs
22	Trey Solpsema	Denver	CO			
23	Ash Bennett	Covington	GA	7/4/2022		
24	Jaysin Saxton	Augusta	GA	8/16/2022		3
25	Dante	Chicago	IL			
26	Fernando Vargas-Soto	Chicago	IL			
27	Jasper Booth-Hodges	Chicago	IL	8/10/2022		2.5 years
28	Alydia Claypool	Overland Park	KS	3/28/2022	14-CA-293122	5 years
29	Hannah McCown	Overland Park	KS	4/12/2022	14-CA-295106	
30	Julia Smith	Overland Park	KS	7/28/2022	14-CA-300506	
31	Lindsay Vanette	Overland Park	KS	4/5/2022		3yrs
32	Maddie Doran	Overland Park	KS	4/5/2022	14-CA-292529	9 months
33	Michael Vestigo	Overland Park	KS	4/1/2022	14-CA-293404	1.5 years
34	Billie Nyx	New Orleans	LA	5/17/2022		
35	Aleah Bacetti	Bel Air	MD			
36	Phoebe Wyatt	Stevensville	MD	8/25/2022		2 years
37	Hannah Whitbeck	Ann Arbor	MI	4/11/2022		3+ years
38	Sasha Anisimova	Ann Arbor	MI	09/01/2022	awaiting #	
39	Ashlee Feldman	St. Louis	MO	5/13/2022		
40	Emma Baker	Independence	MO			
41	Sharon Gilman	Raleigh	NC	4/9/2022		1 yr 11 mos
42	Allegra Anastasi	Buffalo	NY	8/26/2022	03-CA-302194	8 years
43	Angel Krempa	Depew	NY	4/1/2022		
44	Austin Locke	Queens	NY	7/5/2022	29-CA-299127	
45	Bekah Maclean	Ithaca	NY			
46	Benjamin South	Ithaca	NY	8/3/2022	03-CA-300849	4+ years
47	Brian Nuzzo	Rochester	NY	3/21/2022	03-CA-293528	5+ years
48	Cassie Fleischer	Buffalo	NY	2/20/2022	03-CA-291377	5+ years
49	Corey Wibbs	Westal (Binghamton)	NY	9/1/2022	03-CA-302560	2+ years

50	Danny Rojas	Buffalo	NY	3/4/2022	03-CA-291725	3+ years
51	James Schenk	Latham (Albany)	NY	8/31/2022	03-CA-302451	5+ years
52	Joselyn Chuquillanqui	Great Neck	NY	7/27/2022	29-CA-300213	
53	Kellen Montanye	Buffalo	NY	1/30/2022	03-CA-294341	3+ years
54	Minwoo Park	Depew	NY	3/21/2022	03-CA-293362	4+ years
55	Nathan Tarnowski	Amherst	NY	3/30/2022	03-CA-293546	
56	Rhythm Heaton	Manhattan	NY	8/17/2022		3+ years
57	Sam Amato	Buffalo	NY	8/5/2022	03-CA-300873	13 years
58	Sariah Hakes	Williamsville (Buffalo)	NY	8/31/2022	03-CA-302464	3+ years
59	Victoria Conklin	Amherst	NY	6/22/2022	03-CA-296570	5 years
60	Ken Walker	Cleveland	OH	07/06/2022	08-CA-298846	
61	Bex Littleton	Eugene	OR	5/3/2022	19-CA-295197	6 years
62	Jake Lamourie	Eugene	OR	8/29/2022	19-CA-302273	6 years
63	James Martin	Eugene	OR	8/29/2022	19-CA-302274	7 years
64	Matt Thornton	Portland	OR			
65	Quentin Kanta	Portland	OR			
66	Alyx Triche	Pittsburgh	PA	6/1/2022		3yrs
67	Brett Taborelli	Pittsburgh	PA	8/2/2022		8 years
68	James Greene	Pittsburgh	PA	7/28/2022		5 years
69	Kim Manfre	Pittsburgh	PA	7/13/2022		3.5 years
70	Oliver Fulayter	Pittsburgh	PA	8/15/2022		
71	Shea Gannon	Pittsburgh	PA	8/6/2022		2.5 years
72	Tori Tambellini	Pittsburgh	PA	7/13/2022		2.5 years
73	Aneil Tripathi	Anderson	SC	9/2/2022		
74	Jon Hudson	Anderson	SC	9/2/2022		
75	Kadence Britt	Anderson	SC	9/2/2022		
76	Rhi Greer	Anderson	SC	9/2/2022		
77	Rosandra Arellano	Columbia	SC			
78	Sarah Boley	Anderson	SC	9/2/2022		
79	Beto Sanchez	Memphis	TN	2/8/2022		9mo
80	Emma Worrell	Memphis	TN	2/8/2022		7mo
81	Kylie Throckmorton	Memphis	TN	2/8/2022		1yr
82	Lakota McGlawn	Memphis	TN	2/8/2022		14mo
83	Nabretta Hardin	Memphis	TN	2/8/2022		1.3yrs
84	Nikki Taylor	Memphis	TN	2/8/2022		2yrs
85	Tino Escobar	Memphis	TN	2/8/2022		2yrs
86	Atticus Drummond	San Antonio	TX	5/21/2022		4.5yrs
87	Nelly Sanchez	Dallas/Fort Worth	TX	6/14/2022		6.5yrs
88	Alyssa Brodie	Leesburg	VA			
89	Ezra Jefferson	Leesburg	VA	7/13/2022		6 months
90	Khyati Choski		VA			
91	Nessa Fernandez	Herndon	VA	6/10/2022		3yrs
92	Tyler Hoffman	Richmond	VA	5/22/2022		4 yrs 10 mos
93	Artemis Moraine	Everett	WA			
94	Katie McCoy	Marysville	WA	6/7/2022	19-CA-297236	
95	Lincoln Wheeler	Marysville	WA		19-CA-3000021	
96	Lindsey Price	Seattle	WA	4/29/2022	19-CA-293492	17yrs
97	Nelson	Seattle	WA			
98	Sydney Durkin	Seattle	WA	6/20/2022		
99	Hannah Fogarty	Oak Creek	WI	5/25/2022	18-CA-297420	10 months
100	Kolton Gosnell	Plover	WI	5/6/2022	18-CA-295389	9 months

ATTACHMENT B

	City	State	NLRB Case No.	first complaint Date	Number of ULP Charges Consolidated	Number of legal violations alleged	NLRB Hearing Date
1	Hialeah	FL	12-CA-291151	4/21/2022	1	1	6/28/2022
2	Santa Cruz	CA	32-CA-282897	5/18/2022	2	15	9/14/2022
3	Overland Park	KS	14-CA-290968	5/11/2022	9	63	7/5/2022
4	Buffalo	NY	03-CA-285671	5/6/2022	32	294	7/11/2022
5	Phoenix	AZ	28-CA-289622	3/15/2022	5	54	7/26/2022
6	Plover	WI	18-CA-292306	5/5/2022	1	2	8/2/2022
7	Denver	CO	27-CA-290551	5/31/2022	5	10	8/2/2022
8	Seattle	WA	19-CA-290905	5/18/2022	1	11	9/13/2022
9	Seattle	WA	19-CA-289275	5/11/2022	1	1	9/13/2022
10	Memphis	TN	15-CA-290336	4/22/2022	4	18	9/12/2022
11	Knoxville	TN	10-CA-291616	7/12/2022	1	1	9/22/2022
12	La Quinta	CA	21-CA-296716	7/14/2022	1	5	10/11/2022
13	Manhattan	NY	02-CA-292646	7/12/2022	3	5	9/28/2022
14	Great Neck	NY	29-CA-292741	7/15/2022	2	31	9/23/2022
15	Peoria	IL	25-CA-292501	7/18/2022	1	1	10/26/22
16	Ann Arbor	MI	07-CA-293916	6/27/2022	2	2	8/1/2022
17	Seattle	WA	19-CA-295396	8/16/2022	1	3	11/8/2022
18	Chicago	IL	13-CA-296145	7/29/2022	1	10	10/31/2022
19	Chicago	IL	13-CA-296221	8/16/2022	2	6	11/15/2022
20	Seattle	WA	19-CA-299478	8/17/2022	1	1	TBA
21	various	various	14-CA-291388	8/18/2022	6	15	12/6/2022
22	Oak Creek	WI	18-CA-293653	8/19/2022	1	9	TBA
23	various	various	19-CA-290162	8/23/2022	6	15	TBA
24	all	all	19-CA-294579	8/24/2022	4	54	10/25/2022
25	Buffalo	NY	03-CA-295810	8/25/2022	4	7	12/5/2022
26	Seattle	WA	19-CA-293492	8/17/2022	2	6	11/15/2022
				Total:		98	639

Chairman SCOTT. Thank you. Now we will go to member questions, and we will begin with the gentlelady from Oregon, Ms. Bonamici. You are recognized for 5 minutes.

Ms. BONAMICI. Thank you, Mr. Chairman. Thank you for holding this hearing today—did my time start Mr. Chairman? I am not clear.

Chairman SCOTT. Yes.

Ms. BONAMICI. Okay, thank you for holding this hearing today to focus on the importance of protecting workers and the right to organize for better wages, better benefits, and safer working conditions, and thank you to the witnesses for being here.

It is an honor to represent a district in one of the most labor and worker friendly states in the Nation. Liz Shuler, the President of the AFL-CIO, I am proud to say, is from Oregon. Oregon had the second largest year over year increase in total union election petitions to the NLRB between '21 and 2022. Oregon also had the third highest number of Starbucks election petitions of any State in the country at 24.

I was pleased to see that in the district I represent, Starbucks workers at five locations have successfully completed union elections, although we have not seen any retaliatory efforts as we have heard from Ms. Eisen, from any of the Starbucks locations in Northwest Oregon.

We know that food service workers in other parts of the country and in other companies such as Chipotle, are experiencing employer retaliation against their organizing efforts. The sharp increase in union petitions and NLRB cases over the last year affirms the need for more funding and capacity at that agency which Ms. Eisen just mentioned in her testimony.

I want to ask Dr. Bronfenbrenner and Ms. Eisen, what is your perspective on how limited capacity at the NLRB, and the NLRB funding crisis, how does that affect elections and the ability of workers to seek and obtain legal recourse when their rights are violated, and I will start with Ms. Eisen and then Dr. Bronfenbrenner and I do want to get another question in.

Ms. EISEN. Thank you for that question. The longer it takes for an election to go forward, a lot of that is determined by the funding of the agency that oversees that. The longer these companies have to enact their union busting behavior and abuse these workers. I mean that is simply just the rule of what it is.

The longer it takes for us to have that vote, the longer the company has the ability to come in and surveil and intimidate, and make workers afraid of expressing their desire to organize. We also see an issue when it comes to dealing with the complaints and the charges filed regarding unfair labor practices.

There have been hundreds of unfair labor practice charges filed during this union campaign at Starbucks, and as of today the NLRB has only been able to investigate 30 percent of those charges.

Ms. BONAMICI. Wow. Dr. Bronfenbrenner, what can you add in terms of what increased funding would mean at the NLRB?

Ms. BRONFENBRENNER. Workers at Chipotle in Maine organized 9 months ago, they are waiting 9 months for an election to be set. Nine months just because of the delay, because of the staffing at

the NLRB. Nine months, that is 9 months where employers are engaging in threats, intimidation and coercion, acts like waves against the support for the unionization.

Ms. BONAMICI. I do not want to cut you off Dr. Bronfenbrenner, but I want to move on to another delay. I am concerned by reports of employers that try to quash a new union by prolonging bargaining through a combination of legal appeals and delays.

In some cases, that has taken years, as we have seen particularly in the healthcare sector in Northwest Oregon, Willamette Valley Medical Center prolonged negotiations of the Oregon Nurses Association to the extent that it took 2 years to reach a first contract. We are seeing similar things at the Legacy's Unity Center for Behavioral Health where it took 18 months to reach a first contract with the Oregon Nurses Association.

Dr. Bronfenbrenner, and I want to ask Mr. Pearce to weigh in quickly on this. How often do we see similar cases, and what would the PRO Act do to hold employers whose workers have successfully unionized accountable if they deliberately prolong contract negotiations? Maybe about a half a minute each, I am sorry.

Ms. BRONFENBRENNER. Under our labor law, if an employer decides to refuse to bargain the only penalty we have is a notice telling them to bargain in good faith. That has allowed employers to just refuse to honor the Act, and we see delays that go as I said earlier. That we have only 36 percent have a contract within a year, but a third of unions who won elections don't have a contract 4 years after the election.

Ms. BONAMICI. Mr. Pearce, can you add to that in my remaining half a minute please, what would the PRO Act do to help?

Mr. PEARCE. What the PRO Act would do is create a road map for workers in management to reach a first contract because the workers would be required, employers would be required to start bargaining within 10 days of being certified for an election. If there are problems with that it can go to arbitration, interest arbitration and the like.

There is a full court press to make sure that dilatory tactics do not take place under the PRO Act.

Ms. BONAMICI. I appreciate that. This is after workers have decided to unionize. Sometimes it can take years to reach a first contract, and that is unacceptable, and that is why we need the PRO Act, and I yield back. Thank you, Mr. Chairman.

Chairman SCOTT. The gentlelady's time has expired. The gentleman from South Carolina Mr. Wilson.

Mr. WILSON. Thank you very much, Mr. Chairman, and thank each of you for being here today as witnesses. Mr. King, economic research shows that right-to-work states like my home State of South Carolina, enjoy greater job growth and higher per capital disposable income when adjusted for costs of living when compared to forced union states.

South Carolina has especially benefited from a right-to-work environment where people can voluntarily join a union. They are not forced to join a union, in fact, right-to-work means jobs. Specifically, it is amazing in the last 35 years South Carolina has developed an automobile manufacturing capability, a tire manufacturing capability.

South Carolina now is the leading exporter of cars of any State in the union with no unions being forced. Additionally, South Carolina we want everybody to know is also the leading manufacturer of tires. Of any State in the United States, we benefit from investments from France, from Japan, from Germany, from Singapore.

To go from zero manufacturing of tires to be the leading manufacturer and exporter, and a reason for that is right-to-work, that people have a choice joining a union or not. Could you give why you believe that right-to-work states are more—

Mr. KING. I am sorry, I think your microphone went off, Mr. Wilson. Right at the end, I did not hear the end of the question.

Mr. WILSON. I blame anybody for doing that. Anyway, why are right-to-work states more attractive to entrepreneurs and for workers alike?

Mr. KING. Thank you. I have been to South Carolina many times. Great State.

Mr. WILSON. We still have one condo left.

Mr. KING. Workers today want flexibility. They do not want to be told what to do, whether by the employer every day, every hour. They want flexibility, they want voice, but they do not want to be told what to do by a union also. They do not want to be required to pay dues and fees if they choose not to.

In South Carolina, like 26 other states in the country have decided that the right-to-work approach is the better approach. We can debate that. The PRO Act, Mr. Wilson, would overrule that. It would permit employers and unions to say right-to-work makes no difference even though the electorate of South Carolina have voted to have a right-to-work status, which is their right currently under the law.

The PRO Act takes that away. Many members of this committee are from states that have right-to-work status, so the PRO Act would overrule that, a big mistake.

Mr. WILSON. I am personally concerned for the hospitality industry. We benefit so much from Myrtle Beach to Charleston to Hilton Head. The jobs that are created, particularly entry level jobs, and card check would just be catastrophic. I have in the past represented the Indian American community, AAHO, Asian American Hotel Owners, and they would just be catastrophically affected if they could not run their motels and hotels, and restaurants.

I particularly identify with what you said. Along with that, I am grateful to be the sponsor of the National Right to Work Act, which erases automatic dues clauses and Federal statute without adding a single letter to Federal law. The PRO Act bans right-to-work laws as you have stated, which are implemented in 27 states.

Democrats claim it is necessary to avoid a free rider problem of workers benefiting from union representation without paying for it, but many workers do not want union representation making them forced riders, rather than free riders. Again, how do we—what do we say to workers who want to represent themselves?

Mr. KING. What we ought to be saying is they ought to have that opportunity, and what we are seeing consistently, Mr. Wilson, from polling data that workers today do not want to be represented by any entity, any union that gets so involved in an adversarial ap-

proach with their employer, and spends thousands of dollars political and social activities that they do not agree with.

The American Compass polling was very informed on this. Workers want, if they are going to have a union, a union that would work with their employer, partner with their employer, and concentrate on terms and conditions of employment, but that is not the case.

The American worker today is very sophisticated, and they can tell when they are being abused or used, and when their dues monies are being spent inappropriately. I think back to choice is very important. Why should this body, or any body of government overrule employee choice? Let us have free and fair elections, secret ballot elections, hard check is a subterfuge. It does not work.

Electronic voting does not work. We need to have free and fair secret ballot elections. If workers decide they wish representation that is acceptable, but do not force it on the employee. Do not muzzle the employer from at least having an opportunity to speak.

Mr. WILSON. Thank you, and I yield back my time.

Chairman SCOTT. Thank you. The gentlelady from North Carolina, Ms. Adams.

Ms. ADAMS. Thank you, Mr. Chairman. In September 2020, registered nurses at Mission Hospital in Ashville, North Carolina, won the first ever private sector hospital union, NLRB election in North Carolina. During that election, which occurred during the COVID-19 pandemic, the hospital corporation that owns Mission started pulling nurses away from patients that attend anti-union meetings, union busting, inviting consultants to walk through the hospital without masks to spread anti-union misinformation.

A few days before ballots were mailed out by the email RB, a supervisor, threatened if nurses successfully organized a union, the nurses' childcare needs would not be accommodated. Professor Bronfenbrenner, would you say that these tactics are typical of what employers engage in during an organizing campaign? How would increasing NLRB funding help with this?

Ms. BRONFENBRENNER. Yes. These tactics that happened at Mission Hospital represent what the traditional anti-union campaign is. Employer campaigns rest on the principle abusing threats, intimidation, promises, interrogation and retaliation, and those were all elements of the campaign, and a majority of employers engage in those tactics.

When those are repeated over time it has a cumulative effect which intensifies the effect. What would happen with increased NLRB funding is we would get investigations sooner, unfair labor practices would be determined sooner, and they would be able to enforce the Act sooner.

When they are understaffed, it means these campaigns go on without any decision from the NLRB, even though the unfair labor practices have occurred.

Ms. ADAMS. Wow. Thank you for that. Would you, you know, research indicates—and this is for you again, that union organizing helps to narrow the gender wealth gap, so with Black Women's Equal Pay Day coming up next week, have you seen similar trends with the racial wealth also becoming narrower with the increase in union activity and collective bargaining?

Ms. BRONFENBRENNER. There is no question that unionization narrows the gap in terms of race, gender, disability, because unions end arbitrary supervisor power and ensure equality in the workplace, the true raising wages across the board and providing benefits across the board, and improving the standard of living of all workers.

The majority of union contracts, first contract have language that allows workers to grieve discrimination or unfairness in these economic decisions. I would also add that women of color are the workers most likely to organize in this country, and with good reason. They see the benefits for unionization.

Ms. WILSON. Okay. Are they more successful in organizing?

Ms. BRONFENBRENNER. Yes, they are.

Ms. WILSON. Okay. Well, that is a good thing. Well, thank you very much. Mr. Chairman, I will yield back.

Chairman SCOTT. Thank you. The gentleman from Pennsylvania, Mr. Thompson.

Mr. THOMPSON. Thank you, Chairman. Mr. King, thank you for taking the time to be with us today. As you know labor union membership continues to plummet due to modern economy, economic growth, and unions' own failings. Workers disenchantment with union representations create a real crisis for union professionals, union bosses.

Despite these facts, my colleagues on the other side of the aisle introduced H.R. 842, the Protecting the Right to Organize Act, or more commonly referred to as the PRO Act, which fulfills their campaign promises to union bosses and trial lawyers, really at the expense of business owners, workers and the American public.

Specifically, this bill imposes force unionization, eliminates employees' rights to privacy, abolishes employer rights, undermines the independent contractor status, and disrupts the economy so much more.

Instead of increasing transparency and accountability to better serve their members, union leaders are exerting their political influence to demand radical national labor laws like the PRO Act, which would allow them to further consolidate power to workers, and bolster their own political agendas.

Mr. King, the PRO Act requires employers to turn over workers' home addresses, cell phone numbers, and personal email addresses. My democratic colleagues are getting as bad as Facebook in terms of disrespecting people's privacy. That is regardless of whether a worker wants that information shared or not.

Does the bill, the first question for you based on your knowledge Mr. King, does the bill, the PRO Act, include any restrictions on how that information can be used and stored, or could unions sell it to other organizations such as political action committees?

Mr. KING. The first answer to your question is yes. Most people are not aware of these privacy intrusions that the PRO Act would implement. You are absolutely right. Under the PRO Act a worker would have no opportunity, no right to opt out, and her or his personal information, her or his cell phone number, email address, would all be disclosed to the petitioning union and the Federal Government.

There are no restrictions whatsoever on how that [inaudible], no protections for the worker, and the misuse or abuse of that information, even inadvertent is well documented. The Federal Government as we all know could not keep track of personal records, and had massive hacking and leaks.

Unfortunately, employers have also had that experience, so the privacy intrusions that the PRO Act would implement are not known, maybe to many Members of Congress frankly, that even voted for this bill, but the American general public does not have, I think, any knowledge of any great depth of how intrusive this bill would be.

Mr. THOMPSON. Well, thank you. The followup to that. Could this bill potentially result in workers' information falling into the wrong hands, or more specifically, workers receiving more unsolicited calls and emails?

Mr. KING. Absolutely because their email addresses I noted, the personal cell phone information as I noted, would be given to the union and to the Federal Government, the National Labor Relations Board, and there's no way to protect that. Why is that needed frankly, there are other means of communication, but to intrude in an individual's privacy, irrespective to how you even feel about unions and employers, is a policy mistake, and that is one of the major deficiencies of the PRO Act, among many others.

Mr. THOMPSON. Well, thank you Mr. King. I have one more question. The PRO Act makes it significantly more difficult for workers to be classified as independent contractors. What impact would this have on workforce innovations like the ag based economy that has created countless new opportunities for workers, especially during the COVID-19 pandemic as we observed?

Mr. KING. Once again, a major policy error. Individuals want flexibility. They want to work when they want to work, where they want to work. They want to work for multiple employers. They want to be independent, and the PRO Act would take that option away.

That is again a major policy mistake, and of course the ultimate objective here is, at least from an organized labor perspective, is to make every individual an employee so the union then could attempt to organize that individual.

As I show in my testimony the union has not done a very effective job at even trying to reach out to the regular employees in this country, let alone potential change in independent contractor status.

Mr. THOMPSON. All right. Thank you, Mr. King. Thank you, Chairman. I yield.

Chairman SCOTT. Thank you. The gentleman from California, Mr. Takano.

Mr. TAKANO. Thank you, Chairman Scott for holding this important hearing highlighting the increase in worker organizing across the country, and while we have seen a significant spike in worker attempts to organize, the government agency tasked with the U.S. labor law, the National Labor Relations Board, has been chronically underfunded.

The NLRB has divested power to safeguard the rights of employees interested in organizing labor unions. This government agency

also acts to prevent unscrupulous labor practices committed by private sector employees. As a result of the agency's flat funding, staffing shortages and delays in decisions and elections have been commonplace.

This poses an inherent problem for workers as efforts to unionize have recently surged. The NLRB has publicly docketed 349 election petitions for Starbucks workers across the country in 37 states. These workers are organizing and advocating for higher wages, better benefits, and safer workplaces.

When we strengthen and protect the collective bargaining rights of workers, we are improving the lives of workers and strengthening the economy. Congress must pass the Protecting the Right to Organize, or PRO Act, and adequately fund the NLRB. The House passed this measure in March 2021, and if passed, would stand as the most significant improvement to labor law in decades.

California, like most of the country, has seen a big increase in union election petitions, and unfair labor practices, practice charges right now. In my own district, a Starbucks location has had their employees vote to unionize, and a majority of employees voted in favor of creating a union, and their employer has challenged the results of that election.

My first question is to Ms. Eisen. Ms. Eisen, in June the NLRB's General Counsel filed a complaint against Starbucks for among other things, telling a transgender employee that they could lose gender affirming healthcare benefits if they organized. News reports indicate that this is a tactic the company has used at multiple locations.

Can you explain the chilling effect that these threats have had on trans workers, and how it has affected the organizing drive?

Ms. EISEN. Yes, thank you so much for that question. The threat of the loss of benefits has been a talking point from Starbucks corporate since day 1 of our campaign. This is going back to August 2021.

Specifically targeting transgender partners is particularly sickening in my opinion because the company has prided itself on its reputation of attracting all sorts of workers and people, and offering them benefits that they can't get anywhere else.

To purposefully offer that to our transgender workers and then tell them but those benefits no longer apply to you if you decide you would like to have a voice in your workplace. It does not even go along with Starbucks' own mission and values.

As far as what the chilling effect is people are afraid. They are afraid that the place that they came to, to work for who said that they could help them, could offer these benefits and help them become the people that they want to be. That no longer applies to them because they chose to stand with their fellow workers at that store and demand that the company have some level of accountability.

Mr. TAKANO. Well, thank you, Ms. Eisen. I have another question for you. The cafe where you work organized in late December of last year, and it has been almost 9 months since the workers won their election, but they have not yet reached their first collective bargaining agreement with Starbucks. Why has it taken so long to

reach an agreement, and what have been the sticking points at the table?

Ms. EISEN. The simple answer is that we have not reached an agreement because Starbucks does not want to. We were certified on December 16 of 2021, and we sent our demands to bargain a few days later. It took them far longer than it should have to respond to a simple email. It took almost I think 2 months to get to that first bargaining session.

The workers at my store have been ready to bargain from day one. The sticking points have been mostly just delay tactics, and insults from the company and their spokespeople. We actually do not really talk to many of the corporate members. Their main spokesperson is a Littler Mendelson attorney who spends more time being condescending, and not taking our concerns seriously, than they do actually looking at proposals.

Mr. TAKANO. Well, thank you, thank you Ms. Eisner. Mr. Chairman, it is very clear to me that you know our law, the PRO Act is on the side of workers, and we are looking to reduce the polarization of our workforce in terms of wages and the income disparities. The big key solution to that is empowering workers through their ability to organize, and I yield back.

Chairman SCOTT. Thank you. The gentleman from Michigan, Mr. Walberg.

Mr. WALBERG. Thank you, Mr. Chairman, and thanks to the panel for being with us today. Empowering employers and their employees to succeed and prosper is a leading priority for this committee. Unfortunately, working families and job creators seem to be facing an onslaught of activist policies and decisions by the current National Labor Relations Board aimed at chilling employer free speech, and crippling worker free choice.

I grew up in a union household on the south side of Chicago. My father was a machinist and union organizer for part of his career. Americans have the right to organize, and join a union if they choose, and they should be armed with all of the information they need to make an informed decision before casting their vote.

Unfortunately, the PRO Act would codify the Obama era NLRB's ambush election rule, which would significantly shorten the period of time between a union filing for an election, and the election being held to as little as 11 days. Additionally, we have recently seen the NLRB under General Counsel Abruzzo discard decades of case law and NLRB precedents upholding an employer's right to educate its employees about unionization.

Instead, the General Counsel is arguing that it is an unfair labor practice for employers to require employees on paid work time to attend meetings where the employer expresses its opinion concerning unionization. Mr. King, do you think the General Counsel's legal argument is sound?

Mr. KING. No. Mr. Walburg, nice to see you again, and you nailed it. This attempt to muzzle an employer from citing a position, and I certainly would counsel and implore to say so, in a non-coercive thoughtful way, which virtually every employer does. The attempt by this General Counsel is in this scenario, a direct violation of Section 8(c) of the National Relations Act, which is the free speech provision.

It is an attempt not to have all perspectives, all thoughts, all ideas regarding unionization out on the table for the worker to decide. It is an attempt to stop a free flow of communication, and that is throughout the PRO Act, and through this public shaming that I mentioned at the outset of my testimony.

Mr. WALBERG. Let me just ask this question that I almost hesitate to ask because it sounds so common sense the answer, I think so common sense and simplistic. Why is it important for workers to hear from both the union and employer before casting a vote in a representational election having more than 11 days to make the decision?

Mr. KING. Well first of all, Mr. Walberg, the union can take years, months to put an organizing campaign together, and then file a petition. It is had a great advantage already in time, and then to tell workers that they only have 11 days to make an informed decision and gather information from all sides. The union certainly has a right to have a voice, but so does the employer.

Here is the real sticking point here. A decision as to whether a bargaining unit is established at a place of employment, has decades and decades of impact. Once the union is certified, it stays there virtually for the entire life of that company's presence at that location.

This is very serious decision. It has consequences regarding dues payments, fees payments, potential for strike, et cetera. This is a decision that ought to be made seriously, thoughtfully, and over at least a 30 to 60 day period, not 11 days.

Mr. WALBERG. If we are concerned about transparency, it seems that that would be helpful. In your experience do workers generally want to hear from employers?

Mr. KING. Well, I think they want to hear from all sides yes. I think what we are seeing in the polling data, what we are hearing, at least from our members, and we represent most of the Fortune 400 companies in the country. Their employees want a voice. They want to be heard. They want to listen. They want information.

They do not want to have only one side of the story. I keep hearing these allegations against Starbucks. Let us set the record straight. That is just not fact. Yes, there are allegations, but there has not been one final adjudication of guilt against this company. Let us get that clear.

These allegations are part of an ongoing public smear campaign that we often seen in union organizing. Let us wait until we get a final adjudication. If the company did something wrong, so be it. Let us not find them guilty until they have had a fair trial, or any employer has had a fair trial.

Mr. WALBURG. I think the best aspect is transparency, opportunity to have all sides, and let the employee decide, so thank you, I yield back.

Chairman SCOTT. Thank you. The gentlelady from Washington, Ms. Jayapal.

Ms. JAYAPAL. Thank you, Mr. Chairman. I wanted to talk about surveillance, but I want to give Ms. Eisen—

Chairman SCOTT. Ms. Jayapal are you on screen?

Ms. JAYAPAL. No. I am in the room, Mr. Chairman.

Chairman SCOTT. Oh, there you are, okay. I am sorry. Thank you.

Ms. JAYAPAL. Yes. Thank you. I wanted to just give Ms. Eisen a chance to respond to what we just heard in terms of employees wanting to hear from the company. It sounds really good, but tell us about what a captive audience meeting is like actually Ms. Eisen. Do you feel like you get a chance to hear from the company in sort of a mutual way, or how would you describe that?

Ms. EISEN. My apologies. I can say from my own experience in captive audience meetings held by Starbucks during our organizing campaign, they are far from impartial. You are not hearing both sides of the story. You are hearing one side. We were brought to hotel conference rooms located far from our store.

Most Starbucks workers had to find transportation because we are a city store that most of our workers do not drive. That was not offered to them. You need to find a way to get to these. Then we had to sit in a room with high-ranking members of corporate as far up as the President of Starbucks North America who we only just met, where we were talked at for nearly an hour about why we should feel ashamed of asking for more from a company that had already given us so much.

They were only giving us the facts. They were giving us the facts about what the company was, what the company wanted. They wanted us to vote no. They were there to take care of everything. They were going to make sure that any grievance we had was handled. If we needed facts from the union, we needed to contact a union organizer.

When presented with the fact that the union organizers as far as the Starbucks campaign, were Starbucks workers, some of whom were sitting in that room with them. That is not something that they wanted to hear. They did not want to be presented with the fact that it was not a third-party

There was not some big union boss out there corralling these workers and convincing them that this was their best interest. It was the workers making that decision for themselves. We were not given the same time or opportunity to speak in that room to our coworkers about why we felt this was a better option for us.

Ms. JAYAPAL. Hardly an impartial discussion of facts and all sides being presented. I wanted to talk about surveillance because I think that changing technology and employer strategies have increased the surveillance of workers, especially when employers are confronted with the union campaign.

Employers are monitoring social media accounts, installing hidden cameras, analyzing GPS data, and exploiting phone and computer applications to keep tabs on organizing efforts in addition to the more conventional forms of management scrutiny.

Ms. Eisen, in your experience organizing with Starbucks Workers United, how has Starbucks surveilled unionization campaigns?

Ms. EISEN. Well, the in-person surveillance is the most apparent. I think I mentioned in my testimony the out of town corporate and support managers that were shipped in. What the support managers were shipped in for was to be stationed in all of our stores under the guise that we had only filed for union petitions because the management was so poor in Buffalo that it necessitated that.

These managers were supposed to come in and support our store managers. The actuality was it turned our stores so that every operating hour that the store was open there was managerial presence, not just there to support our store manager, but on the floors with us, interrupting conversations, or trying to prevent any conversations from happening about the union.

It also forced a lot of the workers who were pro-union and were wearing pins from the onset of the campaign to remove those pins, not because they were no longer for the union, but because they felt that wearing that pin made them a target. It was, intimidating does not seem like a strong enough word.

It is a job that requires a lot of skill, and when you feel like you are doing that under a microscope it has quite a toll on your mental health.

Ms. JAYAPAL. A chilling effect. In July, Chipotle abruptly announced the closure of a store in Augusta, Maine hours before a union vote was slated to take place. About 20 Starbucks locations have been closed in recent months, including a couple in my home district of Seattle, Starbucks hometown. A disproportionate number of these stores were organizing. What message are these closures sending, and how does it impact workers' livelihoods?

Ms. EISEN. I mean the only message that it could be sending is that if you choose to unionize your workplace the company is going to come in and shut down your store. It is breeding fear. It is following through on threats that they had made throughout the campaign, and it is inappropriate and not right.

Ms. JAYAPAL. Thank you very much Ms. Eisen, I appreciate your courage. I yield back Mr. Chairman.

Chairman SCOTT. Thank you. The gentleman from Wisconsin, Mr. Grothman.

Mr. GROTHMAN. I do not know if it was the intent, but it seems like a lot of the rhetoric here today is kind of blasting Howard Shultz on saying what a horrible boss he is I guess. I will not point out that Howard Shultz has won the National League Justice Award from the NAACP, so you can take whatever lessons you want out of that.

Now Mr. King, a couple questions. It seems to me one of the reasons for upward mobility in the United States, or one of the ways to make more money is to work hard. Unionization, what effect does that have on hard working? Does it make it more difficult for a person who really works hard and wants to move up to distinguish himself from his fellow employees?

Mr. KING. Unfortunately, most union contracts are strict seniority type of agreements, so promotions, job

[inaudible]—not necessarily merit, now that does vary from location to location. It certainly can be an impediment. If you have multiple unions at a location, if an employee is in a union covered contract X, she or he will not have an ability as a general rule, to bid on work for a contract that's covered through union Y.

They are foreclosed. The lack of mobility and flexibility is hampered considerable.

Mr. GROTHMAN. We penalize the more ambitious, or more hard working. Next question. Sometimes I hear, I know a guy that has got a union place, and he feels one of the things that is frustrating

is if he wants to do things differently to make things more efficient. That could be subject to bargains.

In other words, it becomes more difficult to make a factory, I guess a factory is a lot because manufacturing is so important for this country's survival. Does this make things more difficult to change things in the factory and try to make it more efficient, which is so vital if we are going to continue to compete with the Chinese, the Indians, what have you?

Mr. KING. Yes, you are correct. One of the things we hear consistently is that union contracts, union presence hampers the speed of decisionmaking, which is critical for economic survival for employers in this country, particularly given increased global competition.

If you have a collective bargaining agreement in place it is harder to make decisions to shift work to different areas, perhaps as a plant, to adjust wages and benefits. You have to bargain about that. That is part of our law, and we understand that. The lack of flexibility, the lack of the ability to make expeditious decisions is certainly hindering.

Mr. GROTHMAN. Okay. Next question. I like the little guy. I like it when somebody goes into business themselves and likes the independence. I really did not like this COVID thing where at least in my State they let Walmart stay open, but the little retail houses had to shut down, and I think it is because some politicians just I guess prefer the big guy.

They wish everybody had to shop at Walmart, the little gift shop they would like to have them go under. One of the ways you can start out and own your own business is buy a franchise. I think it is good we have a lot of McDonalds, there is a place in West End called Culvers, a lot of these franchised places allow a little guy to build some equity and be his own boss.

I am told that this PRO Act would make it more difficult, and instead would kind of force anybody one more time into the big corporate model. Is that true?

Mr. KING. Yes. The PRO Act provisions that would embody the joint employer test that has being articulated by some in this country to make everyone one employer—

Mr. GROTHMAN. Oh my God.

Mr. King [continuing]. Would interfere with franchise operations. There is an all-out attack unfortunately on the franchise community in this country, and it is really wrong.

