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RESTORING BALANCE: ENSURING FAIRNESS AND TRANSPARENCY AT THE NLRB

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

OF THE

COMMITTEE ON EDUCATION AND WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINETEENTH CONGRESS

FIRST SESSION

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RESTORING BALANCE: ENSURING FAIRNESS AND TRANSPARENCY AT THE NLRB

Wednesday, June 11, 2025

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS,
COMMITTEE ON EDUCATION AND WORKFORCE,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:15 a.m., in Room 2175, Rayburn House Office Building, Hon. Rick Allen (Chairman of the Subcommittee] presiding.

Present: Representatives Allen, Onder, Wilson, Foxx, Baumgartner, Walberg, DeSaulnier, Courtney, McBath, Lee, Mannion, Takano, and Scott.

Staff present: Vlad Cerga, Director of Information Technology; Libby Kearns, Press Assistant; Katerina Kerska, Legislative Assistant; Trey Kovacs, Director of Workforce Policy; Campbell Ladd, Clerk; R.J. Laukitis, Staff Director; Danny Marca, Director of Information Technology; Brad Mannion, Professional Staff Member; John Martin, Deputy Director of Workforce Policy/Counsel; Audra McGeorge, Communications Director; Alexis Morgan, Intern; Daniel Nadel, Legislative Assistant; Kevin O'Keefe, Professional Staff Member; Ethan Pann, Deputy Press Secretary and Digital Director; Ellison Powell, Intern; Kane Riddell, Staff Assistant; Carl Rifino, Intern; Sara Robertson, Press Secretary; Heidi Schneider, Professional Staff Member; Ann Vogel, Director of Operations; Ali Watson, Director of Member Services; Joe Wheeler, Professional Staff Member; James Whittaker, General Counsel; Samantha Wright, Intern; Ellie Berenson, Minority Press Assistant; Sayda Bir, Minority Intern; Ilana Brunner, Minority General Counsel; Ni'Aisha Banks, Minority Staff Assistant; Patrick Jo, Minority Intern; Alexandra Walker, Minority Intern; Vivian Wiggins, Minority Intern; Stephanie Lalle, Minority Communications Director; Dhrtvan Sherman, Minority Research Assistant; Raiyana Malone, Minority Press Secretary; Brian Marshall, Minority Legal Intern; Kevin McDermott, Minority Director of Labor Policy; Eleazer Padilla, Minority Staff Assistant; Mason Pesek, Minority Labor Policy Counsel; Veronique Pluviose, Minority Staff Director; Banyon Vassar, Minority Director of IT.

Chairman ALLEN. The Subcommittee on Health, Employment, Labor and Pensions will now come to order. I note that a quorum is present. Without objection, the Chair is authorized to call a recess at any time.

Today's hearing will examine the current State of labor law under the National Labor Relations Board, and explore solutions that promote worker choice, provide legal predictability, and stability for employers, and give workers better access to a fair representation in their elections.

In 1935, Congress passed the National Labor Relations Act to protect workers and to supervise union elections through the NLRB. Under the Biden-Harris administration, however, the NLRB engaged in gross mismanagement and acted as the litigation arm for big labor, protecting union bosses rather than elevating rank and file members.

The Board spent 4 years under the Biden-Harris administration gutting the Democratic process by which unions become exclusive representatives of employees. One way in which the Board undermined this valued Democratic process was by attacking the use of secret ballots.

Secret ballot elections are the gold standard in any Democratic system. That is why the NLRA, the Board, and the Courts have traditionally encouraged their use in union elections. However, the Biden-Harris NLRB gutted that historical preference for secret ballot elections in favor of the card check process. I have been committed to protecting the use of secret ballots, which is why I recently introduced the Secret Ballot Protection Act, which guarantees that every vote to unionize a workplace is cast with a secret ballot.

In yet another blow to workforce democracy, the Biden-Harris NLRB gagged employers who wished to exercise their free speech rights during a union election campaign. The Board made it an unfair labor practice for an employer to require its employees to attend a meeting on work time and discuss its stance on unionization.

A cornerstone of any campaign is robust debate about the pros and cons of the various candidates and options. The Biden-Harris Board was less interested in debate and democracy than it was in seeing that unions were entrenched in every workplace. One of the purposes of NLRA is to help resolve workplace conflict, and remedy unfair labor practices.

Congress created the NLRB to right wrongs, not to punish wrongdoers, but the Biden-Harris Board was too interested in exceeding congressional authority, and both the General Counsel and the Board itself worked to expand ways to punish parties found to have committed unfair labor practices.

The NLRB also raised barriers to holding elections at all, even when employees petitioned the Board for a vote. The biggest hurdle was the return of the controversial blocking charge policy, which allowed unions to file frivolous, unfair labor charges, and delay elections by months or years.

Finally, the Biden-Harris Board spent 4 years engaging in government overreach to expand unions and their control over American workers. The Biden-Harris Board defined graduate students and student athletes as employees, simply so these groups can unionize.

The NLRB also adopted an elastic standard to determine whether a worker is an employee covered by the Act, or an independent

contractor, despite data showing that this will have a disastrous impact on the economy. Similarly, the Board published their final rule establishing a broader standard to determine the existence of a Joint Employer Relationship, threatening the franchise model and other business relationships.

I will continue to fight for the rights of American workers, ad push back on LARB overreach. For many Congresses I have introduced the Employee Rights Act, which addresses these issues I have mentioned here today. As I work to reintroduce this bill this Congress, the well-being of the American worker will remain at the forefront.

We are here today to discuss how to ensure the NLRB serves the interest of workers as Congress intended. It is time for the Board to champion the right of employees to pick the union, not the union to pick the employees. It is time for the Board to refocus on resolving workplace conflicts, instead of punishing business owners. I look forward to discussing how to adjust that with our expert witnesses today.

I hope that together we can find a way to make NLRB a more balanced referee of American workplaces. With that, I yield to the Ranking Member for an opening statement.

[The statement of Chairman Allen follows:]

COMMITTEE ON EDUCATION & WORKFORCE
CHAIRMAN TIM WALBERG

COMMITTEE STATEMENT

Opening Statement of Rep. Rick Allen (R-GA), Chairman
Subcommittee on Health, Employment, Labor, and Pensions
"Restoring Balance: Ensuring Fairness and Transparency at the NLRB"
June 11, 2025

Today's hearing will examine the current state of labor law under the National Labor Relations Board and explore solutions that promote worker choice, provide legal predictability and stability for employers, and give workers better access to fair representation elections.

In 1935, Congress passed the *National Labor Relations Act* to protect workers and to supervise union elections through the NLRB. Under the Biden-Harris administration, however, the NLRB engaged in gross mismanagement and acted as the litigation arm for Big Labor protecting union bosses rather than elevating rank-and-file members.

The Board spent four years under the Biden-Harris administration gutting the democratic process by which unions become the exclusive representative of employees. One way in which the Board undermined this valued democratic process is by attacking the use of secret ballots. Secret ballot elections are the gold standard in any democratic system. That is why the NLRA, the Board, and the courts have traditionally encouraged their use in union elections. However, the Biden-Harris NLRB gutted that historic preference for secret ballot elections in favor of the card check process. I have been committed to protecting the use of secret ballots, which is why I recently introduced the *Secret Ballot Protection Act*, which guarantees that every vote to unionize a workplace is cast with a secret ballot.

In yet another blow to workplace democracy, the Biden-Harris NLRB gagged employers who wished to exercise their free speech rights during a union election campaign. The Board made it an unfair labor practice for an employer to require its employees to attend a meeting on work time and discuss its stance on unionization. The cornerstone of any campaign is robust debate about the pros and cons of the various candidates and options. But the Biden-Harris Board was less interested in debate and democracy than it was in seeing that unions were entrenched in every workplace.

One of the purposes of the NLRA is to help resolve workplace conflict and remedy unfair labor practices. Congress created the NLRB to right wrongs, not to punish wrongdoers. But the Biden-Harris Board was too interested in exceeding Congressional authority, and both the General Counsel and the Board itself worked to expand ways to punish parties found to have committed unfair labor practices.

The NLRB also raised barriers to holding elections at all, even when employees petitioned the Board for a vote. The biggest hurdle was the return of the controversial blocking charge policy, which allows unions to file frivolous unfair labor charges and delay elections by months or years.

Finally, the Biden-Harris Board spent four years engaging in government overreach to expand unions and their control over American workers. The Biden-Harris Board defined graduate students and student athletes as employees, simply so these groups can unionize. The NLRB also adopted an elastic standard to determine whether a worker is an employee covered by the Act or an independent contractor—despite data showing that this will have a disastrous impact on the economy. Similarly, the Board published a final rule establishing a broader standard to determine the existence of a joint-employer relationship, threatening the franchise model and other business relationships.

I will continue to fight for the rights of American workers and push back on NLRB overreach. For many Congresses, I have introduced the *Employee Rights Act*, which addresses the issues I have mentioned here today. As I work to reintroduce the bill this Congress, the well-being of the American worker will remain at the forefront.

We are here today to discuss how to ensure the NLRB serves the interests of workers, as Congress intended. It is time for the Board to champion the right of employees to pick the union, not of the union to pick the employees. It is time for the Board to refocus on resolving workplace conflicts instead of punishing business owners. I look forward to discussing how to do just that with our expert witnesses today. I hope that together we can find a way to make the NLRB a more balanced referee of American workplaces.

With that, I yield to the Ranking Member for an opening statement.

Mr. DESAULNIER. Thank you, Mr. Chairman. I want to thank the witnesses here today to have this open debate of ideas. I just want to mention that unions are more popular right now than any time in American history. 71 percent, according to well, non-partisan, vetted polling, and that is because Americans know that they need a voice.

They need a voice in the most concentrated economy in American history, worse than the Gilded Age of where the money is, that picture is a swearing in of the current President, where those three individuals have more wealth than 40 percent of the American population, so we need countervailing institutions. The American public gets it, Mr. Chairman. 71 percent of the American people know that labor unions are their voice.

It is about balance, but the idea, at least from my perspective, could not be more different than yours about the balance right now in the comments I just made. Today's hearing is an important one in that regard, as we will discuss the National Labor Relations Board, the only Federal agency that protects the rights of tens of millions of American workers to organize and have a voice.

While I welcome the opportunity to discuss these important issues, the Committee Republicans are holding this hearing as if these are normal times, and it is simply business as usual. Let me start by acknowledging the obvious: these are not normal times, and they are not normal times for American workers as their disposable income continues to shrink as a promise by this President to do something about inflation, is actually not happening, it is getting worse.

In fact, since returning to the White House, the Trump administration has unfortunately consistently undermined working Americans, particularly those who wish to exercise their right to organize and collectively bargain. In January, President Trump ordered the unprecedented firing of NLRB member Gwynne Wilcox, a highly experienced labor lawyer and champion for American workers.

By firing Member Wilcox, the President stripped the NLRB of its quorum, preventing the NLRB from doing its vital work protecting American workers from harassment and coercion by union busting companies. Then in February, President Trump issued an executive order giving himself unprecedented control over the rulemaking and legal positions of independent agencies, including the NLRB.

The repercussions of this executive order could prove to be disastrous, not only for the NLRB and the American workers they defend and their independence, but for workers as a whole. Since the NLRB's inception, workers have relied on the agency's expertise and independence in enforcing the National Labor Relations Act. Any loss of independence means that the NLRB, and other independent agencies, are vulnerable to direct political interference from President Trump and the administration.

Even though the NLRB has not issued reductions in force as of now, we continue to pay close attention to any efforts by DOGE to cut the NLRB's already bare bones workforce. The Board's workforce is nearly 30 percent smaller than it was 15 years ago, while its workload has grown.

I also remain concerned that the President's budget fails to make the investments necessary to address the NLRB's staffing crisis, particularly at its regional offices. Today we have a unique opportunity to learn more about what the Trump administration's policy means for the NLRB as well as the American workforce.

From true expert and committed public servant, we are very fortunate to have Ms. Jennifer Abruzzo, thank you for being here again, you're a great witness from my perspective, as one of the witnesses. She worked for decades at the NLRB, most recently as the General Counsel.

Based on the title of today's hearing, Committee Republicans will have you believe that the scales have been tipped in favor of pro-union workers, or big labor bosses. That is far from the truth. By and large, the system remains rigged against American workers, in favor of corporations that do not play by the rules.

Let me tell you this is not about all employers. Many employers who have union contracts and do not, play by the rules. The problem is that we are going down to the worst employers, employers who want to pay sub-minimum wage work wages, are okay with violating child labor laws, and reliable, consistently proven to defend and help the economy, labor laws that protect the American workforce.

It is those employers that my hope would be that we would join in making sure that there is oversight and consequences when they violate not just the spirit of the law, but the letter of law, and allow for effective regulation. Simply look at the numbers. From 1979 to 23 annual wages for the bottom 90 percent of American households has increased just 44 percent, while average incomes for the wealthiest 1 percent increased more that 180 percent.

Let me repeat that again. 90 percent of American households, they got a 44 percent raise. It sounds like a lot, but the top 1 percent, people making over 10 million dollars a year made 180 percent. Again, it gets worse and worse at the expense of American workers who get up every day and go to work and perform well.

70 percent, as I said in my beginning comments, approve of labor unions, and 60 million American workers say they would unionize if given the opportunity. Even for those who do not unionize, we know from the research that union activity raises the bar for everyone, union and non-union. It makes the country a better place and more productive, makes it more like the Eisenhower administration, when we grew the American middle class, and a GDP of 6 percent over a decade.

Meanwhile, workers organizing has skyrocketed over the last few years, yet union membership has hit a new record low. Why is this the case?

It is because for too long unscrupulous employers, not all employers, have weaponized captive audience meetings, faced no real penalties for illegal firings, and exploited procedural tricks in NLRB's proceedings to crush workers' unions efforts and their ability to have a voice

I come to this hearing with what I believe is a unique perspective. As many of you know, I owned small businesses. I made many payrolls in a very difficult business, the restaurant business, and I take pride in the relationships I formed with my employees during that time.

They made me successful. I learned that the success of a business lies in the relationship between the employer and the employees, union or non-union. Treating workers with respect that they deserve is not only a right, it is a savvy business practice, and it is the essence of America.

As de Tocqueville said in the 1800's, "The simple genius to America is to expect exceptional things from ordinary people." That works in employer/employee, in the business sector. I am also a former union member, having been a Teamster and a member of the AFL–CIO. I know firsthand the benefits of union membership and the power unions have in bridging the gap between workers and their employers, helping all workers.

Not just those, as I have said, who are union members, earn higher pay, better benefits, safer workplaces, and have respect. Forming a union must be a right and not a fight. Democrats will not stay quiet while this administration attacks American workers.

I hope we can have a productive discussion today, Mr. Chairman, that centers around workers experiences, and also focuses on low road employees, who do a disservice, not just to their workers, but to the best American employers who respect their workers. Thank you, I yield back.

[The statement of Ranking Member DeSaulnier follows:]

ED & WORKFORCE DEMOCRATS

OPENING STATEMENT

House Committee on Education and Workforce
Ranking Member Robert C. "Bobby" Scott

Opening Statement of Ranking Member Mark DeSaulnier (CA-10)
Subcommittee on Health, Employment, Labor, and Pensions
Restoring Balance: Ensuring Fairness and Transparency at the NLRB
Wednesday, June 11, 2025 | 10:15 a.m.

Thank you, Mr. Chairman. I want to thank the witnesses here today for having this open debate of ideas. I want to mention that unions are more popular than they have ever been in American history, 71 percent, according to well-known, nonpartisan, vetted polling. That's because Americans know they need a voice. They need a voice in the most concentrated economy in American history, worse than the Gilded Age, where the money is. That picture from the current president's swearing-in ceremony— those three individuals have more wealth than 40 percent of the American population.

So, we need countervailing institutions. The American people get it, Mr. Chairman. Seventy-one percent of the American people know that labor unions are their voice, and it's about balance. And the idea, at least from my perspective, couldn't be more different than yours, regarding the balance comments I just made.

Today's hearing is an important one in that regard as we will discuss the National Labor Relations Board, the only federal agency that protects the rights of tens of millions of American workers to organize and have a voice.

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In fact, since returning to the White House, the Trump Administration has unfortunately consistently undermined working Americans– particularly those who wish to exercise their right to organize and collectively bargain.

In January, President Trump ordered the unprecedented firing of NLRB Member Gwynne Wilcox, a highly experienced labor lawyer and champion for American workers. By firing Member Wilcox, the President stripped the NLRB of its quorum, preventing the NLRB from doing its vital work protecting American workers from harassment and coercion by union-busting companies.

Then, in February, President Trump issued an executive order giving himself unprecedented control over the rulemaking and legal positions of independent agencies, including the NLRB. The repercussions of this executive order could prove to be disastrous for the NLRB, the American workers they defend, and their independence, but also for workers as a whole.

Since the NLRB's inception, workers have relied on the agency's expertise and independence in enforcing the *National Labor Relations Act* (NLRA). Any loss of independence means that the NLRB – and other independent agencies – are vulnerable to direct political interference from President Trump and the Administration.

Even though the NLRB has not issued reductions-in-force as of now, we continue to pay attention to any efforts by the DOGE team to cut the NLRB's already bare bones workforce. The Board's workforce is nearly 30 percent smaller than it was 15 years ago, while its workload has grown. I also remain concerned that the President's budget fails to make the investments necessary to address the NLRB's staffing crisis, particularly at its regional offices.

Today, we have a unique opportunity to learn more about what the Trump Administration's policies mean for the NLRB as well as for the American workforce from a true expert and committed public servant. We are very fortunate to have Ms. Jennifer Abruzzo. Thank you for being here again, you're a great witness from my perspective. As one of our witnesses this morning. She worked for decades at the NLRB, most recently as the General Counsel.

Based on the title of today's hearing, Committee Republicans will have you believe that the scales have been tipped in favor of pro-union workers and labor unions. That is far from the truth. By and large, the system remains rigged against workers in favor of corporations that don't play by the rules. And let me say this isn't about all employers. Many employers who have union contracts play by the rules.

The problem is that we are focusing on the worst employers the employers who want to pay subminimum wages or are okay with violating child labor laws. And reliable employers constantly prove to improve and defend the economy. Labor laws protect the American workforce. It's those employers who, it is my hope, we would join in making sure there is oversight and consequences when they violate not just the spirit of the law, but the letter of the law, and allow for effective regulation.

Simply look at the numbers. From 1979 to 2023, annual wages for the bottom 90 percent of American households increased just 44 percent, while average incomes for the wealthiest one percent increased more than 180 percent. Let me repeat that again: 90 percent of American households saw just a 44 percent raise. That sounds like a lot, but the top one percent of people making over $10 million a year got a 180 percent raise. It gets worse and worse at the expense of American workers who get up every day, go to work, and perform well.

Seventy percent, as I mentioned in my opening comments, of Americans and millions of workers say they would unionize if given the opportunity. And even for those who don't unionize, we know from research that union activity raises the bar for everyone, union and non-union alike. It makes the country a better place, makes it more productive, and makes it more like the Eisenhower administration when we grew the middle class and had a GDP growth rate of 6 percent over a decade. Meanwhile, workers' organizing has skyrocketed over the last few years, yet union membership has hit a record low.

Why is this the case? It's because, for too long, unscrupulous employers, not all employers, have weaponized captive audience meetings, faced no real penalties for illegal firings, and exploited procedural tricks in NLRB's proceedings to crush workers' union efforts and their ability to have a voice.

I come to this hearing with what I believe is a unique perspective. As many of you know, I owned a small business and have made many payrolls, a very difficult business, the restaurant business, and I take pride in the relationships I formed with my employees during that time. They made me successful. I learned that the success of a business lies in the relationship between the employer and the employees, whether union or non-union. Treating workers with the respect that they deserve is not only right — it is a savvy business practice, and it is

the essence of America. As the Tok field said in the 1800s, the simple genius of America is to expect exceptional things from ordinary people. That works in the employer, employee, and business sector.

I am also a former union member, being a member of the Teamsters and AFL-CIO. I know firsthand the benefits of union membership and the power unions have in bridging the gap between workers and their employers and helping all workers, not just those who are union members, earn higher pay, better benefits, and safer workplaces, and have respect.

Forming a union must be a right, and not a fight. Democrats will not stay quiet while this Administration attacks workers. I hope we can have a productive discussion, Mr. Chairman, that centers around workers' experiences. It also focuses on low-road employers who do a disservice not just to their workers but to the best American employers who respect their workers.