Mr. GROTHMAN. It is just another way to hurt the little guy, the little hard working ambitious guy. Cannot start your own McDonalds, cannot start your own Culvers, got to work under the big—and we want to make everybody have to work for Walmart in that situation.

Next question, as I understand when you vote under this card check thing, this vote is not necessarily anymore a private vote. Now I know there are people who like on a national level, on regular elections, they like to have absentee voting for somebody you do not know for sure who is filling out the ballot, or maybe you know your boyfriend/girlfriend fill it out for you and say here, sign here.

I would be shocked the people—does this really mean that people are going to have to vote publicly, take away the right of the private ballot? That seems almost unbelievable. Is that true?

Mr. KING. Well, frankly I am not sure where the proponents are coming from, whether the electronic voting, or some other type of open voting process. What the real tragedy is here, we have had a very successful onsite manual voting election process in this country under the National Labor Relations Act, where 80–90 percent of the potential voters show up.

They mark their ballots in secrecy, and in a closed setting. No one knows how they vote. Why are we changing that, or even considering changing it?

Mr. GROTHMAN. Well, the only reason I can think of is you want to force people to vote the way they do not want to vote. In other words, you want to take away the right to vote by their own conscious. That is the only reason you do it. Thank you, Mr. King.

Mr. KING. Well, I just would add one thing to your question, and/or the proponents of these proposals do not want people to vote at all because unless you are [inaudible], employment from your desk or wherever and vote, people forget, or they just do not vote. That is wrong.

We ought to encourage as many people to vote in these elections as possible.

Mr. GROTHMAN. Thank you.

Chairman SCOTT. Thank you. The gentlelady form—

Mr. GROTHMAN. Thank you, Mr. Chairman.

Chairman SCOTT. You are welcome, Mr. Grothman. The gentlelady from Pennsylvania, Ms. Wild.

Ms. WILD. Thank you, Mr. Chairman. I am going to do a speed round here. I have a lot of questions to ask, and I will probably speak quickly, and I would ask that the witnesses try to keep their answers brief so that I can get through them. I want to start with you, Mr. Pearce.

On July 15 of this year, the NLRB announced that its staff in the field offices was a mere 50 percent, 50 percent of what it was in 2002, 20 years ago. As we examine the agency's staffing crisis right in the middle of an organizing boom, how does the Board's current level of staffing and funding compare to when you were Chairman, and could you also just comment on how that flat funding has harmed the agency, and how it has affected the Board's ability to investigate and resolve complex or large scale cases such as the current investigations into Amazon?

Mr. PEARCE. Well, it is a radical decrease from when I was Chair. When the Republican administration came the first thing that they did was offer buyouts, so all of the experienced people took advantage of that. Then they did not backfill.

Statistics show that the hiring was approximately 13 people as opposed to the 94 percent of backfilling that takes place when reductions in staff took place. 50 percent at the regional level is devastating toward the processing of the agenda of the National Labor Relations Board investigating and dealing with elections are at the heart and the soul of what the Board does.

It is what the public is seeing. The Board at its investigative stage is the stage where unfair labor practices are flushed out, and

it has determined whether or not the law has been broken. During the pandemic you had a situation where many more elections had to be because of for health reasons, conducted by mail ballot election. That is labor intensive.

Ms. WILD. Sure.

Mr. PEARCE. To have less people to be able to do that job affects the process substantially, so the American public throws up its hands in frustration because of the ineffectiveness.

Ms. WILD. Thank you. I appreciate it. Dr. Bronfenbrenner, I have a quick question for you. You discussed the alarming trend of employer surveillance of workers' social media. Can you talk about the form that that surveillance takes, and to what extent you have seen social media used for blacklisting?

Ms. BRONFENBRENNER. If you do a quick search on the internet, you will find that there are numerous companies that advertise themselves and their ability to track social media, and employers encourage them. These companies then search social media for employers and quickly ascertain you know who's posting information.

Then what we find is that employers discharge workers, eliminate their jobs, and a perfect example is what happened at you know Eagle Foods where you know just 2 weeks after workers posted a petition about health and safety conditions on the internet, a majority of the workers who signed that petition lost their jobs.

Ms. WILD. Thank you very much. Ms. Eisen, in your testimony you refer to Starbucks's relentless abuse and delay tactics when it comes to first contract negotiations. Can you discuss with us a little bit how management has stalled contract negotiations, and do you believe that the goal is to decertify the union?

Ms. EISEN. I do personally believe that and being at the very first store to be certified, that is troublesome to me. What we have seen is a very slow, and I would say sluggish response to demands to bargain. Sometimes taking months to respond to an initial demand to bargain from a certified location.

Then when a response does come in it looks like an automated response. "Thank you for sending us your demand to bargain. We look forward to talking to you," and we will always send a date range with our—

Ms. WILD. It takes months to get that automated response?

Ms. EISEN. Yes, it has.

Ms. WILD. Okay. Can you also talk just briefly about the impact of mandatory captive audience meetings and other tactics used to intimidate workers?

Ms. EISEN. Absolutely. I mean first of all, they will never call it a captive audience meeting. They call them listening sessions, not that that is any better. What they were doing in Buffalo was shutting the stores down in order to hold these captive audience meetings.

If you were one of the workers who was supposed to work the shift that was canceled because the store was being closed, you were told that in order to be paid for what was your scheduled shift, you will need to attend this meeting. You are telling an hourly worker living paycheck to paycheck that the only way to be paid for their scheduled shift is to come to a captive audience meeting.

You can say that is not a mandatory meeting, but I do not see that these workers have any other choice.

Ms. WILD. Thank you very much, Ms. Eisen. With that I yield back.

Chairman SCOTT. Thank you. The gentleman from Georgia, Mr. Allen.

Mr. ALLEN. Thank you, Mr. Chairman, and thank you to our witnesses for being here today and sharing with us your thoughts about the workforce. We have been in our districts the last 30 days, and I have got to tell you I have got an earful. What I am hearing from my constituents, they are sick and tired of this government trying to tell them what is morally right and wrong, what to drive, and by the way you have to live with our policies whether you like it or not.

We know what is best for you. You know I realized early on in my business career that the workforce was evolving, and now we have the modern workforce. They are very entrepreneurial. I mean, when you start imposing what you have to do this, you have to donate to this political candidate or whatever, I mean and in fact you know over 40 percent of them support you know different parties in different elections.

This modern workforce is very entrepreneurial. You know our business model changed drastically from we were doing work basically we were doing a lot of self-performed work. In fact, the company I started with, the union company, we did a lot of self-perform.

We got the workers out of the unions. In fact, I was with the construction trades union at Plant Vogel just and you know I said hey, we need workers. They cannot recruit workers. They cannot bring in apprenticeship. I mean nobody wants to join the union, and of course you hit on some of the things.

I mean today you know I think at least the surveys we did in our company is that No. 1, paperwork created and wired to—and they got to find out where they fit, and you know you are just not going to fit with some companies. It is up to the company to provide that fit for the employee.

When that fit works, you better get out of the way because that company is going to be very productive, and it is going to grow, and those workers are going to benefit. In my State of Georgia, we have right-to-work laws, okay. Every State is very different.

That is why Senator Scott, and I introduced the Employee Rights Act. We did this because of the importance of assuring that elections are conducted by secret ballot. It requires union dues transparency, it protects the joint employee model for franchises, which the franchise business has been a huge economic engine in this country.

It maintains worker status as independent contractors, which is a big part of the construction world, and it protects employee privacy, among other provisions. Mr. King, it is interesting that about 77 democrats and the Biden NLRB urged—remember under President Trump urging that Mexico markets had the right to a secret ballot, yet we do not want that in this country. I mean the height of hypocrisy. Can you explain that?

Mr. KING. Yes, I wish I could, Mr. Allen, but I cannot. It is interesting while secret ballots are under attack here, and that is the way we make decisions in this country. Everybody that is in this room as a Member of Congress is elected by secret ballot.

Union officers are elected by secret ballot. Church elections, you name it. What is wrong with the secret ballot election process? I do not think anything. Back to your question, the U.S. MCA agreement is imposing a secret ballot approach on Mexico, and I support that. Our association supports it, that is the way it should be.

Mexico workers should have secret ballot election rights. Why do we not have the same standard here? It is total hypocrisy.

Mr. ALLEN. Yes. It makes no sense. It is like we demand other countries protect their borders, yet ours is wide open. I mean it makes no sense at all. The other thing that is disturbing is that like I said, Georgia is a right-to-work State. We have great leadership in our State.

We have been voted the best State to do business in for I think 10 years reign. We have got a lot of economic activity in Georgia. In fact, we are at pre-pandemic economic levels right now. Why is it that other states want us to have to do what they do with their terrible policies where people are moving out, companies are moving out, businesses are moving out, and they want us to succumb to these same policies.

In other words, like I said, what drives my constituents crazy is you know this town says okay, these are the policies. I do not care whether you like them or not, and it is for all the states. Why cannot Georgia and other states decide what is best for them?

Mr. KING. Well, as you know Mr. Allen, the PRO Act would take away and in essence a right-to-work State for Georgia and 26 other states. Again, it is back to imposing a so-called Federal will on the entire country, and that is not what people want.

Mr. ALLEN. I want to tell you the American people are not going to stand for this. The American people want choice. I heard it loud and clear. Thank you, and my time is out, and I yield back.

Mr. KING. Mr. Allen, I just want to say one thing. 94 percent of the workers in the private sector in this country have elected not at this juncture to become part of a union. Back to your point, they want that flexibility.

Chairman SCOTT. The gentleman's time has expired. The gentlelady from Georgia, Mrs. McBath.

Mrs. MCBATH. Thank you, Chairman Scott. I move to strike the last word.

Chairman SCOTT. The gentlelady is recognized for 5 minutes.

Mrs. MCBATH. Thank you so much for hosting this hearing and thank you to our witnesses here this morning. Thank you so much for taking the time out of your busy day, and your schedule to speak before this committee. These are really incredibly important topics that we are discussing today.

The right to organize for better wages and working condition is a proud American tradition. That is why this country created a working middle class that was the envy of the world. It is how we will again create an economy that works for every single American and their families.

Employees who commit their blood, their sweat, and their tears to their work, they deserve to live with dignity and respect. To put food on their tables, and to provide better lives for their children and for their grandchildren. Decades of working families being left on the outside looking in has sparked a new wave of organizing efforts in workplaces all across the nation

The National Labor Relations Board has reported that petitions for representation elections during the first three quarters of the Fiscal Year 2022 increased by 58 percent, compared to the same period last year. Despite a major increase in the workload for the NLRB, dedicated funding for this critical agency has remained stagnant at 274.4 million dollars, just since the Fiscal Year of 2014, effectively resulting in a 25 percent cut.

The NLRB has been wrongfully hamstrung in their efforts to protect Americans as they exercise their rights in the workplace, and a moment and more and more people are interested in learning more about the proven benefits that come with joining, or organizing a labor union. In order to ensure that every worker in the United States can exercise their rights in the workplace without fear of retaliation, we must provide the NLRB the resources that they need to fulfill their mission to protect the rights of the American people.

My question is for Mr. Pearce. As part of the White House Task Force on organizing and empowerment, the Department of Labor recently established the Worker Organizing Resource and Knowledge Center or Work Center, which provides workers and the public with critical information on how to organize, the proven benefits that come with joining the union, and also the importance of labor management cooperation. Workers cannot exercise their rights if they do not know that they have access to these benefits and to these rights, and outreach like this is just really critical for the government to fulfill its statutory mission of protecting freedom of association and promoting collective bargaining.

How would ending the NLRB's funding crisis further help this effort?

Mr. PEARCE. Thank you for that question. While I was Chairman of the NLRB, it was very important that there be opportunity for strong outreach and education of the American public. When General Counsel Abruzzo first took the job and thought that there was opportunity to enhance that outreach, she promoted agendas that would promote that.

When we have flat funding, when the agency has flat funding like that, resources have to go toward the processing of the cases, and consequently a lot of the efforts toward educating the American public because as you know the Board is reactive. They have to wait for charges to come to them.

There is a presumption that people understand what their rights are before they come into the door. If they do not have that understanding the Board is responsible for having to provide that education, where outreach is taken away because the Board has designated its resources just to get the cases processed.

The American public loses because the American public regretfully remains unaware of what their rights are under the law.

Mrs. MCBATH. Thank you so much for that answer, and I just spent time on Labor Day with our labor unions and just really celebrating all of the wonderful work that they have done in protecting the workforce and the country, and I yield back the balance of my time.

Chairman SCOTT. Thank you. The distinguished Ranking Member of the Full Committee, Dr. Foxx.

Mrs. FOXX. Thank you, Mr. Chairman. Mr. Chairman, I want to wish a speedy recovery from your COVID. You do not look to worse the wear, so I am happy to know that it is not affecting you too negatively.

Chairman SCOTT. I think I am just about one test away from breaking quarantine.

Mrs. FOXX. Mr. King, I really appreciate your comments today and I have a couple of questions for you. An NLRB employer, Whistleblowers, has recently come forward with allegations that NLRB officials engaged in substantial misconduct regarding Starbuck's and Workers United elections, including collaboration with Workers United to increase the number of votes casted in favor in the union and effect the outcome of elections.

Congress established the NLRB to be an impartial and neutral in union elections. If these allegations are proven, does the NLRB risk losing its credibility and legitimacy?

Mr. KING. Absolutely. Now, these are allegations and I've stressed the numerous allegations against the company should be treated just as that also, allegations. Dr. Foxx, if they are proven to be true, they would undermine the credibility and neutrality status of the National Labor Relations Board. It is very troubling. This agency needs to be totally neutral and not take sides in any allegation or in a union-conducted election.

Mrs. FOXX. I would say that also should be true of the Secretary of the Department. Mr. King, in 2015, the Obama NLRB issued a decision in the Browning Fairs Industry case. They changed the definition of joint employer under the National Labor Relations Act. The decisions they test was based on indirect and potential control over an employee's terms and conditions of employment.

The Browning Fairs decision replaced the decades old clear and predictable standard of direct and immediate control. In 2020, the Trump NLRB issued a rule restoring the standard of direct and immediate control, but last week the Biden NLRB issued a proposed rule that would essentially reinstate the Browning Fair standard. Could an expansive joint employer's standard devaState the franchise business model at a time when many of these small businesses are facing record-breaking inflationary and supply chain pressures?

Mr. KING. Yes. The Joint Employer Initiative just announced by the National Labor Relations Board is an attempt to virtually make every employer connected with every other employer in the country and is a very harmful approach toward the franchise industry. As noted in our other testimony, franchisee operators are some of the best job creators in the country. This is a way for people to better their economic status, so an all-out attack on small business trying to make them part and parcel of a parent franchisor or try to make them part of another employer's organi-

zation is simply a way to extract more dollars in litigation from these small business operators, particularly, and discourage them frankly from pursuing these types of business models. It is an incorrect policy approach.

Mrs. FOXX. Thank you. Mr. King, according to union activist and many in the media, America's seeing a historic surge in union organizing. You have given some statistics as you have testified today, but from your analysis of union election data and union membership rates, is the union movement experiencing a renaissance or has the media overstated the impact of a few high-profile organizing campaigns?

Mr. KING. It is certainly, Dr. Foxx, the latter. It is too early to tell, but the media hype that we have seen where one store with one location asking for potential union representation, or a few, even in Starbucks we are talking about a very, very small percentage of that total employee population. This is being overhyped, whether the union movement in this country will have any resurgence or not, I do not know. I do not think anybody knows at this point, but the polling clearly shows a high degree of skepticism, 58 percent of the polling that we've been talking about here today by Gallup concluded that individuals don't want to be part of a union organization. I think it is good to talk about developments in labor law. It makes good maybe headlines, but people that are reporting in this area ought to do their homework. They ought to be much more objective. Again, 94 percent of the private sector workers in this country have decided, for whatever reason, they do not desire union representation at this point.

They are not second-class citizens, and their employers are not bad employers. Let us get that straight.

Mrs. FOXX. We wish that we had more objectivity from everybody who pretends to be a journalist. Thank you very much, Mr. King.

Chairman SCOTT. Thank you. The gentlelady's time has expired. The gentleman from Connecticut, Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Chairman and wish you a speedy recovery. Thank you to the witnesses for being here. Talking about objective reality, Ms. Eisen, I want to thank you again for your testimony which described in real life what you have been going through. Just to buttress that, I can share with you that in New England where myself and Congresswoman Hayes are from, we are seeing a lot of the same really spontaneous almost grassroots organizing at Starbucks. One is in eastern Connecticut in Vernon, Connecticut where I am from actually and they had a union vote on July 14th, which again, was just completely sort of organic movement that took place there and the vote was 14 to 1.

Unfortunately, on August 26th, following the July 14th vote, the lead organizer was terminated and has, by all accounts, had a good work record while he was there. I actually got a text from Congresswoman Pingree, who again was indicating that up in Maine, again another successful Starbucks organizing drive and the business immediately dramatically cut the store hours.

Chipotle is also another chain that, again, is seeing this same phenomenon of people who just basically have been fed up and who really on their own, they were not driven by external forces coming

in. Also, organized in Chellie's district and again, the location was closed immediately.

Mr. Pearce, obviously you have covered a lot of miles in this area. These sort of retaliatory measures or certainly apparent retaliatory measures, how do we respond to this? I mean obviously we passed the PRO Act here in the House, but in terms of just what were the tools that NLRB has, maybe if you could just sort of comment in terms of what you are seeing with incidents like in Connecticut and Maine.

Mr. PEARCE. Well, when you look at Maine, the insidious nature of the Maine situation is a place that gets closed as soon as a petition gets filed after employees were being trained to expand operations at that facility and then they offer jobs to the public at a location 40 minutes away, but block the emails of those employees that were working at the closed facility from applying.

That kind of devastating, diabolical activity has to be looked at very carefully. The law talks about how an employer has a right to shutter its business to stop a union from coming in, but if you have a corporate employer that has a cluster of business and is essentially playing whack-a-mole to drive out the union, I think the law looks a little bit differently at those kinds of activities and it will be interesting to see what the unfair labor practice will result.

Mr. COURTNEY. Again, just in terms of legal process at the NLRB, the Ranking Member's question about allegations made by Starbucks regarding what they described as—what they perceived as unfair labor practices, certainly the Inspector General is an important player in our system of laws and we certainly, I think, welcome any input that they may have. However, it is not like Starbucks did not have other options here, which is if they really felt that there was something amiss, I mean they could have had this issue flushed out at the NLRB itself. I mean there are ways that you can raise these questions; is that correct?

Mr. PEARCE. Oh, yes. The normal course of action would be to file a complaint with the Inspector General, provided that you have some kind of proof to back it up. It begs the question when Starbucks announces that an undisclosed employee divulged that this kind of so-called collusion was taking place, and they divulged this to Starbucks rather than themselves making the complaint to the Inspector General. I smell something foul there.

Additionally, and this is an important point, if there is true collusion between the NLRB and Starbucks, it is interesting that in the wake of these bold accusations the NLRB was successful in getting an injunction to get the Memphis Seven employees reinstated because of the egregious nature of the activity that Starbucks has. It calls into question whether or not the allegation is that the District Court of the United States was part of this collusion. I think not.

Mr. COURTNEY. Well, thank you, sir. I yield back.

Chairman SCOTT. Thank you. The gentleman from Indiana, Mr. Banks.

Mr. BANKS. Thank you, Mr. Chairman. Mr. King, as you know, Indiana is a Right to Work State and since Right to Work was enacted in 2012, the Mackinaw Center for Public Policy recently noted that since that time they noted in the Wall Street Journal that manufacturing jobs as a share of total jobs in Indiana's private

sector has increased by 27 percent. That seemed significant to me. Can you talk about the benefits of that to workers in Indiana, more manufacturing jobs as a result of Right to Work laws and what other ways have workers benefited from Right to Work laws in states like my State, Indiana.

Mr. KING. Well, Indiana is like 26 other states, Congressman. You are right that have Right to Work statutes and the electorate in your State and those other 26 states have decided that that is the policy they want to have for Indiana and the economic benefits, as you have just stated, are obvious. You can argue back and forth about Right to Work status, but we are hearing is the employees want a choice. They do not want to be forced into paying fees or dues to any organization, whether it be a union or any other third-party organization.

They do not want that third party spending their money for social causes, political causes that they do not agree with. They want flexibility and flexibility seems to be one of the key attraction points for qualified workers and Indiana's done an excellent job of attracting qualified workers and employers want to go where there are qualified workers. The Hoosier State is a perfect example of success in this area.

Mr. BANKS. I think you would agree it is not just a matter of fairness, increase of 27 percent of manufacturing jobs since that period of times seems as if there are a lot more good paying jobs available to workers in my State, as I am sure is the case in the 27 other right-to-work states around the country as well. There is a benefit here to workers, to families, financially as well; would you not agree?

Mr. KING. Absolutely. Why should not the electorate of your State or any State decide this question. The PRO Act, as you know, Congressman, would effectively eliminate right-to-work laws. That should be coming from the halls of Congress. The people in the respective states, like Indiana, should be able to make that decision.

Mr. BANKS. I could not agree more. Mr. King, could you talk for a minute about what grounds states like Indiana might have to challenge the PRO Act if it did, God forbid, get passed and signed into law by the President. Would states like Indiana have legal grounds to challenge that law?

Mr. KING. I am not sure about the State, per se, Congressman, but I think employers within the State certainly would have standing and let me give you an example. The prohibition on employers have a right to communicate in a meeting their views on unionization. Let us be clear on this point, the testimony here this morning seems to suggest that a so-called "captive audience" speech, which is an incorrect term, by the way, somehow can brainwash employees.

That sells the American workers short. They are much more sophisticated. Ms. Eisen is a perfect example. They can make their own decisions. They are not in an half an hour or an hour meeting, going to be so brainwashed that they cannot make an intelligent decision about unions and its consequences.

What this is all about is stopping the employer for having any type of communication. The minute that employer walks out of that meeting, and these meetings are paid for, by the way, time, by the

employer, she or he is going to go online, talk to fellow workers and make their own decision. This is a total subterfuge. It is an impediment of free speech.

Notwithstanding the 8(c) violation that would be, I think, legally cognizable, the PRO Act prohibits an employer from having any involvement in a representation proceeding. That is a due process violation. Again, it is an effort here to cutoff free speech, cutoff communication, and irrespective of how you feel about politics in general, when anyone is trying to talk about cutting off speech, having communication, having an ability to exchange ideas back and forth, that is suspect and that is what is happening.

Mr. BANKS. Very well put. Thank you for your time. With that, I yield back.

Chairman SCOTT. Thank you. The gentlelady from Connecticut, Ms. Hayes.

Mrs. HAYES. Thank you, Mr. Chairman. According to the National Labor Relations Board, Connecticut has seen an 18 percent increase in union election petitions, lower than the national average. However, Connecticut has also seen a 35 percent increase in unfair labor practice charges, well above the national average.

Over the past several months, workers across my district at Fuel Style Energy in Danbury, Durham School Services in Waterbury, and registered nurses at Sharon Hospital have filed for union elections. I have heard reports that the hospital in my district is pulling nurses during their shift to go to meetings that discourage unionizing.

Dr. Bronfenbrenner, your most recent data shows that were employers choose to run anti-union campaigns 74 percent brought in one or more management consultants to run the campaign, while outright union busting is illegal, these management consultants often have the same aims.

What recourse is there for workers who see their employer bringing on management consultants with a reputation for unions suppression?

Ms. BRONFENBRENNER. Management consultants have become basically universal in their organizing process, and they tell the company how to run the campaign. Basically, once they are in there, they are in charge of everything—productivity, profits take second. The No. 1 priority is getting rid of the union. Workers are faced with the fact that they really have no say whether management consultants are present or not, but also, even though management consultants are required to register under LMRDA, that many of them do not. A recent study found that in 2021 when there were over 1,216 elections that a very small percentage of the management consultants actually registered any of the forms. With that, unions cannot, and workers cannot find out who they are, how much money they are spending, and whether they are violating the law.

Even if they are found to have violated the law, we do not have a single case where they are charged with criminal penalties or financial penalties. This is in great contrast to unions who in violation of LMRDA are very often charged with huge fines and criminal penalties. There is no enforcement. The only thing that workers can do is talk to other workers of other workplaces and try to find

the practices of these management consultants to be prepared ahead of time what unfair labor practices they are going to commit in their workplace.

Mrs. HAYES. Thank you. When an employee gets fired for union organizing activity, their case before NLRB proceeds while they are out of the job. Workers sometimes wait months for temporary reinstatement. Mr. Pearce, is it a problem that NLRB must file for an injunction when the union violates the law, but does not have to when an employer fires a pro-union employee.

Mr. PEARCE. It is definitely an inequity in the process. As you stated, if the union engages in an illegal strike, the General Counsel is mandated to go and seek an injunction. When an employer engages in wiping out a bargaining unit by firing all of the union activists there has to be a petitioning by the people bringing the charges to the regional office to have 10(j) proceedings considered.

That evaluation has to be done at the regional level. The region makes requests to the General Counsel, who then makes a request to the Board before an injunction could even proceed. All of that is time and labor intensive. Then once that happens, it has to go to a district court and the district court judge makes a determination as to whether or not an injunction is appropriate.

Mrs. HAYES. Thank you so much for that, sir. My last question is for Ms. Eisen. People make life decisions based on their healthcare, when to retire, when to change jobs, oftentimes, when to buy a home. Do you believe that threatening essential health benefits has deterred employees from wanting to unionize?

Ms. EISEN. I think it has brought a lot of fear into employees that would like to unionize, and fear is very, very powerful. Fear is not only a product of union busting. In most cases, it is the intent. Employers are trying to scare their employees into making a decision one way or another. That is not the way that this should work.

Mrs. HAYES. Thank you so much. I just will end by saying I worked for an employer where we had the choice to vote for a union and I voted no. I have worked for an employer where we have the choice to vote for a union and I voted yes. All that to say, leave it up to the employees to take a vote, present your best argument, and let the employees take a vote on what is best for them. Mr. Chair, I yield back.

Chairman SCOTT. Thank you. My distinguished colleague from Virginia, Mr. Good.

Mr. GOOD. Thank you, Mr. Chairman. I am sorry you are not here with me to greet you in person.

As someone who worked in a unionized auto factory in college, I saw first-hand the major problems with unions protecting the disgruntled or unproductive workers, reducing productivity, increasing costs, creating an unhealthy, us first them relationship with management and et cetera.

As a matter of fact, I worked there 34 years ago and they paid me what was then an exorbitant \$11 an hour rate as a college kid and they actually put me in a supervisory role over these lazy union employees who were not doing their jobs, quite frankly, because of my work ethic and that might be why the plant closed not long after I left there.

Biden promised that he would be the most pro-union president in history and like his war on reliable energy, he has kept that promise as well, perhaps because the union spent over \$27 million to help him during the 2020 campaign. Today represents the classic Democrat response to everything and yet another example of their anti-freedom, pro-government control approach to every issue.

Force you to get a vaccine, force you to wear a mask, force you to close your business or your church. Force you to close your school. Force you to buy and drive an electric vehicle. Force you to embrace their values on transgender marriage, secularization of kids and so forth. Force you to pay for everyone else's abortions. Force you to pay for everyone else's student loans. Force your kids into the one government school in your district. Force you to pay more in taxes, regulation and of course inflation. Hey, maybe we should have an inflation celebration. Oh, wait, we did that yesterday.

Force you to join a union and pay union dues. Force you to embrace a union or close your business, which is what the PRO Act would do, force you to embrace a union or close your business. The priorities of unions were on full display these past couple of years where the Teachers unions colluded with the Biden Administration to shut down our schools at the expense of our children.

These lockdowns we all know now have cost decades of progress for our kids, especially, minority students, and we've seen the greatest decline in test scores in 30 years as a result of the teachers' unions closing of our schools and that's why I introduced the Students before Unions Act, which would ensure that students are the priority and not unions.

Mr. King, do you think that the best interest of students are served by teachers' unions. Do you think that the students are their No. 1 priority the interest of students, the teachers' unions?

Mr. KING. Certainly debatable. The closure of schools, even some union proponents right now in reading think that was a mistake. We are years behind in reading recently in education areas, math, and science because we missed these teaching opportunities and online can only do so much. That interactivity and person between teacher and student is critical.

I think this country is, unfortunately, going to suffer for decades perhaps because of these closures. I want to interject one point, Mr. Good. The recent colloquy between the Congressman and Ms. Eisen, you had an opportunity to vote and that is so important. I could not agree with you more. I am glad you voted. We want to preserve that right. Back to your question, Mr. Good, we need to take a step back and think about practicalities here.

Not every ounce of intelligence comes from these halls unfortunately and I used to work here and have a great admiration for the Congress. We have got to pay more attention to reality in this country and have connectivity with the worker and how she or he believes and not force anything upon them against their will. That is not the way we should proceed.

Mr. GOOD. You are exactly right. I think perhaps the most underappreciated, in terms of its danger and its damage to the country, a piece of legislation we have voted on in the House has been the PRO Act, which would essentially, again, tell a business

embrace a union because you have no ability to resist it whatsoever, force a union upon your workers, force them to pay for a union, irrespective of what their wishes or what might be best for that company, which would be terribly damaging, terribly harmful to the country and to the Nation's productivity. What 58 percent of Americans say they are not interested in joining a labor union.

Mr. KING. Correct.

Mr. GOOD. There is a reason why labor unionization has decreased across the country. Mr. King, how is it appropriate for the Federal Government to be involved in efforts to increase union membership anyway? How is that appropriate for the Federal Government to be involved with that?

MR. King. It is quite suspect. I certainly appreciate and can understand President Biden's position. He has a right to make that policy decision, but what is wrong is you do not then have executive agencies, particularly, the National Labor Relations Board take one side or the other on the issue of union representation or unfair labor practice charges.

We have heard a lot of testimony here today about the budget of the NLRB. Well, what has not been said is that the caseload of the NLRB went down drastically and the stats I have in my testimony. The workload for the Board over the years has decreased. It is debatable how much money, if any, additional money they need.

Back to the basic point here, the PRO Act is so one sided. For example, it provides for fines for employers and employer executives, but a rogue union, and there are some inappropriate union activities, there is no fine whatsoever, that there is no provision to curtail that kind of activity. The secondary boycott provision is a drastic policy mistake. Why should you involve a neutral employer and its employees, and it could be union, in a dispute that a union has with another company? That is going to decrease economic productivity, perhaps put that employer out of business. That intervention in the secondary boycott area is a tragic mistake in that legislation and I could go on. It is so one sided. It is so tilted, and I would venture a guess that many Members of Congress and in this body that voted for it have no idea of what they—

Mr. GOOD. Our time has expired the Chairman is saying. That is a pretty heavy thumb on the scale from the government but thank you very much. Thank you, Mr. Chairman.

Chairman SCOTT. Thank you. The gentleman from California, Mr. DeSaulnier.

Mr. DESAULNIER. Thank you, Mr. Chairman. I hope you are feeling well.

I am reminded when I attend hearings like this of a quote by a Republican President during the largest expansion of the American economy in history when one in three workers were members of unions. President Eisenhower said that only a fool would deprive an American man or woman worker from joining a union of their choice.

Professor Bronfenbrenner, and I empathize with any last name that is more than three syllables, could you talk to me a little bit about the importance of the PRO Act in the context of inequality in this country and the disparity of influence between wage earners

and capital investors? During COVID when we seemed to be all in it together to help employers and help employees get through this period. We now have research that inequality got even worse.

Eisenhower was able to get to that period because we learned, in my view, from the last great inequality period between wages and capital, the glided age. The PRO Act, to me, is incredibly important to begin to level the playing field and it is encouraging to see that Americans are starting to understand the importance, whether they are in a union or not, the importance of workers having a voice through union membership. Professor, could you respond to that, particularly, the importance of PRO Act to help with inequality?

Ms. BRONFENBRENNER. There has been a lot of talk about secret ballot elections, but there is no such thing as a secret ballot because employers can engage in—they engage in interrogation, surveillance, monitoring of their employees, so they know exactly which way workers are going to vote at the time of the election.

The PRO Act is needed to make sure that workers who want unions can choose unions and workers who do not want unions do not have to choose unions, to make sure the process is free and fair, which it is not right now.

We also know that unionization, the decline of union density has had a direct correlation with increase in inequality in multiple fronts. Union workers are not just better paid, but union workers are more likely to have access to the legal process which is if you have a collective bargaining agreement you can enforce employment and labor laws that can decades to get enforced under our current legal system because civil litigation comes second to criminal litigation.

There is less discrimination in union workplaces, but also unions have played a major role in our society in pushing for legislation that benefits all workers, union workers and non-union workers, whether it is antidiscrimination laws, minimum wage laws, health and safety laws, and if there is a weak labor movement, then we are less likely to get the kind of laws that benefit all workers.

Finally, we have to understand that unions play a role in our society in terms of improving education, in terms of improving healthcare, and access to protections in the workplace. If you do not have a strong labor movement, all of these factors decline. Thank you.

Mr. DESAULNIER. One of the most disturbing things coming out of COVID again is this continued disparity between wage earners and investors. Nothing against investment. As Lincoln said, you need to have a balance between labor and capital and if you do not, you have lost democracy. One of the really concerning things is research that shows that there is a diminishing consumer class, that actually the top 1 percent is driving the economy based on consuming within the top 1 percent—people who make over \$7 million in investments a year. Care to comment?

Ms. BRONFENBRENNER. One of the biggest driving forces of the organizing surge has been that workers—we have seen in the last decade their wages stagnant at the same time that the top 1 percent has had incredible growth in profit and the amount they are taking home. During COVID, workers felt that they were not just

taking cuts in their wages and their benefits, but they were also risking their lives. When they went to their employers to ask for PPE or paid leave time, these same corporations that were making money hand over fist during the pandemic said, no, we cannot afford that. That was the driving force.

Workers do not come to work to die, they come to work to work, and that was the driving force between not only all the organizing, but the strike wave that we have.

Mr. DESAULNIER. Thank you so much. Thank you, Mr. Chairman. I yield back.

Chairman SCOTT. Thank you. The gentleman from Pennsylvania, Mr. Keller.

Mr. KELLER. Thank you, Mr. Chairman. I must admit I am a little baffled here that we think the individuals that employ so many Americans, the people we represent are bad people. That is not the people I represent. They care about the people who come to work in their businesses, and they want to take care of them because they know they are valuable members of their team.

I know that from when I worked in a factory and I did not need the middleman to help me communicate to the people and to the organization for which I was a part, but it seems like not everybody shares that opinion and I guess they must think that the people they represent are not good people. That is not my experience and I just want to say inflation continues to hammer employees and job creators in Pennsylvania.

The consumer price index has indicated that inflation numbers rose 8.3 percent from August 2021 to August 2022 and our economic outlook is getting worse each day. You know we talk about earnings. The policies of the Biden Administration and the Democrats have taken 1 month's salary, 1 month's earnings of America's workers over the last year with 8.3 percent inflation. House Democrats and the Biden Administration seem more determined than ever to implement the harmful provisions of the PRO Act, a radical change to our labor laws that would benefit union bosses at the expense of workers and further worsen the economic challenges we face.

Workers need to be able to decide for themselves if they want to seek union membership or not. It is not the government's job to make these decisions for them.

Mr. King, Democrats have long desired to eliminate workers' right to secret ballot elections. The latest attempt is this effort is to pressure the NLRB to implement online voting for union representation. Like Card Check, online voting provides no privacy guarantees and invites voter intimidation and coercion. What is the right—why is the right to a secret ballot election so important for workers?

Mr. KING. Mr. Keller, it has so many consequences. If a union is voted in, that union in all probability will stay at that place of employment for decades until that location either merges or closes. There is no reoccurring vote like we have for Members of Congress, for example, whether the union continues. It is a very permanent type of decision that impacts that worker's life, whether they pay dues or fees, whether they have to go out on strike, or whether

they support their union with respect to political and other types of social movement contributions.

It impacts so many things over such a long period of time and it is a very serious decision and that decision should only be made by a secret ballot vote. Now, the colloquy we just had the Congresswoman had an opportunity to vote. That is critical, a secret ballot vote. An electronic voting you mentioned, I do not understand what the objective is. We have high voter turnout under very good circumstances right now by the National Labor Relations Board. They do an excellent job of that.

I have yet to understand what the real objective is, if any, other than maybe to decrease voter participation and only have certain segments of the voter population participate. That is not good. We want everyone involved.

Mr. KELLER. Thank you. Mr. King, the PRO Act allows the NLRB to impose civil penalties of up to \$100,000 on employers that commit unfair labor practices and states that the Board shall consider the gross income of the employer in imposing the fine. Does that mean that a company could be required to pay a fine of up to 100,000 even in a year that it loses money overall?

Mr. KING. Apparently, so. It is another example of the ill-conceived provisions in the PRO Act. This law—excuse me. This legislation, if it were to become a law, is so tilted in favor of one side. There are no provisions, as I mentioned just previously, for any fines whatsoever on rogue union activity. It is a totally one-sided approach. It is unfortunate it has even gotten this far in the discussion in this country. Friends of mine in the union movement, it is honest—and they are often off-the-record discussions, they really concede that many of these provisions are ill advised.

Mr. KELLER. Yes, I would talk about some of the union pension plans that we have had to bail out and subsidize with taxpayer expense too. If we want to talk about bad actors, I think we should not be forcing people to join unions. I think we should allow them to make that decision on their own.

Mr. KING. Mr. Keller, I just want to say one thing before we close. You said at the outset of your remarks people in your district, 94 percent of the American population, I think as you know, does not work under union contract. They are not second-class citizens, and their employers are not bad employers. Yes, we may have some bad employer actors in this country, but let us not diminish the value of these people are providing for our country.

Mr. KELLER. The people that take the risk every day and that is the whole team, that is the team. That is, I think the thing that is important. The people I represent are good people and they work hard, and they do not need the government interfering with the relationship between themselves and their employer. Thank you. I yield back.

Chairman SCOTT. Thank you. The gentlelady from Minnesota, Ms. Omar.

Ms. OMAR. Thank you, Mr. Chair, and I hope that you will be back with us sound and safe soon.

I just wanted to start out my comment by reminding my colleagues that union members are employees themselves. It is not some strange entity that exists outside of that, and I hope that you

also recognize that you do represent the employees who are members of those unions. As a former union member myself, who has gone on strike and relied on the collective strength of my union, I stand behind all of those who fight for fair and safe workplaces.

I am proud to say that Minnesota has one of the largest increases in union activity in the country this year, including multiple Starbucks locations in my district.

Dr. Bronfenbrenner, in your testimony, you stated that the pandemic combined with skyrocketing corporate profits and an increasing tight labor market has created a hot-shop condition for union organizing. Even for organized workers responding to the pandemic has been critical, especially, in the healthcare industry. Right now, 15,000 nurses in Minnesota are currently undertaking the largest strike of private sector nurses in U.S. history and probably globally.

These workers have been heavily impacted by severe staffing shortages and it has been exasperated by the COVID-19 pandemic and they certainly are not the only workplace that is facing this unique and escalating concern to the ongoing pandemic.

Workers also never want to go on strike, but when employers refuse to negotiate over improving wages and conditions, workers are often left without a choice. Can you speak to the rise in strike activity over the past year and what this activity says about how workers perceive employer behavior at the bargaining table?

Ms. BRONFENBRENNER. Thank you for that question. The strike activity there has not just been a dramatic increase in organizing activity. There has been a dramatic increase in strike activity. In 2021, the upsurge gained extensive attention. There were 265 work stoppage involving 140,000 workers. In the first 8 months of 2022, there has been 267 strikes in 393 different locations. A third of those strikes were unorganized workers striking for not just the right to organize, but over health and safety conditions.

Manufacturing and educational services accounted for the majority of total work stoppages, 17.7 percent each, but also healthcare accounted for the largest number of overall strikes. Across the country workers are striking over health and safety, racial justice, scheduling, and deteriorating working conditions.

COVID escalated strike activity because of the overwhelming number of workers who felt that they were not able to work in a safe workplace during COVID, especially, all the essential workers.

Ms. OMAR. Dr. Pearce—Mr. Pearce, for decades the NLRB has interpreted Section 8(c) as permitting captive audience meetings. Ms. Eisen testified to the numerous captive audience meetings dubbed as listening sessions that baristas had to attend which ultimately had a powerful effect in intimidating workers. The current General Counsel is seeking to change this precedent.

Can you explain how the current interpretation is going beyond the speech protected by Section 8(c) and why it is actually extremely coercive?

Mr. PEARCE. Well, the speeches that, as Ms. Eisen has testified, are speeches that employees are forced to listen to and the fact that they are couched as voluntary is a misnomer if the employees will not be able to continue to get paid if they do not attend.

Other people on this panel, Mr. King, in particular, has talked about how 8(c) requires the employer to have free speech. What is being overlooked is that the statute also says that employees have a right to refrain, and they have a right to refrain from engaging in union activities and engaging in anti-union activity, which would include propaganda, and that is where the General Counsel is going, I believe.

Ms. OMAR. Wonderful. I appreciate that. I think that part is really important because no one is forcing anyone to be part of a union, and we are certainly just pushing to make sure that people have the right to vote for one if they want and not to vote for one if they want. Obviously, organizing is part of the activity of getting people involved, which is what Starbucks workers and others across this country, and especially in my district, are doing. That is the right we want to preserve that is a right that exists in this country and should continue to exist. Thank you. With that, I yield back.

Chairman SCOTT. Thank you. Next on my list is the gentleman from New York, Mr. Jacobs.

Mr. JACOBS. Thank you. I have a question for Mr. King. Mr. King, in regard to the PRO Act, as I read provisions of that Act—I am from Buffalo, New York. I served on a Buffalo School Board for years. As I read provisions in the PRO Act, one thing that really looks to me very similar to a provision that we have for some of our public employees in New York State, the Tri-Borough Amendment under New York State's Taylor Law, which the State law governing public sector labor relations and terms and conditions of contract stay in place, even if the contract is expired and workers and management have not settled on a new deal.

This law is one of the main contributors, in my mind, to New York State's extremely high tax burden, the highest in the country, and removes any incentive often for public sector unions to compromise. I have seen this quite a bit in our contract negotiations with the Buffalo Teachers Federation. We, for a long time, did not have a contract because of the fact that the deal that had been negotiated in the past was so good that there was really no incentive for the union to get back to the negotiating table. They were still getting incremental raises, they had lifetime healthcare, and the Buffalo Teacher Federation contract—they had free cosmetic surgery and that cosmetic surgery rider kept going up and up, and up because providers were realizing that they had a goldmine of activity, and they were popping more facilities to provide cosmetic surgery for our teachers, and it got to be over \$13-million a year, and we had to pay a lot to get that out of the contract because it just kept going and going.

My concern is the PRO Act would do that throughout private union negotiations and really tip the scale on the ability to have fair bargaining. I am just wondering if you had any thoughts on that.

Mr. KING. Yes, I do. The points you made are very important practical points. The union particularly will have little or no incentive in a first contract situation to reach an agreement and then force, as the PRO Act would, a government-imposed arbitration panel of three arbitrators who will write the contract for the par-

ties and the employer, and the union will have limited input in how that contract is written.

I have negotiated contracts, Congressman, for over 45 years. If the other party does not have an incentive to reach a deal, a deal does not get done. Under the PRO Act, then it moves to this government intervention arbitration process. It is ill advised. It is not needed and these are first contracts that are critical for the relationship between the parties. As you mentioned, all kinds of provisions can be included and the subject areas that the so-called arbitrators are to look at are very subjective and this is an ill-advised policy approach.

There are other ways to deal with first contract situations, which I would be happy to opine on, but this is a very deficit part of this proposal.

Mr. JACOBS. Thank you for that. I just wanted to just comment on what I referenced in terms of my experience in the Buffalo School Board. What really frustrated me is—well, one, the amount of funds that would be taken out for purpose of that institution, which was educating children. The fact is we had a situation where all the union negotiators were retired, so what they—laying things in place the way they had it and not negotiating a new contract benefited those at the higher end of the scale, but it really left us in a position where we were incapable of enhancing salaries for teachers that were just coming into the system, and it was much harder to encourage them to come into the system and reward them for serving in an urban school district, so it really hurts a lot of the employees as well, this type of structure. With that, I will yield back.

Chairman SCOTT. Thank you. The gentleman from New York, Mr. Jones.

Mr. JONES. Thank you, Chairman, for holding this hearing and to all of the witnesses for being here today.

Unions built the middle class, and they built this country. For decades, the right of workers to organize for higher wages, better benefits, and safer working conditions have been under attack from corporate interest and their right-wing allies. Our future depends on a robust and thriving middle class and that starts with protecting the rights of workers to organized. As a steadfast supporter of organized labor, I was proud to support the Protecting the Right to Organize or PRO Act, which as you all know, passed the House in early 2021, but has yet to pass the U.S. Senate. Since passage in the House, we have seen record-breaking approval ratings of unions and organizing efforts by workers across the country.

Over 640 unions won representation elections, the highest number of victories we've seen in 17 years. However, this is not enough. I urge my Senate colleagues to do their part to hold corporations accountable for illegal union busting tactics. I urge my Senate colleagues to join this body in passing the PRO Act. It is past time to update our labor laws so that unions can organize without fear of intimidation by their employers and negotiate in a timely manner.

One reason why companies like Starbucks can withstand a high degree of scrutiny from the NLRB is because of statutory weaknesses in the NLRB's procedures which fail to deter repeat viola-

tions. Another reason companies flout the NLRB's oversight is because current law permits employers to hold captive audience meetings and use other intimidation tactics.

Ms. Eisen, in your written testimony, you mentioned that Starbucks subjected you and other employees to at least five listening sessions, that the company sent about seven new, untrained staff members to the Elmwood store and that the company assigned up to three so-called support managers per shift. One of these support managers was the president of Starbucks North American.

In your 11 years with the company, did you ever encounter such high-level officials in your stores? Moreover, how did their presence in conjunction with the other intimidation tactics impact your effectiveness as an employee and your overall well-being?

Ms. EISEN. Thank you for that question. No, in my 11 years with the company, the highest person I have ever even seen come through our market was a regional director and I think that was maybe twice in the 11 years that I had worked for the company. Hosting folks as high up the ladder as the President of Starbucks North America, who I would say we did not host, she relocated to Buffalo for 5 months during our organizing campaign.

As far as how it affected our mental health and our even physical health, we have a couple of Starbucks workers at the Elmwood location that were high school seniors, children, actual children working at the store. One of them confided in me that they had been calling off their shifts not long into the organizing campaign because they could not take the stress of coming in and having to feel like they were under a microscope.

It is a high-volume store and it is a very—can be a very difficult job to do. It is hard enough when you are dealing with the public on a regular basis, especially, in the middle of a global pandemic, but now you have to do it with someone who is making \$4 million a year breathing down your neck. It is inappropriate, it is scary, and it should not be allowed to happen.

Mr. JONES. I agree. After the Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, which overturned the constitutional, fundamental right to abortion in this country, Starbucks announced that its healthcare plan would cover abortion-related travel for employees, but that it could not promise that to workers in union stores. In attempting to leverage the Supreme Court's assault on women's rights for the purpose of an anti-union campaign Starbucks appears to pretend that it has to deny medical benefits to union workers. Based upon your interactions with the company, does anything actually prevent Starbucks from offering union workers coverage for abortion-related travel?

Ms. EISEN. It does not. The union, the unionized stores waived their rights to bargain over the new improved benefits. Starbucks likes to use the law as a reason for not being able to offer us those benefits, but the reality is that if the union waives the right to bargain over those, the only thing preventing Starbucks from giving those unionized workers those benefits is because Starbucks does not want to.

Mr. JONES. It is a nefarious tactic to dangle *Dobbs* over workers to make them feel like they have to choose between their rights to

healthcare and to organize. The fact that Starbucks and other corporations continue to employ these illegal practices is why the Senate needs to pass the PRO Act now. I yield.

Chairman SCOTT. Thank you. The gentleman from North Carolina, Mr. Cawthorn—is he not there?

Mr. CAWTHORN. I am here, Mr. Chairman. Thank you so much.

Chairman SCOTT. Okay.

Mr. CAWTHORN. Mr. Chairman, I wish you a really speedy recovery from your COVID.

Chairman SCOTT. Thank you.

Mr. CAWTHORN. Let me see here. Mr. King, thank you for being with us today. I appreciate your testimony and shining a light on the anti-business and pro-union bias of this Committee's Democrat majority. My question today regards the assault on independent contracting that the majority is contemplating today. An assault that could prove damaging to the pursuit of the American dream for many people. I have a two-part question for you, Mr. King.

When California was debating this same, idea, the pro-union forces ignored the arguments that curbing independent contracting would disproportionately affect minorities. In fact, the California Black Chamber of Commerce issued a fiery statement, saying, among other things that the gig economy has become the gateway to independence and self-employment for African Americans, unlike anything seen since the goal made to Black entrepreneurship. They concluded with this line, "Efforts by California politicians to shut the gig economy down in the name of protecting Black workers is the same as burning down a city built with our own dreams to save us from ourselves."

My first question, Dr. King, is as minority groups continue to be among the communities hardest hit by the sluggish economy and by inflation, how will destroying independent contracting affect these communities?

Mr. KING. Adversely. It is not a good policy decision. I want to interject here. The voters in California rejected AB(5), Assembly Bill 5, which was essentially the independent contractor approach. The people of California, even in their so-called "Red State" status have looked at this issue and said no. Apparently, here in Congress, that voice has not been heard.

Back to your question, minorities, disadvantaged individuals in a community often have as their first job working for a franchisee, working for a small business entity, becoming an independent contractor, and working for a variety of different employers. Why should we penalize that? Why should we interfere with that? I think the answer is clearly no, and the proactive course goes, as you mentioned, the wrong way and it diminishes the definition, narrows the definition of where we should go in this area.

Mr. CAWTHORN. Well thank you, Mr. King. Now, swiftly shifting gears, I have a second question. You note in your testimony that adopting this ABC test proved problematic for California bureaucrats. What do you think the outlook would be on adopting this sort of test nationally without extensive carve-outs for the politically well connected?

Mr. KING. Well, AB5 and the PRO Act incorporation of it under the National Labor Relations Act is going to attempt, at least, to

make every individual in the workplace an employee and the objective is clear. Therefore, if the individual is an employee, the union can organize them and have them be a part of a collective bargaining unit.

It really disregards the flexibility, the independence, and the decisionmaking of the worker and it takes us in the wrong direction.

It is really disturbing. It again is another attack on the franchisor/franchisee system in this country that has generated thousands of jobs, hundreds of thousands of jobs. There is no reason or rational for it on a sound policy basis.

Mr. CAWTHORN. Well, Mr. King, I only have about a minute and 13 seconds left and so my last question will be do you believe that unions sometimes forcibly collect fees from non-union employees to be steered for a political agenda that that employee does not agree with?

Mr. KING. Well, unfortunately, it occurs on a reoccurring basis and the polling data—and I have mentioned this earlier today, the polling data clearly shows that workers do not want that type of attraction of their money to go to social causes, political causes they do not agree with. That is one of the reasons that unions are having difficulty, I submit, in convincing workers that a union is in their best interest.

Now, the worker today is intelligent, thoughtful. I keep hearing this suggestion on questions that an employer/employee meeting is somehow going to poison their minds. That degrades the intelligence level of the American worker. At a half an hour or hour meeting, they are not going to be poisoned on how they believe about a union. They will go out and seek their own information.

Back to the essence of your question, the worker today wants to be independent, wants to have a voice, wants to decide for herself or himself without having any restrictions imposed on them.

Mr. CAWTHORN. Well, Mr. King, thank you very much. All of our witnesses, thank you. Ranking Member Foxx, thank you for your leadership, and I yield back.

Chairman SCOTT. Thank you. The gentleman from New York, Mr. Bowman.

Mr. BOWMAN. Thank you, Mr. Chairman. I also want to wish you a speedy recovery from COVID.

My question is for Ms. Eisen. Ms. Eisen, thank you so much for joining us here today and for your immense organizing work, just sending you strength and love and please keep up the fight.

I wanted to mention that, as we know, over the last several decades we have seen a decrease in unions and unions being consistently under attack, and we have a nation that struggles with wealth and equality, as well as unemployment and under employment. Can you speak a little bit about why unionizing is essential to our democracy and a more equity society and how you have seen that manifest in your work?

Ms. EISEN. Well, I think to start, I would like to dispel some of the counterpoints that say that the bulk of the workers are not in favor of unionization. The Starbucks organizing campaign has a 75 percent win rate of the 240 elections, 56 of those were unanimous and many, many, many others were at least a two-thirds majority,

so the workers voices are being heard and they are saying that they are wanting to unionize.

In terms of equitable, unions can help make these workplaces—a personal example would be my wages at Starbucks after 11 years. At the start of our campaign, I was making just 16 cents more an hour than someone who was hired the day before we went public with our campaign. You are looking at a company that can certainly afford to invest in their long-term employees and show that they are valued and chooses not to in favor of making the bottom line seem more impressive to its shareholders.

With unionization, we have the ability to talk about things like seniority pay and to reward those employees for their loyalty. Quite frankly, that was one of our talking points from the very beginning of our campaign and just mere weeks before our vote at Elmwood, the company all of a sudden announced that after 50 years, they were going to implement seniority pay.

Mr. BOWMAN. Thank you for that response. I also want to respond to a comment that was made earlier about unions being responsible for closing schools and hurting student learning. First and foremost, the decision was made across many parts of the country to close schools to make sure our students and our teachers remain sound, secure, and alive as we dealt with a global pandemic.

I want to mention that it was the Democratic Party, and President Biden, and this Committee that helped to pass the American Rescue Plan that sent historic investments to public schools across the country and allowed them to open back up safely.

As we talk about student learning and setbacks to student learning, Teachers unions have consistently been at the forefront of curriculum design and development that has contributed to student learning and growth over many years and singular test scores are not the only measure of that.

Being a former middle school principal and educator for 20 years, I can speak personally to the growth of my students in my Bronx schools related to the union and I was a part of as a principal's union, as well as being part of a teachers union.

My next question is for Dr. Bronfenbrenner. I want to focus for a moment on the care economy. I am really proud that the largest worker-owned cooperative in the country, Cooperative Home Care Associates, is in the Bronx and has seen significant success in improving job quality and quality of care for many of my constituents through its unionized, worker-owned, democratic structure.

Can you talk to the benefits of union representation paired with other forms of democratic workplace structures, such as worker-owned cooperatives, and how can Congress support and empower workers to learn about and participate in these types of arrangements?

Ms. BRONFENBRENNER. The primary reason that healthcare workers organized is over quality of care. They believe that the companies they worked for are not doing enough in terms of providing good quality care and they, as nurse, homecare workers, technicians feel very concerned that they are not doing the best they can by their patients.

Workers need a voice because workers know best what is happening on a day-to-day level with the patients they serve, and unionized workplaces have been shown to have higher quality healthcare than non-union workplaces. It is essential that workers have the ability to express that voice and have a say in the conditions of their employment. Whether the workers try to do cooperative relationships or union relationships, currently, we find that employer opposition is particularly high in healthcare.

It is historically has been. The beginning of the management consultant movement actually came after the seventies after healthcare workers were added to the National Labor Relations Act and so the fight to unionize and be able to raise the quality of healthcare in the workplace is a high prior which passing the PRO Act would greatly benefit because it would restrict the kind of employer opposition that is restraining so many workers from organizing.

We also—

Mr. BOWMAN. Thank you so much. I am sorry I have to cut you off. My time has expired. Thank you, Mr. Chairman. I yield back.

Chairman SCOTT. Okay. Thank you. The gentleman from Kentucky, Mr. Comer.

Mr. COMER. Thank you, Mr. Chairman. In 2015, the National Labor Relations Board comprised entirely of President Obama's appointees, created a broad definition of joint employment that put the franchise model at risk and threatened to erode small business owners' control of their operations. This action costed franchise businesses \$33.3 billion per year and prevented the creation of 376,000 jobs between 2015 and 2020.

Recently, we saw the Department of Labor Wage and Hour Division rescind the narrowly tailored joint employment rulemaking published under the Trump Administration. Now, at a time of soaring prices and House Democrats printing money left and right, the Biden Administration has decided now is the perfect time to release a proposed rulemaking reverting, once again, to the harmful Obama era joint employment definition. Reversing the previous Administration's actions has once again upended business owners' stability and authority oversetting the essential terms of employment for their employees.

Time and time again, those on the other side of the aisle have trampled on the rights of small business owners and failed to provide clarity for businesses and employees.

Mr. King, how would the joint employer definition outlined in the PRO Act further damage the potential of nation's small business owners and franchisees?

Mr. KING. It would be very harmful. What it does, Mr. Comer, is incorporate into the—it would incorporate into the National Labor Relations Act this very broad definition that makes virtually one employer a joint employer with anybody else and it would severely impact the franchisee/franchisor relationship.

A franchisee in your district, as a small, independent businessperson employing many people in your community, is not a joint employer with a large corporate franchisor and the key here is to try to put pressure on the franchisor, to put pressure on the

franchisee to not resist in any way, shape, or form union activity. It is a clear push down, top down, pressure point.

Mr. COMER. Absolutely. Your response is exactly why my legislation, the Save Local Business Act, is essential, and I think the 93 organizations endorsing it would agree. Congress must codify a tailored, consistent, joint employer standard to prevent infringement from government bureaucrats on our Nation's entrepreneurs and job creators.

Now, speaking of rising barriers to growing industries, we have clearly seen within the rail industry over the last several weeks, that unionization, no matter if it is in public or private workplaces, inevitably leads to a slowdown in productivity. The continued negotiations between unions and national rail companies have led to the removal of certain products from rail lines, like fertilizer critical to American farmers.

The eventual increase in prices because of the union demands and threatened work stoppages will cost American consumers at the pump and at the register. As Americans are paying dearly for bloated congressional spending, corn and soybeans will be rotting on railcars, building materials already in scarce supply will be stuck far from the projects for which they were intended, and chemicals and aluminum produced in my district in Kentucky will remain loaded on stationary cars.

This brings back images of boycotts and strikes that deeply damage industries, particularly, agriculture in the 1930's and 1940's. The PRO Act would make such stop gaps a regular occurrence and further strain our already fragile supply chains.

Mr. King, can you provide some insight into the economic damage such strikes, which will inevitably result from the PRO Act will have on American consumers cost of living?

Mr. KING. Mr. Comer, the PRO Act would permit intermittent strikes, which can be even more damaging than a long-term strike. The PRO Act would permit interference with employer operations. It would prohibit employers from hiring, either temporary or permanent replacements, but yet permit the union to go out on strike. Employers have a right to operate their businesses in this country. Unions have a right to strike, but it has got to be equal.

The Rail Act of great concern. Mr. Comer, my trade association represents most of the Fortune 400 companies in the country. We have already heard from a number of them, saying they are going to have to shut down plants if the rail strike occurs. It is not just big business, as you mentioned, it is the farmer, it is the small business, it is the entire economy. People come here and testify, and they think strikes are good. They talk about Striketober, Striketober. They are very damaging to this country and that is an offshoot of this adversarial process that at least some unions have instituted in this country, very harmful.

Mr. COMER. Right. I agree. Thank you so much for testimony. Mr. Chairman, I yield back.

Chairman SCOTT. Thank you. At this point we will take a 5-minute break, and you can start the timer right now. We will reconvene in 5 minutes.

[Off the record.]

Chairman SCOTT. The next questioner was Mrs. Manning, is she available? We will convene when Mrs. Manning becomes available. Who would be next?

Mrs. FOXX. We have two members on the floor—I mean in the room, if you want to recognize one of them to save time because I think we are going to get called to vote.

Chairman SCOTT. Okay. Do you have members on your side ready to—here is Mrs. Manning. Mrs. Manning, you are recognized for 5 minutes.

Ms. MANNING. Okay. Thank you, Mr. Chairman. Thank you to our witnesses for hanging in there with us. I would like to start with Ms. Eisen. Ms. Eisen, your store managed to successfully unionize despite facing the significant opposition that you detailed in your testimony. Can you tell us a little about how the organizing [inaudible] drive was able to convince a majority of your co-workers that unionization was in their best interest.

Ms. EISEN. That was not ultimately my goal. I can only speak from personal experience and the conversations I had with my co-workers in terms of unionizing our location was not about why I thought they should do it. It was about why I was doing it. I have a long-standing history and tenure with the company, and I have seen a lot of changes happen within that company, and the most apparent one was that we had no control over when benefits were granted or when benefits were taken away, and I saw that happen a lot over the decade I had been with the company.

One of the things I talked about with them was that I wanted a way to hold the company accountable. That some of the benefits that Starbucks offers are wonderful, but there is nothing preventing them from coming back tomorrow and taking those benefits away, so we had a lot of conversations about what a collective bargaining agreement could do for us in terms of insuring that the benefits that the company offered remains those benefits.

Ms. MANNING. Thank you very much. Mr. Pearce, in your testimony you mentioned the need to reform the NLRA in response to rulings by the NLRB and the Courts, which have thwarted congressional attempt behind the Act. Can you talk a little bit about that and describe potential legislative solutions to this issue?

Mr. PEARCE. I am sorry Congresswoman, the Court case that you are referencing?

Ms. MANNING. I do not have that in front of me but you did mention the need to reform the NLRA.

Mr. PEARCE. Oh, yes. Well, certainly the NLRA needs to be reformed in several different respects. Particularly, with respect to the coverage of immigrant workers. The Hoffman Plastics case where the Supreme Court denies immigrant workers—undocumented workers the ability to get damages as a result of unfair labor practices. Employers get off completely scot-free because of that.

The NLRA needs to be amended for the purposes of providing sanctions for employers, even if these individuals are not able to gain their remedies the employer needs to have sanctions imposed on them because of the wrongdoings that they engaged in.

Ms. MANNING. Thank you, sir. Dr. Bronfenbrenner, in your testimony you evaluate trends in employers' anti-union campaigns

going as far as back as 1999 and in July of this year, the NLRB announced that its field office staff is half of what it was in 2022. Given the changes you have identified in employer tactics in delays in bargaining in shifts and organizing strategies, what role do you think, if any, the underfunding of the NLRB has played in these trends?

Ms. BRONFENBRENNER. One thing I need to point out. Employer opposition begins well before the petition is filed. In my research, I found that—I did a review of unfair labor practices looking at the date they occurred. I did this in 2014 for the NLRB timing changes and found that in 75 percent of serious unfair labor practices occurred—I mean I should say 75 percent occurred well before the petition is filed and that employers are—when employers say they do not have a chance to speak they do.

Delay has this effect of having repeated, continuous, cumulative effects on workers and when the NLRB is understaffed that means a longer time for workers to feel the pressure of employer opposition is begun and the impact in terms of fear and intimidation and coercion and the inability of the NLRB to investigate charges because they are understaffed. The impact is pervasive and continuous when the NLRB is understaffed, because the longer time goes on more likely there is to be turnover, more likely workers are to give up and feel the futility of organizing, and the more likely they are to be disciplined or discharged in retaliation for organizing.

Ms. MANNING. Thank you. My time has expired, and I yield back.

Chairman SCOTT. Thank you. The gentleman from Wisconsin, Mr. Fitzgerald.

Mr. FITZGERALD. Thank you, Mr. Chair. Question for Mr. King. One of the things that I have been kind of confused by and I think I know there is alternative motives behind it and that is the mandatory meetings that employers are allowed by law to hold to have these open discussions with employees about—it could be anything from dress code to work hours to anything that they want to have, yet there seems to be this resistance sometimes from the union to not only in allowing those meetings to happen, but also to allow them to kind of play out. It is kind of a control piece that I think is part of the overall discussion and I was wondering if you could just discuss kind of the legal aspects of the employer requiring those mandatory meetings of its employees.

Mr. KING. Mr. Fitzgerald, first, Section 8(c) of the National Relations Act, the free speech provision, permits employers to have those types of meetings. Second, there is a prohibition well established or prohibitions of the National Relations Act that employers in these meetings cannot threaten, coerce, or make undue types of pressure on an employee regarding his or her views on unionization, so we already have those protections.

What this is really all about is to cutoff free speech. Why is it so dangerous for a worker to hear both sides or many sides of the aspects of unionization? Unions do not want these kinds of conversations to occur because in some instances they can be very harmful to the union's campaign. They want the worker to hear only one side, and we have heard a lot about the Starbucks meetings. Well, apparently, they were not successful in certain loca-

tions. If they are that harmful, show us the proof. I do not think it is there.

This is really a very active part of a campaign throughout the PRO Act and other ways in the executive agencies to ultimately cutoff free speech and communication. It is very dangerous.

Mr. FITZGERALD. Just to followup, and I do not want to single out Starbucks, but I know that we have the witness here today and I appreciate you being here.

My other concern is that oftentimes it is assumed and it is integrated into the overall model that they are using that someone would start at the bottom and work their way up to be kind of in that management level and then to somehow stifle that individual by saying you can no longer have the same relationship you had with the workers that you are now supervising. It does not make much sense to me, but it seems that that is the case in many of these instances; is that correct?

Mr. KING. Well, it appears to be. It is really interesting, Mr. Fitzgerald. We have this attack permeating in small business right now. The franchisee, stores like Starbucks are all over the country, a lot of part-time workers, people that need additional income, it is a great part of our business model in this country.

Now, is every Starbucks location, every small employer perfect? No. Are there mistakes being made? There may have been, but why are we going after this so successful business model in this country? When I visit Starbucks stores, as I said in my testimony at the outset, the employees are friendly, efficient. They do a great job. I love their oatmeal. We love their coffee. Why are we attacking such a successful business model in this country? If people want to unionize, they have a right to do so.

I am not here to say anything bad about unions, per se, but let us give the worker the right and let us not publicly shame companies for being successful.

Mr. FITZGERALD. Yes. It is part of this conversation that I find somewhat confusing, so thank you very much. I yield back.

Chairman SCOTT. Thank you. The gentleman from Texas, Mr. Castro. The gentleman from Texas, Mr. Castro. If he is not available, Mr. Sempolinski from New York, is he with us today?

Mr. SEMPOLINSKI. Thank you, Mr. Chairman.

Chairman SCOTT. Thank you and welcome to the Committee.

Mr. SEMPOLINSKI. Oh, thank you very much and thank yourself and the Ranking Member who was so gracious to me last night. Thank you. I want to also thank the witnesses for being here. I do not represent the city of Buffalo, but I do represent a good portion of western New York, so thank you for taking the time to come to Washington, DC.

Ms. Bronfenbrenner is coming from the 23d District of New York. She is one of my constituents, at least as of almost 24 hours, so thank you for taking part. I represent Cornell University, but my question is directed to Mr. King, who is also a Cornell Alum, is my understanding, so you are an honorary constituent, but I want to thank you also for coming today.

My main concern when it comes to these issues is freedom of choice. I think it is important that people have a choice to join the labor union, but I think it is important to have a choice not to join

a labor union, have a choice who represents them, make sure that is free from intimidating and manipulation.

The experiences that I have had personally with it when I was a graduate student there was a movement to unionize that graduate department. I did not feel we needed a union. I was not on board with that. I thought we had a pretty good gig, and I could pick up the smallest dose you could have of intimidation [inaudible].

Mrs. FOXX. Mr. Chairman, perhaps we could move Mr. Sempolinski and stop the clock since there is so much difficulty with his microphone.

Chairman SCOTT. Alright, no problem. We will just extend his time, if necessary.

Mr. SEMPOLINSKI. I thank the majority for letting me borrow a microphone.

Chairman SCOTT. Thank you.

Mrs. FOXX. Thank you, Mr. Chair.

Mr. SEMPOLINSKI. Alright, thank you, Mr. Chairman.

Chairman SCOTT. That is fine. Hold the clock for a couple seconds so we can catch up and then proceed. The gentleman will proceed.

Mr. SEMPOLINSKI. Alright. Well, I had the smallest dose of potential intimidation in the graduate students' side. These were not people I had to work with every day. You are in a very independent work environment where you are working on your own projects. I know I am the last Republican to speak on these issues and I think everything has been very well covered over this long afternoon for you all, but can you summarize for us why it is so important that people have a free, open, and clear choice. Why is choice so important when a worker is in a position where they are deciding to unionize or not unionize?

Mr. KING. First of all, congratulations for being sworn in last night and welcome to this great body.

Mr. SEMPOLINSKI. Thank you.

Mr. KING. It is critical because your work life encompasses so much of everything that you are about. It has impact on your family, your economic well-being, and virtually everything you do often revolves around your workplace. Workers need to have the ability to listen to all sides of the issue of unionization and I am not here to condone rogue activity by any employer, certainly, not by any union.

If an employee, a group of employees wishes to organize, they should have that opportunity, but the National Relations Board needs to stay exactly neutral, does not take a side, should not take a side at all, procedurally or otherwise, and that workers should be able to hear every aspect. They should be able to hear from their employer. They should have the ability to understand the consequences.

If a union is voted in, as I have said previously today, that union for all intents and purposes practically will be there for the life of that company's existence at that particular location and that is a serious decision because there are many studies that have been made that 80 to 90 percent of the workers in this country that are working under a union contract never had an opportunity, Con-

gressman, to vote on whether that union should be there. They have never had a choice, and they will not have a choice. If you bring a union into a place of employment it has long-range consequences, not only on the current workers, but on the workforces to come in the future. It has consequences of potential strikes.

We have been talking about a potential railway strike and how it could harm this country. It has consequences on your advancement. It has consequences on all kinds of aspects of your employee benefits, so it is a very serious decision, one that should be made under very controlled, neutral circumstances. The secret ballot vote has to be preserved.

Mr. SEMPOLINSKI. Well, you anticipated my second question. Would you definitively say a secret ballot is better at preserving choice than either a card check system or an online system.

Mr. KING. I think in our democracy here in this country compared to the rest of world, the secret ballot approach to deciding representation, to deciding many important questions local, State, and Federal are best preserved by the secret ballot process. Why we are thinking of doing away with that is a very poor policy approach.

Mr. SEMPOLINSKI. Thank you very much and I yield.

Chairman SCOTT. Thank you. Does the gentleman from Indiana seek recognition?

Mr. MRVAN. Yes.

Chairman SCOTT. The gentleman is recognized for 5 minutes.

Mr. MRVAN. I want to thank everyone for being here. Ms. Eisen, yesterday the New York Times reported that one of your fellow organizers, Jaz Brisack was pushed out of her job by Starbucks. Can you explain what happened and what tactics Starbucks is using?

Ms. EISEN. Absolutely. Jaz was victim of a tactic that the company has been using all along, which is to purge either the unionized stores or stores who are planning to organize of the strongest union supporters. Jaz was integral in organizing the first Starbucks store in the U.S., a co-worker of mine, but she also stood for those workers and used her voice to let the company know that what they were doing was wrong and inappropriate.

As we have seen, I mentioned in my spoken testimony, Starbucks has fired over 100 union leaders and supporters to date and Jaz was just another one in a long line of those. What we saw was a lot of promises leading up to that vote and one we actually did win. Then we started seeing the results of that which were increased discipline and firings and store closures.

That is to say that just because you fight and win your vote does not all of a sudden mean that the company stops their retaliatory actions. In fact, at Elmwood we have actually seen more retaliation since winning our vote than we did leading up to that vote and the only thing that can protect us would be labor law reform and continuing to fund the NLRB so that the agency has the resources to investigate these allegations.

Mr. MRVAN. I thank you very much and with that I yield back, Chairman.

Chairman SCOTT. Thank you. The gentlelady from California, Mrs. Steel.

Mrs. STEEL. Thank you, Mr. Chairman and thank you Ranking Member Foxx. I have a question to Mr. King. As you mentioned, California's AB5 proved to be a disaster and is now riddled with exemptions, yet D.C. Democrats are trying their best to make this a national law. Following these policies is guaranteed to cause more harm to workers at the national level.

Millions of Americans prefer the independent contractor model and want the flexibility it provides. Why are Democrats in California and D.C. pushing so hard for an ABC test? Why are they knowing the needs of those who want to be independent contractors?

Mr. KING. Well, first of all, as you correctly mentioned, the citizens in California had the intelligence and forethought to say no to this very radical proposal. It is interesting to me the Members of Congress from California still voted for the PRO Act. That is a contradiction in and of itself, but the specific answer to your question is if a worker is classified as an independent contractor the union, then cannot organize, cannot unionize that type of workforce and this is a push to make every worker an employee. I mean it is simple as that. It is really interesting to me how much attention and time the union movement is spending in this area when perhaps they ought to devote their resources and intention to the clearly agreed upon employee workforce in this country.

As I said in my testimony, the amount of resources and the amount of activity that unions are spending for all of agreed upon employees is very minimal in this country. I do not understand it. I do not think it is a good use of their resources, but they can do as they wish. I agree with your question. The PRO Act would incorporate this very ill-advised approach.