Thank you, and I yield back.

Chairman ALLEN. The Ranking Member yields. Pursuant to Committee Rule 8(c), all members who wish to insert written statements into the record may do so by submitting them to the Committee Clerk electronically in Microsoft Word format by 5 p.m., 14 days after this hearing.

Without objection, the hearing record will remain open for 14 days to allow such statements and other extraneous material noted during the hearing to be submitted for the official hearing record.

I will now turn to the introduction of our four distinguished witnesses. Our first witness is Mr. Aaron Solem, a Staff Attorney for the National Right to Work Legal Defense Foundation in Spring-

field, Virginia. Our second witness is Mr. Vincent Vernuccio, the President of the Institute for the American Worker in Hamilton, Virginia, and I hope I did not mess that last name up too bad there.

Our third witness is Jennifer Abruzzo, Senior Advisor to the President of Communication Workers of America in Washington, DC. Mrs. Abruzzo served as General Counsel of the NLRB during the Biden administration. Our last witness is Mr. Roger King, Senior Labor and Employment Counsel at H.R. Policy Association in Washington, DC.

We thank the witnesses for being here today, and we look forward to your testimony. Pursuant to Committee Rules, I would ask that you each limit your oral presentation to a 3-minute summary of your written statement, as Committee members have many questions for you, the clock will countdown from 3 minutes.

Pursuant to Committee Rule 8(d), and Committee practice, however, I will not cutoff your testimony until you reach the 5-minute mark. I would also like to remind the witnesses to be aware of their responsibility to provide accurate information to the Subcommittee.

Now, it is my privilege to recognize Mr. Solem for your testimony.

STATEMENT OF MR. AARON SOLEM, STAFF ATTORNEY, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, SPRINGFIELD, VIRGINIA

Mr. SOLEM. Thank you, Chairman Allen, Ranking Member DeSaulnier, and members of the Committee. My name is Aaron Solem, I am an attorney at Right to Work Legal Defense Foundation. I represent individual employees, workers whose voices are too often lost in policy debates dominated by union officials and employer interests.

The National Labor Relations Act is fundamentally about employee free choice. It protects equally the right to choose the union, and the right to reject one. The Board is supposed to remain neutral between those choices, but over the past 4 years the Biden NLRB has severely tilted the playing field in favor of union officials at the expense of employees who oppose union representation.

This shift was not surprising at all. President Biden promised to be the most pro-union President in history, and his appointees followed that lead. Consider just the following examples: In Cemex, the Board held it would nullify an employee vote against a union and then decide that the union is to be the employee's representative, if an employer supposedly committed even minor unfair labor practices.

With the Election Prevention Rule, the Biden Board took away an employee's right to call for a secret ballot election after they are subjected to a union card check campaign, by restoring the so-called recognition bar. With the Election Prevention Rule, the Biden Board revived the discredited blocking charge policy, which allows unions to unilaterally delay and employee to certification election simply by filing an allegation against the employer.

No neutral fact finding required. The Biden NLRB's agenda confused empowering union officials with protecting employee free

choice. The agenda ignores the reality that many workers don't want union representation. It ultimately infantilizes employees by treating them like sheep, or too ignorant to decide for themselves whether they want to be unionized.

To restore balance and fairness, the next Board in this Congress should advance a truly pro-employee agenda. This agenda should be centered on employee democracy and protecting an employee's right not to fund union politics. That includes ending non-statutory election bars, like the recognition bar, that prevent elections at regular intervals.

Ending the blocking charge policy to restore an employee's right to a timely secret ballot election, protecting an employee's right to opt out of funding for union politics, and ensuring open debate by protecting free speech on all sides. Labor law should not protect employees—should protect employees, and that includes employees who do not want a union, employees who want information about the down sides of a union, and employees who want to work without being forced to fund union political causes.

Thank you and I look forward to your questions on all of these issues.

[The prepared statement of Mr. Solem follows:]

Statement of

Aaron Solem
Staff Attorney, National Right to Work Legal Defense Foundation, Inc.

Before the

House Committee on Education & Workforce
Subcommittee on Health, Employment, Labor, and Pensions
June 11, 2025

Chairman Allen, Ranking Member DeSaulnier, and distinguished subcommittee members:

Thank you for the opportunity to appear before you today. I have been practicing labor and constitutional law for thirteen years, on behalf of individual employees, at the National Right to Work Legal Defense Foundation. Since 1968, the Foundation has provided free legal aid to employees who wish to exercise their rights to refrain from joining or assisting labor organizations and their right to freely choose whether or not to be represented by such organizations. I have a unique perspective on the National Labor Relations Board (NLRB or Board) because I have represented hundreds of employees who are subject to the National Labor Relations Act (NLRA).

The purpose of the NLRA is to protect employee free choice regarding unions and union representation. Unfortunately, the NLRA fails to protect employee free choice in one major respect: it authorizes forced fee arrangements that compel employees to pay union fees or be fired. That is why the single most effective way to bring balance and fairness to the Act would be to pass the National Right to Work Act (H.R. 1232) and outlaw forced union fees across the country.

Separate from this Congressional action, the NLRB can also do its part to promote employee free choice by refocusing on eliminating election blocks and bars and by strengthening the right of employees to refuse to pay for union political expenditures.

The heart of the NLRA is in two parts of the Act: Sections 7 and 9. Section 7 grants employees a right to join or organize a union and an equal right for employees

to refrain from these activities.[1] Section 9(a) provides that only a union with majority support may be designated as the exclusive representative of employees in a workplace.[2]

When properly enforced, these two provisions, working together, ensure that employees' choice to be represented or not is governed by the democratic principle of majority rule. "[U]nder Section 9(a), the rule is that the employees pick the union; the union does not pick the employees."[3]

Yet for the past four years, the Biden Board deviated from this principle by preventing secret ballot elections that allow employees to decide whether they want to be represented by a union. For example, the Biden Board made it harder to oust an unpopular union by bringing back the heavily criticized "blocking charge" policy. Similarly, the Biden Board barred employees from seeking elections after an employer recognizes a union through a so-called "card check" process.

These are anti-employee policies because they cancel worker choices and replace them with decisions made by unions and the government. Blocking charges prevent workers from voting in elections that they themselves have requested. The "voluntary recognition bar" prevents workers from seeking an election on the grounds that the government knows, better than the employees, how much support a union has based solely on the abuse-prone "card check" process.

These policies are not just inconsistent with employee free choice—the primary purpose of the Act—but they run against the political winds. President Trump won reelection because he was the candidate who listened to employees. The

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[1] 29 U.S.C. § 157 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all such activities . . . ." *See also Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001) (the NLRA "guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all.").

[2] 29 U.S.C. § 159(a) provides: "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit."

[3] *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (D.C. Cir. 2018).

Board should follow in those footsteps by pursuing a truly pro-employee agenda. This agenda would put power in the hands of workers—not unions or employers—— to decide whether they want to be represented by a labor union.

The Board can accomplish this goal by ending the blocking charge policy, eliminating or reforming non-statutory election bars, and strengthening the right of employees to refuse to pay for union political expenditures by mandating employees opt-in to paying for union politics, rather than force them to opt-out.

I. The Board should reinstate and improve the Trump I Election Protection Rule.

For years, the Board adhered to a "blocking charge" policy of refusing to conduct decertification elections if a union filed almost any unfair labor practice charge against an employer.[4] This policy incentivized unions to file frivolous unfair labor practice charges against employers because merely alleging a violation would unilaterally halt the decertification election process until the unfair labor practice charge was adjudicated. Even the Obama Board recognized that "at times, incumbent unions may abuse the policy by filing meritless charges in order to delay decertification elections."[5]

In 2020, the Trump I Board, under Chairman Ring's leadership, modified the blocking charge policy with the "Election Protection Rule."[6] This modification of the blocking charge policy was extremely successful. From my personal experience,

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[4] In 2014, the Board issued rulemaking codifying its blocking charge policy. 79 Fed. Reg. 74308-74490 (Dec. 15, 2014). Prior to 2014, the policy was set out in Section 11730 of the Board's Casehandling Manual for Representation Proceedings.

[5] 79 Fed. Reg. at 74419.

[6] The Election Protection Rule consisted of three alterations to the Board's Regulations. First, it amended 29 C.F.R. §103.20, overturning the prior "blocking charge" policy in order to streamline and prevent undue delay in representation elections. Second, it added 29 C.F.R. § 103.21, requiring unions and employers who seek to utilize the "voluntary recognition bar" to notify employees of a forty-five day window period to seek an election to challenge the union's allegation of majority support. This rule revived the Board's landmark decision in *Dana Corp.*, 351 NLRB 434 (2007), which the Obama Board had overruled. Third, it added 29 C.F.R. § 103.22, which required employers and unions in the construction industry to obtain objective proof of majority support beyond mere contract language if the employer recognizes the union as a Section 9(a) representative without an election.

during the four years the rule was in effect, employees seeking to change or remove their union representative were far more likely to get a prompt secret-ballot election than before the Rule was enacted.

Despite this success, in August 2024, the Biden Board repealed the Election Protection Rule and revived the blocking charge policy. Returning to the "bad old days," this current policy allows unions to unilaterally block decertification elections just by filing a charge against an employer, no matter how meritless it may be.

While the current rule purports to require unions to file an "offer of proof" in support of their blocking charge, in practice such offers require little hard evidence. Often times no more than the names of the potential witnesses and a summary of each witness's anticipated testimony is needed to block an election.[7] In my experience, Regional Directors reflexively block elections in all such cases, even when the underlying offers of proof are weak and the charges are frivolous, minor, or false.

The Trump II Board should immediately repeal the blocking charge policy and return to and improve the Election Protection Rule. As discussed below, the blocking charge policy conflicts with the Act, undermines employee free choice, incentivizes frivolous charges, and causes widespread delays whenever employees seek elections to change or remove a representative.

A. The blocking charge policy conflicts with the text of the Act.

Section 9(c) of the NLRA states "whenever a petition shall have been filed," if the Board finds "a question of representation exists, it *shall* direct an election by secret ballot."[8] The Board's blocking charge policy defies this statutory command by substituting "shall not" for "shall."

Over the decades many courts have criticized the Board's blocking charge policy.[9] The Fifth Circuit found the policy conflicted with the Act in two separate

[7] 29 C.F.R. §103.20(a).
[8] 29 U.S.C. § 159(c)(1) (emphasis added).
[9] *NLRB v. Hart Beverage Co.*, 445 F.2d 415, 420 (8th Cir. 1971); *NLRB v. Midtown Serv. Co.*, 425 F.2d 665, 672 (2d Cir. 1970); *NLRB v. Minute Maid Corp.*, 283 F.2d 705, 710 (5th Cir. 1960); *Pacemaker Corp. v. NLRB*, 260 F.2d 880, 882 (7th Cir. 1958); *TMobile v. NLRB*, 717 Fed. App'x 1, 3-5 (D.C. Cir. 2018) (Sentelle, J., dissenting).

cases. In *Templeton v. Dixie Color Printing Co.*, a majority of employees filed a petition seeking to decertify their union.[10] The Region dismissed the petition on the basis of a seven-year-old unfair labor practice charge filed against their employer. The employees sued the Board, seeking an election. Relying on the mandatory language of Section 9(c), the Fifth Circuit found the "Board has ignored its responsibility contrary to a specific mandate of the Act and thereby worked injury to the statutory rights of the employees."[11] Dismissing the petition was "tantamount to castrating § 7, the heart of the Act."[12]

In *Surratt v. NLRB*, the Fifth Circuit again relied on the mandatory language of Section 9(c) to uphold an injunction commanding the Board to reinstate a decertification petition.[13] It found the Board had a "clear duty under § 9(c)(1) of the Act to consider, investigate, and act upon the decertification petition."[14] By ignoring that clear duty "the employees were disarmed" of their rights by a "mechanical application of [the] blocking charge [policy]."[15]

B. The blocking charge policy offends the Act's structure and purpose.

The blocking charge policy does not only contravene a clear Congressional command, it offends the entire structure and purpose of the Act: employee free choice. "The *raison d'etre* of the [NLRA]'s protections" are to "empower *employees* to freely choose their own labor representatives."[16]

Section 7 permits exclusive union representation only if a majority of employees support the union.[17] In fact, "[t]here could be no clearer abridgment of § 7 of the Act," than "grant[ing] exclusive bargaining status to an agency selected by a minority of its employees, hereby impressing that agent upon the nonconsenting

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[10] 444 F.2d 1064, 1066 (5th Cir. 1971).
[11] *Id.* at 1069.
[12] *Id.* at 1070.
[13] 463 F.2d 378, 381 (5th Cir. 1972).
[14] *Id.*
[15] *Id.*
[15] *Minute Maid Corp.*, 283 F.2d at 710.
[16] *Colo. Fire Sprinkler*, 891 F.3d at 1038.
[17] *See Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737–39 (1961); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring).

majority."[18] Blocking an election based on an incumbent union's unproven allegations effectively permits a minority representative to entrench itself in power. Rule by the minority is an affront to the "philosophy of democratic institutions" embedded in the Act.[19]

Section 9(a)'s "democratic framework" requires the Board to "adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and *speedily*."[20] The Trump I Election Protection Rule was a step towards these laudable goals. The Biden Board's blocking charge policy is a step backwards because it gives unions the ability to "achieve an indefinite stalemate designed to perpetuate the union in power."[21] A single charge can derail an election for months and even years.[22] And if unions file sequential charges, the election may never occur.[23]

The legislative history of the Act demonstrates Congress' intent to prevent procedural delays and gamesmanship in elections. In support of the 1947 Taft-Hartley amendments, Senator Taft emphasized Section 9 of the Act was designed to avoid "dilatory tactics in representation proceedings."[24] Congress reaffirmed this objective in 1959 by enacting Section 3(b), which authorized the delegation of representation matters to Regional Directors. As Senator Goldwater explained, this

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[18] *Garment Workers*, 366 U.S. at 737 (citation omitted).
[19] *A.J. Tower Co.*, 329 U.S. at 331.
[20] *Id.* (emphasis added).
[21] *Midtown Service Co.*, 425 F.2d at 672.
[22] *Cablevision Systems Corp.*, 367 NLRB No. 59 (2018) (blocking charge followed by regional director's misapplication of settlement bar doctrine delayed processing of petition for over four years).
[23] See *Zev J. Eigen & Sandro Garofalo, Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 Minn. L. Rev. 1879, 1896–1897 (2014) (''Regional directors have wide discretion in allowing elections to be blocked, and this sometimes results in the delay of an election for months and in some cases for years—especially when the union resorts to the tactic of filing consecutive nonmeritorious charges over a long period of time. This is contrary to the central policy of the Act, which is to allow employees to freely choose their bargaining representative, or to choose not to be represented at all.'').
[24] *Boire v. Greyhound Corp.*, 376 U.S. 473, 479 (1964).

amendment aimed "to speed the work of the Board."[25] The blocking charge policy slows it down, sometimes interminably.

C. The blocking charge policy encourages frivolous charges.

Even if the blocking charge policy was consistent with the Act, which it is not, it still is bad policy because it invites gamesmanship and dilatory behavior. Below is just a small (but highly representative) sample of Foundation-assisted cases demonstrating how the blocking charge policy has been employed by unions and NLRB Regional Directors to the detriment of employee free choice.

In *Scott Brothers Dairy/Chino Valley Dairy Products*,[26] Petitioner Chris Hastings filed a decertification petition on August 17, 2010. The union filed blocking charges,[27] claiming the employer was unlawfully involved in the petition. Based on these spurious and unproven charges, the Regional Director blocked the election for several months. Eventually, the charges were either dismissed as meritless or voluntarily withdrawn. The election was finally held on August 10, 2011, a full year after the decertification petition was filed. The union overwhelmingly lost the election by a vote of 54-20, but had managed to retain its exclusive bargaining power and compulsory dues collections for an entire year due to its frivolous and non-meritorious charges.

In *ADT Security Services (IBEW Local 110)*,[28] Petitioner Lance Oelrich filed a decertification petition with signatures he collected in a hotel parking lot following a regularly scheduled employer quarterly meeting. Oelrich collected other signatures on his own time, away from work. IBEW Local 110, however, filed a blocking charge alleging that the decertification petition was circulated during a company-wide mandatory meeting. The Region immediately blocked the petition. Oelrich and other employees filed a Request for Review, providing affidavits stating the petition was collected without employer support or encouragement. IBEW eventually withdrew its unfounded charges against ADT, presumably to avoid their dismissal.

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[25] *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141 (1971) (quoting congressional record).

[26] Case No. 31-RD-001611.

[27] Case Nos. 31-CA-029944 (filed Sept. 21, 2010) and 31-CA-030024 (filed Nov. 10, 2010).

[28] Case No. 18-RD-206831 (Dec. 20, 2017) (order denying review).

Yet even though its blocking charges were not meritorious, the union's tactics managed to prevent an election for several months.[29]

In *Arizona Public Service Co. (USPA, Local 08)*,[30] Petitioner Wayne Evans filed a decertification petition on March 13, 2017. On March 20, 2017, the Regional Director halted the election based on blocking charges alleging the petition was collected during work time and under employer supervision. The employees who collected the petition filed a Request for Review and submitted affidavits demonstrating they had collected the signatures during non-work time and at non-work locations, away from management personnel. The union eventually withdrew its blocking charges, presumably to avoid their dismissal. The Region finally held an election, and the union lost. Yet aided by its spurious blocking charges, the unpopular incumbent union was able to delay its ouster for nearly three months.

In *Apple Bus Co.*,[31] Elizabeth Chase filed her first decertification petition on July 31, 2017. The petition was dismissed due to the Board's "successor bar" doctrine. After the successor bar expired, on March 15, 2018, Chase filed a second decertification petition. Between the filing of the petition on March 15, 2018, and March 28, 2019, Teamsters Local 959 filed nine different blocking charges alleging unlawful employer misconduct. The Region continuously blocked the election despite Chase filing three Requests for Review. Local 959 ultimately withdrew seven of its meritless charges. Among the charges withdrawn were baseless allegations that Apple Bus aided Chase in the collection of her petition. The remaining minor allegations were settled with a non-admissions clause, which allowed an election to be scheduled after the notice-posting period. Before an election could take place after settlement, on March 28, 2019, Local 959 filed a new unfair labor practice charge, which was resolved on May 14, 2019, by another settlement with non-admissions clause. But before an election could be conducted, between July and August, Local 959 filed an additional five blocking charges. In total, the union filed 15 charges against Apple Bus and withdrew over half of them because of their lack of merit. Chase made five attempts to appeal requesting the Board to modify its blocking charge policy and to grant the employees an election. Despite majority support for the decertification petition since March 2018, the Region continued to postpone the decertification election based on the notion that some connection might exist between the petition and allegedly unlawful employer

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[29] ADT eventually withdrew recognition from the IBEW because Oelrich petition was supported by the majority of employees.

[30] Case No. 28-RD-194724 (June 27, 2017) (order denying review).

[31] Case Nos. 19-RD-203378 and 19-RD-2166369.

conduct. In November 2019, over two years from the filing of Chase's first petition, the union disclaimed interest in representation and walked away rather than face the voters it claimed to represent.

As these examples illustrate, the blocking charge policy leads to frivolous charges, delayed votes, and the virtual destruction of employees' Sections 7 and 9 rights.

D. The Board ignored data showing the blocking charge policy caused widespread delays, while elections rarely had to be rerun under the Election Protection Rule.

When promulgating a rule, an agency must "examine the relevant data and articulate a satisfactory explanation for its action."[32] It may not rely "on one unsubstantiated conclusion heaped on top of another."[33] A rule cannot be "intended to defeat a bogeyman whose existence was never verified."[34] The blocking charge policy fails this standard. It fights a bogeyman that doesn't exist: the Board's own data shows very few elections were overturned under the Election Protection Rule while many more elections were unjustly stopped by the blocking charge policy.

The Biden Board reinstated the blocking charge policy because it believed too many employees voted in a "coercive atmosphere that interferes with employee free choice."[35] But the Board failed to grapple with the actual data. In writing its comments to the Biden Board, the National Right to Work Foundation could only find three overturned elections under the Election Protection Rule.[36] The Board itself could only cite five additional cases—all of which concerned union certification elections cases where the General Counsel sought bargaining orders—and *one* additional union certification case where the parties agreed to a rerun election.[37]

At most, the Board identified nine rerun elections over four years. Compare this to the data presented by then-Member McFerran in her April 2020 dissent to the Trump I Election Protection Rule. That data showed in fiscal years 2016 and 2017

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[32] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
[33] *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014).
[34] *Id.* at 710.
[35] 89 Fed. Reg. at 62967.
[36] *Id.* at 62979.
[37] *Id.* at 62980 n.142.

Regions blocked forty-five petitions due to non-meritorious charges. That's an average of 22.5 unjustified investigations per year—or nearly two per month—imposing significant costs on the parties and the Board without any legitimate basis.

The data demonstrates the true problem is delayed elections—not overturned and re-run elections. Yet the Biden Board never considered so few elections were overturned because the blocking charge policy was unnecessary.[38]

The bottom line is blocking charges protect unpopular union incumbents. Employees deserve better. If an employee has the courage to publicly voice his opposition to his exclusive representative to his coworkers and collect a valid petition, the Board should timely process it and hold an election.

E. The Board should overturn *Rieth-Riley* and allow elections to proceed.

In overturning the blocking charge policy the Board should not just readopt the Trump I rule because that rule itself suffered from a defect. The Biden Board interpreted the rule to still allow Regional Directors to dismiss a decertification petition based solely on the General Counsel's issuance of a complaint in an unfair labor practice case.[39] This was despite the fact that the Election Protection Rule stated "the final-rule amendment provides that a blocking-charge request will no longer delay the conduct of an election in *any case*."[40] Any new rule passed by the Trump II Board should not allow a preliminary finding of merit by the General Counsel to derail an election. Instead, the Board should make clear that an allegation is not meritorious unless admitted or there has been a final determination by *the Board* after litigation.

II. The Board should reform or eliminate non-statutory election bars.

The Board can return balance and fairness to the Act by jettisoning all of its non-statutory election bars. When Congress enacted the NLRA, it created only one

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[38] *State Farm*, 463 U.S. at 43 (agency action is arbitrary and capricious if the agency "offered an explanation for its decision that runs counter to the evidence before the agency."); *Envir. Def. Fund v. EPA*, 922 F.3d 446, 454 (D.C. Cir. 2019) ("An agency acts arbitrarily and capriciously when it offers inaccurate or unreasoned justifications for a decision.").

[39] *Rieth-Riley Construction Co.*, 371 NLRB No. 109 (June 15, 2022).

[40] 85 Fed. Reg. at 18375 (emphasis added).

bar to elections—the "election bar," which prohibits elections for one year after a valid election has been conducted.[41]

When unrepresented employees want an election to certify a union, the statute enacted by Congress says they only have to contend with the election bar. Yet the Board over the decades has forced decertification petitioners to overcome several NLRB-created bars that severely limit when they can exercise their equal right to refrain from unionization. The purpose of these bars is to frustrate employee free choice and entrench unwanted unions.[42] These bars have no basis in the Act's text and should be reexamined and jettisoned.

A. The Board should jettison the recognition and successor bars.

Two of the most pernicious bars are the "recognition bar" and the "successor bar." The voluntary recognition bar prohibits petitions for a secret ballot election for at least six months and possibly up to one year from the first date of bargaining session after an employer recognizes a union based on a card check or other non-electoral evidence.[43] Similarly, the successor bar prohibits an election for a similar timeframe after a change in ownership.[44] Under both bars, between six months and

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[41] *See* 29 U.S.C. §§ 159(c)(3) & 159(e)(2).

[42] *UGL-UNICCO Serv. Co.*, 357 NLRB 801, 810 (2011) (Member Hayes, dissenting) (an election bar does not aid employee free choice, but serves only "the ideological goal of insulating union representation from challenge whenever possible"); *Americold Logistics LLC*, 362 NLRB 493, 503 (2015) (Member Miscimarra, dissenting) (an election bars' main purpose is to "protect [incumbent] unions from decertification or displacement by a rival union.").

[43] The prior Board, under Chairman Ring, modified the voluntary recognition bar by requiring unions and employers who seek to utilize the "voluntary recognition bar" to notify employees and give them a forty-five day window period to seek a secret ballot election should they wish to challenge the union's allegation of majority support. 29 C.F.R. § 103.21. Showing no concern for employee free choice, the Biden-appointed majority repealed those reforms through rulemaking and reimposed the voluntary recognition bar as it existed in *Lamons Gasket*, 357 NLRB 739 (2011).

[44] *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011).

one year, any decertification petitions are subject to a complex five factor test seeking to determine whether a union has been given a reasonable time to bargain.[45]

These multifactor tests create confusion for employees and other participants and extra work for the Board. An employee faced with an unpredictable five-part test has little choice but to successively file multiple election petitions, one after another, in the hope that eventually one might be processed by the NLRB. For example, in *Student Transp. of Am., Inc.*,[46] the petitioner, my former client Bob Williams, filed four successive decertification petitions over a year-long period until the NLRB Region finally granted an election—which the union lost by an overwhelming vote of 88-13.

And Mr. Williams was one of the lucky ones—employees opposing a card check may never receive an election. In *Americold Logistics, LLC*,[47] my former client Karen Cox was subject to a card check campaign at her workplace. After the union was voluntarily recognized by the employer, she collected a decertification petition and filed three successive requests for a secret ballot election. After her third election petition, the NLRB Region held a secret ballot election. Because the Union appealed the Region's decision, the Region impounded the ballots pending appeal. On appeal, the Obama NLRB majority overturned the election, finding the union was not granted sufficient time to bargain, despite the fact the union had been recognized for more than one year.[48] The impounded ballots were subsequently destroyed. Because the employer and union had entered into a collective bargaining agreement after the final petition was filed, the employees could not seek another election until the end of the Board's contract bar period.[49]

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[45] *Lamons Gasket*, 357 NLRB at 748 (establishing five factor test); *MGM Grand Hotel, Inc.*, 329 NLRB 464 (1999) (voluntary recognition bar can last for over eleven months).
[46] Case No. 06-RD-127208.
[47] 362 NLRB 493 (2015).
[48] *Id.*
[49] *General Cable Corp.*, 139 NLRB 1123 (1962) (contract bar prohibits employees from filing a decertification petition for the term of a CBA, or for three years, whichever is shorter).

B. The voluntary recognition bar elevates unreliable card checks over elections.

Recognizing these problems with the recognition bar, the Trump I Board's Election Protection Rule reestablished a modified recognition bar. Under the Board's rule, a recognition bar continued for a reasonable period only if: (1) the employer and union notified the Regional office that recognition had been granted; (2) the employer posted a notice of recognition (provided by the Regional office) informing employees that recognition has been granted and they had a right, during a 45-day "window period," to file a decertification or rival-union petition; and, (3) 45 days passed without a properly supported decertification petition being filed. If a petition was filed during the 45-day window period, the Board would process it and hold a secret ballot election.[50]

These procedures were a positive step because card checks are not reliable indicators of employee support. Consider my former client Tami Kecherson, who was the petitioner in *Baseball Club of Seattle, LLLP d/b/a Seattle Mariners*.[51] Ms. Ketcherson was a retail employee of the Seattle Mariners. In 2023, based on an ostensible majority of employees signing union authorization cards, the Mariners voluntarily recognized UFCW Local 3000. A number of the employees questioned the accuracy of the card check recognition and filed for a secret ballot election to determine whether the union really did represent a majority of employees.

The union lost the NLRB secret ballot election by a margin of 50-9. Before the NLRB Regional Director could issue a final certification of the 50-9 election, Local 3000 issued a "disclaimer of interest" and walked away from any authority to represent Ms. Kecherson and her co-workers. In short, the authorization cards were an inaccurate indicator of employee support as the union garnered only 15% of the votes in the secret ballot election.

But it shouldn't surprise anyone that a card check was unreliable. Union-collected authorization cards are inherently unreliable gauges of employee free choice because they are conducted without Board oversight or safeguards to prevent union misrepresentations or coercion of card signers. Unions can and often do engage in coercive conduct and misrepresentations during card check campaigns that would not be tolerated in Board-conducted elections. For example, the following activity has been held to contaminate the "laboratory conditions" necessary to

[50] *See also Dana Corp.*, 351 NLRB 434 (2007).
[51] NLRB Case No. 19-RD-316179.

employee free choice in Board conducted elections: electioneering at the polling place;[52] prolonged conversations with prospective voters in the polling area by union or employer representatives;[53] electioneering among employees waiting in line to vote;[54] speechmaking by a union or employer to massed groups or captive audiences within twenty-four hours of the election;[55] a union or employer keeping a list of employees who have voted as they entered the polling place (other than the official eligibility list);[56] and a union or employer handling ballots.[57]

But similar or identical conduct occurs by union organizers in almost every card check campaign. The place where the union confronts an employee with an authorization card is the functional equivalent to an election polling place because it is where the employee makes his or her definitive choice regarding union representation. When an employee signs—or refuses to sign—a union authorization card, he or she is not likely to be alone. Rather, this decision is likely made in the presence of one or more union organizers soliciting—or, worse, pressuring the employee to sign. Many employees are coerced, harassed, or wrongfully induced to sign union authorization cards. The employee's decision to sign or not sign the card is not secret, as in a Board-conducted election, because the union knows who signed a card and who did not.

In contrast, each employee participating in a NLRB-conducted election makes his or her choice in private—secret from both the union and the employer. Once the employee has made the decision by casting a ballot, the process is at an end. This is not true for an employee caught in the maw of a year-long card check campaign, who may be solicited repeatedly and, perhaps coercively, month after month until he or she signs.

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[52] *Alliance Ware, Inc.*, 92 NLRB 55 (1950); *Claussen Baking Co.*, 134 NLRB 111 (1961).
[53] *Milchem, Inc.*, 170 NLRB 362 (1968).
[54] *Bio-Medical Applications*, 269 NLRB 827 (1984); *Pepsi-Cola Bottling Co.*, 291 NLRB 578 (1988).
[55] *Peerless Plywood Co.*, 107 NLRB 427 (1953).
[56] *Piggly-Wiggly*, 168 NLRB 792 (1967).
[57] *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004); *Professional Transportation, Inc.*, 370 NLRB No. 132 (June 9, 2021) ("[W]e hold that a party's solicitation of one or more mail ballots constitutes objectionable conduct that may warrant setting aside an election.").

These issues are why the Supreme Court[58] and nearly every circuit court has made the common-sense observation that card check campaigns are inferior to secret ballot elections.[59] The Fourth Circuit perhaps put it best: "[i]t would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands. The one is no more reliable than the other."[60]

The Trump II Board should work to safeguard and conduct more elections and end the voluntary recognition bar.

III. The Board should follow Supreme Court precedent and require non-member employees to opt-in to paying for union political expenditures.

Finally, the Board can strengthen *Beck* rights and protect employee free choice by adopting an "opt-in" regime for non-members required to pay union dues. This would require employees to affirmatively consent to pay for union political and ideological expenditures. In non-Right to Work states, non-members subject to a forced fee agreement are assumed to want to pay full union dues. Full dues include political and ideological costs. Employees who want to pay a reduced fee are often forced to jump through several procedural hoops to pay the reduced fee. A system where non-members must opt-in to paying full dues would better ensure that non-

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[58] *NLRB v. Gissel*, 395 U.S. 575, 602 (1969) ("secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support").

[59] *NLRB v. Hannaford Bros. Co.*, 261 F.2d 638, 640-41 (1st Cir. 1958) (noting the "vast difference" between secret ballots and card checks); *NLRB v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965) ("it is beyond dispute that secret election is a more accurate reflection of the employees' true desires than a check of authorization cards"); *NLRB v. Southland Paint Co.*, 394 F.2d 717, 729 (5th Cir. 1968) (calling arguments against card check "persuasive"); *NLRB v. Ben Duthler, Inc.*, 395 F.2d 28, 33 (6th Cir. 1968) (citation omitted) (calling cards "notoriously unreliable"); *NLRB v. Gruber's Super Market, Inc.*, 501 F.2d 697, 705 (7th Cir. 1974) (noting "pressures to sign authorization cards are not unknown, and, because of personal factors arising out of the daily working relationship among fellow employees, are not always easily resisted.") (citation omitted); *NLRB v. Arkansas Grain Corp.*, 390 F.2d 824, 828 n. 4 (8th Cir. 1968) ("authorization cards may be a totally unreliable indication of majority status"). *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460, 469 n.4 (3d Cir. 1981).

[60] *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 565 (4th Cir. 1967).

members cannot be required to fund political and ideological speech with which they disagree.

In *Communication Workers of America v. Beck*,[61] the Supreme Court held that NLRA Section 8(a)(3)[62] allows nonmembers to refrain from paying any portion of a union's dues that are spent on political and ideological activities unrelated to collective bargaining, contract administration, or grievance adjustment. In other words, an employee who is not in a Right to Work state cannot be fired for refusing to pay for a union's political and ideological activities.

In *California Saw & Knife Works*,[63] the Board created a set of procedures purportedly meant to implement *Beck*. The Board outlined a three-stage process: (1) the initial notice stage, requiring a notice to potential objectors to inform them of their rights to be nonmembers and objectors; (2) the objection stage, at which an employee who made an objection to paying full dues receives more detailed financial information from the union explaining how it arrived at its chargeable amount; and (3) the challenge stage, allowing employees to dispute the union's calculation of its chargeable expenses.

The Board adopted an opt-out regime because the Supreme Court long ago made an offhand comment, in *Machinists v. Street*, that an employee's "dissent is not to be presumed[,] it must affirmatively be made known to the union by the dissenting employee."[64]

But the Supreme Court effectively outlawed public sector opt-out schemes in *Knox v. SEIU, Local 1000*[65] and *Janus v. AFSCME*.[66] And in doing so, the Court cast serious doubt on the continuing validity of opt-out schemes in the private sector.

In *Knox*, the Court noted an opt-out system represented "a remarkable boon for unions" because nonmembers would normally "prefer not to pay the full amount

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[61] 487 U.S. 735 (1988).
[62] 29 U.S.C. § 158 (a)(3).
[63] 320 NLRB 224, 332-33 (1995).
[64] 367 U.S. 740, 744 (1961).
[65] 567 U.S. 298 (2012).
[66] 585 U.S. 878 (2018).

of union dues." The Court asked "[s]houldn't the default rule comport with the probable preference of most non-members?"[67]

The *Knox* Court found an opt-out system inadequate because it "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree."[68] Justice Alito concluded that *Street* and other cases gave "surprisingly little attention" to these issues and that the opt-out approach had "come about more as a historical accident.[69]" The Court concluded *Street*'s 'dissent is not to be presumed' language was mere "dicta," "stated in passing" and an "offhand remark."[70]

If there were any more questions, the Court conclusively closed the door on opt-out schemes in *Janus*. There, the Court ruled that employees could not be required to pay an agency fee unless the employee "affirmatively consents to pay."[71] This is because by agreeing to pay money to a union nonmembers are waiving their rights and "such a waiver cannot be presumed."[72] Thus, employees must clearly and affirmatively consent before any money is taken from them.

In sum, the Board should replace its outdated opt-out framework with an opt-in regime that respects employees' statutory rights and aligns with modern Supreme Court precedent. The original justification for the opt-out system, that dissent must be affirmatively expressed, has been thoroughly abrogated by the Supreme Court. This language was given little analytical thought and cannot support a system that presumes consent to waive an employee's right to refuse to subsidize political and ideological speech. This reform would not hinder unions from collecting voluntary contributions but would simply require them to secure an employee's affirmative consent to pay for ideological and political speech. Adopting an opt-in regime would ensure that the Board's procedures provide meaningful protection for employee free choice.

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[67] 567 U.S. at 312.
[68] *Id.*
[69] *Id.*
[70] *Id.* at 313.
[71] 585 U.S. at 930.
[72] *Id.*

Steps Congress should take to support returning balance and fairness to the Board.

While the Board can accomplish much of what I recommend today, Congress can promote employee free choice through the following steps:

(1) Congress should pass the National Right to Work Act (H.R. 1232), which would eliminate the need to depend on the NLRB to enforce workers' right not to subsidize union political and other non-bargaining activities;

(2) Amend NLRA Section 9 to provide that unions may become exclusive bargaining representatives only through Board-conducted secret ballot elections;

(3) Amend NLRA Section 9(c)(3) to specify that decertification petitions are barred only within one year of a Board-conducted election and not for any other reason;

(4) Amend the NLRA to provide that unproven unfair labor practice charges will not block decertification elections, but will be considered (if deemed sufficiently meritorious by the NLRB General Counsel) in conjunction with any objections to an election after the ballots have been cast and counted.

The NLRA needs substantial reform, which should be geared to protecting employee free choice and the democratic process. Union officials should not be empowered by federal law to gain representational rights without a secret ballot election or force employees to pay compulsory union dues and for political expenditures under threat of discharge. Thank you for your attention, and I look forward to answering any questions the Subcommittee Members may have.

Chairman ALLEN. Thank you, Mr. Solem. Now I recognize Mr. Vernuccio for your testimony.

STATEMENT OF MR. F. VINCENT VERNUCCIO, PRESIDENT, INSTITUTE FOR THE AMERICAN WORKER, HAMILTON, VIRGINIA

Mr. VERNUCCIO. Chairman Allen, members of the Committee, my name is Vincent Vernuccio, and I am President of the Institute for the American worker. I4AW is a 501(c)(3) educational organization focused on empowering American workers. Thank you for giving me the opportunity to testify here today.

Constantly shifting interpretations of the National Labor Relations Act are causing confusion and harming workers. The National Labor Relations Board needs to restore balance and ensure fairness and transparency for workers, unions and job creators. In addition to the NLRB's efforts, Congress can work to enhance a level playing field, ensuring NLRA empowers the American worker with a fair and transparent system.

This system should prioritize worker enfranchisement, ensuring that a majority or quorum of the full bargaining unit has a say in union elections, to make sure unionization reflects the true will of the workforce. This is something that a plain reading of the NLRA already provides.

The Act is clear, representatives are to be selected or designated by and I quote, "The majority of the employees in a unit." The NLRB should also ensure workers can make an informed decision on unionization by not stifling speech and forbidding employer meetings on unionization.

These meetings are essential to allow workers to hear all sides on what a unionized workplace would mean for them and their families. The Board should also ensure the NLRA does not shield harassing or discriminatory language or conduct, preserving a respectful workplace.

It should also preserve independent work arrangements and maintain a clear, direct control standard for joint employment. Many of these issues can be addressed at the Board level. Still, Congress can and is taking steps to protect transparency, fairness, and the ability of workers to champion their own destiny.

Representative Bob Onder recently introduced the Worker Enfranchisement Act, which would require a quorum of workers to vote in a secret ballot election before a union is organized. To give workers more freedom, Representative Eric Burleson in the last Congress introduced the Workers Choice Act, which would allow workers in unionized jobs and right to work states to opt out of representation and negotiate directly with their employer.

Representative Kevin Kiley recently introduced the Modern Worker Empowerment Act to ensure that American workers who want to work for themselves or earn extra side income, are not forced to be employees. Unfortunately, on the negative side, Senator Josh Hawley has introduced the Faster Labor Contracts Act, which would allow government bureaucrats to force arbitration for first contracts on workers unions and job creators.

Labor law needs to embrace and encourage entrepreneurship and the flexibility that modern workers want. Congress has sought to

remedy many of these matters through legislation and the NLRB can also restore balance for workers by embracing traditional interpretations on these issues and staying faithful to the plain language of the NLRA.

Thank you for giving me this opportunity, and I will welcome any questions.

[The prepared statement of Mr. Vernuccio follows:]



Statement of
F. Vincent Vernuccio
President, Institute for the American Worker

Before the
House Committee on Education and Workforce
Subcommittee on Health, Employment, Labor, and Pensions

"Restoring Balance: Ensuring Fairness and Transparency at the NLRB."

June 11, 2025

Introduction

Good Morning. My name is F. Vincent Vernuccio and I am President of Institute for the American Worker (I4AW). I4AW is a 501(c)(3) nonprofit organization focused on empowering workers. We educate on the benefits of freedom, innovation, and collaboration between workers and job creators. We also educate on policy solutions to remove roadblocks to worker freedom. More information can be found on www.i4aw.org, a one-stop shop for the best resources on the labor policy debates facing our country.

The National Labor Relations Act (NLRA) was enacted nearly 90 years ago with the promise of fostering labor peace by leveling the playing field between employers and employees. It granted employees the ability to collectively bargain and established the National Labor Relations Board (NLRB) to oversee labor disputes. As we approach its centennial, we should work to ensure we maintain the level playing field and refocus our laws with an eye to empowering the American worker.