Mrs. STEEL. Thank you. My next question is my constituents want transparency. In December, President Biden rescinded the rule that subjected the unions trust funds apprenticeship programs and other trusts to stricter transparency requirements. These funds come from employees' paycheck. Do you feel the unions should ensure they are fully transparent with the dues taken from wages earned by workers and have union funds been misused?

Mr. KING. Well, apprenticeship programs and training they are critical for economic development in this country and there should be total transparency. There ought to be safeguards where there is no improper pressure on people going to the apprentice programs to become union members. There should be verified and independent sources of training. Employers ought to have, in my opinion, a greater role in these apprentice programs and we will see what the Department of Labor does here. I know there is been a recent discussion about this and hopefully Secretary Walsh and his team will make sure that moneys are spent properly and that there is no undue pressure or influence, whether it be by construction unions or other outsiders to interfere with the apprentice program.

Mrs. STEEL. Mr. King, my last question is we are seeing the threat of work stoppage at West Coast ports and now within the freight rail industry. Even small work stoppage can add fuel to the unprecedented supply chain crisis. Congress could vote in coming days to keep rail workers on the job. How vital are West Coast ports have become to the ports be included in the same rules that

railroad and airline employees were under because I introduced that bill and it never got out of the Transportation Committee and I am very much frustrated about that during this negotiation.

Mr. KING. Well, please keep those efforts up. The data that I have seen is that our West Coast ports are some of the least efficient in the world and it is very unfortunate because of the adverse impact then that those work rules have on the rest of the economy. The potential for a port strike and of course we are all concerned this week about the potential rail strike, our transportation system in this country is very fragile and strikes are not the solution. Inappropriate, unproductive work rules have to be changed for the good of the country, putting aside whether you are an employer or union. I am hopeful that the negotiations will put aside some of these unproductive work rules and permit more efficiency.

Mrs. STEEL. Thank you, Mr. King. Mr. Chairman, I yield back.

Chairman SCOTT. Thank you. It is my understanding that there are no further members seeking recognition, if not, I recognize myself for 5 minutes for the purpose of questions.

First, let me make a couple of comments to respond to things said about the PRO Act and the fact that everyone would be expected to pay their fair share. All workers would be required to pay their fair share of the expenses in developing the fact that union members make 10 percent more than non-union members, they get better healthcare, they get better pensions, safer workplace. Those negotiations and hiring experts costs money and it is not unreasonable to ask those that will get the benefits and are entitled to the benefits as a matter of law pay at least their fair share and we are not talking about their fair share of the political activities or the annual holiday party or the summer cookout, but those benefits that are required by law to be negotiated on their behalf and they will get.

Comments have been made, I think, on the independent contractor. Yes, there is more freedom in it, and you cannot organize unless you are an actual employee, but there are other things that independent contractors lose, like unemployment compensation if they lose their job through no fault of their own. Workers compensation—they do not get Workers Compensation if they are injured on the job, minimum wage, they do not get minimum wage or overtime. The civil rights protection, they do not get the assistance of the EEOC. There are a lot of things that happen when you are classified an independent contract.

The joint employer, all that is asked there is that the person responsible for the violation, failure to pay overtime, violations of OSHA, the entity responsible for the violation be held accountable for the violation. I have seen bills where the definition of employer is so strict that you can prove that you were not paid your overtime, and you do not have an employer to collect from. It is unclear who the employer is. If you have got a temp agency and you are working somewhere and so the person who did the violation ought to be responsible.

We have heard comments about the 200 unfair labor practice allegations sources against Starbucks. The fact is these are more than allegations. There have been findings by the Regional Director and the General Counsel that these are valid violations.

Now, Mr. King is absolutely right. They have not been adjudicated. They have to go before an Administrative Law Judge for adjudication. They are subject to appeal, but they are more than just the labor unions making the allegations. These have been actual findings in these 200 cases.

Let me ask Ms. Bronfenbrenner. We have heard that the small percentage of people in labor unions today is a result of them choosing not to join a union, is that the right conclusion to make?

Ms. BRONFENBRENNER. If you were to say that you were facing threats—that you were voluntarily choosing, then that is not a choice. Workers who try to organize today have to jump through repeated hoops of fire in order to organize. They have to overcome the intimidation. They have to overcome fear of job loss, interrogation, surveillance, and so they are not organizing freely, and we know that when there is no employee opposition, as I found in 13 percent of the campaigns in my current sample, the win rate is about 86 percent.

We know in the public sector where there is much less employer opposition win rates average above 85 percent, so when workers can choose without coercion, without threats, without intimidation then the numbers go way up. Unfortunately, we do not live in that climate because we have such weak and poorly enforced labor laws because there are no financial penalties for employees where there are high financial penalties for unions and where employers are literally able to get away with breaking the law on a daily basis.

Chairman SCOTT. Thank you. Mr. Pearce, your initial testimony was cutoff. Were there any points that you were not able to make?

Mr. PEARCE. What I did want to talk about is Amazon. When Bessemer was decided and it initially looked like the union lost two to one, and I was approached about the death knell of unions, I said, well, the difference in this situation and what you have described is that when you have a union that is able to go into the south in a right-to-work State before a company that has more money than God that can control traffic lights and mailboxes, it is not a death knell for the union. It is a shot across the bow, and you saw that that was the case because in Staten Island they won decisively and Bessemer the battle is still not over.

Chairman SCOTT. Thank you. Thank you. My time has expired. Pursuant to Committee practice, materials for submission of the hearing record must be submitted to the Committee Clerk within 14 days following the last day of the hearing, which is the close of business September 28th, preferably in Microsoft Word format. Only a member of the Committee or invited witness may submit materials for inclusion in the hearing record and must address the subject matter of the hearing. Please submit materials to the Clerk electronically by email submission to edandlabor.hearings@mail.house.gov.

Again, I want to thank our witnesses for their participation today. Members of the Committee may have additional questions and we ask the witnesses to respond to those questions in writing. The hearing record will be held open for 14 days in order to receive those responses.

I remind colleagues that pursuant to Committee practice, witness questions for the hearing must be submitted to the majority Com-

mittee staff or Committee Clerk within 7 days. Questions submitted must address the subject matter of the hearing. I now recognize the distinguished Ranking Member for a closing statement.

Mrs. FOXX. Thank you, Mr. Chairman. Before I give my closing remarks, I ask unanimous consent to enter into the record the myth factsheet rebutting many of the statements made by Democrats today. I also ask to enter letters from the Coalition for a Democratic Workplace, the National Association of Homebuilders, the National Restaurant Association, and the Independent Electrical Contractors raising serious concerns with the PRO Act and with recent actions and policies pursued by the NLRB and its General Counsel.

I further ask to enter in the record a letter from Starbucks Corporation to the NLRB detailing alleged misconduct by NLRB employees and union representation elections. Finally, I ask to enter into the record several pleadings from Starbucks litigation with the NLRB.

Chairman SCOTT. Is there any objection? Without objection, so ordered.

Mrs. FOXX. Thank you, Mr. Chairman.
[The information of Dr. Foxx follows.]



E&L BLOG

Debunking Democrats' Union Myths

WASHINGTON, D.C., September 14, 2022

American headlines are saturated with an outpouring of pro-union activity and support; major news outlets claim that interest in union organizing is increasing at companies across the country. In reality, a slim percentage of America's workers are interested in joining a union even as Democrats and the Biden administration assemble task forces and mandate union support.

To help cut through the nonsense spread by the Left, we separate myth from fact:

Myth: Union organizing successes at roughly 200 Starbucks locations proves worker support for unions. Workers at other major companies are also unionizing.

Fact: Only roughly 200 out of 9,000 wholly owned Starbucks locations have unionized. Further, only about 6,300 Starbucks employees have unionized out of approximately 279,000. Only one out of 270 Apple stores voted to unionize, and no other locations have even had a vote. As of 2021, private sector union membership was at 6.1 percent, the lowest it has ever been.

Myth: Union activity is on the rise and unions are working hard to organize more workers.

Fact: According to testimony we'll hear today: "Union activity in the country—as measured by petition activity compared to potential new members—remains low. In FY 2021 there were 103.5 million potential private sector employees available for organizing in the country under the NLRA. The number of employees petitioned-for, in that same year, according to NLRB statistics, was only 46,880. Accordingly, unions only sought to represent 0.453% of potential private sector members in the country."

Myth: Being pro-union means being pro-worker.

Fact: "Pro-union" really means being pro-union boss. Union bosses repeatedly prove they care more about holding on to their own power and advancing their left-wing political agenda than advocating for workers. The AFL-CIO devotes less than 11 percent of its resources to representational activity and spends more than 25 percent on political activities and lobbying.

Myth: Unionization is on the decline because there are too many barriers to organizing.

Fact: American workers do not want to join a union because they don't want to fork over their hard-earned paycheck to union bosses that will spend it on leftist political pet projects. Further, the *National Labor Relations Act* has an extensive list of unfair labor practices to prohibit reprisals against organizing and ensure union elections are fair and lawful. The Biden administration's National Labor Relations Board (NLRB) has not been shy in enforcing these laws and blatantly rewriting—or reviving—regulations to tilt the election process in favor of unions and empower organizers to heckle and harass workers.

Myth: Republicans are anti-union.

Fact: Republicans support workers' freedom to choose whether to unionize or not.

Fact: Republicans support workers' freedom to choose whether to unionize or not. However, Republicans oppose any interference by federal agencies to force workers into unions or promote unfair election practices. For example, one NLRB whistleblower alleged that agency employees worked with organizers to rig elections in favor of unions. Republicans are committed to conducting oversight and upholding the integrity of union elections.

Myth: The PRO Act will help workers.

Fact: The PRO-Union Bosses Act would strip workers of choice. This radical left-wing legislation would nullify right-to-work laws in 27 states, thereby forcing workers to pay union dues, regardless of whether workers want to fork over their wages or support a union's political agenda. This is an attack on self-government and workers' choice. This legislation would also eliminate the "independent contractor" classification and negatively impact franchisees.

Myth: The NLRB has been acting as an independent arbiter between organizing workers and employers as it was set up to do by law.

Fact: The NLRB has attempted to **tip the scales** in favor of unionization and, in the case of one Starbucks union election, allegedly participated in gross misconduct to give organizing employees an advantage. Despite agreeing to an election by mail-in-ballot, the NLRB brought workers into its own office to vote—thereby violating terms of the election. If it happens at one Starbucks location, it could be happening elsewhere. There is nothing impartial about Biden's activist NLRB.

Myth: Union bosses do not need more accountability and transparency.

Fact: Federal investigators uncovered more than a decade of rampant corruption among the senior ranks of the United Auto Workers union, which has included money laundering, tax fraud, bribery, and embezzling union dues for lavish personal expenses. Despite these discoveries, Democrats refuse to provide proper oversight over unions. The Biden administration even issued a rule overturning Trump-era

transparency requirements, allowing union bosses to continue spending member dues without proper oversight.

Myth: Employers stand in the way of unionizing efforts and must be silenced.

Fact: Employers should have the right to educate their employees on what unionization will mean for their company. Silencing job creators, as the Biden-appointed NLRB General Counsel suggests doing by reinstating the *Joy Silk* doctrine, infringes on employers' free speech at workers' expense.

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September 12, 2022

Representative Bobby Scott
Chair
House Education and Labor Committee

Representative Virginia Foxx
Ranking Member
House Education and Labor Committee

Dear Chair Scott and Ranking Member Foxx:

In response to your upcoming hearing, *In Solidarity: Removing Barriers to Organizing*, the Coalition for a Democratic Workplace (CDW) writes to express our serious concerns with the Protecting the Right to Organize (PRO) Act (H.R. 842) and recent activity and policies pursued by the National Labor Relations Board (NLRB) and its General Counsel, Jennifer Abruzzo.

CDW is a broad-based coalition of hundreds of organizations representing hundreds of thousands of employers and millions of employees in various industries across the country concerned with a longstanding effort by some in the labor movement to make radical changes to the National Labor Relations Act (NLRA) without regard to the severely negative impact they would have on employees, employers, and the economy. CDW was originally formed in 2005 and has since focused on pushing back against regulatory overreach by the NLRB.

CDW has long opposed the PRO Act, which would do significant damage to the economy and infringe on the rights of workers and employers across the nation. As we explained in our [July 2021](#)¹ and [March 2021](#)² letters to Congress, this misguided legislation would drastically restructure America's labor laws, resulting in economic upheaval that would cost millions of American jobs, threaten vital supply chains, and greatly diminish opportunities for entrepreneurs and small businesses. The bill attempts to achieve its primary objectives of increasing union density and union leverage at the bargaining table without regard for the negative impacts the legislation would have on workers, businesses, and the economy. An [American Action Forum study](#)³ found that the bill's independent worker reclassification provision alone could cost as much as \$57 billion nationwide, while the joint-employer changes would cost franchises up to \$33.3 billion a year, lead to over 350,000 job losses, and increase lawsuits by 93%. A [national survey](#)⁴ conducted by Forbes Tate found that voters do not support many of the PRO Act's provisions:

¹ CDW July 2021 Letter sent to Senate HELP Committee is available at <https://myprivateballot.com/wp-content/uploads/2021/07/CDW-PRO-Act-Senate-Hearing-Letter-July-2021.pdf>.

² CDW March 2021 Letter sent to all members of Congress is available at https://myprivateballot.com/wp-content/uploads/2021/03/CDW-PRO-Act-Opposition-Letter_March-4_Update-1.pdf.

³ Study available at <https://www.americanactionforum.org/research/state-level-costs-of-the-protecting-the-right-to-organize-act/>.

⁴ Survey results available at http://myprivateballot.com/wp-content/uploads/2021/06/PRO_Act-National-Survey-Summary-6.28.21.pdf.



COALITION FOR A
DEMOCRATIC WORKPLACE

- 70% of voters are concerned about the PRO Act abolishing state right-to-work protections;
- 75% are concerned about the bill's efforts to require employers to turn over employee personal information to union organizers without the consent of the employee;
- 67% are concerned about eliminating secret ballot elections in favor of a system where votes are revealed to everyone;
- 70% are concerned that the PRO Act limits workers' ability to work as independent contractors; and
- 65% are concerned the bill would upend the franchise business model, turning existing owners of franchises into employees of the brand and reducing new franchise ownership opportunities.

Moreover, many of the bill's provisions would implement policies that have previously been rejected on a bipartisan basis in Congress, overturned by the judicial system, and withdrawn by the federal agencies.

Additionally, CDW members have grown increasingly concerned with recent activity by the NLRB and General Counsel Abruzzo. Both the Board and General Counsel are pushing policy changes and enforcement positions that, like the PRO Act, attempt to increase union density without regard to the negative consequences those actions will have on workers, businesses, or the economy. For example, the General Counsel has advocated for limiting workers' access to secret ballots in union representation elections in favor of card check – a method by which employees cast their vote for or against a union in front of union organizers or coworkers that support the union. General Counsel Abruzzo has also advocated for new restrictions on how employers may communicate with employees about unions generally or the specific union seeking to represent the employees. Given employers are already prohibited from behavior that would “interfere with, restrain, or coerce employees” with respect to their right to act in concert or refrain from doing so (see NLRB description of this prohibited activity [here](#)), the General Counsel's position simply deprives employees of information about the union, collective bargaining generally, and their employer's perspective on issues that will impact the workplace. The General Counsel's position is also contrary to the provision in the NLRA and First Amendment that guarantee free speech rights. General Counsel Abruzzo has even argued that unacceptable (often racist or sexist) behavior in workplaces is protected by the NLRA if done as part of a labor protest. This position forces employers to choose to comply with either federal labor law or federal antidiscrimination law.

With respect to Board activity, throughout 2022, CDW has submitted amicus briefs in cases before the NLRB in which the Board is considering policy changes that do not comport with the NLRA and would negatively impact the economy and infringe on the rights of workers and employers. The following are some of those cases:



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- *American Steel Construction*⁵ – The Board is attempting to reinstate a policy that created “micro-units,” effectively gerrymandering representation elections in favor of unions and allowing unions to disenfranchise workers of their right to vote on union representation.
- *The Atlanta Opera*⁶ – The Board wants to limit the ability of workers to work independently by seriously restricting who can qualify as an independent contractor, regardless of binding judicial precedent and NLRA limitations.
- *Stericycle*⁷ – The Board is considering prohibiting standard workplace policies, such as expectations that workers behave respectfully towards each other and customers and prohibitions against the use of expletives, potentially creating unsafe and hostile workplaces.
- *Ralphs Grocery*⁸ – The Board is attempting to supersede the Federal Arbitration Act (FAA), despite Supreme Court precedent clearly indicating the Board does not have authority to challenge enforcement of arbitration agreements under the FAA.
- *Armaz Products*⁹ – In her brief in the case, General Counsel Abruzzo called on the Board to penalize employers for utilizing their NLRA-guaranteed right to challenge union election results, which will undeniably have a chilling effect on employers, leaving them afraid to exercise their rights under the Act.

In May, CDW filed a [motion](#)¹⁰ with the Board requesting they accept amicus briefs in *Cemex* after General Counsel Abruzzo used her brief in the case to call on the Board to overrule multiple longstanding and significant Board precedents. CDW urged the Board to hear from the regulated community on the issues the General Counsel raised. Regardless of the undeniable significance of the General Counsel’s preferred policy changes, the Board chose to reject our motion and proceed with the case without hearing from interested stakeholders.

Furthermore, the current chair of the NLRB, Lauren McFerran, is advocating for the adoption of electronic voting in union representation elections, which is, in essence, card check by another name. Electronic voting will needlessly expose workers to intimidation, harassment, and coercion as they vote and jeopardize the integrity of union representation elections. Please see our [recent report](#) outlining the various failed and costly attempts by governments and government agencies to implement electronic voting and the dangerous potential consequences of implementing electronic voting in union representation elections.¹¹

⁵ Amicus brief available at https://myprivateballot.com/wp-content/uploads/2022/01/CDW-Brief_American-Steel_Jan-2022.pdf.

⁶ Amicus brief available at https://myprivateballot.com/wp-content/uploads/2022/02/CDW_Brief_Atlanta-Opera_Feb-2022.pdf.

⁷ Amicus brief available at https://myprivateballot.com/wp-content/uploads/2022/03/CDW-Brief_Stericycle_March-22.pdf.

⁸ Amicus brief available at https://myprivateballot.com/wp-content/uploads/2022/03/Ralphs-Grocery_March-2022.pdf.

⁹ Amicus brief available at https://myprivateballot.com/wp-content/uploads/2022/08/Armaz_Amicus-brief_Aug-2022.pdf.

¹⁰ Amicus brief available at https://myprivateballot.com/wp-content/uploads/2022/05/CDW_Motion-for-Amici-Invitation-in-Cemex.pdf.

¹¹ Report available at http://myprivateballot.com/wp-content/uploads/2022/07/Online-Voting-in-Union-Representation-Elections_Latest-Attempt-to-Eliminate-Secret-Ballots_July-2022.pdf.



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Most recently, the NLRB issued a new notice of proposed rulemaking radically altering the joint-employer standard under the NLRA. The rulemaking threatens to put at risk nearly every contractual relationship nationwide and would disincentivize larger companies from contracting, franchising, or licensing with small and local businesses. Our statement on the rulemaking can be viewed [on our website](#).¹² Additionally, the regulated community remains seriously concerned with the participation of Board Members Wilcox and Prouty in the issuance of this rulemaking. Prouty and Wilcox both engaged in past advocacy efforts related to the joint employer standard on behalf of their former employer, the Service Employees International Union. At the very least, there is a perception that these members have a conflict of interest on this issue; this should constitute grounds for their recusal from work on the joint employer standard. The Board has refused to release the analysis detailing why it believes Wilcox and Prouty are permitted to participate in the rulemaking and similar matters. This lack of transparency should not be acceptable.

Lastly, serious allegations have been raised against NLRB field staff that warrant an investigation. A whistleblower from within the NLRB has provided evidence that NLRB personnel colluded with labor organizers to influence union representation elections and unfair labor practice cases against a specific employer. This behavior cannot be tolerated, and a full investigation should be conducted. The NLRB is intended to be a neutral arbiter of federal labor law, but such allegations jeopardize the agency's credibility to fulfill its duties.

Thank you for your consideration of these matters. We look forward to working with the committee on these critical issues and ensure oversight over the Board and General Counsel moving forward.

Sincerely,

Kristen Swearingen
Chair
Coalition for a Democratic Workplace

¹² Statement available at <https://myprivateballot.com/2022/09/06/nlr-releases-radical-proposal-to-dramatically-expand-joint-employer-liability/>.



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Government Affairs

James W. Tobin III
Executive Vice President & Chief Lobbyist
Government Affairs and Communications Group

September 14, 2022

The Honorable Bobby Scott
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

The Honorable Virginia Foxx
Ranking Member
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Scott and Ranking Member Foxx:

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I write to express strong opposition to the ongoing efforts across multiple branches of government to enact the provisions of the "Protecting the Right to Organize Act" (PRO Act, H.R. 842). NAHB urges the Committee to oppose these sweeping attempts to redefine longstanding labor laws which would negatively affect the construction labor market.

The PRO Act represents an attempt to resurrect bad union organizing policies that have been repeatedly rejected by Congress and courts alike. It eliminates right to work protections for millions of workers, undermines employee privacy and free choice, robs workers of their right to a secret ballot, and hampers due diligence and decision-making for all parties involved in the union election process.

Furthermore, the PRO Act's proposed codification of a broad joint employer standard and adoption of a rigid "ABC" test to reclassify contractors as employees will stifle entrepreneurship in the home building industry. Builders rely on an average of 22 subcontracting firms to build a home, including framers, roofers, electricians, and other types of specialty trades. For most, there is simply insufficient internal demand to justify hiring an employee for each of the numerous specialized tasks required to complete a project. And for many workers in the construction sector, independent contracting offers the flexibility and opportunity to start a business and work for oneself.

The type of joint employer test contained in the PRO Act, which is currently being advanced by an activist majority at the National Labor Relations Board (NLRB), will deter the use of these specialized subcontractors and independent contractors by exposing builders to unlimited and unpredictable employment liability.

Similarly, foisting a California-style "ABC" test on contractors will add unnecessary confusion into an employment classification system that is already needlessly complicated for employers and workers to navigate. This, in turn, will drive up labor costs in construction, hurting small businesses and putting the dream of homeownership further out of reach for many Americans.

Our nation is currently facing a housing affordability crisis which will only worsen if the federal government continues to promulgate policies that force the labor market to contract and further inflate the costs of home construction. For this reason, NAHB urges all members of the Committee to stand up for affordable housing by opposing any attempt to impose PRO Act provisions on American workers and businesses.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Tobin III".

James W. Tobin III

CC: Members of the Committee on Education and Labor



September 14, 2022

The Honorable Bobby Scott
 Chairman
 U.S. House Labor & Education Committee
 2176 Rayburn House Office Building
 Washington D.C. 20515

The Honorable Virginia Foxx
 Ranking Member
 U.S. House Labor & Education Committee
 2176 Rayburn House Office Building
 Washington D.C. 20515

Dear Chairman Scott and Ranking Member Foxx:

We appreciate the opportunity to submit comments regarding the Committee's hearing, "In Solidarity: Removing Barriers to Organizing." As you know, 9 in 10 restaurants are small businesses, uniquely vulnerable to economic conditions. More than two years after being unceremoniously shutdown, restaurants still have 635,000 fewer jobs helping customers, preparing food, and welcoming guests, who themselves are increasingly concerned by an economic recession.

Inflation continues to eat into the average restaurant's margins. Wholesale food prices have soared over 16% year-over-year, as more than 80% of restaurants say the cost of food, labor, and operating costs are each higher than 2019. Even if a restaurant's current sales recovered to 2019 pre-pandemic levels, its additional costs would turn a 5% profit margin into a -12.3% loss. The restaurant recovery has stalled even as other industry sectors have surged.

Despite these economic headwinds, restaurant and foodservice employee wages are rising. On a year-to-date basis through July 2022, BLS reports the average hourly earnings of eating and drinking place employees rose 10.6%, nearly double the 5.5% increase for all private sector workers. Restaurants represent one of the nation's largest training grounds, having employed 1 out of 2 people in the U.S. workforce. It provides first jobs, good-paying careers, and second chance employment for justice-involved individuals. For example, the Hospitality Opportunities for People (Re)Entering Society (HOPEs) program helps over 500 justice-involved young adults gain industry skills, explore career options, and reduce recidivism. For service members, restaurant management apprenticeships are offered through the Veteran Apprenticeship and Labor Opportunity Reform (VALOR) Act. Veteran apprentices can access tax-free monthly housing stipend while enrolled and swiftly advance in their careers.

Restaurants encourage the Committee to continue its focus on boosting workforce participation and expanding skill building programs like registered apprenticeships. **However, the National Restaurant Association strongly opposes:**

- 1) The partisan "Protecting the Right to Organize (PRO) Act," which bolsters the power of unions over the interests of employees and employers by repealing decades of labor law reforms.
- 2) The proposed Joint Employer rule from the National Labor Relations Board (NLRB), which throws franchisor and franchisee restaurants into uncertainty and reduces entrepreneurship.
- 3) Any attempt by this Congress or the Biden Administration to undermine the sanctity of secret ballot elections in union representation elections.

Enhancing the quality of life for all we serve

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Chairman Scott
Ranking Member Foxx
September 14, 2022
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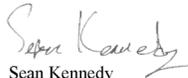
The PRO Act would make radical changes to settled workplace policies, creating chaos for the restaurant industry. It denies attorney-client privilege for employers seeking labor law advice, abolishes states' right-to-work laws, and forces employers to divulge private employee information like home addresses and personal phone numbers. It is both anti-worker and anti-employer. **After 90,000 restaurants permanently closed during the pandemic, the PRO Act renews the threat of closures by upending decades of labor reform.**

The NLRB's proposed rule on joint employer status reignites confusion and uncertainty for restaurant franchisors and franchisees. The Committee must examine the newly proposed joint employment determination standard, which the NLRB bases on ambiguous concepts of indirect and reserved control rather than precedent and experience. **If this rule is adopted, franchisor restaurants will be discouraged from investing in entrepreneurship and smaller businesses, sapping investment in an industry that badly needs it.**

In July 2022, the House of Representatives included a provision in federal appropriations legislation that would require the NLRB to implement electronic union representation elections. This tactic would effectively eliminate secret ballots in union representation elections, denying workers the ability to vote their conscience without influence from others. The Supreme Court and the NLRB itself have all recognized that secret ballots are the best method for determining the will of workers, and the elimination of secret ballots would be a gross violation of workers' privacy. **Restaurants urge the Committee to protect the sanctity of secret ballot elections in all matters.**

As restaurants navigate an inflationary economy on the brink of recession, they are still finding ways to invest in their workforce and increase wages. This is a testament to an industry that lives on a 3-5% pre-tax profit margin but still puts people first. Restaurants appreciate your Committee's work to support the U.S. workforce, including skill building initiatives and efforts to increase worker participation in the economy. We urge you to take our comments under consideration.

Sincerely,



Sean Kennedy
Executive Vice President, Public Affairs



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September 13, 2022

The Honorable Bobby Scott, Chair
 U.S. House of Representatives
 Committee on Education and Labor
 Washington, DC 20515

The Honorable Virginia Foxx, Ranking Member
 United States House of Representatives
 Committee on Education and Labor
 Washington, DC 20515

Dear Chair Scott, Ranking Member Foxx and Members of the Education and Labor Committee:

On behalf of the Independent Electrical Contractors (IEC), I write to express concern with the Protecting the Right to Organize (PRO) Act (H.R. 842) and policies being pursued by the National Labor Relations Board that are the focus of the hearing, *In Solidarity: Removing Barriers to Organizing*. Such proposals are aimed at increasing union membership through drastic changes to well-established labor law at the expense of the rights of employees and employers, like those of the merit shop electrical contracting industry.

Established in 1957, Independent Electrical Contractors is a trade association representing 3,600 members with more than 50 chapters and training centers nationwide. Headquartered in Arlington, Va., IEC is the nation's premier trade association representing America's independent electrical and systems contractors. IEC National aggressively works with the industry to establish a competitive environment for the merit shop—a philosophy that promotes the concept of free enterprise, open competition, and economic opportunity for all.

The PRO Act contains many radical proposals. One of the most damaging would limit employees' ability to choose or reject union representation through secret ballots. Secret ballots are a vital component of a functioning democracy, but the PRO Act vastly increases the circumstances under which the government could impose union representation despite employees voting against such representation in a secret ballot election. The bill attempts to justify disregarding the election results by making the government-imposed union representation contingent on the fact that at some point in the past a majority of employees signed "authorization cards." This is known as "card check," a concept that was rightly rejected by Congress over ten years ago during the debate on the Employee Free Choice Act (EFCA). As members of Congress understood then, card check is no substitute for a secret ballot election. The process of collecting cards is a public one that is innately susceptible to coercion—where union organizers present employees with cards to sign in front of coworkers. Organizers are then free to share with employees who has or has not signed cards, needlessly exposing workers to intimidation and possibly harassment.

The PRO Act also contains policies that would infringe on employees' rights to privacy and association. The bill mandates employers to provide to union organizers the contact information for all employees without prior approval from the employees themselves. Employees would not be able to opt out of this requirement and would not have a say in which contact information is provided, again exposing workers

The leading educator for merit shop electrical and systems contractors

to potential harassment. The bill also rejects the rights of states to implement Right-to-Work laws by eliminating Right-to-Work protections nationwide. This legislation would go against the twenty-seven states with Right-to-Work laws in place, which give employees the option not to fund union activities they do not support.

There are additional provisions in the PRO Act that completely disregard employers' due process rights, which include:

- The inability for employers to challenge union misconduct during union elections.
- Fundamentally eliminating an employer's right to outside counsel on complex labor laws.
- Allowing for secondary boycotts, which would permit unions to target neutral third parties and cause them economic injury even if those entities have no underlying labor dispute with the union.

Furthermore, IEC is concerned the NLRB may seek to enact many of the provisions in the PRO Act simply to increase union density with little regard for the negative consequences to employees, employers, or the economy. These include limiting secret ballot elections, or replacing them altogether, with electronic voting or card check, or imposing new rules that would further restrict an employer's ability to communicate with employees on unions.

Most recently, the NLRB issued a notice of proposed rulemaking that would radically alter the joint-employer standard under the NLRA, putting merit shop electrical contractors at risk in nearly every contractual relationship. The proposed standard inserts unnecessary and additional risks into the traditional contractor-subcontractor relationship, which could eventually lead to the larger contractor imposing far more control over the smaller subcontractor, or possibly refusing to do business with a small contractor altogether and choosing to bring the function in-house. Ultimately, the small contractors seeking to grow and expand would feel the negative repercussions of this policy change.

Thank you for taking the concerns of IEC's merit shop electrical contractors into consideration. We look forward to working with you as the committee performs its oversight of the NLRB on these important issues.

Sincerely,

Jason E. Todd
Vice President, Government Affairs



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August 15, 2022

VIA E-MAIL
Lauren.Mcferran@nlrb.gov

Lauren M. McFerran, Chairman
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VIA E-MAIL
Jennifer.Abruzzo@nlrb.gov

Jennifer A. Abruzzo, General Counsel
National Labor Relations Board
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Re: *Starbucks Corporation*
Case No. 14-RC-289926, et al and Other Matters

Dear Chairman McFerran and General Counsel Abruzzo:

National Labor Relations Board personnel in NLRB Region 14 and elsewhere have engaged in highly improper, systemic misconduct involving Starbucks and Workers United. This misconduct includes Board agents (1) secretly coordinating with Union agents to arrange for "in-person" voting to take place in NLRB offices during NLRB-ordered "mail-ballot" elections, (2) giving Union agents confidential, non-public, real-time information regarding specific vote counts received which enabled the Union to target and influence employees (known as partners) who have not yet voted, (3) disenfranchising other partners who were not given the same opportunity to cast in-person votes in the NLRB's offices, (4) collaborating with Union agents to cover up this misbehavior, and (5) otherwise collaborating with the Union to increase the number of pro-Union votes and affect the outcome of elections, among other things.

A career NLRB professional has truthfully reported events corroborating the misconduct described above. This individual is aware of documents outlining with specificity a concerted effort to tip the scales in voting to favor the Union in a Kansas City area (Overland Park) store election. The individual seeks to ensure such misconduct will not be perpetuated. The available information indicates that these types of misconduct have occurred in other NLRB regions and other NLRB cases.

In light of these types of misconduct by NLRB personnel, we request the Board immediately suspend all Starbucks mail-ballot elections nationwide—and stay the August 16, 2022 hearing in Case 14-RC-289926—until there has been a thorough investigation, the outcome has been made public, and safeguards to prevent future misconduct have been implemented. We also request a commitment that all pending and future elections involving Starbucks will be conducted

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 Jennifer A. Abruzzo, General Counsel
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manually, with in-person voting in accordance with the Board's traditional safeguards. We further request the Board refrain from retaliating against any person or persons who may have provided or will provide information regarding the serious misconduct described herein. We may seek further remedial measures as more facts become available.

Since these issues involve the Board's authority over representation elections, this letter is also copied to Board Members John Ring, Marvin Kaplan, Gwynne Wilcox and David Prouty. We have also copied NLRB Inspector General David P. Berry, and by separate letter, have requested that Inspector General Berry fully investigate the election misconduct described below, in addition to conducting an investigation and audit regarding improprieties that may have occurred in other Starbucks cases throughout the country.

The election misconduct by NLRB personnel—which has been confirmed by the NLRB career professional who has come forward—is already memorialized in numerous documents, including emails between Board officials and Union representatives. This documentation shows that Board personnel have secretly colluded with the Union to affect multiple stages of the mail-ballot election process, including the providing, returning and counting of ballots. The purpose of this misconduct was to tip-the-scale in order to deliver the outcome sought by the Union. The result of the misconduct was to ignore—and bypass—the actual sentiments that Starbucks partners may have expressed in properly conducted elections. The election misconduct includes without limitation:

- **Secret In-Person Voting in NLRB Offices** NLRB Region 14 in Case 14-RC-289926 involving Starbucks' Overland Park, Kansas store—the subject of the August 16, 2022 objections hearing we request be stayed—and NLRB Region 19 made secret arrangements with Union representatives for particular voters to vote “in-person” in NLRB offices, with no party observers present, during what to the parties agreed would be a “mail-ballot” election.
- **Providing the Union Duplicate—and Triplicate—Ballots**. Instead of mailing ballots in compliance with the stipulated election agreement in Case 14-RC-289926, NLRB Region 14 coordinated with the Union, and provided the Union and/or individual voters, with duplicate and, in some cases, triplicate, ballots.
- **Individualized Voting Arrangements for Select Voters**. Instead of requiring all Overland Park voters to adhere to the same mail-ballot procedures, or the common procedures for in-person voting, NLRB Region 14 made individualized arrangements for particular voters—handpicked by the Union—to vote in different ways and at particular times. Starbucks partners confirmed this in testimony during the trial in Case 14-CA-290968.
- **Disclosing Non-Public Real-Time Information to the Union Regarding Votes Received**. Throughout the Overland Park mail ballot voting period, NLRB Region 14 disclosed confidential, non-public, real-time information to the Union regarding whether

Lauren McFerran, Chairman
 Jennifer A. Abruzzo, General Counsel
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certain ballots were received on particular dates, and how many ballots were received, thereby improperly enabling the Union to monitor the status of voting and, through process of elimination, identify and specifically target individuals who had not yet voted, enabling the Union to target and attempt to influence the vote of partners who had not yet voted.

- **Mishandling Ballots.** Region 14 lost one ballot prior to the ballot count (only to find it the morning of the count) and a second ballot was lost during the ballot count, only to be found under a flap of a cardboard ballot box on the floor and out of view. Several ballots received the wrong time stamp. Seven determinative challenged ballots were unsecured and outside of view for at least 15 minutes. It is apparent that NLRB Region 14 does not maintain an adequate system for collecting and storing mail ballots and properly handling impounded ballots. And it is clear that these failures and shortcomings are not limited to Region 14. We remind you that Starbucks filed election objections in NLRB Region 3 and, upon investigation, NLRB Region 10 found Region 3 engaged in misconduct by failing to count seven ballots in its possession on the date of the ballot count. But for Starbucks' filing objections and another Region investigating, Region 3's misconduct would never have been exposed.
- **Concealment of Misconduct and Lack of Neutrality.** NLRB Region 14 took affirmative actions to conceal the misconduct described above—including preparation of self-serving documents to falsely portray the actions as being routine Board "protocol"—in order to improperly influence the election's outcome in a manner favorable to the Union, thus depriving all Starbucks partners their voice and vote in a fairly conducted election.
- **Similar Misconduct in Other Regions.** Other available information indicates that the same type of misconduct that has occurred in NLRB Region 14 and, as noted above, in Region 3 (Buffalo) has also occurred in NLRB Region 19 (Seattle). Until a thorough investigation is conducted it's anyone's guess how many elections in how many other regions have been similarly infected.
- **Board Misconduct and Lack of Neutrality in Unfair Labor Practice Cases.** The NLRB General Counsel and other Board personnel have repeatedly stated that Starbucks has committed more than one hundred "unfair labor practice" violations. These statements are contradicted by the fact that the Board to date has *not* made *any* finding regarding the merits of any Starbucks violation. Indeed, as set forth below, an Arizona federal court dismissed a petition for Section 10(j) injunctive relief in its entirety. The General Counsel and other Board personnel should cease misrepresenting the Board's own process.

The Board has repeatedly acknowledged that "mail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual elections . . ." *Mission Industries*, 283 NLRB 1027, 1027 (1987); *see also Thompson Roofing, Inc.*, 291 NLRB 743, 743 fn. 1 (1988) (citing the greater vulnerability of mail-ballot elections to the destruction of laboratory

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Jennifer A. Abruzzo, General Counsel
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conditions as basis for requirement that voters sign and not print their name on the ballot envelope). In the cases described below, these weaknesses in the mail-ballot election process have been exploited – by Board personnel working in tandem with Union representatives – to the great detriment of Starbucks partners to whom the Board owed a commitment of neutrality and even-handedness regarding all election arrangements.

The undisclosed actions by Board personnel, in coordination with Union representatives, has enabled the Union and the Board—acting in concert—to engage in ballot harvesting among Union supporters.¹ Making matters worse, if this is even possible, are the facts that the election misconduct, and the secret, intentional, coordinated efforts to cover it up, occurred at the very moment Starbucks was attempting to work in good faith with Region 14 and the Union to ensure that all eligible voters who did not receive a mail ballot—regardless of their views concerning unionization—were given a fair opportunity to cast a mail ballot, as is their right.

Dating back to its decision in *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967), the Board set forth the following standard for conduct by its agents:

The Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside the election.

Id. at 966; *see also Professional Transportation, Inc.*, 370 NLRB No. 132, *1 (2021) (“It is well established that in conducting elections, the Board must maintain and protect the integrity and neutrality of its procedures. Accordingly, the Board, throughout its history, has zealously safeguarded the integrity of its elections against irregularity and even the appearance of irregularity.”).

We believe strongly in the Board's solemn obligation to be a *neutral* protector of the statutory rights of employees (including Starbucks partners) to vote against or in favor of unionizing. Because the rights to “refrain” from or favor union representation are *equal* under National Labor Relations Act, it is extremely serious misconduct when Board personnel improperly manipulate the election process to favor one side (followed by an effort to cover it up). Obviously, these actions undermine the integrity of the secret ballot election process.

There can be no doubt the systemic election misconduct described above impugns the integrity of the NLRB election process itself. If the NLRB does not respond by investigating and remedying these types of actions, we do not see how the Board can represent itself as a neutral agency adjudicating unfair labor practice disputes—and elections—in a manner that is fair,

¹ Starbucks raised and properly preserved this objection with respect to this election although dismissed by Region 29.

Lauren McFerran, Chairman
Jennifer A. Abruzzo, General Counsel
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honest, and proper, without the appearance of impropriety.

Again, the misconduct described in this letter was voluntarily reported by a career professional within the NLRB who was concerned by the failure to ensure appropriate neutrality and laboratory conditions when ascertaining employee sentiments for and against union representation in connection with a Board-conducted election. Under federal law, including 5 U.S.C. § 2302(b)(8) *et al.*, we urge you to ensure there is no form of retaliation of any sort undertaken against this employee or any employees for disclosing a violation of any law, rule, or federal regulation. The NLRB should celebrate the individual's belief in and commitment to honesty, fairness, and the NLRB's mission, as well as such individual's courage.

The evidence demonstrates that Region 14 and Union agents conspired to deny Starbucks' partners their Section 7 rights under the Act. And Region 14 and Union agents continue to obstruct Starbucks' efforts to gather even more admissible evidence of wrongdoing in their possession. We believe you will share our view that the election misconduct described in this letter is irreconcilable with the Board's standards and the Act. And that the numerous, documented examples of intentional election misconduct to date has understandably undermined the confidence that Starbucks partners, Starbucks itself—and employees, employers, and unions overall—are entitled to have in the integrity of the Board's election process under the Act.

Given the egregious nature of the election misconduct in connection with both the representation and unfair labor practice cases related to the Overland Park store as set forth in detail on the pages that follow, we respectfully request that the General Counsel stay the August 16 hearing. In the event the hearing is not stayed, we request you reconsider—and grant—Starbucks' June 28, 2022 request, made pursuant to Section 102.118 of the NLRB's Rules and Regulations, for the consent of the General Counsel to subpoena documents and electronically stored information (ESI), including emails, in the possession and control of the NLRB and its Region 14 agents for admission as evidence at the hearing now scheduled to begin on August 16, 2022 before Region 29 regarding the Objections to the Election filed by Starbucks Corporation on April 15, 2022. We believe that failure to do so will, in effect, implicate the General Counsel's office in the misconduct and cover-up. In addition, to restore confidence in the Board's election process, Starbucks requests the Board immediately take the following actions:

- Suspend all mail-ballot Starbucks elections nationwide—and stay the August 16 hearing in Case 14-RC-289926—until the Board conducts a thorough investigation into the misconduct and reports to the public on the outcome of such investigation,
- Conduct a thorough investigation to determine the likelihood of similar misconduct by Board personnel in past and pending Starbucks elections and unfair labor practice cases throughout the United States and publicly report the outcome of such investigation,
- Develop and implement safeguards to prevent further misconduct from occurring, including implementing procedures precluding any NLRB Region from coordinating with one party to the exclusion of the other regarding voting arrangements, prohibiting

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individualized voting in NLRB offices by voters supplied by one party only, prohibiting the disclosure of non-public information about voting that would permit one party to engage in real-time monitoring regarding which, and how many, persons have cast ballots and for which side those persons have voted, and similar such improper conduct,

- Issue an order providing that all pending and future elections involving Starbucks be conducted manually with in-person voting in the presence of observers from both sides,
- Issue an order prohibiting any kind of retaliation or adverse action against any person or persons who may have provided information regarding the inappropriate and improper misconduct by NLRB personnel as described in this letter, or uncovered in the Board's subsequent investigation,
- Issue an order requiring that all persons who have knowledge or information regarding misconduct by NLRB personnel, including but not limited to election misconduct, come forward, including providing that any such persons may publicly disclose such information without fear of being subjected to any kind of retaliation or adverse action,
- Take steps to appropriately discipline all NLRB personnel found to have engaged in misconduct, and to report such findings and disciplinary actions to the public,
- Issue a public statement acknowledging the truth: all existing unfair labor practice cases only involve *allegations* which cannot be said to involve *any* findings of violations unless and until these cases are resolved by the Board.

The detailed information that follows more than justifies the above requests. As you know, you are required to take immediate steps to preserve, and prevent the destruction of, any and all information and data, including all information and data in the NLRB's computer systems and records, that reflect, relate or pertain to the misconduct described in this letter.

BACKGROUND—THE ELECTION IN REGION 14 (CASE 14-RC-289926)

On February 24, 2022, in Case 14-RC-289926, Starbucks, acting in good faith, executed its first Stipulated Election Agreement (“Election Agreement”) with the Union, obviating the need for a hearing and moving the parties expeditiously to election. This case marked a turning point for Starbucks, the Union, and the NLRB as it reduced the NLRB's backlog and paved the way for hundreds of subsequent Starbucks Election Agreements across the country in which Starbucks partners (employees) would be able to cast votes and have their voices heard irrespective of their unionization beliefs.

The Election Agreement called for a mail-ballot only election and provided, in relevant part:

- 4. ELECTION.** The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations

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Board, SubRegion 17, by close of business 4:45 p.m. on Wednesday, March 16, 2022. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region office by close of business 4:45 p.m. on Wednesday, April 6, 2022. The mail ballots will be counted at the SubRegional office located at 8600 S Farley St., Overland Park, KS at 2:00 p.m. on Friday, April 8, 2022. A meeting invitation for the videoconference will be sent to counsel for the parties prior to the count. No party may make a video or audio recording or save any image of the count.

Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be void.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region office by no later than 4:45 p.m. on Wednesday, March 23, 2022, in order to arrange for another mail ballot kit to be sent to that employee.

If the election and/or count is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, and place of the election.

On March 1, 2022, Starbucks timely filed and served its voter list. The next day, Starbucks filed and served an amended voter list, adding two partners on leaves of absence inadvertently omitted from the initial list. Region 14 purportedly mailed ballots on Wednesday, March 16, 2022 in accordance with the terms of the Election Agreement.

March 23, 2022

On March 23, 2022—the *last day partners* could request duplicate ballots from the Board—at 1:11 p.m., Union organizer Mari Orrego emailed Union attorney Gabe Frumkin informing him of four voters who allegedly had not received mail ballots: Alydia Claypool; Kelsey Stoermann; Carlee Stoermann; and Sage Quigley.² At 1:24 p.m., Frumkin forwarded Orrego’s email to Region 14 Field Examiner Amy Novara and requested replacement ballots for those four individuals, contrary to the parties’ agreed upon procedures for requesting duplicate mail ballot kits under the Election Agreement (“If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region office . . .”) Minutes later, at 1:33 p.m., Novara forwarded Frumkin’s email to NLRB Board Agent Melissa Nisly, advising her of *the Union’s requests* for duplicate ballots.

A few hours later, at 3:27 p.m., Frumkin emailed Novara with the case number, 14-RC-289926, and within five minutes Novara advised Frumkin she had forwarded his request to an election specialist. At 3:40 p.m., Frumkin again emailed Novara identifying three more voters who

² Notably, all four of these individuals testified for the General Counsel during the unfair labor practice trial in support of the Union.

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allegedly had not received mail ballots: Michael Vestigo; Delia Twaddell; and Katie Kreutzjans. Frumkin requested more mail ballots but provided a mailing address only for Michael Vestigo's ballot.³ At 3:46 p.m., Novara emailed Nisly again informing her of the three additional individuals who did not receive mail ballots. Novara explained the Union's concern as at least seven of the eighteen ballots were allegedly missing. Novara was unaware of any past mail issues in the area and stated she hoped this was a fluke.

On Thursday, March 31, 2022, Frumkin called Novara and asked if three of the voters could come by, pick up replacement ballots, and vote in person. Frumkin claimed Region 19 allowed the Union to make these same arrangements in other Starbucks mail ballot only elections. This revelation by the Board agent who has come forward indicates that at least two NLRB Regions have worked with the Union to secure votes of pro-union voters. This warrants a search of the NLRB's system to identify other similar misconduct.

April 1, 2022

On Friday, April 1, 2022, Frumkin learned that Region 14 failed to mail two ballots and that a third ballot did not get delivered to Vestigo, and he expressed his frustration to Novara and Nisly. Novara called Frumkin and told him someone would be in the office the following week and to have his pro-union partners call her.

At 2:04 p.m., Novara emailed Nisly, copying Region 14 Supervisory Field Examiner (now Assistant Regional Director) Carla Coffman. Novara advised Coffman she had been working with Frumkin on allegedly missing ballots. Nisly, Novara, and Coffman agreed to prepare multiple duplicate ballot kits for pro-union partners. One ballot kit would be placed in the mail to the voter, while the second ballot kit would be kept at the Board's office so at least Vestigo, Quigley, and Claypool, and perhaps others, could make an appointment, visit the office, and vote in-person.

At 2:15 p.m., Novara emailed Frumkin and told him to have the individuals he wanted to vote to call her, and she would assist them with scheduling a time to visit the Overland Park Subregion 17 office to vote in person. At 2:22 p.m., Frumkin emailed Novara, thanked her for the information, and said he would provide the information to the organizer (presumably Orrego).

On Friday night (April 1 at 6:41 p.m.), Nisly emailed Littler attorneys Kimberly J. Doud and Elizabeth Carter on behalf of Starbucks, former Interim Store Manager Amanda Pittman,⁴ and Union attorneys Frumkin, Dmitri Iglitzin and Robert Cervone, copying Novara, and informed them of an "inadvertent fumble on [her] part," where she used the wrong voter list to mail the ballots two weeks prior. Nisly told the parties she had "since corrected the error, sending out

³ Vestigo also testified for the General Counsel during the ULP Trial.

⁴ Amanda Pittman was no longer the Overland Park store manager on April 1, 2022. However, Region 14 continuously copied Pittman on emails and continues to serve mail and electronic filings on her despite numerous requests from Starbucks' attorneys to stop.

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ballots to those voters who were added in the revised list.”

At 7:22 p.m., Frumkin replied to Nisly’s email, but notably intentionally removed Starbucks attorneys Doud and Carter, as well as Pittman, from his response. In his email, Frumkin advised Nisly he had spoken to Novara earlier that day about three individuals who had not received ballots as well as the two other individuals mentioned in Frumkin’s prior email who were never mailed any ballots. According to Frumkin’s email, Novara assured him at least these five individuals would be able to vote in person at the Board’s Subregion 17 office. Inexplicably, Frumkin asked Nisly *how many voters have reached out to her and when will they be permitted to vote in person.*

The entire “process” created between Region 14 and the Union to circumvent the Election Agreement—and to create individualized voting arrangements for particular pro-union partners (providing the opportunity for in-person voting in the Board’s offices without any observers by either party)—occurred without Starbucks’ knowledge and/or consent. This misconduct converted the mail- ballot only election into an impromptu mixed mail/manual election for a handful of select individuals who were hand-picked and solicited by the Union, and with the NLRB giving improper support to a single party (the Union) with the obvious objective of influencing the election’s outcome in a manner most favorable to one side (the Union).

April 4, 2022

On Monday, April 4, 2022, at 9:05 a.m., Alydia Claypool called Novara and made an appointment to vote in person at 12:00 p.m. At 9:45 a.m. on April 4, 2022, Sage Quigley called Novara and made an appointment to vote in person at 1:15 p.m. Starbucks’ attorney was not made aware of these contacts.

At 9:54 a.m., Starbucks attorney Doud emailed Nisly in response to her April 1, 2022 email, including all the email’s original recipients (i.e., Carter, Pittman, Frumkin, Iglitzin, Cervone, and Novara), and asked her when the additional ballots were mailed. Neither the Union attorneys nor the NLRB Region 14 agents immediately responded.

At 3:08 p.m., Michael Vestigo called Novara and left a voicemail identifying himself as a former employee of the 75th street store in Overland Park, Kansas. He said he was recently terminated but was told he could still vote. He asked if he could set up an appointment to vote in person and advised Wednesday was good for him. At 4:30 p.m., Region 14 personnel called Vestigo and made an appointment for him to vote in person on Wednesday, April 6, 2022.

At 6:02 p.m., Nisly replied to Doud’s 9:54 a.m. email asking when the ballots were mailed. Nisly removed all the other email recipients from her reply and stated only: “The day of the email, April 1, 2022.”

The next morning, on April 5, 2022, at 7:41 a.m., Starbucks attorney Doud replied to Nisly’s email, adding Frumkin, Iglitzin, Cervone, and Novara back into the email chain, and also

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included the Board's Regional Director for Region 14 Andrea Wilkes. Doud's reply provided:

Thank you for your response, Melissa. We have not had a chance to discuss with Union counsel. The ballot return date is tomorrow Wednesday April 6 (three business days after mailing). It seems unlikely the partners you identified in your email below will receive their ballots in time to fill them out and mail them back. The ballot count is currently scheduled for this Friday April 8. We are concerned about disenfranchising these partners. We want to ensure they have a reasonable amount of time to receive and mail back their ballots. We request the ballot count be rescheduled to an agreeable future date to allow this to occur. The ballots were mailed to the rest of the partners at this store on March 16. Those partners were provided 3 weeks to return their ballots (April 6). Therefore, we propose these partners be provided the same amount of time by extending the ballot return date to Friday April 22 and holding the ballot count on Monday April 25. I am unaware of this coming up in any other Starbucks campaigns and am open to your thoughts. Please advise if you need a formal filing in this regard. Look forward to hearing from you. Thank you.

At 12:51 p.m., Frumkin (knowing but not disclosing that he had secretly arranged with Region 14 personnel for in-person voting in the Board's offices by select partners) responded:

Good morning all:

The Union does not agree to extend the ballot return date. The election has generated a substantial amount of engagement amongst bargaining unit members, and the Union is confident that those bargaining unit members who wish to vote will be able to do so. Moreover, the election has generated sufficient public interest that delaying the vote count would be inappropriate.

If after the vote count the Employer believes that those voters who were not originally sent ballots a) were not able to vote and b) that their votes could be determinative in the outcome of the election, the Employer may have cause to file an objection.

Sincerely,

Gabe Frumkin

It is now clear why Union attorney Frumkin opposed any extension of the ballot return date – because the Board created individualized voting procedures for particular voters designated by the Union, who were able to submit ballots in person, with the Region encouraging and approving these arrangements. Therefore, it is not surprising that at 3:53 p.m., Region 14 Supervisory Field Examiner (now Assistant Regional Director) Carla Coffman adopted the

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Union's stated position without further explanation:

Good afternoon,

While we understand the concerns raised by the Employer, and noting the Union's opposition, we do not believe that there is any basis to postpone the count at this time.

Thank you,

Carla

At 5:35 p.m., Starbucks attorney Doud replied:

Thank you for your email. My concern rests with the potential disenfranchisement of these voters. I don't see the harm in moving the ballot count for a period of days to ensure election integrity.

Kimberly Doud

Neither the Union nor the Region ever responded.

The Ballot Count

At the outset of the ballot count on April 8, 2022, Starbucks attorney Doud objected that the ballot count could not proceed considering the voter disenfranchisement. Notably, at the time, Starbucks attorney Doud was unaware of the extent of the disenfranchisement or the lengths to which Region 14 and the Union had gone to manipulate the election voting arrangements in favor of the Union. Nonetheless, the ballot count proceeded as scheduled via Zoom and over these objections. Four NLRB agents from Region 14 attended: Novara; Coffman; Nisly; and Susan Wade-Wilhot. Nisly handled the opening and tallying of the ballots.

To Starbucks' surprise, the ballots of Alydia Claypool and Sage Quigley, represented as having been mailed on April 1, 2022, were nevertheless present for the ballot count—*without postmarks*. Instead of truthfully describing how the Region came into possession of these ballots, Novara stated "Board protocol" supposedly permitted at least two voters to deviate from the parties' agreed upon procedures for obtaining and returning ballots as set forth in the Election Agreement. No mention was made of any special arrangements for Michael Vestigo or others.

Additional irregularities occurred during the ballot count itself, further undermining the integrity of an already undermined election. Regarding Calvin Culey's ballot, Nisly admitted she had lost custody of their ballot for an unspecified length of time prior to the ballot count and then "found it" the morning of the ballot count. Nisly stated she had no idea how Culey's ballot appeared at the Board's Subregion 17 office. Another ballot belonging to Hope Gregg did not contain any postmark. Ballots of six more eligible voters never arrived at all. Those six voters were unjustly

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denied the opportunity to vote in person despite Frumkin and Region 14 personnel secretly giving such right to vote in person to pro-union voters.

During the ballot count, Nisly proceeded to lose yet another ballot when she placed seven ballots into a cardboard box labelled "ULTA" and used the box to mix the ballots. She then removed ~~six~~ six ballots from the box, placed those six ballots on her desk, and placed the box onto the floor outside of the view of the camera and anyone attending the ballot count. Nisly opened and counted only six ballots. She then began looking for the missing seventh ballot. Nisly eventually found the missing ballot under the flap of the cardboard box on the floor and then opened the seventh ballot.

The tally at that point was six votes for the Union, one vote against the Union, and seven unopened, determinative challenged ballots. Nisly began preparing a list of the challenged ballots. Thereafter, she took all seven unsecured, challenged ballots and left the room for at least 15 to 20 minutes to purportedly photocopy each challenged ballot. The determinative challenged ballots were outside of the presence of parties' representatives and unsecured for the entire time while Nisly was absent from the room.

Finally, Nisly prepared the tally of the ballots and told the parties she would sign their names to the tally of ballots and write "via videoconference" after their names because the parties' representatives were not present to sign in person. Starbucks attorney Doud objected and told Nisly she did not consent to signing the tally underneath the certification of the election results. Despite repeated objections, Nisly improperly affixed Doud's name to the tally of ballots.

EFFORTS TO CONCEAL MISCONDUCT

File Memoranda

On the same day as the improper, incorrect and irregular ballot count, Coffman created self-serving memoranda regarding the procedures the NLRB and the Union created for the improper in-person voting in this election.

The first memorandum related to Alydia Claypool and stated that on April 4, 2022, Novara contacted Coffman regarding a request from Claypool for a duplicate ballot. The memorandum stated that Claypool was one of two voters initially not mailed ballots until April 1 due to a mix up and "to franchise voters" they "utilized board protocol" to arrange for in-person voting. The memorandum further stated that voter 19D (Claypool) came into the Subregion 17 office in Overland Park, Kansas, voted "alone in an empty room," and returned her completed ballot to NLRB personnel who recorded the time stamp of the receipt of the ballot. However, the memorandum indicates there was an error with the time stamp machine (which was not realized until April 6). As a result, the initial time stamp on the ballot was incorrect.

The second memorandum concerns Sage Quigley and stated that on April 4, 2022, Novara contacted Coffman regarding a request from Quigley for a duplicate ballot. The memorandum

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provides Quigley was one of two voters initially not mailed ballots until April 1. Like Claypool's memorandum, this one also provides "in order to franchise" the voter, the voter was allowed to come in person for a pre-arranged appointment made on April 4 and vote in person. The memorandum stated Quigley voted "alone in office" and then returned the signed mail envelope. Again, the time stamp on the ballot was incorrect due to an error with the time stamp machine.

The third memorandum concerns Michael Vestigo and states on April 6, 2022, Novara notified Coffman of a duplicate mail ballot requested for Vestigo. The memorandum provides "per board protocol" Vestigo was allowed to pick up a new ballot on Wednesday, April 6, 2022, went "alone into an empty office," came out and gave NLRB personnel the completed ballot.⁵

Because observers were not present, no one can be sure who appeared to vote, whether NLRB personnel had inappropriate communications with the voters, told them how to vote, showed them how to vote, or engaged in other undisclosed misconduct.

MISCONDUCT IN OTHER REGIONS

The misconduct in Case 14-RC-289926 detailed above is by no means our only concern with the integrity of the NLRB's elections processes involving Starbucks. In addition to the disclosure regarding Region 19 engaging in similar misconduct, an election held for one of Starbucks' Buffalo stores was set aside due to election misconduct by Region 3 personnel.

Specifically, on March 16, 2022, Starbucks filed objections to the election in Case 03-RC-285929 because, among other things, Region 3 failed to account for timely mailed ballots. In response to Starbucks' objections, Region 10 investigated Region 3's handling of the case. On April 12, 2022, the Regional Director for Region 10 issued a Decision informing Starbucks and the Union that its investigation into Starbucks' objections uncovered that Region 3 engaged in misconduct by failing to count seven valid ballots in its possession, without explaining this failure, noting: "[t]he casefile contains no reason as to why the seven ballots that arrived on February 25 were not processed at the March 9 count." Region 10 found that the Region 3 "Board agent conducting the count should have presented these ballots to the parties during the count, but did not do so."

Region 10 refused Starbucks' request for a rerun election or hearing, but instead directed Region 3 personnel to process the seven mail ballot envelopes received on February 25 in a second ballot count. Significantly, Region 10 did not provide the parties with *any* information regarding the chain of custody for the seven ballots it found were received by Region 3 on February 25, 2022 and which Region 3 failed to open and count at the March 9, 2022 ballot count. The second

⁵ Novara also prepared and filed a memorandum regarding the calls she had with Claypool, Quigley, and Vestigo. Each memorandum, along with all the emails, telephone logs, and other responsive documents regarding the election at this store, is relevant, admissible evidence as they constitute Region 14 and the Union's admissions of election misconduct. Based on the timing of their creation, the memoranda further Region 14's elaborate efforts to cover up the misconduct in the weeks surrounding the election. These documents and electronically stored information may not be withheld from Starbucks, its partners, or the public any longer.

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ballot count occurred on April 22, 2022 and resulted in a 10 to 10 tally of ballots.

On April 28, 2022, Starbucks filed objections to Region 3's misconduct of handling the ballots. Region 10 again investigated Starbucks' objections and issued its Decision on May 18, 2022. In its Decision, Region 10 sustained Starbucks' objections over Region 3's misconduct, set aside the prior election, and directed a rerun election. To this date, the parties do not know how or if Region 3 maintained custody and control over these ballots for a period of one month, from the date the ballots were received on February 25, 2022 until they were counted on April 22, 2022. Neither Region 3 or Region 10 ever informed the parties why they were not informed ballots existed in the file and/or not counted. But for filing objections and another Region investigating, the parties never would have known of this misconduct.

MISCONDUCT AND LACK OF NEUTRALITY IN ULP CASES

Starbucks has also encountered what we believe to be misconduct and the absence of neutrality in numerous unfair labor practice cases against Starbucks. Recent litigation in Tennessee, Michigan, New York, Colorado, and Arizona demonstrates that Regional offices are indiscriminately targeting Starbucks based on evidence known to be or with reasonable diligence would be known to be unreliable.

For example, in Arizona federal court, Case No. 2:22-cv-00676-JJT, the Regional Director for Region 28 sought Section 10(j) injunctive relief against Starbucks for allegedly surveilling employees engaged in Section 7 protected activity and retaliating and discriminating against three union supporters. During depositions in that case, two of the partners (Tyler Gillette and Alyssa Sanchez) provided sworn testimony utterly contradicting and effectively recanting affidavits they provided Region 28 while the third partner (Laila Dalton) provided deposition testimony proven false by store security video. To be clear, the video showed Dalton surreptitiously recording manager conversations of which she was not a part and for which she was not present, in violation of Starbucks' policy and likely Arizona state law.

After the depositions, instead of acknowledging his case was baseless, the Regional Director pressed forward. Not surprisingly, the Regional Director did not prevail on a single claim. By judgment entered on June 9, the court dismissed the Petition in its entirety. Despite the federal court ruling, Counsel for the General Counsel in Region 28 is continuing to pursue the underlying unfair labor practices.

In another case (NLRB No. 10-CA-291951), the NLRB General Counsel is prosecuting a complaint against Starbucks based on a routine question asked by a Starbucks attorney in an NLRB-conducted representation hearing. During that hearing, the NLRB Hearing Officer instructed witnesses not to discuss their testimony with other witnesses. Consistent with this instruction, the Starbucks attorney asked whether the next witness (who had been called by the Union) spoke with other witnesses who had testified in prior hearings. The NLRB Hearing Officer resolved an objection to the question by instructing the Starbucks attorney, "Go

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forward”; and the General Counsel has now issued a complaint against Starbucks because its attorney complied with the instruction given by the NLRB’s own Hearing Officer.

More generally, the Board’s Regional Offices—and the Office of the General Counsel—have persistently stated publicly that Starbucks has engaged in more than one hundred “unfair labor practice” violations. In reality, the Board to date has *not* made *any* finding regarding the merits of any claimed Starbucks violation. Indeed, it is unlikely that the Board will resolve any unfair labor practice claims against Starbucks until (at the earliest) late 2022 or 2023. Indeed, as described above, the Arizona federal court dismissed in its entirety a petition for Section 10(j) injunctive relief based on alleged unfair labor practice claims against Starbucks because the court concluded the evidence against Starbucks was not credible. The General Counsel and other Board personnel should cease misrepresenting the Board’s own process, and Starbucks requests that the Board issue a public statement acknowledging the truth: all existing unfair labor practice cases only involve *allegations* which cannot be said to involve *any* findings of violations unless and until these cases are resolved by the Board.

Such actions undermine the public trust in the Board as an impartial agency responsible for even-handed administration and enforcement of the NLRA.

CONCLUSION

In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680-81 (1982), the Supreme Court stated that the National Labor Relations Act “is *not* intended to serve either party’s individual interest, but to foster *in a neutral manner* a system in which the conflict between these interests may be resolved” (emphasis added). The actions of the NLRB personnel described above are completely at odds with any sense of neutrality, and worse, the Board’s actions were calculated to influence the outcome of union representation elections in a manner favorable to one party—the Union.

At bottom, Region 14 and the Union unjustly denied Starbucks partners at its Overland Park store the opportunity to participate in a fair and free election. Starbucks partners in a prior Region 3 case were also denied their Section 7 rights to vote due to Region 3’s misconduct. It also appears that Region 19 and the Union have collaborated to afford pro-union voters special treatment to the detriment of all voters. Likewise, there has been Board misconduct associated with Region 28 which continues to pursue unfair labor practice charges despite a federal court ruling that there was no reasonable cause to believe Starbucks violated the rights of its partners.

Starbucks respects the rights of its partners to decide for themselves whether they wish to be represented by a union pursuant to Section 7 of the NLRA. But those rights can only be properly exercised—and realized—through a neutral, honest process overseen by the NLRB consistent with the NLRA and legal precedent. As you can see, this is not happening today. We urge you to grant the requests we make in this letter. It is the only way for the NLRB to effectively address these problems, which subvert the rights of Starbucks partners, and begin to deliver the fair, honest and transparent process required by the NLRA and to which Starbucks and our partners

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are entitled.

Given the nature of these matters, we hope this will receive the Board's immediate attention, and we ask that you let us know how the Board intends to respond.

Respectfully,

STARBUCKS CORPORATION



Zabrina Jenkins
Acting Executive Vice President and General Counsel

LITTLER MENDELSON, P.C.



Kimberly J. Doud
Counsel for Starbucks Corporation

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EXHIBIT A

The logo for Littler, consisting of the word "Littler" in a stylized, outlined font.

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May 21, 2022

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VIA E-MAIL

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**Re: *Cornele A. Overstreet v. Starbucks Corporation*
Case No. 2:22-cv-00676-JJT**

Dear Fernando:

As you are aware, this Firm represents Respondent Starbucks Corporation ("Starbucks" or the "Company") in this matter. We are writing to provide your client and you the opportunity to enter a voluntary withdrawal of Petitioner Cornele A. Overstreet's ("Petitioner") meritless claims. Put simply, Petitioner's insistence on pursuing his claims in Court against Starbucks represents a clear violation of Fed. R. Civ. P. 11. In particular, the deposition testimony given by alleged discriminatees Tyler Gillette, Laila Dalton, and Alyssa Sanchez over the last two days establishes that the factual contentions on which Petitioner's Petition is based have no evidentiary support whatever. Let us explain.

In their deposition on May 19, 2022, Tyler Gillette admitted, contrary to the allegations in the Petition, that: (1) Store Manager Nichell Olson and District Manager Megan Diller did not grant Gillette's request for an accommodation at their meeting on January 27, 2022, or at any other time, but instead informed Gillette at the meeting that they would have to contact Partner Relations to request an accommodation, and would need to support the request with medical documentation; (2) at Gillette's request, Olson submitted an accommodation request on Gillette's behalf to Partner Relations; Partner Relations informed Gillette on February 25, 2022, of the need to submit support for the request from a medical provider and Starbucks did not grant provisional accommodations pending approval of an accommodation request; (3) on March 10, 2022, Gillette asked to go on a leave of absence because they felt they could not work without a provisional accommodation and were unwilling to seek medical support for the accommodations they sought; (4) Olson completed Gillette's leave of absence request and application for sick leave pay; (5) Gillette was on a mostly sick leave-paid leave of absence from March 11 to April 2, 2022, returned to work on a part-time, open shift basis on April 3, 2022, was placed on the regular schedule on April 18, 2022, and has been working a regular schedule since that time; and (6) Partner Relations and store management have worked with Gillette to offer Gillette things they could do outside the accommodation process to address the affects of their medical condition on their ability to

Exhibit A

meet Starbucks' uniform requirements. Gillette also admitted that they had done nothing that would have provided store management with knowledge that they supported the Union until the union committee went "public" with its campaign on January 31, 2022, by issuing an open letter containing Gillette's and other committee members' names relating to their actions.

In her deposition on May 19, 2022, Laila Dalton verified as accurate the affidavit testimony she provided the Board relating to her surreptitious recording of Store Manager Olson on March 23, 2022, and maintained she did not recall surreptitiously recording Store Manager Maria Von Boeckel on March 26, 2022, notwithstanding the security video the Company provided the Board that proves her testimony to be false. The video proves that on both occasions Ms. Dalton intercepted conversations of the managers for which she was not present and without their consent over a recording app on her cell phone while charging her phone at the manager's desk in the back of the house of the store. To be more specific, the video proves that Ms. Dalton was not "present" for the store managers' conversations for most if not all of the time that she recorded them, having spent time while recording in the front of the house and outside of eyesight of the manager's desk. Ms. Dalton's conduct was a terminable offense under Starbucks policy – as in-store union organizer Bill Whitmire testified at his deposition today, surreptitiously taping store managers, as Ms. Dalton did, is conduct for which he would expect to be terminated. The security video also can reasonably be construed to establish probable cause that Ms. Dalton's actions violated state and federal criminal law making it a felony secretly to intercept conversations to which one is not a party and, in establishing probable cause of those crimes, raising a question whether Ms. Dalton committed perjury in her affidavit testimony.

Lastly, during her deposition today, Ms. Sanchez testified that: (1) the statements she made in her Board affidavit that the Company denied scheduling availability requests she submitted on January 22 and 23, 2022, were false, admitting that she did not submit requests on either of those dates; (2) the statements that she made in her Board affidavit that the Company denied an availability request she made on January 13, 2022, was false, admitting that she cancelled that request; (3) the last availability request she made was submitted on January 10, 2022, well before the union activity at the store began; and (4) when asked by the Board to sign her affidavit, she indicated that she was not sure of the dates. Ms. Sanchez also admitted that: (1) she did not tell management of any union activity prior to her resignation; (2) she did not engage in any overt union activity before her resignation that would alert management to her union support; and (3) she has no evidence that management had any knowledge of her engaging in any union activity prior to her resignation. In the end, Ms. Sanchez admitted that she resigned her employment on January 27, 2022, because of her own busy schedule with flight school and other jobs, four days before the union committee went public on January 31, 2022 regarding the union campaign.

Under Fed. R. Civ. P. 11(b), by signing a pleading, the attorney or party is certifying that to the best of his/her knowledge, information, and belief, the attorney formed after a reasonable inquiry that the claims alleged are warranted under existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law, and that the contentions in the pleading have evidentiary support. The Advisory Committee's Notes on Rule 11 instruct that "a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit." Fed. R. Civ. P. 11, Notes of Advisory Committee on Rules - 1993 Amendment, Subdivisions (b) and (c).

The failure by Petitioner, and by you as his counsel, to withdraw the claims against Starbucks would represent what we believe to be a clear Rule 11 violation. At its core, the Petition is a baseless filing not "well grounded in fact, legally tenable, and 'not interposed for any improper purpose.'" *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) (the purpose of Rule 11 "is to deter baseless filings in district court..."); *See also Bus. Guides Inc. v. Chromative Commc'n Enter., Inc.*, 498 U.S. 533, 542-545 (1991) (noting that Congress amended Rule 11 to give courts greater authority to impose sanctions to discourage wasteful and abusive tactics). If Petitioner fails to dismiss voluntarily his claims against the Company by May 25, 2022, we will file a motion for Rule 11 sanctions.

This issue seems easily resolvable by you dismissing the Petition against the Company. It should not require Starbucks to devote time and resources to pursuing a Rule 11 motion in which we will seek, among other things, sanctions including attorneys' fees and costs. We look forward to this matter being brought to a quick and appropriate resolution.

Sincerely,

/s/ David A. Kadela

David A. Kadela

/s/ Adam Paul Tuzzo

Adam Paul Tuzzo

cc: Shawn Oller, Jonathan Levine, Brittany Stepp

4874-9454-2881.1 / 655187-1253

EXHIBIT B



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May 21, 2022

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VIA E-MAIL

Fernando Anzaldua
National Labor Relations Board
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Phoenix, AZ 85004
Fernando.anzaldua@nrlrb.gov

**Re: *Cornele A. Overstreet v. Starbucks Corporation*
Case No. 2:22-cv-00676-JJT**

Dear Fernando:

As you are aware, this Firm represents Respondent Starbucks Corporation ("Starbucks" or the "Company") in this matter. We are writing to provide your client and you the opportunity to enter a voluntary withdrawal of Petitioner Cornele A. Overstreet's ("Petitioner") meritless claims. Put simply, Petitioner's insistence on pursuing his claims in Court against Starbucks represents a clear violation of Fed. R. Civ. P. 11. In particular, the deposition testimony given by alleged discriminatees Tyler Gillette, Laila Dalton, and Alyssa Sanchez over the last two days establishes that the factual contentions on which Petitioner's Petition is based have no evidentiary support whatever. Let us explain.