The law should put the American worker first—and with the right reforms, it can. Every employee deserves a fair, transparent system that protects their rights and supports their ability to make informed choices about union representation. Over time, legal complexities and a constantly shifting regulatory landscape have made the NLRA difficult to navigate. Instead of empowering workers with meaningful choices, the current system obscures information, restricts employer communication, and too often stacks the deck in favor of an outdated one-size-fits-all collective bargaining model—regardless of worker preferences.

This is particularly true for small businesses where nearly half of Americans are employed.[1] Too often, smaller employers and their employees lack the clarity or support they need. A more balanced and transparent system would better serve American workers.

American workers deserve a transparent, fair, and modern labor system. That means:

- Ensuring that a majority or quorum of the full bargaining unit has a say in union elections to make certain unionization reflects the true will of the workforce.
- Ensuring workers can make an informed decision on unionization by giving them the opportunity to hear all sides regarding what a unionized workplace means for them and their families. And, if a union is chosen, ensure government bureaucrats don't impose a collective bargaining agreement on their workplace.
- Ensuring the NLRA does not shield harassing or discriminatory conduct, preserving respect and safety in the workplace.
- Preserving independent work arrangements and maintaining a clear, direct control standard for joint employment.

[1] U.S. Small Bus. Admin. Off. of Advoc., *Frequently Asked Questions About Small Business July 2024* (2024), https://advocacy.sba.gov/2024/07/23/frequently-asked-questions-about-small-business-2024/.

As we work to modernize labor law, it should reflect the realities of today's workforce—not the economy of the 1930s. A balanced, forward-looking system should empower workers with meaningful choices and ensure they have access to all information needed to make informed decisions regarding union representation. True empowerment comes from respecting how Americans work today—not from one-size-fits-all solutions. It's time to renew the original promise of the NLRA: to level the playing field and ensure every worker and job creator has a voice in shaping the future of the workplace.

Ensuring True Worker Support in Union Elections

The decision as to whether to grant a union a monopoly to represent all workers should reflect the will of the full bargaining unit, not just those members of the bargaining unit who vote. Under the current interpretation of the NLRA, unions are elected based on majority support from *voting* employees.[2] In these elections, workers decide whether to be represented by a union and, if so, which one. If a majority of *voters* choose a union, it is authorized to represent all employees in the designated bargaining unit, regardless of how many individuals in that bargaining unit actually voted.

A recent study released by I4AW and the Mackinac Center for Public Policy, explains that the manner in which union elections occur today is contrary to the plain language of the NLRA.[3] Currently, a union can win with support only from a majority of workers who vote, instead of a majority of the proposed bargaining unit—whereas the plain language of the NLRA requires a majority of the employees in a unit to vote:

> Representatives designated or selected for the purposes of collective bargaining *by the majority of the employees in a unit* appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment [...].(emphasis added.)[4]

This language suggests two possible interpretations. Under a strict reading a union may represent employees only if a majority of all eligible employees vote in favor. A more flexible interpretation would require that a majority or quorum of employees vote, and the union wins if it secures most of the votes of the employees who voted.

Both standards reflect a core principle: unionization should be based on the will of the majority of affected employees. However, for nearly 90 years, unions have been certified based only on the majority of those who voted, regardless of turnout. As a result, unions obtain exclusive

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[2] Nat'l Labor Relations Board ("NLRB"), *About NLRB: Conduct Elections*, https://www.nlrb.gov/about-nlrb/what-we-do/conduct-elections ("Elections to certify or decertify a union as the bargaining representative of a unit of employees are decided by a majority of votes cast").
[3] Stephen Delie, *Misred: How Legal Authorities Allowed Tyranny of the Minority to Subdue Worker Enfranchisement* (2025), https://www.mackinac.org/archives/2025/s2025-06.pdf.
[4] 29 U.S.C. § 159(a)

representation over bargaining units even when most eligible employees did not support unionization.

Compounding the matter, once a union is elected employees cannot move to decertify a union for the first year and, further, once a collective bargaining agreement is in place, a decertification election cannot occur for three years except during a very narrow "window period."[5] This is known as a "contract bar." This window period is important—if workers do not request a decertification election during the window period, the employer and union can enter into another agreement and re-start the three-year contract bar which then curtails workers' opportunity to have a say on the union at their workplace. The contract bar combined with a lack of majority standard contributes to why 95% of private-sector union workers covered by the NLRA didn't vote for the union that represents them.[6]

The NLRB continues to uphold the contract bar doctrine despite recognizing that the "window period" is not always known to employees. In fact, in the 2021 *Mountaire Farms* case, the NLRB stated:

> Some parties and several amici argue that the relevant date may not always be readily ascertainable under the contract-bar doctrine in its current form. These arguments have considerable force. The efficacy of the contract-bar window period is obviously negated if employees are unable to determine when the window period opens and closes. Although we share this concern, a sufficiently compelling case has not been made for any particular proposed modification.[7]

American workers deserve transparency, fairness, and for their voices to be heard. According to the I4AW and the Mackinac Center for Public Policy study:

> Recent data from the National Labor Relations Board shows that 20% of private sector unions were elected with less than a quorum of the collective bargaining unit voting, and 40% were elected without majority support from all employees eligible to vote. Of the approximately 74,000 employees collectively eligible to vote in these elections, only 32,000, or 43%, actually did.[8]

Employees also can't simply decide they don't want to be part of the union without a decertification vote. Additionally in states without right-to-work laws, workers can be fired for not paying their union fees.

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[5] NLRB, *About NLRB: Rights we Protect*, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/decertification-election (According to the NLRB, a "window period" begins, "90 days and ends 60 days before the agreement expires (120 and 90 days if your employer is a healthcare institution)").

[6] F. Vincent Vernuccio, Opinion, *Workers of the World, Vote!*, Wall St. J., Aug. 30, 2024, https://www.wsj.com/opinion/workers-of-the-world-vote-unions-voting-election-36f9087a?st=oa2hHC.

[7] Decision agreed to by Board Members McFerran, Kaplan, Emanuel, and Ring. McFerran "did not join her colleagues' observations about the potential problems with current law." 370 NLRB No. 110 (2021).

[8] *Supra* note 3.

Amending the NLRA to make clear the true meaning of its voting requirements would realign labor law with its original intent and this change would not significantly disrupt current election procedures. As I stated in a Wall Street Journal op-ed:

> Federal data show that unions can rally workers in most cases. According to the NLRB 2022 election report, in nearly 60% of successful unionization elections, a majority of eligible workers voted for representation. Nearly 80% of successful unionization elections met a lower bar, with more than half of workers participating and the union getting a majority of support from that smaller number of eligible workers who participated. These elections reflect some measure of democratic fairness. The rest raise doubts about the true level of worker support for unionization.[9]

Congress could also pass Rep. Bob Onder's (R-MO) *Worker Enfranchisement Act* (H.R. 2572) to require at least two-thirds of eligible workers participate in a unionization election.[10] If that threshold is met, the union wins and obtains the representation monopoly. If that threshold is not met, the union is not certified. Even the NLRB itself has a quorum requirement—at least three of the Board's five members must be lawfully seated to exercise its full power, and then a majority of that quorum is required to issue decisions. Requiring unions to win the support of a majority of all employees—or at least a majority of a two-thirds quorum—would ensure workers are not compelled to join and financially support a union that the majority of the workforce did not actively choose.

When a union does win an election it has a monopoly on bargaining for each and every worker in that unit. It's a requirement of the union to bargain even for workers that choose to opt-out of union membership in right-to-work states. Some call this a "free-rider" problem. Many of those workers would argue they're "forced riders" stuck under a collective bargaining agreement negotiated by a union they haven't joined and of which they don't pay dues. A policy solution exists for those that view it as either a free-rider or forced-rider problem – Workers' Choice.[11] The *Workers' Choice Act* was introduced in the previous Congress by Representative Eric Burlison (R-MO).[12]

Workers' Choice would empower employees in right-to-work states by allowing them an option to fully opt out of union representation and negotiate directly with their employer, just like more than 93% of the rest of the private sector workforce.[13] It addresses the "free rider" issue by freeing unions from the obligation to represent non-members. This commonsense reform

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[9] F. Vincent Vernuccio, *In Union Votes, 11% Can Make a Majority*, Wall St. J., June 23, 2023, https://perma.cc/T95M-4TNX; NLRB, *Election Reports Fiscal Year 2022*, https://perma.cc/Z76R-QBEC.
[10] Worker Enfranchisement Act, H.R. 2572, 119th Cong. (2025).
[11] Rep. Eric Burlison and F. Vincent Vernuccio, *Workers' Choice is the Way Forward*, Wall St. J., Dec. 12, 2023, https://www.wsj.com/articles/workers-choice-is-the-way-forward-unions-employees-9847e341.
[12] Workers' Choice Act, H.R. 6745, 118th Cong. (2023).
[13] Bureau of Labor Statistics, *2024 Union Membership Rate*, https://www.bls.gov/news.release/pdf/union2.pdf.

both respects freedom of association and modernizes labor relations without undermining collective bargaining rights.[14]

Leveling the Playing Field: Conversations with Workers about Unionization & Ensure a Fair Collective Bargaining Process

Employer Meetings on Unionization

During an organizing campaign, workers should have access to comprehensive information and the opportunity to make an informed, thoughtful decision regarding union membership. Employer meetings with employees typically occur during working hours and are compensated, similar to other workplace briefings or training sessions required by the employer. Prohibiting such employer meetings deprives workers of crucial information about the effects of unionization and places employers at a disadvantage. While employers may generally only speak with employees during work hours due to employment laws, unions have the latitude to contact employees at any time during non-working hours —including outside of the workplace, at home, or through other means of personal communication. This creates an uneven playing field as unions can freely contact employees at any time when they are not actively working, while employers are constrained by employment and labor laws that limit communication. Employer-led staff meetings are often the only opportunity for workers to hear from their employers regarding unionization because if a union is elected, employers are prohibited from engaging with employees directly regarding workplace related issues covered by the collective bargaining agreement.[15]

During the Biden administration, General Counsel Jennifer Abruzzo issued a memorandum declaring employee meetings on unionization to be unlawful.[16] Although the Trump administration subsequently rescinded that memorandum,[17] late last year in *Amazon.com Services LLC* the Board overturned more than 75 years of precedent and also held these meetings to be unlawful.[18] That case is still controlling. My organization recently released a report, *Free Speech Under Fire*, by James A. Prozzi. It demonstrates why the NLRB's *Amazon.com* decision is unconstitutional and underscores why workers have a right to hear from their employers and employers a right of free speech about unionization during paid staff meetings.[19]

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[14] F. Vincent Vernuccio, *Workers' Choice: Freeing Unions and Workers from Forced Representation*, Mackinac Center for Public Policy, June 1, 2016, https://www.mackinac.org/22471.

[15] *See* Institute for the American Worker, *Senator Hawley's Pro Act Lite*, Mar. 13, 2025, https://i4aw.org/resources/hawleys-pro-act-lite/.

[16] NLRB Gen. Couns. Mem. GC 22-04 (Apr. 7, 2022).

[17] NLRB Acting Gen. Couns. Mem. GC 25-05 (Feb. 14, 2025).

[18] *Amazon.com Services, Inc.*, 373 NLRB No. 136 (2024).

[19] James A. Prozzi, *Free Speech Under Fire: How Restricting Employee Meetings on Unionization Prevents Workers from Making Informed Decisions*, Institute for the American Worker, Feb. 2025, https://i4aw.org/reports/free-speech-under-fire-how-restricting-employee-meetings-on-unionization-prevents-workers-from-making-informed-decisions/.

In order to better understand how workers feel about employer meetings on unionization, I4AW commissioned the bipartisan public affairs firm Forbes Tate Partners to conduct an online survey of national likely voters.[20] The results showed broad support for employer meetings on unionization with 84% of those polled viewing the meetings favorably or neutrally and only 12% holding a negative view.[21] These results suggest that most people value an open dialogue and believe employers should have a voice in the conversation about workplace unionization.

Further, the permissible content of communications to workers are different for employers and unions. While employers face significant legal restrictions regarding what they may say to employees during organizing campaigns, unions do not have those same restrictions.[22] Unions are not required to keep the promises made during their organizing campaign—these promises can include guarantees of job security, better pay and benefits, and a greater voice in the workplace.[23]

Workers should be empowered to engage in informed decision-making when deciding whether to unionize. Banning employer meetings on unionization deprives employees of critical information and creates an uneven playing field.

Government Forced Collective Bargaining Agreements

Imposing a one-size-fits-all contract on workers and job creators through unelected government bureaucrats is fundamentally at odds with the principle of worker empowerment. The *Faster Labor Contracts Act* (S. 844) would force contracts on workers, unions, and employers—allowing government-appointed arbiters to make critical employment decisions in the name of speed.[24] Under current law, employers and unions are required to negotiate in good faith, providing both parties the opportunity to reach a mutually acceptable agreement. Replacing the negotiation process with government-imposed arbitration risks producing collective bargaining agreements that are unworkable, unreasonable, and ultimately disadvantageous to the very workers they are meant to serve.

Protecting Workers from Harassment

Employers should have the ability to protect their employees from discriminatory, harassing, or demeaning language. This behavior has no place in the workplace—and certainly should not be *protected*. However, in its 2023 decision in *Lion Elastomers*, the NLRB disagreed, holding that

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[20] Institute for the American Worker, *Polling Results for Employer Meetings on Unionization* (2022), https://i4aw.org/resources/polling-results-for-employer-meetings-on-unionization/.
[21] *Id.*
[22] NLRB, *Interfering with Employee Rights (Section 7 & 8(a)(1)*, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1 ("[an employer] may not . . . [p]romise employees benefits if they reject the union."); *An Outline of Law and Procedure in Representation Cases*, NLRB, https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/OutlineofLawandProcedureinRepresentationCases_2017Update.pdf.
[23] Glenn Spencer, *Do Unions Deliver on Their Promises*, U.S. Chamber of Com., https://www.uschamber.com/employment-law/unions/do-unions-really-deliver-on-their-promises.
[24] Faster Labor Contracts Act, H.R. 844, 119th Cong. (2025).

racist, sexist, and vulgar rhetoric is permissible in the workplace so long as it occurs in the context of "union activity."[25]

In June 2024, I4AW released a report exploring this deeply concerning interpretation entitled, "Battle of the 7s: Lauren McFerran's Weaponization of NLRA Section 7 Against Title VII Civil Rights Protections, Allowing Racist and Sexist Harassment in the Workplace." The report details the conflicting obligations placed on employers under federal law with respect to preventing workplace discrimination and harassment.

The NLRB's ruling is not only inconsistent with federal civil rights laws—it is a troubling example of how the law can fail to protect American workers. In *Lion Elastomers*, the NLRB held that employers may be restricted from disciplining workers who use discriminatory language during union-related activity, citing protections under Section 7 of NLRA. The plain language of Section 7 protects employees' right to engage in collective bargaining or other concerted activities—it does not grant immunity for unlawful or abusive conduct. The Board's interpretation suggests that employers may be prohibited from protecting employees from vulgar, harassing, or discriminatory speech from coworkers, if that speech is union related—potentially leaving employees vulnerable to such behavior in the workplace. While the NLRB's position was vacated by the Fifth Circuit for procedural reasons, it leaves open the door for a future NLRB to revisit this stance.[26]

This position also conflicts with guidance from the federal agency charged with enforcing anti-discrimination laws. In 2024—one year after *Lion Elastomers*—the Equal Employment Opportunity Commission (EEOC) reaffirmed that harassment because of race, color, religion, sex (including pregnancy, childbirth, or related medical conditions; sexual orientation; and gender identity), national origin, disability, genetic information and age (40 or over) can trigger liability under federal law.[27]

Employers should have the ability to enforce basic standards of respect and civility—not only to comply with civil rights laws but also to maintain a safe and inclusive work environment. Under the NLRB's 2023 standard, employees disciplined for offensive conduct could be reinstated and even receive back pay—undermining workplace integrity and encouraging further misconduct.

All workers deserve a safe and respectful workplace. Congress should act to protect the American worker and clarify that discriminatory, harassing, or demeaning language is not protected activity under the NLRA—or under any federal law.

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[25] *Lion Elastomers LLC II,* 372 NLRB No. 83 (2023).
[26] *Lion Elastomers, LLC II v. NLRB*, 108 F.4th 252 (5th Cir. 2024).
[27] Equal Emp. Opportunity Comm'n, *Enforcement Guidance on Harassment in the Workplace* (2024), https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace

Protecting Worker Freedom and Flexibility

Independent Contractors

Our nation's labor laws were originally designed to protect and empower American workers, but over time administrative overreach and shifting legal interpretations have moved us from that core mission. To truly support today's workers, we need to restore balance and refocus labor policy on fairness, choice, and economic opportunity.

Independent contracting is a popular way tens of millions of workers earn a living or make extra income. In 2023, 38% of the American workforce, or 64 million Americans, engaged in some form of independent contracting work.[28] These arrangements empower workers to work how they want and when they want, providing flexibility and economic opportunity. Independent contractors can take time during the day to help with a sick family member, earn extra money to pay for unexpected medical bills, save for a family vacation, and/or grow and build their own career pathways.

Unfortunately, this popular model for workers is regularly endangered by legislation and regulation at the state and federal level. For example, in its 2023 *Atlanta Opera* case, the Biden administration's NLRB tried to make it more difficult for individuals to work as independent contractors under the NLRA by creating a burdensome analysis that deemphasized a workers' entrepreneurial opportunity.[29] In addition, the Biden administration's Department of Labor (DOL) issued a rule that confused the issue and potentially could reclassify many independent contractors as employees. The Biden era NLRB and DOL changes to the longstanding independent contractor definitions have a common theme: they were designed to move more workers from an independent contractor relationship into an employment relationship—deciding what's best for workers and their families instead of empowering workers to make those decisions for themselves. While the Trump administration stated it will not enforce the rule and is in the process of reconsidering that rule,[30] the ever-swinging pendulum of policy changes between presidential administrations only leads to economic uncertainty and instability for America's workers.

Gig workers enjoy the flexibility of being independent contractors. A recent study found 77% of app-based workers want to remain independent contractors and not be forced into an employment model.[31] Another study found that flexibility is the reason they choose to work on an app-based platform, followed by allowing them to earn money quickly (65%) and enjoying

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[28] https://www.upwork.com/resources/gig-economy-statistics#:~:text=2.,of%20the%20global%20labor%20force.
[29] Board Modifies Independent Contractor Standard under National Labor Relations Act. (n.d.). National Labor Relations Board. Retrieved October 13, 2023, from https://www.nlrb.gov/news-outreach/news-story/board-modifies-independent-contractor-standard-under-national-labor
[30] *Frisard's Transp., LLC v. U.S. Dept. of Labor,* No. 24-30223 (5th Cir. 2025) ("[DOL]" intends to reconsider the 2024 Rule at issue in this litigation, including whether to issue a notice of proposed rulemaking rescinding the regulation.")
[31] Flex Association, *The App-Based Economy at Large* (2023), https://www.flexassociation.org/report/the-app-based-economy-at-large/.

being one's own boss (64%).[32] Further, 79% of rideshare and delivery drivers have other forms of income, including retirement income.[33] Yet another study found that more than a quarter of all skilled knowledge workers in the United States are independent contractors and are intentionally choosing this career pathway.[34] Of full-time w-2 employees, just 20% hold postgraduate degrees—while 37% of these skilled freelance knowledge workers hold postgraduate degrees.[35]

My organization and allies have spoken to many workers who can attest to the value of independent contracting. Independent Women's Forum, leaders on this issue, recently showcased examples of workers thriving as independent contractors and the risk of poor policies can have on their careers.

The Independent Women's Forum (IWF) spoke with freelance writer Cynthia Clampitt, who left a corporate job after a decade. Her freelance career faced a major setback when Illinois passed a law forcing companies to reclassify independent contractors as employees. Her main client offered to retain as employees some of the freelancers it contracted with, but at what amounted to lower pay rates. Cynthia remained a freelancer, valuing the flexibility to travel for speaking engagements and research, and to care for loved ones.[36]

Another was Sheryl Myers, an owner-operator truck driver. She and her husband transport cargo for the likes of the Department of Defense and Smithsonian museums. Myers told IWF about independent contracting, "It has been a real blessing to lay out our business strategy the way we chose, and it's worked well for us." They had crisscrossed the country for years but when California approved the disastrous AB5 law to limit independent contracting the Myers chose to avoid California like many other independent contractor drivers.[37]

Representative Kevin Kiley (R-CA) understands the importance of this model for workers and recently introduced legislation to empower workers and protect the independent contractor model. The *Modern Worker Empowerment Act* (H.R. 1319) would amend the *Fair Labor Standards Act* (FLSA) and NLRA to support entrepreneurial opportunity, ensuring those who are genuinely independent contractors are not misclassified as employees.[38]

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[32] Flex Association, *Flex Economy Impact Report* (2024), https://www.flexassociation.org/wp-content/uploads/2024/03/Flex-Economic-Impact-Report-2024.pdf.
[33] *Id.*
[34] Upwork, *Future Workforce Index* (2025), https://www.globenewswire.com/news-release/2025/04/23/3066181/0/en/Upwork-Study-Finds-1-in-4-U-S-Skilled-Knowledge-Workers-Now-Work-Independently-Generating-1-5-Trillion-in-Earnings.html.
[35] *Id.*
[36] Andrea Mew, *Cynthia's Story: This Food Historical Documented the Midwest's Agricultural Legacy Thanks to Freelance Work*, Independent Womens Forum (2023), https://www.iwfeatures.com/profile/cynthias-story-this-food-historian-documented-the-midwests-agricultural-legacy-thanks-to-freelance-work/.
[37] Ashley McClure, *Department of Defense Truck Driver Says Law Undermining Independent Contractors Also Undermine National Security*, Independent Womens Forum (2025), https://www.iwfeatures.com/profile/department-of-defense-truck-driver-says-laws-undermining-independent-contractors-also-undermine-national-security/.
[38] Modern Worker Empowerment Act, H.R. 1319, 119th Cong. (2025).

Workers like Cynthia Clampitt and Sheryl Myers should have the freedom to choose how they work, when they work, and what kind of employment best meets their needs.

Joint Employment

Recent changes to the definition of joint employment have far-reaching implications for small businesses, workers, and the broader American economy. For decades, joint employer status was based on whether one entity exercised actual, direct and immediate control over another company's employees. However, in 2015, the Obama administration's NLRB significantly broadened that standard to include indirect or unexercised control—upending 30 years of established precedent.[39] In 2017, the Trump administration's NLRB rescinded this decision, restoring the traditional standard.[40] In 2023, the Biden NLRB finalized a rule returning to the broader Obama-era standard—a move that prompted Republican NLRB Member Marvin Kaplan to warn in his dissent that it is "potentially even more catastrophic to the statutory goal of facilitating effective collective bargaining, as well as more potentially harmful to our economy, than the Board's previous standard..."[41] In 2024, the Biden rule was vacated by a U.S. District Judge.[42]

The constant legal whiplash has created significant instability for employers, especially small businesses, and workers. Businesses now face uncertainty over when they might be held liable for workers they do not hire, supervise, or compensate—making it harder to confidently enter partnerships, grow, or invest in workforce development. Industries that rely on franchising, subcontracting, or staffing are particularly vulnerable.

Workers benefit from diversity of industry. The legal ping-pong regarding joint employment creates concern and uncertainty among small business owners. A survey from the International Franchise Association showed that nearly three-quarters of franchisees are concerned about increased control from the franchisor and two-third expect that increased control would institute barriers to entry into this popular small business ownership model.[43] We should actively encourage job creation, career development, and economic mobility for workers, not decrease access to small business ownership. Ultimately, these dynamics restrict—not expand—workers' access to growth and choice in the labor market.

To restore stability and protect worker opportunity, Representative James Comer (R-KY) introduced the *Save Local Businesses Act* in the previous Congress.[44] This legislation would codify a clear, fair definition of joint employment, specifying that a business is only a joint employer if it, "directly, actually, and immediately" exercises control over another entity's

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[39] *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015).
[40] *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017).
[41] Standard for Determining Joint Employer Status, 29 C.F.R. pt. 103 (2023).
[42] U.S. Chamber of Com. v. NLRB, No. 6:23-CV-00553 (E.D. Tex. Mar. 8, 2024).
[43] Int'l Franchise Ass'n, *Potential Consequences of the NLRB Joint Employer Rule* (2023), https://www.franchise.org/potential-consequences-of-the-nlrb-joint-employer-rule/.
[44] Save Local Business Act, H.R. 2826, 118th Cong. (2023)

employees. By eliminating regulatory confusion, the bill would have empowered workers with more job opportunities while providing legal certainty to job creators.

True worker empowerment requires clarity, consistency, and accountability. Constantly shifting joint employment rules limits workplace flexibility and stifles entrepreneurial opportunity. A clear standard grounded in actual control ensures that businesses can innovate and grow—giving workers the freedom to thrive.

Conclusion

American workers deserve fairness and transparency at the NLRB. Labor law should prioritize the best interests of both workers and job creators.

The NLRB should strive for an informed workforce that is given information on their rights as opposed to stifling one side's speech.

It should also prioritize worker enfranchisement, ensuring that unions cannot represent all workers in a collective bargain unit unless they have the support of a majority of those employees.

Additionally, once a union is chosen, the workers, employers, and unions should be given the time needed to come to agreement on a contract instead of being constrained by an arbitrary deadline that allows bureaucrats to force arbitration. Forced arbitration could result in a panel unfamiliar with the workers or the business, dictating almost every aspect of working conditions for the employees.

The Board should allow employers to protect their employees from harassment and not allow special circumstances to shield vile conduct and language that makes employees feel unsafe.

Finally, labor law needs to embrace and encourage entrepreneurship and the flexibility modern workers want. Rather than forcing workers into one-size-fits-all collective bargaining agreements, Congress can amend the NLRA to allow workers to represent themselves if they choose and remove union's obligation to represent workers who do not pay them. Additionally, the Board should not hamper workers' ability to be self-employed and small business owners' ability to open and run a franchise.

Congress has sought to remedy many of these issues through legislation, but the NLRB can also restore balance for workers by embracing traditional interpretations on these issues and staying faithful to the plain meaning of the NLRA.

Chairman ALLEN. Thank you, Mr. Vernuccio, and next I will recognize Ms. Abruzzo for your testimony.

STATEMENT OF MS. JENNIFER ABRUZZO, SENIOR ADVISOR TO THE PRESIDENT, COMMUNICATIONS WORKERS OF AMERICA, WASHINGTON, D.C.

Ms. ABRUZZO. Thank you, Chairman Allen and Ranking Member DeSaulnier, I am Jennifer Abruzzo, and I served the public for almost 30 years at the National Labor Relations Board, most recently as its General Counsel.

As to the theme of this hearing, I would submit that we need to restore balance and ensure fairness and transparency at all workplaces around the country. In order to do that, the NLRB must be able to hold true to the public policy of the United States, as stated in the National Labor Relations Act, and that is to encourage collective bargaining, and to protect workers full freedom of association.

We all know that the power dynamics at workplaces are skewed in favor of employers, and in enacting the statute Congress rightly recognized the only way to combat that power and balance was by fostering strength in numbers among employees, so they could act together, and engage with their employers and negotiate over improved working conditions and wages, with or without a union.

As written and intended, the NLRA is a pro-worker statute, not a pro-union one, and not a pro-employer one. It protects workplace democracy where employees feel empowered to freely exercise their rights to engage in union or other protected activity to better their lives. The problem is that the NLRB is not fully protecting workers in this country right now, and it could get worse.

Today, I share four action items for Congress to consider and implement. First, you should force this President to abide by the NLRA. In January, the President unlawfully fired Board Member Gwynne Wilcox, an experienced labor law attorney who was well, well steeped in labor law, violating not only the statute, but also 90 years of Supreme Court precedent.

As a result, the Board lost its quorum, which means it cannot issue decisions. Who is benefiting from that—that dysfunction? Not workers, employers. Employers who now feel emboldened to violate the law with impunity and retaliate against their workers because there is no functioning board to hold them accountable.

At the same time that corporations and billionaires are pushing for more tax cuts at the expense of working families, they are also trying to squelch worker action, worker power, worker voice.

Second, Congress needs to fight to maintain the statutory independence of this multi-member bipartisan board, and its decision-making authority. Through actions and arguments made in Court, I think this President believes that he can ignore statutes, fire people at whim, and give his donors a blank check to trample on workers' rights in this country to unionize, collectively bargain, and act together to improve their circumstances.

Third, Congress needs to fully fund the NLRB. When I started back as General Counsel, the staffing was at the lowest level it had been since 1958. The staff is very talented, and very dedicated, but

they do not have the resources that they need to address the case intake.

Until Congress fully funds the NLRB, workers are going to continue to experience long delays in getting remedies, after being unlawfully fired. They cannot get back to work in any timely manner. They cannot get the back pay that they deserve. Unfortunately, corporations can afford to drag out the processes, but workers cannot.

Fourth, Congress should use its power to make the law even more balanced and fair by passing legislation that protects more employees, covers more employers, assesses penalties for violators, and facilitates reaching collective bargaining agreements in a timely manner.

Congress passed this statute in 1935 during the Great Depression, amid widespread industrial instability and workplace conflict. A functioning, well-funded NLRB can help ensure stable labor management relations at workplaces that inures to the benefit of workers, their families, their communities and employers alike. This is all about protecting workers and their families whose interests you were elected to represent. Thank you, and I look forward to your questions.

[The prepared statement of Ms. Abruzzo follows:]

CONGRESSONAL TESTIMONY OF

JENNIFER ANN ABRUZZO

HELP SUBCOMMITTEE HEARING

JUNE 11, 2025

I appreciate the opportunity to speak with the subcommittee today about the vital importance of protecting workers' rights in this country, including the fundamental right that employees have under the National Labor Relations Act (NLRA) to band together and seek better wages and working conditions.

I served the public for almost three decades at the National Labor Relations Board (NLRB) in various roles of increasing responsibility both in the field and headquarters, starting as a field attorney in Miami and ending as its General Counsel.

Ostensibly, this hearing is about restoring balance and ensuring fairness and transparency at the NLRB. Based upon my years of public service, working alongside many dedicated and talented career staff, I feel that I can speak with sufficient authority about the NLRB's fairness, transparency and commitment when protecting workers' rights and enforcing the statute when those rights are violated.

As to the theme of the hearing, I would submit that we need to restore balance and ensure fairness and transparency at all workplaces around the country. Congress enacted the statute with that goal in mind, and, throughout my almost 30-year career at the NLRB, I tried to fully effectuate Congress's mandate. In fact, while there were many practitioners representing deep-pocket companies

and other businesses that did not agree with my positions seeking to ensure that workers' rights were paramount over corporate interests, I believe all agreed that I was the most transparent General Counsel in the 90-year history of the NLRB, having issued many substantive memos fully explaining and justifying my positions.

For me, restoring balance and ensuring fairness and transparency means that the NLRB must hold true to the policy of the United States to encourage collective bargaining by protecting workers' full freedom of association. We all know that the power dynamics at workplaces are skewed in favor of employers. In enacting the NLRA, Congress sought to address that power imbalance by trying to level the playing field so that employees could act together and effectively negotiate with their employers to improve their conditions at work without fear of retaliation.

Congress, back then, rightly recognized that the only way to combat the power imbalance and unfairness at workplaces was by fostering strength in numbers among employees. And, 90 years later, it is more important than ever that the NLRB protect workplace democracy and ensure that employees feel empowered to freely exercise their rights to engage in union and other collective activities to better their lives.

As written and intended, the NLRA is a pro-worker statute, not a pro-employer or a pro-union one. And, I believe it is incumbent upon this Congress to restore the balancing intent of the 1935 Congress by ensuring that corporate interests are not elevated above workers' rights, which sadly is what the first Trump Board did and what I anticipate a second Trump Board will do once there is a quorum

comprised of one or more new politically-appointed and Senate-confirmed Board Members.

Speaking of a quorum, as you likely know based on Supreme Court precedent, the NLRB needs at least three members out of a total complement of five to issue decisions. On January 27th, after the President unlawfully fired Board Member Gwynne Wilcox – the first black woman on the NLRB - at the same time that he removed me, the Board lost its quorum and now is comprised of two white males, who can't issue decisions. And, who is benefitting from this dysfunction? Not workers, but employers, who may feel emboldened to violate the law with impunity and retaliate against their workers, who are unionizing or otherwise acting together to make their work lives better, because there is no functioning Board to hold them accountable for lawbreaking activity. So, at the same time that billionaires and corporations are pushing for more tax cuts at the expense of working families, they are trying to silence their workers. This is a travesty. Corporate billionaires and CEOs are getting rich off the backs of their employees. The ones that should get more money, benefits, protections and tax breaks are workers and their families.

In order to comply with Congress's statutory mandate, not to mention the Constitution and the law, Board Member Wilcox, a very experienced attorney with a wealth of labor law knowledge, should be returned to her rightful position at the NLRB so that she can continue to protect the rights of workers in this country and the Board can start issuing decisions that help workers, families and communities thrive. And, I implore more Members of Congress to call on the President to reverse course.

As mentioned, as members of Congress, I believe it is your duty to ensure that the statute Congress enacted is adhered to. This includes fighting to maintain the protections for Board members from Presidential removal except for malfeasance in office or neglect of duty. And, it also includes the maintenance of the independence of the NLRB's decision-making processes from interference. If the President gets the absolute power to ignore statutes passed by Congress and remove any executive official at his whim, as he seeks, what is to stop him from threatening to remove and actually removing a Board member if they don't issue a decision in favor of a corporation that donated millions during his campaign or that continues to add to the coffers through purchases of Presidential meme coins or crypto wallets, for example?

Under the U.S. Constitution, there remain, for the moment at least, three separate and co-equal branches of government. It is your responsibility as one of those co-equal branches of government not to allow the executive branch to usurp your legislative responsibilities to all of us who voted for you. You cannot allow the President to give his billionaire corporate donors a blank check to trample upon the rights of workers to unionize, collective bargaining, and act together to improve their circumstances. Are you as outraged, on behalf of all workers in this country, whose interests you are elected to represent, as I am?

Further, if you are to put working families first, as I believe you must, then you need to give millions more in funds to the NLRB, which is the only federal agency that enforces the only federal labor law in the country. When I started as General Counsel, the NLRB had hit its lowest staffing level since 1985 due to years of underfunding.

The significant decrease in staffing, particularly in the field offices where the vast majority of the NLRB's service to the public is done, is detrimentally affecting many in this country.

While Congress provided a modest budget increase in FY 2023 - the first increase in funding in nearly a decade – the NLRB just doesn't have the resources it needs to address case intake. And, to add insult to injury, the incursion of DOGE, coercion of OPM and OMB, and recent Executive Orders have made matters worse. Despite the best efforts of dedicated and talented staff, the lack of sufficient funding has hampered the NLRB's ability to protect workers, enforce the statute, and get remedies for workers who are fired or otherwise adversely affected because they exercised their rights to organize, collectively bargain, and engage with one another about their workplace issues. What this means in real terms for working people is that, until Congress fully funds the NLRB, workers will continue to experience long delays in getting the remedial relief to which they are entitled for myriad violations of their rights. Unfortunately, corporations can afford to drag out the process for years, but most workers cannot.

A sufficiently funded NLRB, which in my mind means a $100M increase at least, will help ensure that the NLRB can robustly do its job of promoting productive labor management relations at all workplaces, inuring to the benefit of workers, their families, communities, and employers alike.

As a reminder, the NLRA was enacted during the Great Depression because employees lacked sufficient channels of communication with their employers to improve their circumstances and that led to

a lot of workplace conflict and industrial instability affecting commerce throughout the country. Congress sought to eliminate that by empowering employees to freely speak out about their workplace issues and to seek a seat at the bargaining table to address them. Specifically, it gave employees the right to: self-organize; join, support, or assist a union; collectively bargain through representatives of their free choosing; act together for mutual aid or protection; or refrain from these acts. That Congress rightly understood that negotiated increases in wages and benefits would help struggling families and lift up the failing economy.

And, you have the power to make the law even more balanced and fair for workers by passing legislation that would, for example, broaden the scope of workers and employers covered by the law, better address interference with employee free choice, create monetary penalties for significant violations, and facilitate good faith bargaining and reaching first contracts in a timely manner.

In conclusion, if this Congress acts in contradiction of the public policy of the United States, as stated in the preamble of the NLRA, by elevating corporate interests above workers' rights, and fails to ensure that the NLRB can fully do its job of encouraging employers to respect employee voice and choice, to listen and address their employees' mutual concerns, to be fair and transparent with workers and their representatives, and to recognize their workers for the value that they add to their employer's profit-making enterprises, then I expect that workers will not only elect different legislators next fall, but will return to the self-help activities pre-dating 1935, including wide-scale protests and strikes, in order to re-take control of our governance, to gain or regain the benefits that

were earned through hard work, and to receive the recognition, dignity and respect that they so richly deserve.

This is all about protecting workers and their families, whose interests you were elected to represent.

Let's all do our part to ensure that we remain a country of the people, by the people, and for the people.

Thank you.

Chairman ALLEN. Thank you for your testimony. Last, I recognize Mr. King for your testimony.

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

Mr. KING. Thank you, Chairman Allen, Ranking Member DeSaulnier, and Committee Chair Walberg, and Ranking Committee Member Scott. It is nice to again appear before this Committee. I am here on behalf of the H.R. Policy Association. We represent over 350 employers that have operations throughout the country.

The employee complement of those member companies is almost 10 percent of the private sector workforce in this country. The issues before this Committee on a continual basis are of vital interest to our Association. I commend the Committee for the title of the hearing today, Rebalancing the Application of the National Labor Relations Board.

Suffice it to say, while I have a very high regard for my colleague, Ms. Abruzzo, I believe she has an incorrect view of the National Labor Relations Act at the outset. What unfortunately many proponents come here in this Committee and other Committees of Congress, and they make the statement that the National Relations Act was passed to promote collective bargaining.

That is correct to a point, but what those individuals fail to acknowledge is the Act was written by the Congress for those employees that desire union representation. They have the cart before the horse. Collective bargaining does not occur unless or until a majority of employees in an appropriate unit have elected union representation.

With respect to the balancing of the application of the Act, it has been out of balance in a very significant way for the last 4 years plus. First, the Office of General Counsel has pursued initiatives that are not core important to the Act. For example, pursuing the initiative that college athletes, student athletes, should be covered by the National Labor Relations Act, was a significant waste of government money, and agency resources.

Trying to narrow the definition of who is an independent contractor has interfered with numerous entrepreneurial opportunities for literally thousands of workers in this country. Further broadening the definition of joint employer status has interfered with business relationships for thousands of employers and many, many more, thousands of employees.

The franchisor/franchisee industry has been seriously disrupted by initiatives by the National Labor Relations Board. These attempts to expand the Act well beyond its intent is well beyond the core mission of protecting employees, and I certainly agree with Ms. Abruzzo, the Act is intended to protect employees, not union institutional interest, nor employer interests. It is about employees.

In the Office of General Counsel's pursuit of this agenda they have wasted taxpayer dollars in numerous, numerous unneeded initiatives. The agency's own statistics show that for every reduction of settlement percentage of 1 percent, the agency suffers at least 2 million dollars of wasted resources.

The settlement rate for cases has dropped dramatically under the past administration, at least 5 percent. That is 10 million dollars right there, but that is not the end of the story. The time it takes

to even get to a settlement has increased significantly. At the time that the Agency is not using its resources properly, it continually comes to Congress and asks for more money.

That is certainly not appropriate. Briefly, with respect to the National Labor Relations Board's juris prudence, the Biden Board overruled literally decades of precedent. Mr. Allen, I commend you for your proposal to guarantee secret ballot elections. The Cemex case at bottom is all about eliminating secret ballot elections and relying primarily on card checks.

That case alone overrules decades of precedent. The Amazon case that was referred to earlier prohibits employers from having meetings with their employees regarding unionization. That case decision again overrules decades of precedent and is inconsistent with Section 8(c) of the NRA, and the First Amendment.

From my perspective, it has no chance of survival in the Court. In summary, there are many other things, Chairman Allen, that we could discuss, and hopefully we will have an opportunity to discuss that this morning.

[The prepared statement of Mr. King follows:]



G. Roger King[1]

SENIOR LABOR AND EMPLOYMENT COUNSEL

HR POLICY ASSOCIATION

TESTIMONY BEFORE THE HOUSE SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS (HELP)

HEARING ON "RESTORING BALANCE: ENSURING FAIRNESS AND TRANSPARENCY AT THE NLRB"

Wednesday, June 11, 2025

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[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 State 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 Greg Hoff, his colleague at the HR Policy Association, in the preparation of his testimony.