In their deposition on May 19, 2022, Tyler Gillette admitted, contrary to the allegations in the Petition, that: (1) Store Manager Nichell Olson and District Manager Megan Diller did not grant Gillette's request for an accommodation at their meeting on January 27, 2022, or at any other time, but instead informed Gillette at the meeting that they would have to contact Partner Relations to request an accommodation, and would need to support the request with medical documentation; (2) at Gillette's request, Olson submitted an accommodation request on Gillette's behalf to Partner Relations; Partner Relations informed Gillette on February 25, 2022, of the need to submit support for the request from a medical provider and Starbucks did not grant provisional accommodations pending approval of an accommodation request; (3) on March 10, 2022, Gillette asked to go on a leave of absence because they felt they could not work without a provisional accommodation and were unwilling to seek medical support for the accommodations they sought; (4) Olson completed Gillette's leave of absence request and application for sick leave pay; (5) Gillette was on a mostly sick leave-paid leave of absence from March 11 to April 2, 2022, returned to work on a part-time, open shift basis on April 3, 2022, was placed on the regular schedule on April 18, 2022, and has been working a regular schedule since that time; and (6) Partner Relations and store management have worked with Gillette to offer Gillette things they could do outside the accommodation process to address the affects of their medical condition on their ability to

Exhibit A

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Under Fed. R. Civ. P. 11(b), by signing a pleading, the attorney or party is certifying that to the best of his/her knowledge, information, and belief, the attorney formed after a reasonable inquiry that the claims alleged are warranted under existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law, and that the contentions in the pleading have evidentiary support. The Advisory Committee's Notes on Rule 11 instruct that "a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit." Fed. R. Civ. P. 11, Notes of Advisory Committee on Rules - 1993 Amendment, Subdivisions (b) and (c).

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Sincerely,

/s/ David A. Kadela

David A. Kadela

/s/ Adam Paul Tuzzo

Adam Paul Tuzzo

cc: Shawn Oller, Jonathan Levine, Brittany Stepp

4874-9454-2881.1 : 055187-1253

EXHIBIT C
[FILED UNDER SEAL]

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18 Attorneys for STARBUCKS CORPORATION

19
 20 UNITED STATES DISTRICT COURT
 21 FOR THE DISTRICT OF ARIZONA

22 Cornele A. Overstreet, Regional Director of
 the Twenty-Eighth Region of the National
 23 Labor Relations Board, for and on behalf of
 the National Labor Relations Board,

Case No. 2:22-cv-00676-JJT
 Certificate of Good Faith Consultation

24 Petitioner,

25 v.

26 Starbucks Corporation,

27 Respondent.
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Pursuant to LRCiv.P. 54.2(d)(1), Respondent's counsel, Adam Tuzzo hereby certifies that he made a good faith effort to confer with NRLB's counsel, Fernando Anzaldua at the telephone number he provided at 5:09 p.m. CT today to discuss the matters discussed in the contemporaneously filed Motion for Attorneys' Fees. As of the time of the filing, Mr. Anzaldua has not returned the call.

Dated: July 11, 2022

/s/ Adam Paul Tuzzo
Adam Paul Tuzzo
LITTLER MENDELSON, P.C.
Attorneys for Defendant

1 Respondent Starbucks Corporation (Respondent) has filed the instant motion for
2 attorneys' fees (Doc. 49) (Motion) against the Regional Director of the Twenty-Eighth
3 Region of the National Labor Relations Board (NLRB) under 29 U.S.C. § 2412(b)
4 (Section 2412(b)), 29 U.S.C. § 1927 (Section 1927), LRCiv 54.2, and the Court's
5 inherent authority, in response to litigation over Petitioner's April 22, 2022, Petition for
6 Temporary Injunction Under 10(j) of the National Labor Relations Act (Petition). (Doc.
7 1). The Motion describes conduct that, even under Respondent's chosen case law, fails
8 to state any claim under Section 2412(b) or Section 1927. Petitioner respectfully
9 requests that the Court deny Respondent's Motion.
10

11 **I. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

12 A basic review of the procedural history of the investigation and subsequent
13 litigation shows a deliberate, reasoned process safely within the ethical bounds of
14 Section 2412(b) and Section 1927. The following facts, limited for brevity and the
15 narrow scope of a sanctions motion, are either undisputed or readily discernible from
16 the documentary evidence.
17

18 On April 22, 2022, Petitioner filed its Petition (Doc. 1) seeking injunctive relief
19 based upon charges filed against Respondent alleging violations of the National Labor
20 Relations Act (Act).
21

22 On April 25, 2022, Petitioner filed with the Court, and served upon the parties,
23 its Memorandum of Points and Authority (Doc. 5-4) along with supporting declarations
24 and documentary evidence.
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1 Pursuant to the Court's discovery order (Doc. 16), the parties engaged in
2 discovery between making initial disclosures on May 5, 2022, and the close of
3 discovery on May 24, 2022. For its part, Petitioner secured deposition testimony from
4 five witnesses as well as relevant document production.
5

6 On May 16, 2022, Respondent's responsive document production, included for
7 the first time, relevant evidence to certain allegations contained in the Petition,
8 including those related to Laila Dalton, Alyssa Sanchez, and Tyer Gillette. Some of this
9 new evidence was provided to the Court in binder form by the parties on May 25, 2022,
10 and later filed through ECF (Doc. 28 and 29).

11 On June 8, 2022, a Temporary Restraining Order Hearing was conducted with
12 witness testimony and oral argument from the parties. (Doc. 46).

13 Based on the evidence and arguments presented by the parties, the Court made its
14 findings on the record as discussed below, along with Petitioner's position on the
15 likelihood of success.
16

17 Regarding Laila Dalton's (Dalton) January 25, 2022, discipline and suspension,
18 the Court found that Respondent initiated the written warning process resulting in
19 Dalton's January 25 discipline and suspension on January 18, before it knew of her
20 union activities. (June 8 Hearing Tr. 159). This finding was in part supported by internal
21 management communications showing that Store Manager Nichell Olson (Olson)
22 contacted partner relations about Dalton on January 18 (evidence first disclosed in
23 discovery, after the filing of the 10(j) petition). However, those communications did not
24 document what conduct led Olson to contact partner relations at that time. In
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1 Petitioner's view, the discipline clearly violated Section 8(a)(1) of the Act because, on
2 its face, it was based in part on Dalton raising concerns about staffing. Further, with
3 respect to the timing evidence impacting the Section 8(a)(3) allegation, although there
4 was evidence that Olson contacted partner relations on January 18, the fact that the
5 discipline that ultimately issued relied on numerous stale incidents and conduct, like
6 text messaging Olson about attendance, that Olson had tolerated in the past, makes it
7 seem possible that Respondent trumped up additional grounds for the discipline after
8 learning of Dalton's union activity. The fact that after January 23 Respondent began
9 closely monitoring Dalton was, as this Court found, "some circumstantial evidence of
10 motivational nexus" and makes the possibility that Respondent trumped up additional
11 reasons for Dalton's discipline after learning of her union activity a strong one. (June 8
12 Hearing Tr. 159). Absent documentary evidence that as of January 18 Olson wanted to
13 discipline Dalton for all the conduct listed in the discipline, it was not unreasonable for
14 Petitioner to conclude there is an arguable prima facie case and arguable likelihood of
15 success on the merits of that allegation before the Board, although the Court ultimately
16 made a different determination.
17
18

19 Regarding the investigations of Dalton and disciplines for wearing AirPods and
20 not masking during an off-duty store visit, the Court found: "Post-January 23 of 2022,
21 the Court can find that there was some circumstantial evidence of motivational nexus.
22 The evidence shows much attention was being paid to Ms. Dalton from January 21 of
23 2022 up to the point of just before the recording incident on March 23 of 2022. There
24 are issues of possible disciplinary areas there for which both sides have colorable
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1 arguments to support their respective positions and which both -- which the
2 [Administrative Law Judge]¹ might ultimately find was a motivational nexus.” (June 8
3 Hearing Tr. 159). Thus, again, Petitioner’s position in continuing to pursue injunctive
4 relief for these allegations was not unreasonable or in bad faith.

5
6 Regarding Dalton’s discharge, the Court found that Respondent showed it would
7 have discharged Dalton even in the absence of union activity for violating company
8 policy, and maybe law, by recording managers without their knowledge and while she
9 was not present. (June 8 Hearing Tr. 159-160). Respondent presented video surveillance
10 footage showing that Dalton recorded managers while she was not present (more
11 evidence first disclosed in discovery, after the filing of the 10(j) petition). Dalton put her
12 phone on the desk in the back room and then walked in and out of the room. This
13 evidence was first provided to Petitioner after the filing of the petition and was arguably
14 inconsistent with Dalton’s affidavit testimony that she only recorded during times when
15 she was present. It remains Petitioner’s view, despite this evidence, that Dalton’s
16 recording was protected activity under the Act. Dalton was recording to defend herself
17 from discipline and to publicize Respondent’s discrimination against her. Her recording
18 for this protected purpose arguably did not violate the law because the area where she
19 recorded was an area that employees frequently entered, and the managers had no
20 reasonable expectation of privacy in that space. Indeed, there was deposition testimony
21 that managers sometimes went outside when having conversations that they wanted to
22 keep private. Also, even if the recording were not protected, in Petitioner’s view,
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1 “ALJ”.

1 Respondent's close scrutiny of Dalton established unlawful motivation. The fact that
2 Respondent gave Dalton no warning of its interpretation of its recording policy (which,
3 ambiguously, prohibits recording "except as protected under federal labor laws"),
4 despite knowing that Dalton had a practice of recording, and that two managers picked
5 up Dalton's phone from the desk and looked at it, shows that Respondent was trying to
6 set Dalton up for discharge. Respondent did not show that it ever discharged any other
7 employee for recording in its stores. Again, there is arguably sufficient evidence for the
8 ALJ to conclude Dalton's discharge was discriminatory, even if the Court had a
9 different view of the evidence.
10

11 Moving on to the allegations concerning Tyler Gillette (they/them) (Gillette), the
12 Court found that there was not a reasonable likelihood of success in establishing that
13 Respondent revoked accommodations granted to Gillette and placed Gillette on leave of
14 absence because of their union activities. (June 8 Hearing Tr. 158-159). The Court
15 found that Gillette never requested the accommodations at issue (a point of
16 inconsistency between Gillette's affidavit and deposition testimony), that Olson had
17 requested them, that Gillette never submitted the medical documentation required to get
18 accommodations, that Gillette asked to be placed on leave of absence, and that
19 Respondent returned them to work when they asked. (June 8 Hearing Tr. 158-159). The
20 Court further found that injunctive relief was not appropriate because Gillette has
21 returned to work (a fact the Region learned after the filing of the petition in the 10(j)
22 discovery process). (June 8 Hearing Tr. 158). However, even if Gillette did not request
23 and was not given "accommodations" (defined narrowly in scope by Respondent to
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1 include only ADA accommodations and requests, but not so limited by Petitioner) on
2 the spot when meeting with Olson and District Manager Megan Diller (Diller), Gillette
3 left the meeting believing they could work with some interim modifications (e.g., not
4 wearing an apron or headset during parts of their shift, using a single AirPods for noise
5 cancellation, and taking an 10-minute extra break). And Gillette worked with those
6 modifications until Olson stopped them after an unfair labor practice charge was filed
7 about a grant of benefits to Gillette and the strength of Gillette's union support would
8 have become more apparent to Respondent. Gillette then had to go on a leave of
9 absence because working without these modifications caused breakdowns. In
10 Petitioner's view, the evidence of Respondent's general animus, plus Respondent's
11 about-face on the work modifications arguably establish unlawful motivation and a
12 possibility that the ALJ may find a violation. Moreover, although the Court found that
13 injunctive relief as to Gillette was moot due to their reinstatement with
14 accommodations, other courts have held that even in similar circumstances, a
15 reinstatement order is just and proper to fully erase the chilling message on other
16 employees. *See, e.g., Gottfried v. Mayco Plastics, Inc.*, 472 F. Supp. 1161, 1166 (E.D.
17 Mich. 1979), *aff'd*, 615 F.2d 1360 (6th Cir. 1980) (reinstatement order appropriate even
18 though employer had already reinstated several discriminatees).

19
20
21 Finally, in regards to the allegations concerning Alyssa Sanchez (Sanchez), the
22 Court found that, since documentary evidence showed that Sanchez's request to change
23 her schedule was made and denied before Sanchez engaged in any union activity, and
24 since Sanchez testified in her deposition (contrary to her affidavit) that she withdrew her
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1 last schedule change request and resigned to go to flight school, there was no likelihood
2 of success in establishing that Sanchez's schedule change request was denied, or that
3 she was constructively discharged, because of her union activities. (June 8 Hearing Tr.
4 157). Petitioner believes the ALJ, with the benefit of a full evidentiary hearing, may
5 determine differently that Sanchez only meant to confirm that she saw that
6 Respondent's documents (again only produced through discovery and first shown to her
7 during her deposition) did not reflect her later requests, rather than admit that she did
8 not make the later schedule change requests. Petitioner is also investigating whether the
9 denial of employees' schedule change requests (for Sanchez and similarly situated
10 employees) resulted from a nationwide implementation of increased schedule
11 availability requirements—an issue raised in a separate charge against Respondent.
12

13 Given the above, Petitioner believes the Court would not have abused its
14 discretion by granting the requested relief in the Petition and that the ALJ may make
15 different factual findings and conclusions. In sum, it was not unreasonable, and was in
16 good faith, for Petitioner to believe that there is a likelihood of success before the Board
17 and to continue to pursue injunctive relief after discovery.
18

19 **II. ARGUMENT**

20 **A. Attorneys' Fees Pursuant to Section 2412(b) are Not Appropriate**

21 Section 2412(b) provides, in part, that the "United States shall be liable for such
22 fees and expenses to the same extent that any other party would be liable under the
23 common law. . . ." Thus, under the common law a court may assess attorneys' fees
24 against the government if it has "acted in bad faith, vexatiously, wantonly, or for
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1 oppressive reasons.” *Rodriguez v. United States*, 542 F.3d 704, 709 (9th Cir. 2008)
2 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46, 111 S.Ct. 2123, 115 L.Ed.2d
3 27 (1991)). “[W]e hold the government to the same standard of good faith that we
4 demand of all non-governmental parties.” *Id.* Such an award “is punitive and the penalty
5 can be imposed only in exceptional cases and for dominating reasons of justice.”
6 *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1298 (9th Cir.1982) (quoting *United*
7 *States v. Standard Oil Co.*, 603 F.2d 100, 103 (9th Cir.1979)).

9 In addition, under the common law, “a finding of bad faith is warranted where an
10 attorney knowingly or recklessly raises a frivolous argument or argues a meritorious
11 claim for the purpose of harassing an opponent.” *Id.* See also *Primus Auto. Fin. Servs.*
12 *Inc., v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997). This is a high standard—negligent
13 or inadvertent conduct does not constitute bad faith, and neither does mere recklessness.
14 *Fink v. Gomez*, 239 F.3d 989, 992–94 (9th Cir. 2001); See also *F.D.I.C. v. Schuchmann*,
15 319 F.3d 1247, 1252 (10th Cir.2003) (“bad faith requires more than a mere showing of a
16 weak or legally inadequate case, and the exception is not invoked by findings of
17 negligence, frivolity, or improvidence”) (internal quotation marks omitted). Rather, the
18 bad-faith exception is reserved for “the rare and exceptional case” where litigation is
19 reckless *and* frivolous, harassing, or for an improper purpose. *Primus*, 115 F.3d at 649;
20 *Fink*, 239 F.3d at 994 (sanctions available for “recklessness when combined with an
21 additional factor such as frivolousness, harassment, or an improper purpose”).
22 Accordingly, as the cited cases demonstrate, “[m]ere recklessness does not alone
23 constitute bad faith; rather, an award of attorney’s fees is justified when reckless conduct
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1 is combined with an additional factor such as frivolousness, harassment, or an improper
2 purpose.” *Rodriguez*, 542 F.3d at 709 (internal quotation marks omitted) (quoting *Fink*
3 *v. Gomez*, 239 F.3d 989, 993–94 (9th Cir. 2001)). Finally, the Ninth Circuit has long
4 established that to make a bad faith determination, the Court must review the totality of
5 the government’s conduct. *Ibrahim v. U.S. Dep’t of Homeland Sec.*, 912 F.3d 1147, 1181
6 (9th Cir. 2019) (internal quotation marks omitted).
7

8 Here, Respondent failed to demonstrate that Petitioner knowingly or recklessly
9 raised a frivolous argument. Even if Respondent could establish that Petitioner acted
10 recklessly—which it cannot—mere recklessness does not alone constitute bad faith.
11 *Rodriguez* at 709. Indeed, much of the evidence relied upon by Respondent in its
12 defense to the Petition was not provided to Petitioner until after the Petition was filed
13 with the Court. Respondent cannot have it both ways—arguing that Petitioner
14 proceeded with frivolous claims given the evidence presented, while also failing to
15 provide relevant and responsive evidence during the investigations conducted into
16 Respondent’s conduct prior to the Petition being filed. Petitioner conducted a thorough
17 investigation of the allegations raised, looking into many issues before filing the
18 Petition without the full cooperation of Respondent.
19

20 In short, before filing its Petition, Petitioner discharged its duty to enforce the
21 National Labor Relations Act (“NLRA”) [29 U.S.C. §§151-169] by conducting a
22 reasonable investigation into claims that Respondent violated the NLRA. Petitioner’s
23 investigation gathered supporting information from both the Union and Respondent.
24 Then, Petitioner filed its Petition and obtained additional evidence, including the
25
26

1 deposition testimony of adverse witnesses, that included both unfavorable and favorable
2 evidence (e.g., evidence showing the extent of Respondent’s unprecedented surveillance
3 and scrutiny of alleged discriminatees). Respondent’s Motion at best raises conflicts in
4 the evidence and credibility issues better left for the underlying administrative hearing,
5 and at worst lambasts and mischaracterized the preliminary record evidence in
6 conclusory terms. The Court should reject Respondent’s bald assertions that such
7 conduct is sanctionable.
8

9 **B. Attorneys’ Fees Pursuant to Section 1927 are Not Appropriate**

10 Section 1927 provides that “Any attorney or other person admitted to conduct
11 cases in any court of the United States or any Territory thereof who so multiplies the
12 proceedings in any case unreasonably and vexatiously may be required by the court to
13 satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred
14 because of such conduct.” 28 U.S.C.A. § 1927. The statute indicates that actions that
15 multiply the proceedings must be both unreasonable and vexatious, and the Ninth
16 Circuit has also stated that recklessness alone will not suffice. *See United States v. Rico*,
17 619 F. App’x 595, 601 (9th Cir. 2015). What is required is recklessness plus something
18 more—for example knowledge, intent to harass, or frivolousness. *Id.* (internal quotation
19 marks omitted).
20

21
22 Though an argument may ultimately be unconvincing to a Court, that does not
23 make it frivolous. *See United States v. Corinthian Colleges*, 652 F. App’x 503, 505 (9th
24 Cir. 2016); *United States ex rel. Mateski v. Raytheon Co.*, 816 F.3d 565, 579 (9th Cir.
25 2016). Further, the Ninth Circuit overruled a district court’s finding that several of a
26

1 party's motions and filings were "vexatious" because the Court's finding was without
2 support in the record where there was nothing to suggest that the party acted with intent
3 to increase expenses or delay. *See New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298,
4 1306 (9th Cir. 1989).

5
6 As is explicit in Section 1927, these cases require misconduct that is not only
7 unreasonable and vexatious, but that also multiplies the proceedings.² In addition to its
8 failure to allege or demonstrate vexatious litigation, Respondent's Motion is plainly not
9 an appropriately "sparing" use of Section 1927. *See Zapata Hermanos*, 313 F.3d at
10 388.³

11 In this case, Petitioner did not have an intent to increase expenses or delay. In
12 fact, the opposite is true. Petitioner did all it could to limit expenses or delays, including
13 by filing all its evidence in support of the Petition with its initial filings, by arguing
14 against discovery from the onset of litigation, and then when the Court contemplated
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18 ² *Zapata Hermanos*, 313 F.3d at 388. The *Zapata Hermanos* court held sanctions to be
19 inappropriate, as it was the district court judge's error in refusing to grant partial summary
20 judgment that prolonged the proceedings, rather than the plaintiff's counsel's conduct. *Id.* at
21 391.

22 ³ Moreover, Section 1927 by its terms authorizes claims only against attorneys and not clients.
23 *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 535 (5th Cir. 1996); *New Life*
24 *Homecare, Inc. v. Blue Cross of Ne. Pennsylvania*, No. 3:06-cv-2485, 2008 WL 534472, at *2
25 (M.D. Pa. Feb. 20, 2008) (citing *United States v. Int'l Bhd. of Teamsters*, 948 F.2d 1338, 1345
26 (2d Cir. 1991)). Petitioner does not believe that Respondent's Section 1927 assertion should be
considered a claim made against the NLRB attorneys concerned in their personal capacities. But
assuming *arguendo* that it does, then the NLRB attorneys are not waiving any defense that they
are entitled to absolute immunity under *Butz v. Economou*, 438 U.S. 478, 515 (1978), or qualified
immunity under *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and *Hunter v. Bryant*, 502 U.S.
224, 229 (1991) (per curiam). Notably, all the conduct complained of in Respondent's Motion
was performed by Petitioner and his counsel in their official capacities, within the scope of their
authority as representatives of the NLRB, consistent with Agency guidelines and practices, and
with the approval of their superiors.

1 discovery Petitioner argued for expedited discovery to not prolong or delay litigation. In
2 addition, despite the existence of discovery disputes between the parties, Petitioner did
3 not seek the Court's intervention to resolve those disputes—again, to prevent additional
4 expenses and delays in the proceedings. In sum, Petitioner did not multiply the
5 proceedings in this case, and even if the Court determines that Petitioner did multiply
6 the proceedings, Respondent has failed to demonstrate that Petitioner did so
7 unreasonably and vexatiously.

8
9 Respondent's Motion fails to meet the exacting standards above and should also
10 be considered in light of the presumption of regularity for government actions. *United*
11 *States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926) (“The presumption of regularity
12 supports the official acts of public officers and, in the absence of clear evidence to the
13 contrary, courts presume that they have properly discharged their official duties.”). As
14 shown above, none of the Petitioner's alleged conduct comes close to what is required
15 under controlling case law. Besides Respondent's general contention that Petitioner
16 should have withdrawn its Petition, Respondent fails to clearly identify the conduct it
17 claims to be sanctionable in this case—instead, it makes scattered attacks on the merits
18 of the Petition. Respondent's requests for sanctions under Section 1927 fails on its
19 merits.
20

21
22 **C. Attorneys' Fees Pursuant to the Court's Inherent Authority are Not
23 Appropriate**

24 The Court also has inherent power to issue sanctions in response to bad faith, as
25 discussed in *Barber v. Miller*, 146 F.3d 707 (9th Cir. 1998); *see also Fink v. Gomez*, 239
26 F.3d 989, 991 (9th Cir. 2001). However, a court's inherent power must be utilized with

1 caution and restraint, although it can be used when counsel's actions are in "bad faith"
2 or are "tantamount to bad faith." *See United States v. Rico*, 619 F. App'x 595, 601 (9th
3 Cir. 2015). Indeed, the Ninth Circuit has overruled a district court's issuance of
4 sanctions under its inherent powers because there was no evidence that the party had
5 any improper purpose, and therefore, there was no support for the conclusion that the
6 party acted in "bad faith." *United States v. Corinthian Colleges*, 652 F. App'x 503, 506
7 (9th Cir. 2016) (citing *Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233, 1244
8 (9th Cir. 2016)). Here, besides Respondent's bald assertions, there is no evidence that
9 Petitioner acted in "bad faith" or in any other manner than attempting to effectuate its
10 statutory mandate to enforce federal labor law and protect employee rights under the
11 NLRA.
12

13
14 Alternatively, to the extent that Respondent intends to invoke a court's "inherent
15 authority" to sanction bad-faith litigation conduct, such a claim fails on its merits for the
16 reasons shown above, but also because it is precluded by sovereign immunity. *United*
17 *States v. Droganes*, 728 F.3d 580, 590 (6th Cir. 2013) ("sovereign immunity wins when
18 it comes head-to-head with a lower court's inherent authority"); *see also Alexander v.*
19 *FBI*, 541 F. Supp. 2d 274, 299-300 (D.D.C. 2008) ("When it comes to monetary
20 sanctions against the government, the doctrine of sovereign immunity prevails over
21 inherent judicial power.") (cleaned up).
22

23 **D. Respondent's Requested Attorneys' Fees are Unreasonable**
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1 District Court of Arizona LRCiv 54.2(c)(3) – Reasonableness of Request Award

2 discusses the various factors bearing on the reasonableness of the requested attorneys'

3 fee award, including, but not limited to, the following:

4 (A) The time and labor required of counsel;

5 (B) The novelty and difficulty of the questions presented;

6 (C) The skill requisite to perform the legal service properly;

7 (D) The preclusion of other employment by counsel because of the acceptance of
8 the action;

9 (E) The customary fee charged in matters of the type involved;

10 (F) Whether the fee contracted between the attorney and the client is fixed or
11 contingent;

12 (G) Any time limitations imposed by the client or the circumstances;

13 (H) The amount of money, or the value of the rights, involved;

14 (I) The experience, reputation and ability of counsel;

15 (J) The "undesirability" of the case;

16 (K) The nature and length of the professional relationship between the attorney
17 and the client;

18 (L) Awards in similar actions; and

19 (M) Any other matters deemed appropriate under the circumstances.

20 Respondent's Motion does not discuss the various factors above, including the
21 novelty and difficulty of the questions presented (allegations analyzed under the
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1 Board's *Wright Line*⁴ test); the customer fee charged in matters of the type involved
2 (e.g., examples of past fee arrangements for similar cases); whether the fee arrangement
3 was fixed or contingent; the amount of money or the value of rights involved; the
4 "undesirability" of the case (especially in light of the high-profile nature of the
5 litigation); and the length of the professional relationship between counsel and the
6 client. Respondent's lack of information provided supports a finding that its attorneys'
7 fees request is unreasonable.

8
9 In addition, LRCiv 54(d)(1) states "No motion for award of attorneys' fees will
10 be considered unless a separate statement of the moving counsel is attached to the
11 supporting memorandum certifying that, after personal consultation and good faith
12 efforts to do so, the parties have been unable to satisfactorily resolve all disputed issues
13 relating to attorneys' fees or that the moving counsel has made a good faith effort . . ."
14 Here, Respondent did not make a good faith attempt at consultation besides making a
15 late afternoon call to Petitioner's counsel the *same day* its Motion was filed, and leaving
16 no indication in its a voicemail message that Respondent was attempting to discuss
17 attorneys' fees or the filing of the Motion itself. This can hardly be characterized as a
18 good faith effort to resolve disputed issues.
19

20 The Equal Access to Justice Act (EAJA) caps the rate for recoverable attorneys'
21 fees at \$125 per hour, subject to exceptions due to cost of living increases or the
22 presence of "a special factor, such as the limited availability of qualified attorneys for
23 the proceedings involved." In *Pierce v. Underwood*, 487 U.S. 552 (1988), the Supreme
24

25 _____
26 ⁴ 251 NLRB 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989
(1982).

1 Court interpreted the “special factor” language narrowly. There is no showing of a
2 “special factor” in this case, as Respondent’s law firm had local counsel, experienced in
3 traditional labor law and employment law. Indeed, “Producing high-quality work on a
4 short deadline hardly satisfies th[e] standard” in *Pierce* of “work requiring specialized
5 skills or knowledge beyond what lawyers use on a regular basis.” *Nat. Res. Def.*
6 *Council, Inc. v. Winter*, 543 F.3d 1152, 1160 (9th Cir. 2008) (citing *Role Models Am.,*
7 *Inc. v. Brownlee*, 353 F.3d 962, 969 (D.C.Cir.2004).

9 **III. CONCLUSION**

10 In sum, Respondent’s Motion lacks the factual and legal support sufficient to
11 sustain sanctions against Petitioner under Section 2412(b), Section 1927, or the Court’s
12 inherent authority. The Motion should therefore be denied in its entirety.

13 Dated at Phoenix, Arizona, this 25th day of July 2022.

14
15 /s/ Fernando Anzaldúa

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UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA

Cornele A. Overstreet, Regional Director of the
 Twenty-Eighth Region of the National Labor
 Relations Board, for and on behalf of the
 National Labor Relations Board,

Petitioner,

v.

Starbucks Corporation,

Respondent.

Case No. 2:22-cv-00676-JJT

**RESPONDENT'S MOTION FOR
 FEES PURSUANT TO 28 USC §
 2412(b), 28 USC § 1927, LOCAL
 RULE 54.2, AND THE COURT'S
 INHERENT AUTHORITY, AND
 SUPPORTING MEMORANDUM**

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4 28 U.S.C.
5 § 1927 1, 5, 6, 7
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11 [https://www.nlr.gov/news-outreach/news-story/nlr-files-in-federal-court-](https://www.nlr.gov/news-outreach/news-story/nlr-files-in-federal-court-seeking-immediate-reinstatement-for-three)
12 [seeking-immediate-reinstatement-for-three](https://www.nlr.gov/news-outreach/news-story/nlr-files-in-federal-court-seeking-immediate-reinstatement-for-three) 1

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1 Pursuant to 28 U.S.C. § 2412(b), 28 U.S.C. § 1927, “LRCiv54.2, and the Court’s
 2 inherent authority, Starbucks Corporation (“Respondent”) hereby respectfully moves the
 3 Court for an award against Petitioner of the reasonable attorneys’ fees Respondent incurred
 4 in defending this action from the date that Petitioner had knowledge of the facts establishing
 5 that his claims were baseless and that continuing to pursue them would be in bad faith. The
 6 grounds for this Motion are set forth in the Memorandum of Points and Authorities that
 7 follows.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. FACTUAL BACKGROUND**

10 This Motion would not be necessary but for Petitioner’s continued pursuit of his
 11 Petition for Temporary Injunction Under Section 10(j) of the National Labor Relations Act
 12 (“NLRA”), as Amended [29 U.S.C. § 160(j)] (“Petition”) against Starbucks after discovery
 13 exposed his case for what it really was – a sham that was entirely reliant upon
 14 misrepresentations and willfully erroneous affidavits provided by (former) Shift Supervisor
 15 Laila Dalton, barista Tyler Gillette (they/them), and (former) barista Alyssa Sanchez
 16 (collectively the “alleged discriminatees”). That was less than a month after Petitioner, upon
 17 the filing of his Petition, issued a press release in which he boldly asserted that the Petition
 18 explained:

19 [A]fter learning its employees were engaging in protected
 20 activity, the Employer swiftly retaliated against three of the four
 21 members of the union organizing committee. Among other
 22 things, Starbucks disciplined, suspended, and discharged one
 employee, constructively discharged another, and placed a third
 on an unpaid leave of absence after revoking recently granted
 accommodations.

23 Petitioner was proven wrong for saying that and even more so for scurrilously adding,
 24 “Immediate injunctive relief is necessary to ensure that the Employer does not profit
 25 nationwide from its illegal conduct...” [https://www.nlr.gov/news-outreach/news-](https://www.nlr.gov/news-outreach/news-story/nlr-files-in-federal-court-seeking-immediate-reinstatement-for-three)
 26 [story/nlr-files-in-federal-court-seeking-immediate-reinstatement-for-three](https://www.nlr.gov/news-outreach/news-story/nlr-files-in-federal-court-seeking-immediate-reinstatement-for-three).

27 The Court is familiar with the facts of the case, which need not be recited in great
 28 detail here. In summary, Petitioner alleged that Starbucks unlawfully surveilled employees

1 engaged in Section 7 protected activity, and retaliated and discriminated against Dalton (by
2 issuing her corrective actions and terminating her employment), Gillette (by rescinding a
3 previously granted medical accommodation and involuntarily placing them on an indefinite
4 leave of absence), and Sanchez (by denying previously granted scheduling accommodations
5 to constructively discharge her).

6 To say that Petitioner watched his case unravel during discovery risks understating
7 what actually happened. Indeed, Petitioner was present during the depositions of Gillette
8 and Sanchez on May 19 and May 20 when they provided sworn testimony utterly
9 contradicting and effectively recanting affidavits they gave to one of Petitioner's attorneys
10 at Region 28 of the National Labor Relations Board (the "NLRB" or "Board"). Petitioner
11 was also present when Dalton provided sworn deposition testimony on May 19 that was
12 proven false by store security video (provided to Petitioner earlier that week) showing that
13 on March 23 and March 26 she surreptitiously recorded manager conversations of which
14 she was not a part and for which she was not present, in violation of Starbucks' policy and
15 likely Arizona state law. Discovery was so damaging to Petitioner's case that Starbucks
16 fully expected that Petitioner would withdraw his Petition without hesitation out of concern
17 that continuing to proceed would be unethical.

18 When Petitioner did not withdraw his Petition, Starbucks presented Petitioner with
19 a Rule 11 Notice dated May 21, 2022 detailing the proof demonstrating that his claims were
20 groundless (See **Exhibit A**). Undeterred by the evidence in front of him, Petitioner
21 effectively closed his eyes, covered his ears, and pretended that he was not present for
22 discovery and did not review any of the evidence Starbucks produced. Starbucks was
23 literally shocked when it received a short four paragraph reply from Petitioner's office dated
24 May 25, 2022, in which he stubbornly maintained his position, no longer supportable by
25 the evidence, that he had a likelihood of success on the merits, and then brazenly glossed
26 over the ethical concerns Starbucks raised by asserting that Rule 11 was inapplicable since
27 the matter would be concluded before the expiration of the requisite 21-day notice period
28 (**Exhibit B**).

1 The surprises did not end there. Starbucks was again shocked when Petitioner
2 doubled down on his unsupportable position by filing on May 27, 2022, the same
3 discredited declarations and memorandum of points and authorities that he had filed on
4 April 22, 2022. Just under two weeks later, Starbucks watched in disbelief on June 8 as
5 Petitioner went for broke by making the same assertions in his closing argument to the
6 Court, even though the Court had just finished reviewing security video and other evidence
7 proving the assertions to be false. And to top things off, Petitioner concluded his case
8 without offering a single solitary piece of evidence supporting his surveillance claim. It was
9 as if he forgot it was part of the Petition.

10 Not surprisingly, Petitioner did not prevail on a single one of his claims in the
11 Petition. By judgment entered on June 9, the court dismissed the Petition in its entirety.
12 More notable than the complete dismissal of the Petition are grounds upon which it was
13 dismissed. It was not just that the court applied the *Wright Line* analysis and held that
14 Petitioner failed to establish a prima facie case with respect to all but one of the allegations
15 involving the alleged discriminatees, and that, in any event, Starbucks had successfully
16 demonstrated that it would have taken the same action in the absence of any Section 7
17 activity. The court also held that Gillette's affidavit and deposition testimony were
18 inconsistent, and that, contrary to the allegations in their affidavit, Gillette admitted that
19 they did not request the medical accommodation at issue, and furthermore requested (as
20 opposed to being involuntarily placed on) a voluntary leave of absence. As for Sanchez, the
21 Court likewise held that her affidavit and deposition testimony were entirely inconsistent,
22 and that, contrary to the allegation in her affidavit that she was discharged, Sanchez
23 admitted that she voluntarily resigned to attend flight school and never actually made three
24 of the four scheduling accommodation requests at issue. With regard to Dalton, the Court
25 held that she was lawfully discharged for violating Starbucks' no recording policy and
26 perhaps state law by surreptitiously recording the conversations of two managers, one on
27 March 23 and the other on March 26, of which she was not a part, and further rejected her
28 claim, utterly discredited by irrefutable video evidence, that she was present during all of
the recordings.

1 We would not be here if Petitioner had, following the depositions of Gillette,
 2 Sanchez, and Dalton on May 19 and May 20, acknowledged that a mistake was made by
 3 filing a Petition based on erroneous affidavits and without giving Starbucks an opportunity
 4 to respond. As the court in *Gate Guard Svcs., LP v. Perez*, 792 F.3d 554, 555 (5th Cir. 2015)
 5 held when it granted respondent’s motion for sanctions under 28 U.S.C. 2412(b), “[i]t is
 6 often better to acknowledge an obvious mistake than defend it.” Instead of acknowledging
 7 their mistake, Regional Director Cornele Overstreet and counsel Fernando Anzaldua made
 8 the unconscionable decision to proceed with the Petition undeterred by the truth or their
 9 ethical obligations as officers of this Court. Their bad faith and recklessness forced
 10 Starbucks to invest in attorneys’ fees to defend itself against a frivolous lawsuit that, while
 11 unwarranted in the first place, never should have proceeded beyond May 20, 2022, when it
 12 was revealed for what it really was – a sham derived from a false narrative that was the
 13 product of Petitioner’s eagerness to accept at face value fictional stories of alleged unlawful
 14 conduct by Starbucks. In light of their failure to withdraw obviously meritless claims, the
 15 outcome of which was that Starbucks prevailed on every allegation, and the need to preserve
 16 public trust in the National Labor Relations Board as an impartial agency responsible for
 17 even-handed administration and enforcement of the NLRA, Starbucks should recover
 attorneys’ fees reasonably related to defending this matter.

18 II. ARGUMENT

19 A. The Court has the Authority to Award Attorneys’ Fees in this Matter 20 Subject to a Showing of Bad Faith, Frivolousness, or Recklessness

21 The Court has at least three avenues available for awarding sanctions and/or
 22 attorneys’ fees in this matter. The first is 28 U.S.C. § 2412(b), which provides that the
 23 “United States shall be liable for such fees and expenses to the same extent that any other
 24 party would be liable under the common law. . . .” Section 2412(b) is the bad-faith exception
 25 to the American rule under which courts may award attorney’s fees when a party has “acted
 26 in bad faith, vexatiously, wantonly, or for oppressive reasons.” *F.D. Rich Co. v. United*
 27 *States*, 417 U.S. 116, 129-30 (1974). This “explicit incorporation of the common law in its
 28 attorney’s fees provision” provides a “clear indication” that the court must “hold the

1 government to the same standard of good faith” demanded of all non-governmental parties.”
 2 *Rodriguez v. United States*, 542 F.3d 704, 709 (9th Cir. 2008).

3 Under the common law, “a finding of bad faith is warranted where an attorney
 4 knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the
 5 purpose of harassing an opponent.” *Id.* See also *Primus Auto. Fin. Servs. Inc., v. Batarse*,
 6 115 F.3d 644, 649 (9th Cir. 1997). The government’s case is frivolous when, such as here,
 7 it “is groundless with little prospect of success” and “foreclosed by binding precedent or so
 8 obviously wrong as to be frivolous.” *Id.* at 710 (citing *United States v. Manchester Farming*
 9 *P’ship*, 315 F.3d 1176, 1183 (9th Cir. 2003). See also, *Rodriguez*, 542 F.3d at 709
 10 (government’s position was “so lacking in support that it constituted bad faith”).¹

11 28 U.S.C. § 1927 provides another mechanism for recovering attorney’s fees. The
 12 statute imposes personal liability for costs, expenses, and attorney’s fees reasonably
 13 incurred because an attorney “multiplies the proceedings in any case unreasonably and
 14 vexatiously.” See, *Myers v. Freescale Semiconductor*, No. 20-16592, 2022 US App. LEXIS
 15 2386 (9th Cir. 2022)(unpublished) and *Stiegel v. Health*, No. 20-15485, 2021 US App.
 16 LEXIS 34070 (9th Cir. 2021)(unpublished) (cited only to demonstrate that courts of this
 17 circuit have exercised their authority to issue attorney’s fees under § 1927). An award
 18 issued under § 1927 requires a showing of recklessness. See *Fink v. Gomez*, 239 F.3d 989,
 19 993 (9th Cir. 2001) (recklessness suffices for sanctions under § 1927).

20 Additionally, separate and apart from these mechanisms, the Court also has inherent
 21 power to issue sanctions in response to bad faith, as discussed in *Barber v. Miller*, 146 F.3d
 22 707 (9th Cir. 1998). In *Barber*, the court reversed a sanctions award under Fed. R. Civ. P.
 23 11 for failing to follow the 21-day procedural requirement but reviewed the propriety of an
 24 award under § 1927 and the court’s inherent power. The *Barber* court affirmed that such an
 25 award requires a finding of bad-faith. *Id.* at 711. See also, *Fink v. Gomez*, 239 F.3d at 993.

26 ¹ Notably, § 2412(b) is not subject to the net worth limitations imposed by § 2412(d). See
 27 *e.g., Protect Lake Pleasant, LLC v. Connor*, 2011 U.S. Dist. LEXIS 2359 n. 5 (D. Ariz.
 28 2011)(discussing differences between § 2412(b) and § 2412(d)); *Lier Siegler, Inc. v.*
Energy Products Division v. Lehman, 893 F.2d 205, 207 (9th Cir. 1989)(net worth
 requirements under § 2412(d) not applicable to § 2412(b)). See also, *Tri-State Hosp. Supply*
Corp. v. United States, 341 F.3d 571, 580 (DC Cir., 2003)(§ 2412(b) not subject to the
 threshold eligibility requirements provided in § 2412(d)).

1 994 (sanctions available under inherent power for bad faith or conduct tantamount to bad
2 faith).

3 Furthermore, Starbucks brings to the Court's attention *Overstreet v. Farm Fresh Co.*
4 *Target One*, CV-13-02358-PHX-NVW, 2014 U.S. Dist. LEXIS 123346 (D. Ariz. 2014),
5 which involved a petition for Section 10(j) relief and a demand that a number of discharged
6 employees be reinstated and exempted from state and federal E-Verify requirements. *Id.* at
7 9. The court rejected the reinstatement demand because it was unlawful and hence unjust.
8 *Id.* at 9. Following the dismissal, Farm Fresh filed for fees under 28 U.S.C. §§ 2412(b),
9 2412(d) and 1927. In his reply, the Regional Director Overstreet attempted an
10 unceremonious about face by arguing that he "never demanded that the Company refrain
11 from E-Verifying" the individuals once they had been reinstated. *Id.* at 11. Awarding fees
12 under Section 2412(d), the court described the Regional Director's argument as "revisionist
13 history" that contradicted the record and the Regional Director's closing arguments, in
14 which he declined an opportunity to retract his position on the E-Verify requirement for
15 reinstatement.

16 All of this is to say that (1) the Court has the authority to award fees in this matter
17 subject to a finding of bad faith, frivolousness, or recklessness; and (2) this is not the first
18 instance that an aggrieved employer has come to this Court seeking sanctions and fees from
19 Petitioner for abusing the Court's processes.

20 **B. Starbucks is the Prevailing Party in this Matter**

21 There is no question that Starbucks is the prevailing party in this matter. "A party
22 is a prevailing party if it succeeds on any significant issue in litigation which achieves some
23 of the benefit the parties sought in bringing the suit." *See, U.S. v. Real Property Known as*
24 *22249 Dolorosa Street*, 190 F.3d 977, 981 (9th Cir. 1999). A defendant may obtain fees
25 against a government entity "where the defendant defeats an attempt to materially alter the
26 legal relationship and the defeat is substantial." *Overstreet v. Farm Fresh Co. Target One*,
27 2014 U.S. Dist. LEXIS 123346 * 9 (D. Ariz. 2014). Here, Petitioner sought extraordinary
28 remedies, including reinstatement of the alleged discriminatees, and access to Starbucks'
stores for notice readings and other purposes, actions that clearly attempted to alter a legal

1 relationship. Considering that the Court set aside and/or dismissed the Petition in its
2 entirety, it is safe to say that Petitioner's defeat was substantial.

3 **C. Beginning on May 21, 2022, and Until the Case's Conclusion, Petitioner**
4 **Acted Recklessly, Frivolously, And/or in Bad Faith by Willfully**
5 **Misstating Facts and Continuing to Pursue Allegations that He Knew**
6 **Were Meritless**

7 Petitioner continued to pursue his Petition after it became clear that Respondent had
8 not violated the law as alleged, and that certain allegations on which Petitioner relied were
9 predicated on misrepresentations. At that point, the irrefutable evidence belying
10 Petitioner's claim demonstrates that Petitioner and his counsel had to know that the Petition
11 had no basis in fact and that the claims Petitioner alleged were frivolous. Nonetheless,
12 Petitioner and his attorney continued to prosecute the Petition. This behavior is clearly
13 proscribed by both 28 U.S.C. § 2412(b) and 28 U.S.C. § 1927 and warrants sanctions.

14 Petitioner's first violation of his ethical obligations and his obligations to this Court
15 and Starbucks involved his claims that on about January 21, 2022, Starbucks District
16 Manager Megan Diller engaged in unlawful surveillance of employees engaged in union
17 and protected concerted activities and unlawfully created the impression among employees
18 that their union and protected concerted activities were under surveillance. (ECF No. 1 at
19 7). Petitioner and his counsel pursued the claim to the completion of this matter without
20 offering any evidence to support it - nothing. They offered no explanation for this omission.
21 The Court properly set this allegation aside.

22 Petitioner's second violation involved his continued pursuit of the claim that, by
23 allegedly denying her availability requests for work because of her union activities,
24 Starbucks unlawfully constructively discharged Sanchez on January 27, 2022. (ECF No. 1
25 at 9). At her deposition, Sanchez pulled the rug out from under Petitioner's claim when she
26 testified:

- 27 • She only made one availability request, which was on January 10, 2022, and Store
28 Manager Nichell Olson denied the request *before* the union organizing drive. (See

1 Exhibit 6, Deposition of Alyssa Sanchez (“Sanchez Depo.”) at 41:21 – 44:24, Exs.
2 7, 8.; 61:19 – 63:10, Ex. 13.).

- 3 • Prior to her resignation, she did not engage in any overt union activity or say anything
- 4 to management about any union activity, and she had *no evidence* management had
- 5 any knowledge of her union activity (Id. at 56:21 – 58:13, 61:12 – 17, Ex. 9).
- 6 • Statements that she made in her sworn NLRB affidavit (which formed the foundation
- 7 of the Petitioner’s case against Starbucks) were false, and that, contrary to what she
- 8 said in her affidavit, she never made availability requests on January 22 and 23, 2022.
- 9 (See Exhibit 6, Deposition of Alyssa Sanchez (“Sanchez Depo.”) 44: 25 – 48:17,
- 10 Exs. 8, 9, 10; 61:19 – 63:10, Ex. 13.), and the Company did not deny an availability
- 11 request she made on January 13, 2022, she cancelled the request (Id. at 43:22 – 48:17,
- 12 Exs. 8, 9, 10; 61:19 – 63:10, Ex. 13.).

13 Finally, Sanchez admitted she resigned her employment on January 27, 2022,
14 because of her own busy schedule and four days before the union committee went public
15 with its organizing effort on January 31, 2022. (Id. at 13:3 – 16:21; 27:7 – 33:1; 34:13 –
16 22; 50:3 – 51:16; 52:3 – 13; 55:1 – 56:20, Ex. 12; 58:18 – 59:10; 64:15 – 66:8, Ex. 15). She
17 acknowledged that she resigned because she had 54 hours of flight school each week and
18 another job. (Id. at 13:3 – 16:21; 27:7 – 33:1; 34:13 – 22; 50:3 – 51:16; 52:3 – 13; 55:1 –
19 56:20, Ex. 12; 58:18 – 59:10; 64:15 – 66:8, Ex. 15). To make matters worse, Sanchez
20 acknowledged that Olson wanted her to stay and work longer shifts than she was offering.
21 (Id. at 53:17-22). The Court dismissed the Sanchez claim in its entirety and, in fact,
22 described the claim in its order as a temporal impossibility.

23 Petitioner’s third violation involved his continued pursuit of the claim that Starbucks
24 terminated the employment of Dalton because of her union activities. (ECF No. 1 at 10).
25 Starbucks terminated Dalton on April 4, 2022. The reasons for the termination were that
26 she had surreptitiously recorded – bugged - conversations of store managers while they sat
27 at the manager’s desk in the “back of house” of the Starbucks Scottsdale and Mayo store.
28 She did this twice. The first incident occurred on March 23, and the second on March 26.

1 Her pretext for bugging the conversations was that she had been charging her cell phone
2 using a plug at the manager's desk. However, instead of merely charging her phone, Dalton
3 activated an app on her phone and placed the phone where it could not be detected. She
4 proceeded to remain in the store while the app recorded the managers' conversation, but
5 was not with the phone at the time. Once this was brought to her attention, Dalton displayed
6 an unusual, at least for a 19 year old, knowledge of Arizona criminal law, saying that she
7 knew that it was unlawful not to be "present" while recording someone's conversations and
8 that she was present the entire time that her phone was recording. Security video establishes
9 that Dalton was not present much, if not most, of the time that she was recording her
10 managers' conversations. Starbucks sought to provide this evidence to the Petitioner during
11 the administrative investigation. Rather than conducting a simple review of the video,
12 Petitioner simply authorized a complaint and sought the injunctive relief that is the subject
13 of this Petition. Even so, once in this proceeding, discovery offered Petitioner yet another
14 opportunity to review the video and reconsider his claims. Notwithstanding all the
15 available evidence, Petitioner and his counsel continued to ignore the basic facts before
16 them and continued to pursue this frivolous claim. The irrefutable security video not only
17 proves that Dalton violated Company policy, and arguably state and federal criminal law,
18 but also that she lied about it. (See Exhibit 4, Deposition of Laila Dalton ("Dalton Depo.")
19 7:6 – 14:20, Ex. 1.; 15:18 – 16:6; 18:11 – 31:8, Exs. 2, 3, and 4; 70:17 – 72:2; 72:12 – 76:3).

20 Petitioner's last violation involved his claims that on March 9, because of Gillette's
21 (pronouns they/their) union activities, Starbucks rescinded medical accommodations that it
22 had previously granted Gillette, and that it placed Gillette on an indefinite and unpaid leave
23 of absence the next day. Petitioner sought an order reinstating the accommodations
24 allegedly granted to Gillette and requiring Starbucks to resume scheduling Gillette for work.
25 Petitioner and his counsel have had the facts wrong on this claim from the time the Petition
26 was filed. Gillette's deposition testimony leaves no doubt about this.

27 First, Store Manager Olson and District Manager Diller did not deny Gillette's
28 request for an accommodation at their meeting on January 27, 2022, or at any other time.

1 Instead, they informed Gillette at a meeting on January 27 that Gillette would have to
2 contact Partner Relations to request an accommodation, and would need to support the
3 request with medical documentation. (See Exhibit 3, Deposition of Tyler Gillette. (“Gillette
4 Depo.”) 20:9 – 28:17).

5 Second, at Gillette’s request, Olson submitted an accommodation request on
6 Gillette’s behalf to Partner Relations on February 18 (Id. at 44:2 – 45:2, Ex. 4.) On February
7 25, Partner Relations informed Gillette that Gillette needed to submit support for the request
8 from a medical provider and that Starbucks did not grant provisional accommodations. (Id.
9 at 45:3 – 46:13, Ex. 4.).

10 Third, on March 9, Gillette asked to go on a leave of absence because Gillette
11 believed Gillette could not work without a provisional accommodation and was unwilling
12 to seek medical support for the accommodations sought. (Id. at 46:21 – 47:3; 66:23 – 67:22;
13 70:6 – 24, Ex. 4.; 72:7 – 74:20; 76:4 – 18, Ex. 2.).

14 Fourth, Gillette was on a mostly sick leave-paid leave of absence from March 11 to
15 April 2, and returned to work on a part-time, open shift basis on April 3. Gillette resumed
16 a regular schedule on April 18 and has been working a regular schedule since that time. (Id.
17 at 76:8 – 78:12; 81:1 – 82:9, Ex. 2.; 88:15 – 89:5).

18 Finally, Partner Relations and store management have worked with Gillette to offer
19 Gillette things that could be done outside the accommodation process to address the effects
20 of Gillette’s alleged medical condition on Gillette’s ability to meet Starbucks’ uniform
21 requirements. (Id. at 31:2 – 34:22, Ex. 2.; 53:3 – 60:7 ; 77:24 – 80:25; 82:10 – 83:1).

22 If anything, unrefuted evidence offered by Gillette confirms that Starbucks has gone
23 to an extreme to accommodate Gillette. Yet, Petitioner continued to pursue a claim that
24 those accommodations amount to an unfair labor practice, and one so severe that it warrants
25 injunctive relief from this Court. Contrary to Petitioner’s allegations, as admitted by
26 Gillette, Starbucks did not rescind any accommodations it previously granted to Gillette
27 because it never granted any accommodations to Gillette in the first place. Gillette was not
28 on an indefinite leave of absence and while on a leave of absence Gillette was paid by

1 Starbucks. Perhaps most telling with respect to the frivolity of Petitioner's and Petitioner
2 counsel's claim for injunctive relief, *Gillette was back at work 19 days before the Petition*
3 *was filed*. Even so, knowing all these facts following Gillette's deposition, Petitioner and
4 his counsel chose to ignore them and insist that this Court order Starbucks to resume
5 scheduling Gillette.

6 **D. The Attorney's Fees Starbucks is Seeking Are Reasonable**

7 Under the Equal Access to Justice Act ("EAJA"), "[t]he most useful starting point
8 for determining the amount of a reasonable fee is the number of hours reasonably expended
9 on the litigation multiplied by a reasonable hourly rate." *Nadarajah v. Holder*, 569 F.3d
10 906, 910 (9th Cir. 2009) (citing *Hensely v. Eckerhart*, 461 U.S. 424 (1983)). The Task-
11 Based Itemized Statement of Fees (Statement of Fees) attached as Exhibit C sets forth a
12 description of each legal service provided, the date on which the work was performed, the
13 name of the attorney or paralegal who provided the service, the specific time expended, and
14 the amount of fees charged for the service.

15 The amount of time committed to successfully defending this Petition was
16 reasonable considering the complexity, high-profile nature, and potential consequences for
17 being unsuccessful on any element. To fight Petitioner's frivolous Petition, Starbucks was
18 forced to sufficiently address 16 individual allegations against Starbucks, not including
19 subitems, and address four prayers for extraordinary relief, not including subitems.
20 Starbucks was also forced to analyze and respond to Petitioner's nearly 46 page
21 memorandum of points and authorities and more than 180 pages of attached exhibits filed
22 even after Petitioner knew full well that the claims asserted therein were frivolous.
23 Starbucks also had to prepare to present extensive exhibits and video exhibits, including
24 video exhibits that Petitioner was provided but simply chose to ignore. Furthermore,
25 Starbucks was required to prepare this fee application and associated documents.

26 The hourly rates Starbucks is seeking to recover are reasonable and customary for a
27 case of this kind in the Phoenix market. Indeed, Starbucks is seeking to recover fees at the
28 hourly rates detailed in its supporting affidavit. (Affidavit of Jeff Jones).

1 I hereby certify that the original of the foregoing
2 was electronically filed using CM/ECF and a copy
3 of the same was emailed to the following if
non- registrants, this 11th day of July 2022.

4 Fernando Jose Anzaldua
5 National Labor Relations Board - Phoenix, AZ
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7 Email: fernando.anzaldua@nrlrb.gov

8 /s/ David A. Kadela
9 David Kadela

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Cornele A. Overstreet, Regional Director of the
Twenty-Eighth Region of the National Labor
Relations Board, for and on behalf of the
National Labor Relations Board,

Petitioner,

v.

Starbucks Corporation,

Respondent.

Case No. 2:22-cv-00676-JJT

**RESPONDENT'S REPLY
MEMORANDUM IN SUPPORT
OF ITS MOTION FOR FEES**

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1 **I. INTRODUCTION**

2 In his Opposition to Respondent's Motion for Fees (ECF No. 54), Petitioner does
 3 not offer any viable fact-based or legally-sound arguments that overcome the showing made
 4 by Respondent (also referred to as "Starbucks" or the "Company") that it has met the
 5 standard for awarding the Company attorneys' fees under 28 U.S.C. § 2412(b), 28 U.S.C.
 6 § 1927, LRCiv54.2, and the Court's inherent authority. Much of what Petitioner says in his
 7 Opposition does not reach a level warranting a response. In this Reply Memorandum,
 8 Starbucks addresses the principal flaws in his contentions, unmasking them as a failed
 9 attempt to save him from an award of fees for knowingly pressing baseless claims in this
 10 case in bad faith.

11 **II. ARGUMENT**

12 **A. Laila Dalton**

13 **1. The January 25, 2022, Written Warning**

14 Petitioner argues that although the Company initiated the process resulting in the
 15 written warning issued to Dalton on January 25 on January 18, before it had knowledge of
 16 the union organizing drive, "the fact that the discipline that issued relied on numerous stale
 17 incidents and conduct . . . makes it seem possible that Respondent trumped up additional
 18 grounds for the discipline after learning of Dalton's union activity." He goes on to
 19 manufacture that the "fact that after January 23 Respondent began closely monitoring
 20 Dalton . . . makes that possibility . . . a strong one." (ECF No. 54, at 4). Petitioner could not
 21 have reasonably drawn such an inference. And he did not advance an argument that the
 22 Court could or should draw the inference. Petitioner's argument is predicated upon made-
 23 up and meritless conjecture and speculation. Beyond that, it is belied by the conveniently
 24 overlooked declarations of Store Manager Olson and District Manager Diller. In her
 25 declaration, Olson stated that on January 18 she spoke to Alyona Colyar in Partner
 26 Relations, to whom she provided background information on incidents involving Dalton.
 27 She indicated that she did not know how much information to include or what level of
 28

1 corrective action to issue (ECF No. 29-1, Ex. No. 101, Olson Decl. ¶ 13). Both Olson and
 2 Diller explained that they had a conference call with Colyar on January 24, which was
 3 originally scheduled for January 19, during which Colyar recommended that the written
 4 warning include prior incidents to demonstrate to Dalton a pattern of work-related concerns.
 5 And that is what Olson did. (ECF No. 29-1, Ex. No. 100, Diller Decl. ¶ 23; ECF No. 29-1;
 6 Ex. No. 101, Olson Decl. ¶ 15). Apart from this uncontestable evidence, the fact that no
 7 evidence exists that during the organizing drive Starbucks issued any formal discipline to
 8 organizing drive-initiator Whitmire, any other members of the union organizing committee,
 9 including Gillette and Sanchez, or any other employees who supported the union lays waste
 10 to Petitioner's argument as one that he could not have in good faith advanced in this case.

11 **2. Dalton's Termination**

12 Tripling down on a losing hand, Petitioner still incredibly maintains that Dalton's
 13 surreptitious recording of private conversations in the back of house by Olson on March 23,
 14 and Support Store Manager Van Boeckel on March 26 was "protected activity" under the
 15 NLRA. He cannot even admit that Dalton lied when she stated in her affidavit (as well as
 16 at the investigatory interview on April 2 with Diller and District Manager Leister) that she
 17 was in the back of house the entire time that her phone was recording at the manager's desk
 18 on March 23. (Pet. Ex. 30, p.164, ECF No. 27-2). Instead, he says that security video
 19 showing Dalton walk in and out of the back of house is only "arguably inconsistent with
 20 Dalton's affidavit testimony that she only recorded during times when she was present."
 21 (ECF No. 54, at 5). The inconsistency is far more than arguable; it is patent. And Petitioner's
 22 characterization of it overlooks Dalton's admissions at the hearing that she was not
 23 "present" for much of the time that she secretly recorded both Olson and Van Boeckel.
 24 (June 8, 2022, Hearing Tr., at 64-94).

25 Dalton's admitted knowledge that "it's illegal, it's really illegal," under Arizona law
 26 to secretly record someone's conversations without being present for the conversations gave
 27 her a powerful reason to lie that she was present in the back of house and within earshot of
 28

1 did not have a reasonable expectation of privacy while being recorded rings hollow upon
 2 consideration of their statements in their declarations that their conversations were
 3 confidential in nature and that no one else was present or in earshot while they were talking,
 4 (ECF No. 29-1, Ex. 101, Olson Decl. ¶ 36; ECF No. 29-1, Ex. 102, Van Boeckel Decl. ¶¶
 5 9-10 (Thumbdrive 1)). The portions of the security video showing them alone in the back
 6 of house much of the time proves what they said to be true. *See id.*

7 **B. Tyler Gillette**

8 Petitioner attempts to counter Starbucks' showing that he maintained the claims he
 9 asserted on behalf Gillette in bad faith by arguing that, when Gillette left the meeting with
 10 Diller and Olson on January 27, 2022, at which Gillette mentioned they were having some
 11 autism-related issues, Gillette believed that they would be permitted to work going forward
 12 without "wearing an apron or headset during parts of their shift, using a single AirPods for
 13 noise cancellation, and taking an (sic) 10-minute extra break." (ECF No. 54, at 7). The
 14 evidence proves that what Petitioner contends Gillette believed, in fact, were subjects
 15 Gillette did not and had no reason to believe. While the declarations of Diller and Olson
 16 prove that, so too does Gillette's deposition testimony.

17 While Starbucks could cite more, the following portions of Gillette's deposition
 18 testimony demonstrate that Gillette knew that Diller and Olson did not have authority to
 19 and did not grant them any interim accommodations like those Petitioner describes: (1)
 20 Gillette was told at the meeting on January 27 that the apron was part of the required
 21 uniform; (2) Gillette was told at the meeting that they needed to reach out to Partner
 22 Relations to make an accommodation request; (3) Gillette understood following the meeting
 23 that neither Diller nor Olson could grant an accommodation; (4) Gillette knew as well that
 24 before an accommodation was granted that they would have to follow all Company policies;
 25 (5) Diller and Olson promised to help Gillette get an accommodation; (6) Diller and Olson
 26 also stated at the meeting that they needed to figure out how they could help Gillette, which
 27 Gillette understood to mean figure out what they could do in the store, within the rules, to
 28 "kind of tide me over, get me through until I could – I heard back from Partner Resources";

1 (7) after Olson initiated an accommodation request on Gillette's behalf on February 18,
 2 Gillette received an email that day from Partner Relations informing them that the Company
 3 did not grant accommodations on a provisional basis, which Gillette understood meant that
 4 they would have to follow all Starbucks policies until the accommodation requests were
 5 approved; (8) on February 28, Gillette recorded a meeting they had with Olson during which
 6 Olson told Gillette that they were out of uniform and had discussed that issue in the past,
 7 and offered to provide additional support and assistance with Gillette's accommodation
 8 request. (Gillette Dep. Tr. 26-28, 44-45, 56-57, ECF No. 35-5). In short, if Gillette ever
 9 worked with any of the "interim modifications" to which Petitioner refers in its Opposition,
 10 it was not with the knowledge or approval of Diller, Olson or anyone else in management.

11 To justify pursuing the baseless claims alleged on behalf of Gillette, Petitioner points
 12 to "Respondent's general animus, plus about-face on the work modifications, contending
 13 that they arguably establish unlawful motivation and a possibility that the ALJ may find a
 14 violation." (ECF No. 54, at 7). That is nonsense. Although evidence of general animus is
 15 not enough for the General Counsel to make out a violation, it plainly does not exist with
 16 respect to Gillette. As Gillette testified at the hearing, they were promoted to Barista Trainer
 17 after their support for the union, as a member of the organizing committee, became known.
 18 That coupled with the support and assistance Diller and Olson provided Gillette in seeking
 19 an accommodation, in having Gillette placed on a leave of absence that Gillette requested,
 20 and in approving Gillette's return to work from the leave of absence demonstrate the
 21 Company harbored no animus whatever against Gillette. And as already demonstrated,
 22 Diller and Olson never approved any alleged interim work accommodations.

23 **C. Alyssa Sanchez**

24 Most surprising of all is that Petitioner attempts at all to justify pursuing a constructive
 25 discharge claim on behalf of Alyssa Sanchez. The only cognizable argument Petitioner
 26 makes is that at the administrative hearing Sanchez might recant her deposition testimony
 27 that she did not make the two availability requests that she said in her Board affidavit she
 28

1 made after the Company learned of the union organizing effort, one on January 22, and one
 2 on January 23. Instead, Petitioner speculates that Sanchez could testify that she only “meant
 3 to confirm that she saw that Respondent’s documents did not reflect her later requests.”
 4 (ECF No. 54, at 8).¹ Being in possession of the transcript of Sanchez’s deposition, Petitioner
 5 should know better than to suggest that Sanchez has any escape from what she said at her
 6 deposition. And given what she said, recanting the testimony at an ALJ hearing could well
 7 be considered perjurious and asking her to do so subornation of perjury. Below is the
 8 pertinent testimony:

9 Page 45

10 21 Q. And do you have any record showing that you made

11 22 those requests on the 22nd or the 23rd?

12 23 A. No. I believe they would be in the system.

13 24 Q. You pointed to which exhibit?

14 25 A. The same system that all of these are in.

15 Page 46

16 1 Q. In Exhibit 8? Yes?

17 2 A. Yes.

18 3 Q. And you say in your affidavit that the store

19 4 manager rejected your January 22 and 23 requests?

20 5 A. Correct.

21 6 Q. Looking at the last exhibit, Exhibit 8, it shows

22 7 that you only made availability requests two times in

23 8 January, on the 10th and on the 13th. One was denied.

24 9 One was cancelled.

25 10 There are no third or fourth requests.

26 ¹ Petitioner also goes outside the record to submit that there is an ongoing investigation into
 27 whether “the denial of employees’ schedule change requests . . . resulted from a nationwide
 28 implementation of increased schedule availability requirements.” (ECF No. 54, at 8). While
 Petitioner does not explain what effect the investigation might have on the constructive
 discharge claim advanced on behalf of Sanchez, the investigation is not part of this case
 and, as such, has no relevance here.

1 11 Do you see any third or fourth requests there?
2 12 A. No.
3 13 Q. So I had Starbucks pull all of the approvals for
4 14 your final month of employment and for the month following
5 15 that.
6 16 I will mark those as Exhibit 10.
7 (Exhibit 10 was marked for identification.)
8 18 MR. HILLER: It's one.
9 19 BY MR. HILLER:
10 20 Q. And I want you to take a look through each page
11 21 of this. They're organized in chronological order
12 22 starting with December 27, 2021, to January 2, 2022.

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13 18 Q. So there is no evidence that you made any third
14 19 or fourth request to change your availability, is there?
15 20 A. No.
16 21 Q. So your affidavit testimony on those points is
17 22 wrong?

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18 4 A. No, it doesn't.
19 5 Q. It's not right? Your affidavit testimony is not
20 6 correct?
21 7 A. Correct.
22 8 Q. Okay. Did you ever make an attempt to correct
23 9 your affidavit testimony with the National Labor Relations
24 10 Board when -- after you signed the initial affidavit?
25 11 A. No. I had said that I couldn't remember exact
26 12 dates.
27 13 Q. You told the National Labor Relations Board that?
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14 A. Yes.

15 Q. Okay. And now that you see the exact dates, you

16 don't have any evidence to dispute them, do you?

17 A. Correct.

(ECF No. 35-8, Sanchez Dep. Tr., at 45-48).

While perhaps unnecessary to add, even if Sanchez could somehow evade the clarity of this unambiguous testimony at an administrative hearing, the General Counsel has no answer for the fact that no evidence exists that Olson, Diller or anyone else in management had knowledge that Sanchez was involved in organizing the store or in any way supported the union. Indeed, it remains a mystery to Respondent how Sanchez became involved in this case. The email she sent to Olson resigning her employment, which she wrote entirely on her own, leaves no doubt as to why she resigned and that her resignation was entirely voluntarily.

D. Petitioner Knowingly and Recklessly Raised Frivolous Arguments

Petitioner devotes much of his argument that an award of fees is not warranted under either 28 U.S.C. § 2412 (b) or 28 U.S.C. § 1927 on a contention that Starbucks has not demonstrated that he knowingly or recklessly raised frivolous arguments. His arguments are, in part conclusory, and in part extrajudicial. None overcome Starbucks' showing of the recklessness Petitioner displayed after the depositions of the alleged discriminatees concluded on May 20, 2022. As the Company said in the Rule 11 letter that it sent to Petitioner, the depositions established that he did not have a good faith basis for continuing to pursue any of the claims he alleged on behalf of the alleged discriminatees, i.e., that the claims were frivolous.

Petitioner's principal argument is based on what can be described as "process." He argues that prior to the Petition's being filed, he "conducted a thorough investigation of the allegations raised, looking into may issues before filing the Petition without the full cooperation of Respondent." (ECF No. 54, at 10). Expanding upon that, Petitioner adds that he conducted "a reasonable investigation into claims that Respondent violated the NLRA."

1 gathering supporting information from both the Union and Respondent, and then, after
 2 filing the Petition, obtained additional evidence during expedited discovery. *See id.* None
 3 of what Petitioner says is in the record in this case and, as such, may be dismissed on that
 4 basis. That said, suffice it to say, Starbucks has an entirely different perspective on the
 5 process that led to the filing of the Petition. As the Court may recall, at the discovery
 6 conference on May 5, 2022, Starbucks expressed that it sought to depose the Regional
 7 Director precisely to inquire about its contention that it was denied due process during the
 8 Region's investigation of the unfair labor practice cases underlying this case. Here is a short
 9 excerpt from a longer explanation provided at the conference by Counsel for Starbucks on
 10 the reasons for the Company's request:

11 I would start by pointing to the petition itself where the Regional Director
 12 alleges at I believe four points that respondent was given the opportunity to
 13 present evidence and legal argument and this goes to each of the charges that
 14 were filed. Our position is that we were not and there is a serious due process
 15 issue in this case that we don't raise lightly that goes to the issue of likelihood
 16 of success on the merits and the fairness of the process before the Board,
 17 some serious questions about the fairness of the process. And it's difficult
 18 to articulate it in short order because it involves so many different elements.
 19 But in short order, the Regional Director issued the complaint before we had
 20 an opportunity to present our position supporting evidence on the alleged
 21 constructive discharge of Alyssa Sanchez, on the termination of Laila Dalton,
 22 and the leave of absence of Tyler Gillette.

23 And our position is, we want to know why the Regional Director rushed to
 24 judgment in this particular case.

25 (Tr. May 5, 2022, at 9). If the Court deems it material to the disposition of this Motion
 26 whether the Regional Director conducted a fair and reasonable investigation of the charge
 27 allegations made by the Union in each unfair labor practice case or, as Starbucks contends,
 28 denied the Company due process, then Starbucks respectfully requests that the Court
 conduct a hearing on the issue and that, in advance of the hearing, it provide the Company
 an opportunity to depose the Regional Director or a designee with knowledge of the
 investigation in each case.

For now, Starbucks points the Court to the fact that in fiscal year 2021, the NLRB

1 had a goal of processing meritorious unfair labor practice cases from filing to issuance of
2 complaint within 90 days. *See* NLRB FY 2021 Performance and Accountability Report, at
3 37 ([https://www.nlr.gov/sites/default/files/attachments/pages/node-130/nrb-fy-2021-par-](https://www.nlr.gov/sites/default/files/attachments/pages/node-130/nrb-fy-2021-par-final_508.pdf)
4 [final_508.pdf](https://www.nlr.gov/sites/default/files/attachments/pages/node-130/nrb-fy-2021-par-final_508.pdf)). Here, in Case 28-CA-289622, complaint issued 48 days after the initial
5 charge was filed and only 20 days after the second amended charge was filed; in Case 28-
6 CA-291044, complaint issue 50 days after the initial charge was filed and only 9 days after
7 the amended charge was filed; and in Case 28-CA-293522, complaint issued 15 days after
8 the original charge was filed and only 3 days after the amended charge was filed. (ECF No.
9 27-1, at Exs. 1-10).

10 More important than the due process issue, however, is that Petitioner's argument
11 overlooks that it is Starbucks' position that he pursued the claims on behalf of the alleged
12 discriminatees in bad faith, knowing the claims had no factual basis and were, in a word,
13 frivolous, is predicated upon his failure after the last alleged discriminatee was deposed on
14 May 20, 2022, to withdraw the Petition. Nothing was left for Petitioner at that point to
15 attempt to salvage any of the claims. But instead of withdrawing the Petition, he resubmitted
16 on May 27, 2022, the same discredited affidavits of the alleged discriminatees that he
17 submitted on April 25, 2022, and used those affidavits and the same memorandum and
18 points of authorities that he submitted on April 25, 2022, in his closing argument at the
19 hearing. With the depositions of the alleged discriminatees completed and security video of
20 Dalton's recording of the managers in hand 20 days before the hearing, Petitioner at a
21 minimum had an obligation at least to revisit with the alleged discriminatees their claims to
22 determine if, notwithstanding what the evidence showed, he could in good faith pursue the
23 claims alleged on their behalf. His doing so would have brought an end to this litigation.
24 His failure to do so perfects the claim that he acted in bad faith.