Chairman Allen, Ranking Member DeSaulnier, and Members of the Subcommittee:

Thank you for the opportunity to again testify before the House Education and Workforce Committee and the Subcommittee on Health, Employment, Labor, and Pensions (HELP).

I am appearing today on behalf of the HR Policy Association, where I serve as the Senior Labor and Employment Counsel. HR Policy is the premier public policy advocacy organization that represents the chief human resource officers – C-suite executives who lead the human resources function – of more than 350 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States – nearly 9 percent of the private sector workforce. Since its founding, one of HRPA's principal missions has been to leverage the expertise of its members to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace. My biographical information is attached to my written testimony as Exhibit A. I respectfully request that my written testimony and the appendices hereto be included as part of the record of the hearing.

Mr. Chairman, the title for this hearing, "Restoring Balance: Ensuring Fairness and Transparency at the NLRB," is well-chosen for our discussion this morning. There is an immediate need to restore balance to the direction of the National Labor Relations Board ("NLRB," "Board," or "Agency"). Outlined below are three areas where such rebalancing is quite important to pursue.

The National Labor Relations Board Office of General Counsel

- Scope of Board Jurisdiction

Under the direction of former General Counsel Jennifer Abruzzo, the Office of General Counsel of the Board pursued initiatives that attempted to extend coverage of the National Labor Relations Act ("NLRA" or "Act") to private college athletes, invalidate common sense workplace rules, and restrict and/or eliminate well-established contractual terms between employers and employees, including non-compete agreements and training repayment programs. This is merely a sample of the far-reaching initiatives pursued by former General Counsel Abruzzo – the full list is much longer. Acting NLRB General Counsel William Cowen has made significant progress to curb several of these previous initiatives by rescinding a number of former General Counsel Abruzzo's memoranda.[2] There is much more work to be done. Other initiatives and directives from the former General Counsel should be reviewed, and no further Board resources should be expended to expand the former General Counsel's ill-advised attempts to expand the reach of the NLRA.

- Protection of Board Jurisdiction - Preemption

[2] Acting General Counsel Cowen has rescinded, to date, 29 memoranda issued by former General Counsel Abruzzo.

In the last four years, the NLRB Office of General Counsel has completely ignored numerous state-level legislative efforts on labor issues that clearly interfere with the jurisdiction of the Board in its enforcement of the NLRA.[3] These initiatives, particularly with respect to so-called "captive audience meetings" have continued to develop without any challenge from the Board.[4] The new General Counsel should make it a priority to review the state law developments, and, where appropriate, submit requests to the Board to initiate litigation to protect the jurisdiction of the NLRB, and to protect our federal model of labor law in the country.

- Overly Rigid Settlement Procedures

The former General Counsel of the Board also instituted harmful restrictions on parties in the settlement process of Board allegations. For example, former General Counsel Abruzzo issued guidelines that no settlement was to be entered into unless it was a one hundred percent financial repayment agreement by the employer with respect to back wages, benefits, and other contested issues in a case.[5] This approach disregarded the common meaning of settlement, where both parties make some movement in their respective positions to reach an ultimate agreement. Further, a flexible approach to reach a settlement in Board cases was the policy and practice of virtually every other General Counsel preceding former General Counsel Abruzzo. Unfortunately, the former General Counsel's approach led to parties in contested Board cases with the decision of whether to "capitulate or litigate." Such overly strict guidelines resulted in approximately a five percent (5%) decrease in recent settlement rates in Board cases.[6] This decrease in settlement rates was extremely harmful to the Agency, and according to a performance and accountability report from the Board, "The Agency calculates that every one percent in the settlement rate costs the agency more than $2 million."[7] These additional costs to the agency, however, regarding reduction in settlement rates, are not the full story. A review of current Borad statistics shows that even where settlements were reached, the time taken to reach such settlements was significantly longer, and therefore more costly. Accordingly, using the Board formula contained therein, the recent decrease in Board settlement rates has cost the agency in excess of $10 million due to reductions in settlement rates, lengthier settlement

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[3] Former General Counsel Abruzzo not only did not request that the Board initiate litigation challenges to various state initiatives that undermined the jurisdiction, but she also requested that the Board rescind approval for jurisdiction challenging San Francisco port and Chicago airport regulations.

[4] Beyond several recently passed laws banning captive audience meetings – detailed further below – California recently introduced legislation – AB 288 – that would give the state direct jurisdiction over union elections and certain unfair labor practice proceedings – areas clearly preempted by the jurisdiction of the National Labor Relations Board. These types of infringements upon federal labor law will continue to proliferate if they remain unchecked by the Board.

[5] General Counsel Abruzzo required Regional Directors to seek consequential damages, written apology letters, and admission clauses, among other measures, in addition to traditional remedial backpay. *See* OFF. OF NLRB GENERAL COUNSEL, MEMORANDUM GC 21-07, FULL REMEDIES IN SETTLEMENT AGREEMENTS (2021).

[6] *See* OFF. OF NLRB GENERAL COUNSEL, MEMORANDUM GC 25-06, SEEKING REMEDIAL RELIEF IN SETTLEMENT AGREEMENTS (2025).

[7] 2012 PERFORMANCE AND ACCOUNTABILITY REPORT, NATIONAL LABOR RELATIONS BOARD 49 (2012).

processes, and the associated unnecessary litigation. The Office of General Counsel needs to return to a flexible, common-sense approach to properly balance core mission enforcement objectives of the NLRB, with the acknowledgement that the General Counsel's position in many cases may have defects, and therefore protracted litigation is not in the best interest of any party.

In summary, the Board and its future General Counsel should follow the advice contained in one of its own publications – the Basic Guide to the National Labor Relations Act – which states as follows at page 40:

> The objective of the National Labor Relations Act, to avoid or reduce industrial strife, and protect the public health, safety, and interest, can be best be achieved by the parties or those who may become parties to an individual dispute. Voluntary adjustment of differences at the community and local level is almost invariably the speediest, most satisfactory, and longest lasting way of carrying out the objectives of the Act…formal proceedings that can be time-consuming and costly, and that are often followed by bitterness and antagonism, are economically wasteful, and usually it is accurate to say that neither party really wins.[8]

- Approach of Board Personnel to Enforce the Provisions of the NLRA

The new General Counsel of the Board should also address a mindset among certain Agency executives and staff that their mission is to continually develop "new law" and expand, wherever possible, coverage of the Act. Such an approach of contemplating hypothetical situations and then proceeding to initiate novel enforcement actions based on these hypotheticals does not serve the Agency well. A "common-sense," "practical," and "realistic" approach to Board enforcement of the statute should return. This approach will decrease the unnecessary case law burden on Agency staff. This approach also preserves important Agency resources for cases and issues that deserve attention, such as unlawful retaliatory termination of employee cases, union and employer threats to employees for exercising their rights under the Act, improper interference with the Board election procedures, and other core mission objectives of the Agency.

- Presentation of Cases to the Board for Review

The new General Counsel should expeditiously present a number of the decisions issued by the Biden Board for review by the new Trump Board. The Trump Board should closely analyze and, where appropriate, overrule, or substantially modify, a number of these decisions. A list of cases for such review is attached to my testimony as Exhibit D.

- Senate Confirmation

[8] OFF. OF NLRB GENERAL COUNSEL, BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT 40 (1997).

The Senate should expeditiously confirm Crystal Carey, the President's nominee for the vacant General Counsel position, and permit Ms. Carey to start the important and needed rebalancing work of the NLRB Office of General Counsel.[9]

The Board's Case Law Agenda

- Biden Board reversal of precedent

Important rebalancing is also needed with respect to the Board's decision-making over the last four years. The Biden Board, unfortunately, continued the increasing trend of one Board reversing the decisions of a previous Board. As outlined in Exhibit C, the Biden Board overruled at least 15 major policy cases, with a resulting 211 years of precedent being reversed.

- The *Cemex* Decision

The Biden Board's reversal of precedent, however, was not limited to just overturning decisions of the Trump I Board. In the *Cemex* case, for example, the Biden Board overruled fifty-two (52) years of precedent developed under both Democrat and Republican Boards. This was one of the most radical and far-reaching decisions issued by the Board in its nearly 100-year history. This decision attacks the fundamental principle embraced by Democrat and Republican Boards that the strongly preferred procedure for employees to determine whether they desire union representation is by secret ballot elections. The *Cemex* Board provided a blueprint for unions to bypass secret ballot elections altogether and increase their use of card check procedures[10] to attempt to increase union density in the country. This approach by the Biden Board was not only contrary to well-established Supreme Court case law but was not necessary as unions, as noted in the charts attached as Exhibit B, are winning elections that are held by the NLRB at a very high percentage.

Indeed, the underlying premise in *Cemex* of avoiding secret ballot elections is particularly disturbing because the ultimate victims of this decision are employees who forfeit their right to have a secret ballot election to determine whether they desire to be represented by a union. The consequences of a union being certified are considerable. In fact, in virtually every instance, once a union is certified at a place of employment, that bargaining unit stays in place for decades, and the subsequent employees at such location are required to be part of the certified unit without ever having the opportunity to vote on whether they desired union representation. As one study found, 94 percent of employees covered by union contracts in the country have never had the opportunity to vote on whether they desired union representation.[11] Simply stated, certification of a union as the exclusive representative of employees for terms of conditions of

[9] Mr. King is endorsing Ms. Carey's nomination in his own individual capacity.
[10] "Card check" means the process by which unions will attempt to gain signatures from employees on union authorization cards to show majority support amongst a potential bargaining unit.
[11] JAMES SHERK, UNELECTED REPRESENTATIVES: 94 PERCENT OF UNION MEMBERS NEVER VOTED FOR A UNION 1 THE HERITAGE FOUNDATION (2016).

employment is virtually never disturbed by subsequent elections, and unlike the vast majority of other representation process in the country, no subsequent voting opportunity is required or generally occurs.

- The *Amazon* Decision

Cemex is not the only case, however, that the Trump II Board should overturn. The Biden Board's decision in *Amazon.com Serv. LLC* 373 NLRB No. 136 (2024) was also disturbing. There, the Biden Board held that employers could not require employees to attend mandatory meetings when unionization issues are part of the meeting agenda. This prohibition on so-called "captive audience" meetings overturned 76 years of precedent. This decision is a clear violation of the Section 8(c) free speech provision of the NLRA. It is also an unlawful content-based violation of the First Amendment.[12] Finally, the breadth of the decision is such that it restricts or interferes with employers' ability to discuss fundamental workplace issues with their employees in general, regardless of whether the meeting agenda or ensuing discussion might touch upon unionization issues.

- *Thryv, Inc.* – Imposition of Tort-Like Remedies

Another example of overreach by the Biden Board includes its decision in *Thryv, Inc.,*[13] where it held that tort-type legal damages could be available in Board proceedings. Such an approach is contrary to well-established law under which the Act only provides for remedial remedies. This decision is also a violation of the Eighth Amendment right for parties to have a jury trial in civil proceedings where tort-type damages are available. The United States Court of Appeals for the Fifth Circuit refused to enforce the Board's decision in *Thryv.*[14] A clear reversal of *Thryv*, however, is still needed by the Trump Board II to rebalance the law in this area.

...

Other examples of Board overreach are listed in Exhibit C of my testimony. The Trump II Board should follow the reasoning of the Fifth Circuit and rebalance the law in this area, and with the assistance of the Board's new General Counsel, expeditiously review and take appropriate action in these cases.

- Establishment of the Trump II Board

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[12] Amazon has appealed this decision to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit case law in this area includes a decision in *Honeyfund.Com Inc. v. Florida* No. 22-13135 (Mar. 4, 2024), where the Circuit Court held that a Florida law prohibiting employers from holding mandatory meetings to discuss the virtues of DE&I policies was an unlawful content-based violation of the First Amendment. The Circuit Court may apply the same rationale in the *Amazon* case and find that the Board's decision constituted a content-based violation of the First Amendment.

[13] *Thryv, Inc.*, 373 NLRB No. 22 (Dec. 13, 2022).

[14] *See Thryv, Inc. v. NLRB*, 102 F.4th 727* (May 24th, 2024).

The President should expeditiously nominate individuals to fill existing vacancies on the Board, and the Senate should quickly confirm these nominations to permit the beginning of the needed rebalancing of the Board's jurisprudence.

The Need for a Labor Court[15]

- Constant reversal of Board precedent

The Board has become a labor policy adjunct or arm of the party occupying the White House. In pursuit of partisan policy agendas of the administration in power, both Republican and Democrat Boards have constantly modified and reversed prior decisions, particularly on important policy issues, decided by previous Boards. This constant reversal of precedent has adversely impacted the Board's ability to engage in reasoned and neutral decision-making. Such constant "flip-flopping" or extreme policy oscillation is harmful to labor, management, and all stakeholders under the Act. Indeed, the constant changes to our labor laws have particularly adversely impacted small business entities and employees covered by the Act, as they cannot afford specialized labor counsel to keep abreast of these constant changes in the law. All stakeholders under the Act would benefit from greater clarity and consistency in the interpretation and application of the NLRA.

The Board's constant reversal of precedent has also been criticized by federal courts. The Board has lost a great deal of "judicial credibility." The constant reversal of Board precedent from the perspective of certain United States Courts of Appeals perhaps was thoughtfully summarized by Senior Judge O'Scannlain of the Ninth Circuit, where he stated in a special concurrence in the *Valley Hospital* case:

> The National Labor Relations Board frequently changes its mind, seesawing back and forth between statutory interpretations depending on its political composition, leaving workers, employers, and unions in the lurch...Beyond the practical difficulties it creates, the Board's approach also raises fundamental concerns about how courts interpret the NLRA and other statutes administered by agencies...The Board's "flip-flop problem" creates nationally unstable labor policy, consistent from one state to another, but not from one day to the next...In short, we too often defer to an unstable body of labor law built on political predilection rather than policy expertise.[16]

- The Unitary Executive Theory

The future of the Board has also been cast in doubt by the President's removal of a Democrat member of the Board, Gwynne Wilcox. Ms. Wilcox has contested her termination, and the ensuing litigation has resulted in conflicting decisions in the courts. The ultimate resolution of Ms. Wilcox's fate and the question of whether the President has the right to remove without

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[15] Regulatory Review Article May 27th Estreicher King Sherwyn

[16] *Valley Hosp. Med. Ctr., Inc. v. NLRB*, 104 F.4th 994*, 1003*-05* (Dec. 6th, 2023) (O'Scannlain, J., concurring).

cause Senate-confirmed members of multimember agencies like the NLRB will likely be decided by the Supreme Court. No matter how the Court may rule, however, this constitutional challenge to the Board's structure and other constitutional challenges to the functioning of the Board[17] creates an opportunity for both labor and management to consider how to refashion the Board into an exclusively adjudicatory Article I labor court. This approach can insulate the Board's decision-making from partisan political interference and, at the same time, reduce the incidence of extreme policy oscillation, which has plagued the Agency for decades.

- An Article I Court Solution

The country needs an impartial decision-making body to resolve workplace labor disputes and hold secret ballot elections to decide whether particular groups of workers wish to be represented by a labor union or not. The Board and its administrative structure, however, needs a serious overhaul. One solution would be for Congress to create under its Article I Constitutional authority a new court – a labor court. Judges on the new court would serve for a six-year term and would rotate off the court every two years on a staggered basis unless renominated and reconfirmed by the Senate. The new court would consist of two Independent, two Democrat, and two Republican judges, all appointed by the President, with the Senate's advice and consent. For any individual to qualify as an Independent judge, the individual could not have represented either labor or management interests and could not have participated in any court filings or as an expert witness in support of a labor or management position for the immediate six-year period prior to their nomination. Further, such individuals would evidence by writings, teachings, and interaction with unions, employers, courts (including participation in amicus briefs) and regulatory agencies a strong propensity for neutral and independent thinking.

The court would appoint administrative law judges (ALJs) to handle trials. The ALJs would be part of a trial division of the court. Such appointments would require four votes from members of the court, and the appointments would be for renewable, six-year terms, subject to dismissal for cause by four members of the court.

The new entity would decide only appeals from ALJs and election-related issues on appeal from NLRB regional directors. The Court would not have the authority to engage in rulemaking. The NLRB Office of General Counsel would be statutorily separated from the court. It would be directed by a General Counsel - an individual appointed by the President with the Senate's confirmation and removable at will by the President, as now. The General Counsel would have authority over the Board's regional offices. The Board's regional offices would continue to hold representation elections and also investigate unfair labor practice charges. If a regional office,

[17] *See, e.g.*, Haleluya Hadero, *Amazon and Elon Musk's SpaceX Challenge Labor Agency's Constitutionality in Federal Court*, ASSOCIATED PRESS (Nov. 18, 2024), https://apnews.com/article/amazon-nlrb-unconstitutional-spacex-elon-musk-ab42977117d883e97110a7bf8e8b257f

pursuant to the General Counsel's guidance, determined that an unfair labor practice charge had merit, a complaint would issue and the complaint would be tried by the General Counsel before an ALJ of the court's ALJ division. Any party adversely affected by an ALJ decision could appeal such a decision to the new court.

If the General Counsel finds after an investigation that there is good cause to seek preliminary injunction relief against an employer or union, the General Counsel will present the case to an ALJ designated by the court. Only if the ALJ affirms the General Counsel's finding after an expedited hearing would the General Counsel have the authority to seek such relief in federal district court.

Any adversely affected party by a decision of the labor court would have the right to appeal such a decision to a federal court of appeals, as now. The General Counsel, however, would not have standing to pursue any such appeal. Decisions of the labor court would be self-enforcing, triggering an immediate right of appeal by an adversely affected party. An office of solicitor would be created as a division of the new court. The solicitor would serve as the court's attorney and make appropriate appearances in federal courts, including the filing of amicus briefs in cases raising important labor policy issues. The General Counsel would also have the right to file amicus briefs in such cases.

Finally, the new entity would be created by nominations by the next president after the 2028 election cycle. The new court would begin to function as soon as a quorum of four members was achieved. Such a quorum would have to include at least one Independent judge. In the interim, the current Board structure would remain in place.

Labor Law Reform

The scope of this hearing does not permit a detailed consideration of labor law reform proposals. A comment, however, regarding "A Pro-Worker Framework for the 119th Congress" proposed by Senator Josh Hawley (R-MO) and the corresponding S.844 bill introduced by Senator Hawley - the Faster Labor Contact Act - is appropriate to address in this hearing.

- The Hawley Labor Framework

While Senator Hawley's Labor Framework proposals are welcomed as an opportunity to discuss needed labor law reform, they are not balanced proposals. They were written to exclusively assist unions in their organizing efforts.[18] Further, in addition to the practical, statutory, and

[18] Reviewing union election data consistently shows that unions win elections between 65 to 80 percent of the time in any given year (*see* Exhibit B). The downward trend of union representation cannot, therefore, be attributed (solely) to difficulties in winning elections, and attempts at labor law reform should not attempt to fix a problem that does not exist. A more likely reason is the failure to organize new workers; in FY 2022, for example, unions attempted to organize less than 0.1% of eligible private sector workers. This failure to attempt to organize larger groups of workers has been identified by certain leaders within the ranks of organized labor itself. For a more a detailed discussion of this subject see my testimony before this Committee on Wednesday, December 13th, 2023 where I pointed out the fact that unions have failed to file petitions to organize a significant number of private sector

constitutional defects of the Framework, the suggestion regarding the negotiation of first labor contracts between parties is particularly troublesome and defective in a number of areas, as outlined below. Other portions of the Framework, including prohibiting employers from holding mandatory meetings with their employees when the subject of union representation discussed is defective for a number of practical reasons and is clearly prohibited by Section 8(c) of the NLRA and the First Amendment Free Speech protection clause. The warehouse remedies provision of the Framework is also constitutionally defective as it singles out one employer – Amazon – and perhaps may be successfully constitutionally challenged on a due process and equal protection argument basis.

- S.844 – The Faster Labor Contact Act

S.844 would require parties to begin negotiations for initial contracts essentially within ten (10) days after a union is certified to represent employees in a bargaining unit. I have been involved in negotiating labor contracts for over forty-five (45) years, including participating in a considerable number of first contract negotiations, and this proposal is simply not practical or realistic. Parties are not prepared to begin bargaining in such a short period of time. Negotiating committees have to be established, contract proposals have to be developed and discussed internally by both unions and employers, and, thereafter, reduced to formal written contract proposals before bargaining can begin. Logistical issues have to be agreed upon regarding meeting times and locations, along with the resolution of a number of other practical and administrative issues.

- Bargaining Unit Composition Appeal Statutory Defect

S.844 ignores entirely the statutory right of unions and employers to contest a Board's decision as to what constitutes an appropriate bargaining unit. Such a right of appeal is an important safeguard for all stakeholders under the NLRA, as the Board and its regional directors have been inconsistent in issuing decisions as to which categories of employees should be included in a bargaining unit. The right of appeal, not only to the Board but also to the courts, is an important right to retain.

- Short Duration Period to Conclude First Contracts

S.844 is also not well-reasoned by its inclusion of a requirement that first contracts negotiation be completed within ninety (90) days (or even within one hundred and twenty (120) days if mediation is requested by a party). In addition to the need for parties to work out logistic issues, often the negotiation of ground rules can take a considerable amount of time, particularly for parties that have not negotiated with one another in the past. For example, release time for negotiating committee members, compensation, if any, for members of negotiating committees,

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employees. This fact is established by what I have identified as the "union organizing index" – an index that I developed and explained in such testimony before the Committee.

the issue of whether negotiating sessions are open to the public and/or available online, and a host of other ground rule issues can be difficult to resolve. Further, the order of negotiations can also be a contentious issue. For example, are non-economic issues to be resolved first before economic issues are to be discussed? These and many other procedural issues frequently take significant time to negotiate before the parties can even begin to discuss substantive issues.

- Government Imposed Arbitration – Interest Arbitration

The most fundamental problem with S.844, however, is a requirement that if an agreement is not reached for an initial contract within the one-hundred-and-twenty-day (120) period, a three-person arbitration panel is to be established with the assistance of the Federal Mediation and Conciliation Service (FMCS). The imposition of such panels inappropriately interferes with the rights of all parties in the collective bargaining process and the opportunities for such parties to reach an agreement on terms and conditions of employment without government interference. Further, this approach is not practical as outside arbitrators will lack familiarity with an employer's operations and objectives, and also have scant, if any, understanding of the workplace issues that are important to bargaining unit employees. Further, the drafters of S.844 are apparently not experienced in negotiating collective bargaining agreements – particularly first contracts. There is substantial experience and authority that establishes that the negotiation of first contracts can be exceedingly difficult and time consuming. Indeed, provisions agreed to by management and labor in initial contracts are entered into with great care, as many of these provisions remain in successor collective bargaining agreements for decades. Additionally, as a practical matter, at present, the FMCS has essentially been disbanded by significant reductions in Agency staff and proposed elimination of its funding. Indeed, over ninety percent (90%) of FMCS personnel have either been terminated or furloughed – there is no FMCS in existence, at present, to assist with this portion of the bill's requirement.

- Elimination of the Impasse Option

The Hawley proposal ignores the right of employers under the NLRA to reach impasse in collective bargaining and implement their last proposal. Stated alternatively, under current law, when a deadlock occurs in negotiations, an employer is permitted to unilaterally implement its last contract offer. The supporters of S.844 are apparently not aware of this important area of labor law.

- Adverse Practical Impact on the Collective Bargaining Process

Additionally, the approach taken by S.844 discourages meaningful collective bargaining, as employers, before an arbitration panel is implemented, will frequently not offer meaningful proposals to resolve negotiation issues and stay low in their proposals. Correspondingly, unions stay on the "high side" with their proposals and are unwilling to move off of their position. Both parties, under these circumstances, expect an arbitration panel to write an agreement that is in the

"middle range" of their respective positions. Meaningful bargaining simply often does not occur under this procedure.

- Constitutional Violations

Finally, there are serious constitutional problems with S.844. Any award or contract ultimately written by the government-imposed arbitration panel would no doubt impose economic terms on an employer with respect to wages, benefits, and related economic requirements for bargaining unit employees. This approach clearly involves "state action" and, therefore, is subject to constitutional analysis. The Takings Clause of the Constitution found in Article V clearly becomes an issue under this procedure. For example, the Takings Clause prohibits the government from taking private property or otherwise interfering with the use of same without providing just compensation. The Hawley interest arbitration approach does not provide private sector parties any compensation for government-imposed economic terms. An initial collective bargaining agreement mandated by outside arbitrators may also provide for union representatives to have access to employer property, which also presents Takings Clause issues. Indeed, the United States Supreme Court held in its recent decision in the *Cedar Point*[19] case that a state regulation entitling union access to an agricultural employer's property constituted a per se taking under the Fifth and Fourteenth Amendments because the government had appropriated a right of access to the grower's property, allowing union organizers to traverse it at will. Other constitutional issues also exist with respect to the Hawley Framework.[20]

In summary, the Hawley Framework and S.844 do not present a balanced and well-thought-out approach to labor law reform.[21]

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Mr. Chairman, Ranking Member DeSaulnier, and Members of the Subcommittee, thank you for holding this hearing and inviting me to participate. I would be pleased to respond to any questions the Subcommittee may have.

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[19] *Cedar Pt. Nursery v. Hassid*, 594 U.S. 139 (2021).

[20] An article by Alex MacDonald provides an excellent discussion of these and other constitutional defects of S.844. *See* ALEX MACDONALD, *"Pro-Worker" but Anti-Constitution: A New Labor Framework Raises Serious Legal Doubts*, THE FEDERALIST SOCIETY (Feb. 20, 2025), https://fedsoc.org/commentary/fedsoc-blog/pro-worker-but-anti-constitution-a-new-labor-framework-raises-serious-legal-doubts

[21] The Association's position with respect to the Hawley Framework is outlined in the attached letter that the Association sent to Congress on February 6, 2025 and is attached as Exhibit E to my testimony.

EXHIBIT A



Roger King
Senior Labor and Employment Counsel
HR Policy Association

Roger King is a highly regarded labor relations attorney, whose career spans more than 40 years, including serving as a partner with the Jones Day law firm. He now serves as Senior Labor and Employment counsel for HR Policy Association.

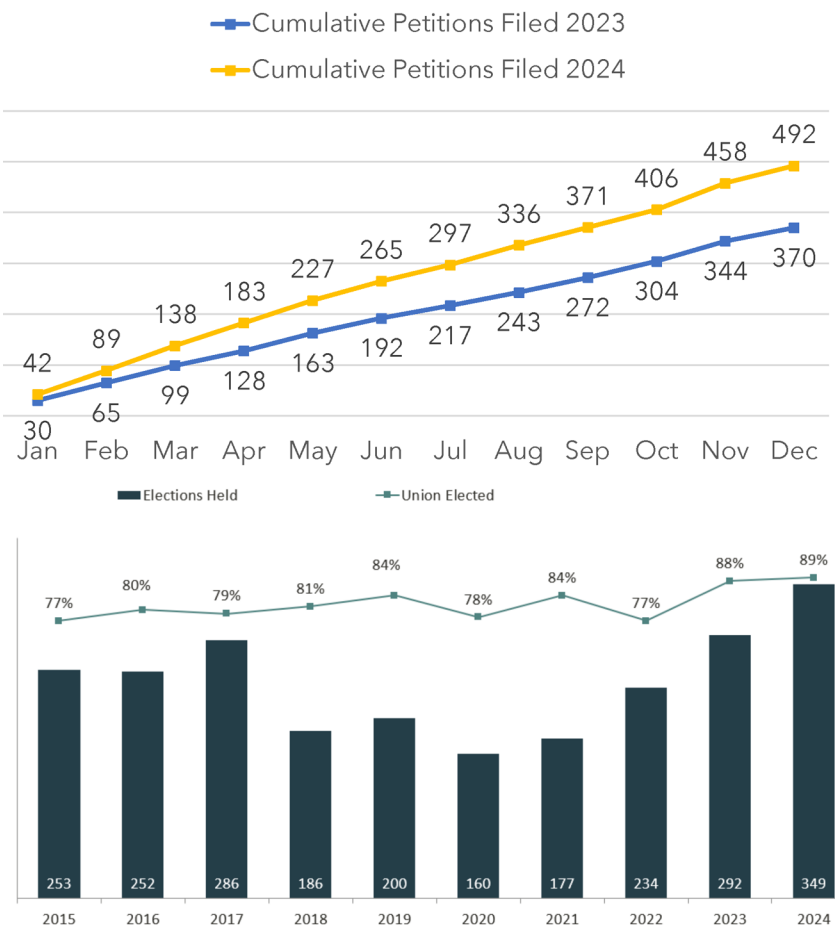
After graduating from Cornell University Law School, he was a Captain and Legal Services Officer in the United States Air Force, on the Staff of United States Senator Robert Taft, Jr. and, subsequently, was appointed as Professional Staff Counsel to the United States Senate Labor Committee.

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 Manufactures 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 cocounsel 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.

EXHIBIT B


Cumulative Petitions Filed 2023
Cumulative Petitions Filed 2024
30
42
65
89
99
138
128
183
163
227
192
265
217
297
243
336
272
371
304
406
344
458
370
492
Jan
Feb
Mar
Apr
May
Jun
Jul
Aug
Sep
Oct
Nov
Dec
Elections Held
Union Elected
77%
80%
79%
81%
84%
78%
84%
77%
88%
89%
253
252
286
186
200
160
177
234
292
349
2015
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2022
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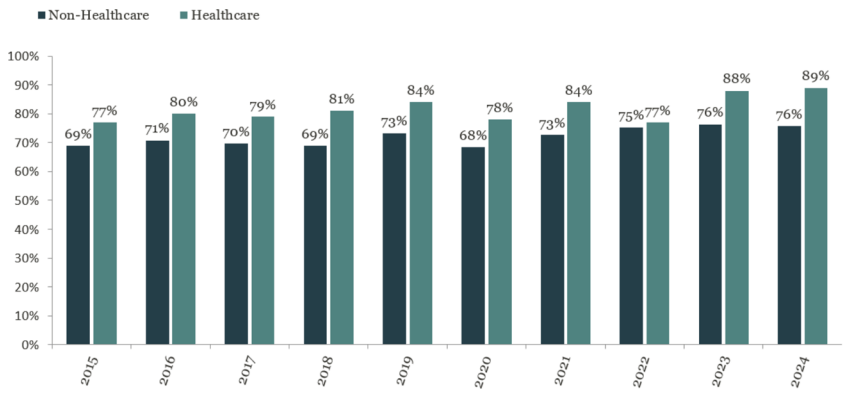

Non-Healthcare
Healthcare
100%
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88%
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89%
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2024

EXHIBIT C

LIST OF BIDEN BOARD DECISIONS OVERRULING PRECEDENT

- Valley Hospital Medical Center II, 371 NLRB No. 160 (Sept. 30, 2022) – dues checkoff – 3 years
- American Steel Construction, 372 NLRB No. 23 (Dec. 14, 2022) – bargaining unit size determinations – 5 years
- Bexar County Performing Arts Center II, 372 NLRB No. 28 (Dec. 16, 2022) – access to employer property – 3 years
- McLaren Macomb, 372 NLRB No. 58 (Feb. 21, 2023) – severance agreements – 3 years
- Tesla, 371 NLRB No. 131 (Aug. 29, 2022) – dress codes/uniform policies – 3 years
- Lion Elastomers, 372 NLRB No. 83 (May 1, 2023) – offensive language/conduct in the workplace – 3 years
- Stericycle, Inc. 372 NLRB No. 113 (Aug. 2, 2023) – workplace rules/policies – 6 years
- Cemex Construction Materials, LLC, 372 NLRB No. 130 (Aug. 25, 2023) – bargaining orders – 52 years
- Intertape Polymer Corp., 372 NLRB No. 133 (Aug. 25, 2023) – causation/GC burden – 4 years
- Tecnocap LLC, 372 NLRB No. 136 (Aug. 26, 2023) – unilateral changes – 6 years
- American Federation for Children, Inc., 372 NLRB No. 137 (Aug. 26, 2023) – employee protests on behalf of nonemployees, scope of protected concerted activity – 4 years
- Miller Plastic Products, 372 NLRB No. 134 (Aug. 23, 2023) – scope of protected concerted activity – 4 years
- Atlanta Opera, Inc., 372 NLRB No. 95 (Jun. 13, 2023) – independent contractor status – 4 years
- Siren Retail Corp., 373 NLRB No. 135 (Nov. 8 2024) – direct dealings with management – 39 years
- Amazon.com Services LLC, 373 NLRB No. 136 (Nov. 13, 2024) – captive audience meetings – 76 years

LIST OF BIDEN BOARD CASES ESTABLISHING NEW PRECEDENT

- Thryv, Inc., 372 NLRB No. 22 (Dec. 13, 2022) – remedies – new policy
- Direct Hospital Partners, *LP*, 373 NLRB No. 55 (May 8, 2024) – surface bargaining – new policy

EXHIBIT D

The New General Counsel of the Board Should Present the Following Cases to the Trump II Board and the Newly Constituted Trump Board should either Overrule Such Cases or Substantially Modify Them to Reflect a More Balanced Approach Under the NLRA.[22]

- *Amazon.com Services, LLC*, 373 NLRB No. 136 (2024) – In *Amazon*, the Biden Board overturned nearly 75 years of established law to infringe on employers' First Amendment rights. The Board held in *Amazon* that an employer may not inform employees of its views on unionization during a mandatory workplace meeting. By creating this content-based restriction on speech, the *Amazon* ruling violates the free speech provision in Section 8(c) of the NLRA and is a content-based violation of an employer's First Amendment rights. The Trump II Board should expeditiously overturn the Biden Board holding in *Amazon*.

- *American Federation for Children, Inc.*, 372 NLRB. No. 137 (2023) – The Biden Board expanded the scope of activities that fall under the protection of Section 7 of the Act to include employees' efforts to advocate on behalf of non-employees. Previously, advocating for non-employees was not considered for "mutual aid and protection" under the Act. The Biden Board altered this framework so that advocacy on behalf of nonemployees is considered protected activity if it might in some theoretical fashion in the future benefit employees. The decision leaves employers questioning at what point theoretical future help from a nonemployee becomes so attenuated that employees are no longer acting for mutual aid and protection and should be overruled.

- *American Steel Construction, Inc.*, 372 NLRB No. 23 (2022) – The makeup of a bargaining unit, the group of employees that will collectively bargain together, dictates many aspects of a labor-management relationship. In *American Steel Construction*, the Biden Board made it easier for unions to gerrymander bargaining units into "micro-unions" or "fractured units" and disenfranchise employees that do not support a union. In doing so, the Board overturned the Trump I Board's decision in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017). The Biden Board's new framework presumes the unit selected by the union is presumptively appropriate unless the employer can demonstrate that other employees share an "overwhelming" community of interest with the petitioned-for unit. Employers know from past history that this is a virtually impossible standard to

[22] The Coalition for a Democratic Workplace (CDW) identified these cases as needing attention by the new Administration in letters to various Administration officials. The listing contained in this Exhibit incorporates the list of cases developed by CDW and also incorporates, in part, CDW's analysis of such cases.

meet. Further, such standard has never been utilized in the past to determine appropriate bargaining unit composition except in highly unusual situations. The *American Steel* decision should be overruled.

- *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023) – Secret ballot elections have long been considered the most reliable method of determining whether workers desire union representation. In *Cemex*, the Biden Board overturned decades of settled law favoring secret ballot elections and made it a violation of the NLRA for an employer to decline a union's request for voluntary recognition unless the employer files a petition with the NLRB for an election. This decision should be reversed for several reasons. First, a union seeking recognition may or may not have the support of a majority of the unit it desires to represent. Previously, employers could refuse the union's request and require the union to file a petition for election. Under this decision, if the employer does not file the petition for an election, it can be forced to bargain with the union without any election being held. This requires employers to make the difficult choice when presented with a *Cemex* demand of whether to file for an election even if they don't believe the union has majority support—essentially giving the union a "free run" at an election. Further, the Board in *Cemex* overruled a sixty-year-old Supreme Court standard established in *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). The Supreme Court, *in Gissel*, held that only severe and pervasive employer violations (i.e., threats to close the business, terminations of union supporters) would result in setting aside NLRB election results and the imposition of a remedial order to bargain with the union in question. In *Cemex*, however, the Board established a framework where even minor violations of the NLRA (e.g., having a handbook with overbroad rules) could result in a bargaining order. The overruling of *Cemex* should be a high priority by the Trump II Board.

- *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141 (2024) – For decades, the Board maintained a contract interpretation standard in determining the permissible scope of employer actions and decisions under the applicable bargaining agreement. This approach was supported by the United States Court of Appeals for the D.C. Circuit and other federal appellate courts. The Biden Board rejected this approach and returned to the "clear and unmistakable waiver" standard. Under this standard, employers contemplating options to make business changes in a unionized workplace must establish that definitive language in a collective bargaining agreement that permits the action in question and that the union has clearly "waived" the right to negotiate over the change. In *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), the Trump I Board corrected this problem. Bringing its precedent in line with the federal courts' approach to contract interpretation, the Trump I Board adopted the "contract coverage" standard, which held

that if the parties have negotiated over a certain subject, the employer may make business changes without additional negotiations with the union if the actions in question were within the scope of the contract's language. In *Endurance Environmental*, however, the Biden Board rejected this commonsense standard, reviving the highly criticized "clear and unmistakable" standard. The Trump II should return to the standard set forth in *MV Transportation*.

- *Home Depot USA, Inc.*, 373 NLRB No. 25 (2024) – In *Home Depot*, the Biden Board held that an employee was protected by the NLRA when displaying a Black Lives Matter message on the employee's dress code required uniform. While the message from the viewpoint of the employee in question was arguably politically important, it had no relation to the employee's terms and conditions of employment. The Board's ruling violates the First Amendment by forcing employers to endorse political speech and unlawfully interferes with an employer's right to establish standards for conduct in the workplace. Further, this decision is particularly problematic, as it interferes with the right of employers to establish appropriate rules and regulations for customer-facing employees. This case is presently on appeal before the United States Court of Appeals for the Seventh Circuit. Hopefully, the Circuit Court will overrule the Board's decision. In the interim, The Trump II Board should reverse *Home Depot*.

- *Lion Elastomers LLC II*, 372 NLRB 83 (2023) – In 2020, the Trump Board adopted a uniform and common-sense standard for deciding whether employer disciplinary decisions are lawful under the NLRA. That decision, announced in *General Motors LLC* 369 NLRB No. 127 (2020), provided that the Board would evaluate whether an employee's abusive workplace conduct merited discipline based on the longstanding *Wright Line* test, which analyzes whether an employer would have taken the same action if the employee had not engaged in protected activity. The standard under *General Motors* presented a legal framework to determine whether employees engaged in protected activity while allowing employers to ensure a workplace free from threats of violence, harassment, and hostility. It aligned labor law with the legal requirement that employers must act to prohibit sexually or racially disparaging conduct in the workplace. The Biden Board rejected this standard in *Lion Elastomers* and adopted a complex and difficult to follow, context-specific framework including different tests depending on the context in which the abusive conduct arises. The Trump II Board should return to the *General Motors* standard.

- *McLaren Macomb*, 372 NLRB No. 58 (2023) – When employers reach settlement and severance terms with employees, they often desire that, in return for settlement

compensation, an agreement that employees will not disparage the employer publicly and to keep the terms of those agreements confidential. The Biden Board outlawed these common-sense agreements between employees and employers in *McLaren Macomb* and reversed well-reasoned Trump I Board decisions in *Baylor University Medical Center*, 369 NLRB 43 (2020) and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020). Now, the mere proffer of an agreement with certain confidentiality and non-disparagement clauses can be considered a violation of the NLRA if the Board finds such agreements were not narrowly tailored, even if the employer never enforces the agreement. The Trump II Board should return to the test set forth in *Baylor University Medical Center* and *IGT*.

- *Metro Health Inc. d/b/a Hospital Metropolitano Rio Piedras*, 373 NLRB No. 89 (2024) – The Board has historically allowed unfair labor practices to be resolved through consent orders, in situations where an employer proposes a resolution of a charge and such proposal is approved by an administrative law judge and/or a regional director of the Board without the consent of the charging party. This framework avoids unnecessary litigation and allows the Board to impose a settlement over the objection of an unreasonable charging party if the agency determines that settlement is in the public interest. In *Metro Health*, the Biden Board ended this important practice of accepting consent orders and, for the first time in the history of the NLRA, found that administrative law judges lack the authority to approve consent orders. Now, even if the General Counsel of the Board and the employer have come to a resolution, the charging party can force the parties to litigate, wasting time and resources for all involved. *Metro Health* should be overruled.