25 III. CONCLUSION

26 For all of the foregoing reasons and the reasons set forth in its opening memorandum,
27 Starbucks respectfully requests that the Court issue an order granting its Motion for Fees
28

1 and awarding the Company its attorneys' fees and such other relief as the Court deems
2 appropriate.

3 Dated: August 1, 2022

Respectfully submitted,

4
5 /s/ David A. Kadela
6 R. Shawn Oller
7 LITTLER MENDELSON, P.C.
8 2425 E Camelback Rd., Suite 900
9 Phoenix, AZ 85016

10 David A. Kadela (*pro hac vice*)
11 LITTLER MENDELSON, P.C.
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17 111 East Kilbourn Avenue, Suite 1000
18 Milwaukee, WI 53202

19 Brittany Stepp (*pro hac vice*)
20 LITTLER MENDELSON, P.C.
21 1601 Cherry Street, Suite 1400
22 Philadelphia, PA 19102

23 Attorneys for Respondent,
24 Starbucks Corporation

25 I hereby certify that the original of the foregoing
26 was electronically filed using CM/ECF and a copy
27 of the same was emailed to the following if
28 non-registrants, this 1st day of August 2022.

Fernando Jose Anzaldua
National Labor Relations Board - Phoenix, AZ
2600 N Central Ave., Ste. 1400
Phoenix, AZ 85004
Email: fernando.anzaldua@nlrb.gov

29 /s/ David A. Kadela
30 David A. Kadela

Mrs. FOXX. Mr. Chairman, I want to thank the witnesses for participating in today's hearing. Ensuring workers can make a free and informed decision about unionization should be a priority on both sides of the aisle, but my Democrat colleagues sole objective seems to be to force union representation on workers and increase union membership, even though, as we have heard today, the majority of workers have little interest in joining a union.

Democrats and union activists claim there is a historic surge in union organizing, yet, private sector union membership is at an all-time low. Unions are quick to blame external factors for declining membership, but they need to look in the mirror. Most labor unions devote little resources on retaining and recruiting new members. Instead, big labor gives priority to funding left wing advocacy groups and lobbying Democrats to enact legislation that forces unions on unwilling workers.

While they currently have an ally in the White House who's willing to mobilize all Federal agencies in his crusade to force as many workers into unions as possible that will not always be the case. Democrats should work with Republicans to promote pro-growth and pro-opportunity policies that work for a 21st Century economy rather than the PRO Act, which is an assault on worker freedom and would devaState the economy.

Again, I would like to thank our witnesses for taking time to join us today and I yield back.

Chairman SCOTT. Thank you. I now recognize myself for the purpose of making my closing statement. I want to thank our witnesses for your time and testimony. Comments have been made about the pending rail strike. I just want to say that we all hope that the issues can be resolved before the deadline, especially, the paid sick leave issues. No one benefits with a strike, particularly, the workers involved themselves.

Joining a union, as I indicated in my opening statement, should be a right not a fight. Unfortunately, despite record popularity and high-profile victories workers are facing unprecedented anti-union campaigns. As our witnesses made clear, decades of GOP and corporate attacks have rendered the National Labor Relations Act toothless, allowing unscrupulous employers to intimidate and retaliate against their workers virtually without recourse. In response, House Democrats and five House Republicans passed the Protecting the Right to Organize or the PRO Act, which would address weaknesses in the NLRA and strengthen workers' rights.

Regrettably, the Senate has failed to act. While the House Labor Appropriations bill would increase the NLRB's appropriations by \$45-million and ameliorate almost a decade of flat funding, it is imperative that Congress actually enact this increase. We are serious about giving workers the tools that they need to succeed in the modern economy. The Senate must pass the PRO Act and fully fund the NLRB to ensure that workers can collectively bargain for higher wages, better benefits, and safer workplaces.

Before we end, I want to recognize two outgoing Committee members who have championed rights that we have discussed today, Congressman Levin of Michigan and Congressman Jones of New York worked hard to support working families throughout their time on this Committee where they both demonstrated prin-

cipld leadership to strengthen the right to organize and pass the PRO Act.

Congressman Levin provided valuable insight and amendments to strengthen the PRO Act, bringing attention to organizing campaigns across the country and introducing groundbreaking legislation to protect the integrity of union representation elections by allowing safe, electronic voting. He also brought his experience in job training to the Committee which was very valuable as we worked on many job training and bills and legislation.

Just recently, Congressman Jones successfully offered an amendment to the National Defense Authorization Act that seeks to crack down on contracting with those employers who engage in unfair labor practices in the last 3 years. I want to thank both Congressman Levin and Congressman Jones for their leadership on behalf of the American people. Is there any further business?

Mrs. FOXX. Mr. Chairman.

Chairman SCOTT. The gentlelady from North Carolina.

Mrs. FOXX. Thank you, Mr. Chairman. With your indulgence, I would like to recognize the parting Republican members of the Committee since you have done so for the Democrat departing members.

Chairman SCOTT. The gentlelady is recognized.

Mrs. FOXX. Thank you, Mr. Chairman. The departing members, Republican members of the Committee are Mr. Keller of Pennsylvania, the Ranking Member of the Workforce Protection Subcommittee who has done a fantastic job of bringing his experience, his experiences in the real world to this Committee. Mr. Cawthorn of North Carolina, my colleague, and Mr. Jacobs of New York. I thank all of them for their contributions to the Committee and they will be sorely missed. Thank you, Mr. Chairman.

Chairman SCOTT. Thank you. We want to congratulate all of our retiring members for their great work on the Committee and great contributions. Is there any further business to come before the Committee, if not, without objection, the Committee stands adjourned.

[Whereupon, at 2:03 p.m., the Subcommittee adjourned.]

[Additional submissions from Ranking Member Foxx follows:]



September 16, 2022

Representative Bobby Scott
Chair
House Education and Labor Committee

Representative Virginia Foxx
Ranking Member
House Education and Labor Committee

Dear Chairman Scott and Ranking Member Foxx:

As your committee prepares for your upcoming hearing, *In Solidarity: Removing Barriers to Organizing*, the American Hotel & Lodging Association (AHLA) writes to express our concerns with the National Labor Relations Board's (NLRB) recently issued notice of proposed rulemaking altering the joint-employer standard under the National Labor Relations Act (NLRA). This rulemaking will have devastating consequences for the economy and specifically for the hospitality industry, which still has not fully recovered from the COVID-19 pandemic.

Serving the hospitality industry for more than a century, AHLA is the sole national association representing all segments of the U.S. lodging industry, including hotel owners, REITs, chains, franchisees, management companies, independent properties, state hotel associations, and industry suppliers. The lodging industry is vital to the nation's economic health, employing nearly 2 million employees and generating \$155.5 billion in annual sales from 4.9 million guest rooms.

The NLRB's proposed rulemaking, which was issued on September 7, would threaten nearly every contractual relationship across the economy. It expands joint-employer liability to entities that have indirect or even unexercised, reserved control of workers' essential terms and conditions of employment. If implemented, this rulemaking would create significant uncertainty for the regulated community. The current standard has provided much needed predictability and stability for the hotel industry and economy generally, but the changes being considered would inevitably result in increased uncertainty, compliance costs, and litigation for stakeholders.

Furthermore, the expanded joint employer status would threaten the franchising model, which is critical to the hospitality industry, and extinguish many Americans' dreams of owning their own small business. These small business owners and entrepreneurs represent three out of every five lodging businesses across the US. Previous efforts to implement less extreme standards were estimated to threaten 500,000 jobs in the leisure and hospitality industry alone.¹ It remains to be seen how devastating this new joint-employer standard will be.

¹ Ben Gitis, American Action Forum, "The NLRB's New Joint Employer Standard, Unions, and the Franchise Business Model," April 26, 2017. Available at

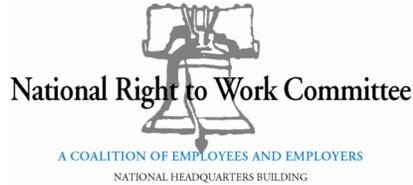


The NLRB is considering these changes at a time of significant economic uncertainty. The hospitality industry has not yet fully recovered from the COVID-19 pandemic, but workforce shortages, inflationary pressures, and supply chain disruptions are making our recovery even more difficult. If this joint-employer standard is implemented, that recovery may be out of reach for hotel owners across the country.

Thank you for your consideration of these concerns while you consider labor policy in the coming hearing and beyond. AHLA looks forward to working with the committee to find an appropriate balance for the joint-employer standard and federal labor law.

Sincerely,

Brian Crawford
Executive Vice President of Government Affairs



Dear Members of the House Education and Labor Committee,

I write on behalf of the National Right to Work Committee and its more than two million members and supporters.

While you examine proposals to tilt the organizing playing field even further in favor of Big Labor, I urge you to consider the true reasons union organizing efforts have been falling short, and how individual employees stand to lose from measures being proposed at today's hearing.

The National Labor Relations Act already protects an employee's right to become a union member. Employees are free to join a union, send money to it, and encourage others to do the same.

What they cannot do is seek to speak for themselves with their employer if a bare majority of their colleagues do not agree.

The problem for unions is not current law, but rather that most employees no longer have an interest in union representation. Earlier this year, Gallup pollsters found that 58% of non-union employees had "no interest at all" in joining a union, and only 10% were "extremely interested."

It is clear upon examining union boss-backed bills like the so-called "PRO-Act" that Big Labor and its allies see workers who oppose unionization as "barriers" to their ambition, whose opposition must be overcome with legislative force.

No worker should be forced to join or pay dues to a union. The majority of Americans who have no interest in unionizing should have their decisions respected.

Instead, the PRO Act and other union boss-backed proposals seek to punish and suppress workers who do not want to be unionized by forcing them to pay for so-called union "representation," making them declare their anti-union positions publicly, reducing their ability to hear anti-union arguments from their employers, blocking their petitions to decertify and remove unwanted unions, and much more.

The National Right to Work Committee strongly opposes such measures.

The most troubling aspect of the PRO Act is the nationwide repeal of state Right to Work laws. The National Labor Relations Act gives states the option to prohibit forced union dues, ensuring union membership and dues payments are strictly voluntary.

In 27 states, Right to Work laws protect workers. Because compulsory unionism is detrimental to economic progress, Right to Work states experience faster job growth and their workers have higher real incomes.

Unilaterally repealing all 27 state Right to Work laws would end the economic benefits enjoyed by the states who have passed them -- while denying other states the opportunity to boost their own economies -- and would once again subject workers in all 50 states to unwanted forced union dues.

Passing the PRO Act would force employees to contribute to organizations that spend their dues supporting candidates and policies that they oppose -- a practice Thomas Jefferson denounced as tyrannical.

Yet union bosses spend upwards of two billion dollars each election cycle on politics, without regard to the wishes of their members.

Union bosses regularly take radical positions contrary to the will of many unionized workers because the compulsory power to force non-members to pay dues shields them from accountability. A nationwide Right to Work repeal takes away a worker's right to withhold funds from union bosses they deem to be corrupt, incompetent, or political.

It is a blatant demonstration of Big Labor's greed and naked opportunism that one of the main provisions in the PRO Act has nothing to do with organizing, but rather ensures union bosses can extract money from as many newly unionized workers as possible. Compulsory union dues serve to enrich union bosses while saddling American workers with unwanted expenses and a weakened economy.

The PRO Act also opens the door to union organizing via the corrupt "Card Check" scheme, where signatures on "cards" collected by union agents (often via fraud or intimidation) are counted as "votes" for unionization.

This would enable union bosses to impose themselves on a workplace by coercing workers one-on-one (or more commonly three-on-one) into signing their "cards," rather than by persuading the workers that the union has anything of value to offer. A card check signature is far easier to obtain than a secret-ballot "yes" vote, because union bosses can extract signatures through harassment and pressure tactics.

Union organizers jump at any chance to have voting take place outside of the security of a ballot box, which is why they have tried for years to implement electronic voting for NLRB elections. H.R. 8295, the House appropriations bill for the Department of Labor, directs the NLRB to establish procedures for electronic voting.

Electronic voting denies workers the security of private ballot booths in favor of insecure computer voting. Voting via the internet opens the door to one-sided interference by union agents -- the sole parties permitted to conduct coercive "home visits" during organizing drives.

It is impossible to monitor election security when voting takes place across workers' electronic devices. Electronic voting could allow union organizers to visit workers' homes and "make sure" they voted and offer to "help" them cast their votes; conduct that, for good reason, would be totally impermissible in a traditional ballot box election.

It is yet another indication that the only "barrier" to organizing is the free choice of employees, and that Big Labor wants to remove it by gaining even more power to harass and intimidate dissenting workers.

Another way the union bosses want to interfere with workers' free choice is by making sure they only ever hear Big Labor's perspective on an organizing campaign.

By reinstating the rescinded Obama-era "persuader rule," the PRO Act would make it much harder for employers to get confidential legal advice during an organizing drive. This will drastically chill employer speech and thus increase the likelihood that employees will only hear the union bosses' side of the argument before getting a chance to vote on unionization.

The "persuader rule" targets experts who help employers explain the downside of unionization to their employees by vastly increasing their bureaucratic burden and nullifying their attorney-client privilege.

It places employers in a no-win situation. They can try to communicate with their employees on their own, in which case they will almost certainly fall afoul of the NLRB's complicated legal framework that governs what employers may say. This will lead to employers unintentionally committing unfair labor practices, triggering the "Card Check" provisions discussed above.

Alternatively, employers can say nothing and give union boss propagandists free rein to influence their employees' opinions.

Rather than promoting legislation like the PRO Act to reduce the rights of individual workers, Congress should be pursuing legislation to rein in the current rogue National Labor Relations Board, which regularly exceeds its statutory authority to impose rules, regulations, and decisions that help Big Labor force itself on independent workers.

The NLRB is not waiting around for PRO Act passage to target employer speech. NLRB General Counsel Jennifer Abruzzo has filed exceptions encouraging the Board to prevent companies from holding informational meetings to discuss unionization. This move raises significant First Amendment concerns, since employers have a right to communicate with employees on company time.

Union bosses and their allies do not trust workers to weigh both sides and come to an informed decision on unionization, but instead want to suppress what they can hear.

A key responsibility of the NLRB is to hold representation elections, where workers can vote to install a new union or remove an existing one. Though unionized workers make up only

6.1% of the private sector workforce, 13.3% of the election petitions filed at the NLRB in the past year were decertification petitions filed by workers who wanted to get rid of a union.

Though the media focuses on the supposed “boom” in union organizing, in the past year, a unionized worker was more than twice as likely to experience an effort in their workplace to *remove* a union as a non-union worker was to experience an effort to *install* one.

This disparity persists, despite numerous NLRB rules restricting when and how employees can request decertification elections. Indeed, a tangled thicket of NLRB regulations presents numerous barriers that make “de-organizing” a union extremely difficult.

The National Labor Relations Act creates only one “bar” on decertification elections: The NLRB may conduct one election per year. However, the NLRB has made up its own rules, and over the years added a number of additional restrictions on decertification elections.

For example, the “contract bar” prevents workers from decertifying a union for up to three years while a union contract is in effect. If union bosses renew their contract with an employer, workers have only 30 days to file for decertification. If employees do not file a petition within the 30-day window, the employer and union have the right to enter into another agreement locking them out for up to another three-year period.

Moreover, other bars can close even that tiny window. The “successor bar” prevents workers from voting out a union for up to one year after their employer changes ownership.

At U.S. Brick in Mooresville, Indiana, a corporate merger triggered the “successor bar” right when the 30-day window created by the “contract bar” had opened. Two-thirds of U.S. Brick’s employees asked for a vote to remove the Teamsters union from their workplace, but the NLRB upheld its “bars” and prevented the workers from voting.

Even when workers have the right under the NLRB’s strict rules to request an election, the NLRB can hold off certification of the election results if there are pending union-filed charges. Until recently, unions could unilaterally delay an election by filing unmeritorious “blocking charges,” alleging the employer committed an unfair labor practice. Such charges could be unfounded, yet delay elections for a substantial amount of time. While the Trump Board recently reformed the “blocking charge” policy, the Biden NLRB is considering repealing these much needed reforms.

The contract bar, successor bar, and blocking charge policies would all be codified by the PRO Act so that a pro-worker NLRB in the future could not overturn them.

If this committee intends to remove barriers faced by workers, it should reject proposals such as Big Labor’s PRO Act and instead seek ways to rein in the NLRB, which has abandoned its mission of being a neutral arbiter and instead has become a taxpayer-funded agent of Big Labor.

237

Union membership and dues payment should be an individual choice for every worker.

Sincerely,

Greg Mourad
Vice President, National Right to Work Committee

[Additional submissions from Rep. Norcross follows:]

Dear Senator,

We, the undersigned national, regional, and local faith-based organizations, urge the swift passage of the Protecting the Right to Organize Act. Last year, the House of Representatives passed H.R. 842 and it is time for the Senate to send this critical legislation to President Biden's desk.

As an interfaith community, we believe all workers should be free to act in solidarity with one another and make their voices heard. Our belief in the intrinsic worth of both work and workers leads us to strongly support the PRO Act, which will strengthen and expand the right of workers to bargain collectively, form unions, and engage in collective action without fear of retaliation from their employers. Such assurances are also better for the employers as they contribute to better productivity, mutual collaboration, and sustainability.

Our current labor laws are no longer effective in protecting the lives and dignity of workers and fall woefully short of allowing workers to effectively advocate for their needs from a position of mutuality with employers. As union membership has fallen due to counter-productive laws and amendments, inequality has skyrocketed leaving the working class with little constructive power over their own economic security; and thus, also harming sustainable business models.¹

The PRO Act addresses these current inadequacies by empowering workers to effectively exercise their freedom to organize and bargain. Critically, it also ends employers' practice of punishing striking workers, strengthens the National Labor Relations Board and allows it to hold corporations accountable for retaliating against workers, and would help us collectively do better for all our needs by repealing "right to work" laws which are a harmful legacy of the Jim Crow Era.

"Right to work" laws originated in the 1940s as a way to reinforce Jim Crow by maintaining labor segregation and further exploiting workers of color. These laws allowed states to ban unions from requiring workers who benefit from collective bargaining to help pay for bargaining costs. Today, 8 of the 10 states with the highest percentage of Black residents have "right to work" laws, which prohibit fair share fees.² These restrictions strip funding and bargaining power from unions which have a devastating effect on the economic stability of people of color.

Martin Luther King Jr. spoke on "right to work" laws, preaching that "In our glorious fight for civil rights, we must guard against being fooled by false slogans such as 'right to work.' It is a law to rob us of our civil rights and job rights. Its purpose is to destroy labor unions and the freedom of collective bargaining by which unions have improved wages and working conditions for everyone... Wherever these laws have been passed, wages are lower, job opportunities are fewer, and there are no civil rights."³

The PRO Act is more than labor reform, it is civil rights legislation. A union contract is generally one of the best tools we have to close the racial and gender wage divide. A union contract also

¹<https://www.epi.org/publication/charting-wage-stagnation/>

²<https://www.americanprogress.org/issues/race/reports/2019/08/07/472910/systematic-inequality-economic-opportunity/>

³<https://labomotes.org/2018/07/racist-history-right-work>

often ensures dignity and due process for workers, regardless of where they were born, who they are, or what industry they work in. Removing barriers to organizing and bargaining is critically important to workers who have been marginalized or those working in segregated fields such as the service industry. Such barriers are forms of structural violence. Finally, expanding collective bargaining will increase protections for women, people of color, immigrants, and the LGBTQ+ community in areas where our laws still fall short. Such attention to those most marginalized benefits all of us as a community.

With all of this in mind, it is not surprising why the PRO Act, and unions in general, are popular. Research shows that more than 60 million people would vote to join a union today if given the opportunity—that is nearly half of all nonunion workers.⁴ Union density increased in 2020 amid the federal government's failure to protect workers from the COVID-19 Pandemic.⁵ Finally, polls have found that union approval stands at 65 percent which is one of the highest marks in the last 50 years.⁶

When left without regulation and enforcement, corporations, employers, and the government have forced the working class to accept poverty wages and stymied the enactment of necessary benefits such as paid family and medical leave. They have allowed income inequality to exponentially rise, leaving essential workers and their families with little to show for their labor.

A commitment to human dignity, worker justice, and the common good of all demands support for the PRO Act. This legislation would better the lives of tens of millions of workers and their families by creating an economy that is rooted in solidarity and supports working people as well as sustainable business models. We urge you to act and vote in the best interest of workers, employers, and the economy: Pass the PRO Act today.

In Solidarity,

ALEPH: Alliance for Jewish Renewal

Alliance of Baptists

American Baptist Home Mission Societies

American Friends Service Committee

Arise Chicago

Arizona Faith Network

Association of United States Catholic Priests

Bend the Arc: Jewish Action

CAIR Arizona

Carolina Jews for Justice

⁴ <https://iwer.mit.edu/2018/08/30/who-wants-to-join-a-union-a-growing-number-of-americans/>

⁵ <https://www.bls.gov/news.release/union2.nr0.htm>

⁶ <https://news.gallup.com/poll/318980/approval-labor-unions-remains-high.aspx>

Catholic Labor Network
Christian Methodist Episcopal Church
Christians for Equality
Church World Service
Clergy and Laity United for Economic Justice
Coalition For Economic Justice
Columban Center for Advocacy and Outreach
Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces
Disciples Center for Public Witness
Disciples Justice Action Network
Disciples Refugee & Immigration Ministries
Dominican Sisters ~ Grand Rapids
Dorothy Day Catholic Worker, Washington D.C.
Ecumenical Ministries of Oregon
Episcopal Church of New Hampshire
Farm Worker Ministry Northwest
Franciscan Action Network
Friends Committee On National Legislation
Glenmary Home Missioners
Granite State Organizing Project (GSOP)
Greater Birmingham Ministries
ICNA Council for Social Justice
Ignatian Solidarity Network
Interfaith Worker Justice - New Mexico
Interfaith Worker Justice of East Tennessee
Interfaith Worker Justice of San Diego County
Interreligious Network for Worker Solidarity
Jewish Alliance for Law and Social Action
Jewish Council on Urban Affairs

Jewish Labor Committee
Kairos Center for Religions, Rights, and Social Justice
Kalmanovitz Initiative for Labor & the Working Poor, Georgetown University
Labor-Religion Coalition of NYS
Leadership Conference of Women Religious
Maine Council of Churches
Meriden Congregational Church, UCC
Missionary Oblates of Mary Immaculate
National Advocacy Center of the Sisters of the Good Shepherd
National Council of Jewish Women
National Council of Jewish Women, South Cook Section
National Council of the Churches of Christ (USA)
National Farm Worker Ministry
National Missionary Baptist Convention of America
NCJW Chicago North Shore
NETWORK Lobby for Catholic Social Justice
New Hampshire Conference/United Church of Christ, Economic Justice Mission Group
New Hampshire Council of Churches
New Hampshire Faith & Labor Coalition
North Carolina Council of Churches
Pax Christi USA
Peace & Justice Committee, Congregation of Mission, Western Province, U.S.A.
Poor People's Campaign
Presbyterian Church (USA), Office of Public Witness
Presbytery of Grand Canyon, Presbyterian Church (USA)
Progressive National Baptist Convention, Inc.
Reconstructionist Rabbinical Association
Religions for Peace USA

Repairers of the Breach

Sema Foundation

Society for Humanistic Judaism

Sojourners

Southwest Conference United Church of Christ

T'ruah: The Rabbinic Call for Human Rights

Tempe Interfaith Fellowship

The Episcopal Church

The Labor Guild

The United Methodist Church - General Board of Church and Society

Unitarian Universalist Action New Hampshire

Unitarian Universalist Association

Unitarian Universalist Association Pacific Western Region

Unitarian Universalists for a Just Economic Community

Unitarian Universalists for Social Justice

United Church of Christ Justice and Witness Ministries

Uri L'Tzedek: Orthodox Social Justice

WHEAT (World Hunger Ecumenical Az Task Force Inc)

Wisconsin Council of Churches

Worker Justice Wisconsin

[Responses to questions submitted for the record by Mr. Pearce follows:]



COMMITTEE ON
EDUCATION AND LABOR
U. S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

October 4, 2022

MAJORITY MEMBERS:

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Mr. Mark Gaston Pearce, J.D.
Visiting Professor, Executive Director
Workers' Rights Institute/ Georgetown Law School
1714 Sanford Road
Silver Spring, MD 20902

Dear Mr. Pearce:

I would like to thank you for testifying before the House Committee on Education and Labor, Full Committee hearing entitled "*In Solidarity: Removing Barriers to Organizing*," held on Wednesday, September 14, 2022, at 10:15 a.m. (Eastern Time) in room 2175 of the Rayburn House Office Building and via Zoom.

Please find enclosed additional questions submitted by Committee Members following the hearing. Please provide a written response no later than Tuesday, October 18, 2022, for inclusion in the official hearing record. Your responses should be sent to Clerk of the Committee at E<estimony@mail.house.gov and Tanisha Wilburn (Tanisha.Wilburn@mail.house.gov) of the Committee staff.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Committee on Education and Labor
Full Committee Hearing
“In Solidarity: Removing Barriers to Organizing”
Wednesday, September 14, 2022
10:15 a.m. (Eastern Time)

Representative Lucy McBath (D-GA)

1. Mr. Pearce, there has been some recent progress in ensuring that people with significant disabilities are empowered to organize and gain union representation. Some workers on AbilityOne contracts are unionized, such as the workers at the disability services nonprofit Melwood in Maryland. However, the NLRB’s 2004 decision in Brevard Achievement Center held that disabled workers were excluded from the National Labor Relations Act if their work is “primarily rehabilitative.”

- a. Is it time for the Board to reconsider that decision?

Representative Jahana Hayes (D-CT)

1. Mr. Pearce, in her testimony during the hearing, Mr. Eisen discussed ways that Starbucks engages in threats, intimidation, and surveillance to undermine the integrity of the vote in representation elections. Recently, the current NLRB General Counsel proposed reviving the Joy Silk doctrine so the agency could issue bargaining orders whenever a majority of workers demonstrated support for the union, but the employer refused to bargain while lacking good faith doubt of the union’s support.

- a. Would restoring this remedy protect the integrity of elections, and if so how?

Mark Gaston Pearce

Former Chairman, National Labor Relations Board
Executive Director, Visiting Professor
Workers' Rights Institute, Georgetown Law Center

Tuesday, October 18, 2022

Thank you for this opportunity to testify in response to the questions for the record below, following my testimony before the Committee on Education and Labor during the Full Committee Hearing *"In Solidarity: Removing Barriers to Organizing"* held September 14, 2022.

QUESTIONS FOR THE RECORD

Representative Lucy McBath (D-GA)

1. Mr. Pearce, there has been some recent progress in ensuring that people with significant disabilities are empowered to organize and gain union representation. Some workers on AbilityOne contracts are unionized, such as the workers at the disability services nonprofit Melwood in Maryland. However, the NLRB's 2004 decision in Brevard Achievement Center held that disabled workers were excluded from the National Labor Relations Act if their work is "primarily rehabilitative."

a. Is it time for the Board to reconsider that decision?

Answer

Thank you, Representative McBath, for raising this very timely and important issue.

The simple answer to your question is most definitely "yes, the Brevard Achievement Center decision should be reconsidered". The 2004 Brevard Achievement Center decision of the NLRB was the product of a Bush administration majority. That Board declined to extend the protections and organizing rights afforded to employees under the NLRA to a bargaining unit of custodians at the Cape Canaveral Space Station. The bargaining unit included non-disabled workers as well as workers with intellectual disabilities and mental health diagnoses. The NLRB (Board) majority contended that the employer/employee relationship was "primarily rehabilitative" and not purely economic. This was in spite of the fact that the disabled workers received the same wages and worked the same hours as their non-disabled coworkers and were also subject to the same standard of discipline for misconduct not resulting from their disabilities. The Bush Board's rationale represented a significant shift from prior Board precedent, which considered a rehabilitative relationship as merely one factor in determining whether or not a unit of disabled workers could organize under the NLRA.

As disability advocate Adrienne Langlois points out, "Brevard's conclusion feels outdated, precisely because it is: the "primarily rehabilitative" standard relies on the policy promoted by two 1938 laws. The first, the Wagner-O'Day Act, sought to encourage the employment of blind workers by creating a market in the federal government for the "brooms, mops, and other commodities" they produced. Nonprofits employing a workforce of at least seventy-five percent blind workers were eligible for these contracts. The Act was amended in 1971 to include services provided by

organizations employing people with disabilities. Today, the Javits-Wagner-O'Day Act is administered under the AbilityOne program, which produced \$4 billion in goods and services for the federal government in 2020 and employs over 42,000 people with disabilities.”¹

It is noteworthy that workers in rehabilitative placements made significant gains with the 2014 passage of the Workforce Innovation and Opportunity Act (WIOA). Among other wide-reaching reforms, WIOA expanded the definition of “competitive integrated employment” in the Rehabilitation Act, prioritizing vocational rehabilitation placement in traditional workplaces with at-market wages where workers of all abilities work side-by-side. These developments exemplify how the Board-created “primarily rehabilitative” standard is now inconsistent with federal policy in favor of the rights of disabled workers. Unions and disability advocates have already recognized this opportunity for cross-movement organizing.

During a 2016 hearing held by the Advisory Committee, custodian and building services union SEIU 32BJ presented testimony on the dangers *Brevard Achievement Center* poses to WIOA’s promise of competitive integrated employment. “Without full labor rights under the NLRA,” noted 32BJ attorney Jessica Drangel Ochs, “a worker can be disciplined or fired for talking to union organizers or coworkers about problems on the job or for advocating for changes in working conditions—like better wheelchair access or accommodations.”²

In July 2021, a coalition of fourteen disability and eight labor organizations submitted a joint comment in response to an Office of Management and Budget (OMB) request for information on advancing equity in federal contracting. Among the proposed reforms for the AbilityOne program, was a “recognition of the right of workers under the AbilityOne program, and workers with disabilities more broadly, to unionize and engage in collective bargaining,” as well as the development of an “offsets” program that would permit more integrated worker placements in AbilityOne contractors.

The decision in *Brevard Achievement Center* similar to the Board’s decision in *Brown University*³ which affected student employees and is now overruled⁴, was a regrettable attempt by this particular Board majority to diminish the rights of workers to organize. That Board, by using a rationale that ignores the fact that, similar to universities who employ students, employers of workers who happen to be mentally or otherwise disabled individuals, not only subject these individuals to terms and conditions of employment unrelated to their disability and appropriate for collective bargaining, these employers also derive an economic benefit from the labor of these workers.

I am encouraged by and applaud the current NLRB General Counsel’s public statement expressing a desire to have the Board reconsider *Brevard Achievement Center*. Disabled workers, like students, building trade apprentices, interns, and residents, receive training while providing essential services to their employer. They are entitled to the protections of the National Labor Relations Act.

¹ [Reconsidering Brevard Achievement Center: An Opportunity for Labor and Disability Rights To Build Worker Power By Adrienne Langlois](#)

² *ibid*

³ *Brown University* 342 NLRB No. 42 (2004)

⁴ The *Brown University* decision was overruled in *Trustees of Columbia University*, 364 N.L.R.B. No. 90 (2016)

Representative Jahana Hayes (D-CT)

1. Mr. Pearce, in her testimony during the hearing, Mr. Eisen discussed ways that Starbucks engages in threats, intimidation, and surveillance to undermine the integrity of the vote in representation elections. Recently, the current NLRB General Counsel proposed reviving the Joy Silk doctrine so the agency could issue bargaining orders whenever a majority of workers demonstrated support for the union, but the employer refused to bargain while lacking good faith doubt of the union's support.

a. Would restoring this remedy protect the integrity of elections, and if so how?

Answer

Thank you, Representative Hayes, for this opportunity to address a concern critical to worker representation free choice. Joy Silk⁵ is a doctrine that dates back to 1949. It held that where an employer, in the absence of good faith doubt as to a union's majority status, refuses said union's request to be recognized as the bargaining representative of an appropriate bargaining unit, it violates section 8(a) 5 of the NLRA and would be ordered to bargain with that union. For the employer to escape this bargaining obligation, it would have to demonstrate to the NLRB good faith doubt of the union's majority status. If that employer, however, engaged in any unfair labor practices after its denial of recognition, it would be foreclosed from making the good faith doubt argument, because there would no longer be any good faith that could be relied upon. Rather, the unfair labor practice was proof of just the opposite. Although Joy Silk was eventually approved by every federal circuit court in the country and commonly utilized even after, the 1947 Taft-Hartley Act repealed the provision that permitted the Board to certify a union by a means other than an election⁶ it was abandoned by the NLRB.

The Joy Silk doctrine was still utilized and enforced by the Board until 1969 when the Supreme Court of the United States announced its opinion in *NLRB v. Gissel Packing Co.*⁷ which effectively replaced *Joy Silk*. With *Gissel*, the employer no longer had to rely on good faith doubt to challenge a demand for recognition by a union. Rather, in order to get a bargaining order without first going to an election, the General Counsel of the NLRB would have to prove that the employer committed an unfair labor practice, (ULP) but not just any ULP, it had to be one that made the conduct of a fair election unlikely or impossible even with the utilization of the Board's traditional remedies – a high bar that is seldom, if ever attained.

Under current law employers are allowed to go ahead with a union election regardless of the fact that it has full knowledge that the union enjoys majority support. In effect, there is a presumption that the union is being untruthful about its majority status and the only gage of its veracity is an

⁵ Joy Silk Mills, Inc., 85 N.L.R.B. 1263, 1264 (1949), modified and enforced, *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950)

⁶ If a union wanted the NLRB to certify a bargaining unit, it had to submit to a Board conducted election, but NLRB certification via an election was but one means of obtaining valid recognition. See [Brian J. Petruska, Adding Joy Silk to Labor's Reform Agenda, 57 Santa Clara L. Rev. 97 \(2017\)](#).

⁷ 395 U.S. 575 (1969)

NLRB conducted election. The employer can lawfully take this position even if its intent is solely to delay in order to undermine the union and whittle away support through an anti-union campaign.⁸

The ability of the NLRB to deter the nefarious means used by employers to derail organizing drives is weak, at best - this is particularly so when the agency has been flat funded for eight years. However, the main limitation of the Board, in this regard, stems from the inadequacy of the statute. In the absence of enforcing Section 8(a)(5) with respect to uncertified, unrecognized unions, the NLRA lacks any alternative remedy to achieve effective deterrence to the commission of ULPs during organizing drives. The Board's only other remedies under the Act consist of cease and desist orders, reinstatement, backpay, or other affirmative relief, which usually takes the form of a notice. Without the *Joy Silk* doctrine, the NLRA lacks any meaningful deterrent to the commission of ULPs. This statutory failure radically undermines the real ability of employees to organize.⁹

The *Joy Silk* doctrine does protect the integrity of elections, as it facilitates fair and free choice during the process. There is criticism that *Joy Silk* restoration would reduce the number of Board conducted elections. On the contrary, *Joy Silk* would not only increase the number of Board conducted elections but would decrease the number of unfair labor practices associated with a union campaign. Having a *Joy Silk* option will increase the occasions where unions request recognition. Unions are therefore obliged to obtain legitimate majority support. According to one study, historic evidence shows that, under the *Joy Silk* regime, employers committed on average approximately one illegal discharge and 0.11 illegal intimidation ULPs per election. After the abandonment of *Joy Silk*, these averages increased to 3.2 illegal discharges and 1.08 illegal intimidation ULPs per election. These comparative averages suggest that a return to *Joy Silk* is likely to result in a drop of 66% for illegal discharge ULPs per election and of 90% for illegal Intimidation ULPs.¹⁰

As discussed, under *Joy Silk*, a company would need to demonstrate "good faith doubt" to the NLRB about the union's majority—basically, that organizers representations of having more than 50% union support is inaccurate. The NLRB would then investigate. If the Board disagrees with the employer, it would order the employer to bargain with the new union. If however, the Board, through its investigation, found the allegations plausible, it could order a secret-ballot election. This election, in most cases would have the most integrity because it would be devoid of unfair labor practices.

Thank you again for giving me this opportunity to assist this Committee through the information provided.

Respectfully submitted

Mark Gaston Pearce

⁸ [Brandon Magner, The New York Times Makes The NLRB's Case For Reviving The "Joy Silk" Doctrine, Labor Law Lite, August 13, 2021](#)

⁹ Brian J. Petruska, *supra*

¹⁰ Brian J. Petruska, *supra* at 141