- *Miller Plastic Products, Inc.*, 372 NLRB No. 134 (2023) – Section 7 of the NLRA protects employees when they engage in concerted activities for the purpose of collective bargaining and mutual aid or protection. Before the Biden Board, activity was considered "concerted" under the NLRA when an employee would either: (1) engage in activity with or on the authority of other employees; (2) initiate or induce group action; or (3) bring a group complaint. In *Miller Plastic Products*, the Biden Board broadened and blurred the lines for determining what is considered "concerted" action under the NLRA. Now, whether an employee's activity is protected depends on a review of an ambiguous "totality of the evidence" test. This vague, eye-of-the-beholder approach departs from 37 years of precedent and should be overruled.

- *Siren Retail Corp. d/b/a/ Starbucks*, 373 NLRB No. 135 (2024) – For over four decades, the NLRB allowed employers to truthfully inform employees that they could lose their

direct relationship with management if they elected a union. *Tri-Cast, Inc.*, 274 NLRB 377 (1985). This precedent was overruled by the Biden Board in *Siren Retail Corp.* In this case, the Biden Board rejected this standard, overruled nearly 40 years of precedent, and held that employers violate the NLRA when they tell employees that they will lose their direct access to management in the event of unionization. The Trump II Board should return to the *Tri-Cast* Standard.

- *Stericycle, Inc.*, 372 NLRB No. 113 (2023) – In *The Boeing Co.*, 365 NLRB No. 154 (2017), the Trump I Board announced that it would treat facially neutral employer rules either as categorically lawful, or subject to a balancing test that weighed the restriction of employee rights against employer legitimate business needs. The decision reversed a 2004 case under which "Board members have regularly disagreed with one another regarding the legality of particular rules or requirements, and in many cases, decisions by the Board (or a Board majority) have been overturned by the courts of appeals." Id. at 1495–96 (see 1496 n. 9 for list of examples). The Board also noted in *Boeing* that the application of the prior standard had resulted in decisions that were clearly never envisioned by Congress, such as one case where the Board found the employer violated the act by advising employees to "work harmoniously" and conduct themselves in a "positive and professional manner." Id. at 1496. The Biden's Board decision in Stericycle returns to this vague standard. Now, workplace rules are presumptively unlawful if they "could" be interpreted to limit employee rights, based on the perception of the reasonable employee who is "economically dependent" on the employer. In other words, virtually any rule that could even remotely be read to hypothetically interfere with employee protected activity may be unlawful. This approach leaves employers guessing how the Board will treat certain rules, as outcomes cannot be predicted even for similar rules with similar justifications. *Stericycle* should be overruled, and the new General Counsel of the Board should issue a series of memoranda providing direction for all stakeholders under the Act as to how employer rules and regulations, particularly provisions in employer handbooks, could be written to avoid violations of the NLRA.

- *Tesla, Inc.*, 371 NLRB No. 131 (2022) – Employers have dress codes for a variety of legitimate business-related reasons, including: procedural production uniformity and oversight, creation of interaction environments with customers, and setting a culture and tone for the workplace. The Biden Board in *Tesla* created a "special circumstances" test requiring employers to meet an exceptionally high burden that there had to be "special" set of circumstances in the workplace before an employer could implement its dress code policy. Previously, employers were permitted to regulate the type and/or manner in which employees donned buttons, badges, and insignia, including union insignia, in the

workplace. Under the Biden Board's approach, even if an employer has a neutral policy regarding dress codes, the employer cannot implement that policy, including restrictions with respect to union insignia, unless it can meet this highly difficult and hypothetical special circumstances test. The Board's position in *Tesla* was rejected by the Fifth Circuit. The Circuit Court refused to enforce the Board's rationale, holding that the NLRB does not have the authority to make all company uniforms presumptively unlawful. See *Tesla, Inc. v. NLRB*, 86 F.4th 640 (5th Cir. 2023). The Board should follow the lead of the Fifth Circuit and overrule the Biden Board *Tesla* decision.

- *The Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023) – In *Atlanta Opera*, the Biden Board made it more difficult for workers to qualify as independent contractors. The Board returned to a standard established in *Fed Ex II*, 361 NLRB 610 (2014), which has twice been rejected by the United States Court of Appeals for the D.C. Circuit. Under the Biden Board's standard, even if workers can pursue many entrepreneurial opportunities and contract their services with many employers, they may still be deemed employees of those companies under the Act. This expands the number of workers who could be considered employees under the NLRA and improperly interferes with business models that have been well-established across the economy for decades. The Trump I Board introduced a more commonsense independent contractor standard in 2019. Its decision in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), rejected the Obama Board's *FedEx* decision. The Biden Board's ruling in *Atlanta Opera* rejects that approach in favor of a rule that will place more workers into a rigid traditional employment arrangement. *Atlanta Opera* should be reversed.

- *Thryv, Inc.*, 372 NLRB No. 22 (2022) – The Biden Board held that employers are liable for all arguably foreseeable financial harms, both direct and indirect, flowing from an employer's violation of the NLRA. The decision in *Thryv* is contrary to well-established law that the Board only has authority to impose equitable remedial remedies for violations of the Act. The Board does not have authority to impose tort remedies that have for decades only been resolved by jury trials. In addition to leading to protracted litigation over the tenuous chain of causation between an unfair labor practice and claimed employee losses, the Board's conflicts the Constitutions Seventh Amendment requirement that damages only be awarded after trial by jury. The Third Circuit has held that the Board exceeded its authority in issuing the *Thryv* decision. See *NLRB v. Starbucks Corporation*, 125 F.4th 78, 95 (3d. Cir. 2025) ("The NLRA . . . limits the Board's remedial authority to equitable, not legal, relief"). The Trump II Board should follow the lead of the Third Circuit and overrule the Biden Board's decision in *Thryv*.

HRPA HR POLICY ASSOCIATION®

EXHIBIT E

March 6, 2025

Bill Cassidy
U.S. Senator
Chair
Senate Committee on Health,
Education, Labor & Pensions
455 Dirksen Senate Office Building
Washington, DC 20510

John Thune
U.S. Senator
Senate Majority Leader
U.S. Senate SD-511
Washington, DC 20510

RE: HR Policy Association Opposition to the Faster Labor Contracts Act

Dear Chair Cassidy and Majority Leader Thune:

HR Policy Association ("HRPA") writes to urge your opposition to the Faster Labor Contracts Act ("FLCA") recently introduced by Sens. Josh Hawley (R-MO), Cory Booker (D-NJ), Gary Peters (D-MI), Bernie Moreno (R-OH), and Jeff Merkley (D-OR). HRPA strongly supports efforts to modernize federal labor law and promote productive and harmonious labor relations. However, the FLCA presents significant practical issues for workers, unions, and employers alike. Government arbitrators, no matter how well-intentioned, simply cannot match the level of understanding that employers, their workers, and their workers' union representatives have of their respective workplaces and their respective needs. Forcing arbitration could lead to contracts that do not work for anyone and, worse, could threaten the very businesses that workers depend on for their livelihoods. The legislation also presents major legal concerns, as outlined below. Accordingly, HRPA strongly urges you to oppose this legislation.

HR Policy Association is a public policy advocacy organization that represents the chief human resource officers of more than 350 of the largest corporations doing business in the United States and globally. Collectively, their companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce. Since its founding, one of HRPA's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

As proposed, the FLCA would require employers and unions to begin negotiating their first collective bargaining agreement within 10 days of the union's certification. If no agreement is reached within 90 days, the bill would require parties to submit to mediation. If mediation does not produce an agreement within 30 days, the parties would be required to submit to government-imposed binding arbitration. In essence, the bill would allow the federal government to impose contractual terms on parties if they are unable to reach an agreement within 120 days. Such terms would be binding for up to two years.

To the extent that current legal frameworks do not adequately facilitate or incentivize faster initial collective bargaining agreements, the draconian measures that the FLCA would impose do not provide a measured or practical solution.

The FLCA presents several major practical concerns for employers, workers, and their unions:

- These three parties inherently have the best understanding of what is most effective for their respective workplaces.
- The collective bargaining process, while at times contentious, is informed by this understanding and is meant to produce compromises which benefit all stakeholders.
- There is simply no reality in which government arbitrators have a better understanding of what is best for a specific workplace. Requiring forced arbitration could result in contracts that do not work effectively for any party, let alone jeopardize the viability of the business on which the workers rely for their livelihood.
- It is unrealistic to expect parties to begin bargaining within 10 days. The establishment of bargaining committees, the resolution of bargaining guidelines, the drafting of contract proposals, and many other logistical issues take up to 90 days if not longer. For first contract negotiations, these timelines can be even longer as parties are just beginning a formal bargaining relationship.
- Further, as detailed below, employers and unions may disagree with the decision of the NLRB with respect to the bargaining unit composition and may appeal such decision in federal court. Bargaining therefore should not, and cannot, occur within 10 days in such situations.
- It is similarly unrealistic to expect bargaining for an initial contract to be completed with 120 days. Initial bargaining can be quite complex, as essentially all terms and conditions of employment have to be negotiated between the parties and reduced to a formal written agreement. Indeed, the provisions of initial labor contracts are exceptionally important as many of the initial terms remain in place for decades in successor agreements.
- Bargaining for initial agreements can also be interrupted by lengthy information requests by either party, and/or strikes and lockouts and other economic self-help options that are available to employers and unions.
- The Federal Mediation Conciliation Service (FMCS) does not have the budget or staff to conduct the mandatory mediation and arbitration provided for by this legislation.

The FLCA also presents several significant legal issues, including running afoul of both the Constitution and the text and purpose of the NLRA:

- Allowing the government to impose contractual terms on private parties could – and would – amount to impermissible takings devoid of due process protections, in clear violation of the Fifth Amendment of the U.S. Constitution.
- Government arbitrators could also impose contractual terms that could run afoul of First Amendment speech rights, such as requiring employers to provide employer property access to union representatives.
- Under current federal labor law, employers are permitted to impose terms and conditions provided they have already bargained to impasse with the union. Because the FLCA would permit government arbitrators to impose contractual terms after 120 days of bargaining and reaching such an impasse, this legal doctrine – and the rights it affords employers – would be eviscerated.

- One of the foundational principles of the NLRA is the right for both parties to voluntarily negotiate (provided both parties make good faith negotiating efforts) collective bargaining agreements, a principle that has been further established by the Supreme Court.[1] Indeed, this right of parties to collectively bargain is at the core of the NLRA, and such right has been recognized by both Democrat and Republican-led Boards for decades. The FLCA directly contravenes this principle by allowing the government to dictate contractual terms.
- Under current federal labor law, employers have the well-established right to challenge certification of a union election victory solely through a refusal to bargain (known as a "technical 8(a)(5) violation") that through the Board's appellate process results in the challenge being heard in federal court. The FLCA's bargaining requirements (and eventual mandatory arbitration requirements) would foreclose this judicial appeal option as provided for in the NLRA.

HRPA supports efforts to create new legal frameworks for labor relations that better reflect current workplace realities than the current, significantly outdated approach which is based on antiquated and adversarial industrial relations. Such efforts should be informed by input from all stakeholders that best promotes harmonious and productive labor relations. The FLCA would not achieve these goals, was developed without balanced stakeholder input, and presents serious legal and practical implications. For these reasons, we strongly urge Senators to oppose its passage.

We welcome the opportunity to work with you and your colleagues in the Senate to develop a new proposal that better meets the goals outlined above.

Sincerely,

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Director of Labor &
Employment Law and Policy
HR Policy Association

G. Roger King
Senior Labor &
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HR Policy Association

Chatrane Birbal
Vice President, Public Policy
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HR Policy Association

CC: U.S. Senate

[1] *See, e.g. H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970).

Chairman ALLEN. Thank you, Mr. King. Under Committee Rule 9, we will now question the witnesses under the 5-minute rule. I will recognize myself for 5 minutes. Mr. Vernuccio, your written testimony reflects your concern that under current law NLRB election procedures do not do a good job at ensuring workers get the collective bargaining representatives of their choice.

As we all know, the Biden-Harris NLRB made it easier than ever for unions to come into a workplace without an election at all. How should current election procedures be changed to address your concerns?

Mr. VERNUCCIO. Mr. Chairman, thank you again for the question and the opportunity. Workers need empowerment, and when it comes to selection to selecting a union, they need to be empowered to make that choice, to make that choice securely and privately, and that choice should be reflective of the entire workforce.

Given some of your legislation in the past, Secret Ballot Protection Act, workers should be afforded the secret ballot to choose a union in private without intimidation or coercion, and we have heard countless stories before this Committee of that type of intimidation and coercion that comes with card check, and could come out of a decision stemming from the Cemex decision of the previous NLRB.

Further, the NLRB should also honor the true language, the precise language of the National Labor Relations Act that says that a union must be chosen by the majority of all the employees in the unit, or at a minimum, a quorum of majority of employees in the unit.

Chairman ALLEN. Good, thank you. Mr. King, last Congress, the Save Local Business Act was introduced to reverse the damage done by the Biden-Harris Board's position on the joint employer issue. Can you explain the 2023 NLRB Joint Employer Rule and how we could amend the law to create a predictable legal landscape for employers?

Mr. KING. Well, hopefully an approach will emerge from the Board, whether it be a Democrat Board, a Republican Board, Chairman Allen, that only would find a joint employer relationship when there is direct and immediate control of one entity over another entity's employees in terms of conditions of employment.

This area of the law has been turned upside down, back and forth, it is in a State of continual flux. It helps no one, and as I mentioned at the outset of my remarks, it particularly hurts franchisors and franchisees, which are the bedrock of entrepreneurialism in many communities in your respective districts. This has to change.

Chairman ALLEN. Yes, I agree. Mr. Solem, you discussed the Biden-Harris Board's blocking charge policy in your written testimony. Can you expand on your comments, and give some examples of the way that blocking charge policy has been abused by unions and the Board to delay elections?

Mr. SOLEM. Chairman Allen, thank you for your question. You know, I give a few examples in my written testimony on pages 8 and 9, but just to pull one out. It was one of my colleague's cases, it was called Apple Bus Company, and Apple Bus Company. They filed for an election in 2017, and they did not get an election until

2019 because over the course of the next 2 years the union filed 15 blocking charges, eight of which were dismissed.

The other ones were settled with non-admissions clauses, so there was never any proof that any of the allegations exist. When the day for the election finally came, the union did not even face the voters. They walked away. They disclaimed interest, which makes it look like they were filing just to delay their time and power.

The blocking charge policy, which was brought back by the Biden Board is going to lead to more of this, that in fact, Member McFerrin's own dissent, dissenting from the Trump One Rule showed that roughly about 22.5 frivolous blocking charges were filed per year. The Trump Two Board should return to the Election Protection Rule and allow employees to get elections promptly.

Chairman ALLEN. Okay. Yes, thank you. Again, I was for 4 years ran a small business, and in fact Mr. Ranking Member DeSaulnier and I talk about the old times a lot, but I will tell you over my career things changed drastically, so it is a modern workforce today, a very entrepreneurial workforce.

I was with a group last night. We did not even talk about ESOP programs and things like that. I remember that folks working at Proctor and Gamble there in Augusta, who were making nice wages, but they ended up millionaires because they were participating in the Proctor and Gamble stock program.

I know that my greatest privilege as an employer was to give our workers an opportunity, our employees, it is like family actually, to provide for their family, provide for their church, their community and this great country. That is a great privilege, so please know that you know, employers are very dedicated too. I am sure there are bad actors, but for the most part if you are going to stay in business, you better take care of your folks, which is what we used to say.

With that I yield back, and now recognize Ms. McBath from Georgia for your questions.

Mrs. MCBATH. Thank you, Mr. Chair, and Ranking Member DeSaulnier, and to your staffs, and to our witnesses for being with us today. By my count, we have had roughly seven different anti-union and anti-worker hearings at the Full and Subcommittee level last Congress, and that was more hearings than we had on any other topic considered before this Committee.

The majority is picking up right where it left off and trying to make it as difficult as possible for working Americans to organize a union and protect themselves on the job. Regardless of what may be said at these hearings, or how hostile to unions this President and this majority may be, the first section of the National Labor Relations Act clearly states that it is, and I quote, "The policy of the United States to encourage the practice of collective bargaining freedom, and freedom of association."

That is the exact opposite of what we see from this President and House Republicans. Instead, we see efforts to change the status quo, to change the rules and make it as uncomfortable as possible for working men and women in this country to exercise their rights in the workplace.

My Republican colleagues claim overreach by the previous administration but fully support this President illegally firing Gwynne Wilcox from the National Labor Relations Board, essentially freezing this important agency, and preventing it from carrying out its mission to protect workers from being wrongly fired for exercising their rights.

Instead of changing the rules to make it harder for workers to organize, and more difficult for companies to voluntarily recognize a union, we should be ensuring that every American can freely exercise their rights in the workplace without the fear of being fired and losing their main source of income.

The difference between Republicans and Democrats on this issue and so many others could not be more clear. The Democrats used our majority to save the hard-earned pensions of over 1.2 million Americans, literally preventing people from having to go back to work in their old age, and helping them to enjoy their retirement.

Republicans used their last majority under President Trump to change the law to prevent union workers from being able to write their dues off on their taxes. Now, they are using their current majority to extend tax cuts for the wealthiest Americans, while taking away nutrition and healthcare benefits from millions of families, and they are doing it all at the same time.

Make no mistake, this majority is not a pro-union majority or pro-worker majority. As I mentioned earlier, President Trump illegally removed Gwynne Wilcox from the NLRB without a hearing, as required by law, just a week into the second term, showing that cracking down on unions was always their intention.

Ms. Wilcox was not fired for negligence or for malfeasance, like so many others, she was wrongly fired for her commitment to maintaining a political independence of this important agency. She was fired for her refusal to abandon the rule of law in this country, and our long commitment to the idea that some government functions should be protected from special political interests.

That commitment is what differentiates our country from corrupt authoritarian regimes, and that is what is at risk every day that this President is allowed to do these things unchecked. Ms. Abruzzo, beyond the fact that the removal of Ms. Wilcox is a true overreach of Presidential power, can you talk about why every American should be concerned about a President firing a member of the NLRB without a legitimate reason for the first time in history?

Ms. ABRUZZO. Thank you. Yes, it is all about protecting workers, and workers will not have an independent body to decide their cases. It is putting the scales—putting a thumb on the scales of justice, rigging the system. Corporations with money, and corporate billionaire donors will be able to influence the White House and be able to avoid liability. Worse, you get folks, decisionmakers at the Board that will call the White House and say "hey, we have case against Amazon," or "we have a case against Meta," or "we have a case against Tesla or SpaceX, what do you want us to do here?"

It is the opposite of correcting the power imbalance, and it is allowing for workers to have less safe working conditions and more inequities at the workplace and less voice.

Mrs. MCBATH. Thank you so much, and I yield.

Chairman ALLEN. The gentlelady yields. I now recognize—it is my pleasure to recognize our great Chairman, Tim Walberg for your questions.

Mr. WALBERG. Well, I thank another great Chairman, and I appreciate the panel being here today. This is an issue that you know I have had concerns with for many years right now and card check in my opinion right now, does not serve unions well, with membership that feel at times that they are pestered and pushed in an unfair way to even consider unionization.

Mr. Vernuccio, good to see you. Do you think the card check process is less fair than secret ballot elections, and what can be done to ensure fairness in that process?

Mr. VERNUCCIO. Mr. Chairman, it is good to see you as well, and thank you for the question. Card check is absolutely inferior to a secret ballot election. We have heard testimony before this Committee time and again of workers being intimidated, workers being threatened, and coerced of not getting the full story on unionization, signing cards only to regret that signature.

The secret ballot gives those workers the opportunity to have a private vote where they can reflect on unionization where there is not intimidation, where there is no coercion and make that choice just like we choose for any political office in the privacy of a voting booth.

Mr. WALBERG. Yes, I appreciate that. I contend that if unions really understood it, that this shows that the interest is not so much in the worker, but rather in just the operation of the union. Card check is wrong. Secret ballot is American, and we need to continue that.

Mr. King, you devote a considerable portion of your written testimony sharing your perspective on the Faster Labor Contracts Act, which is appreciated by me. Based on your experience, negotiating collective bargaining agreements, what effect would you expect this bill to have on parties' abilities to reach a first contract?

Mr. KING. Nothing positive. I negotiated, Mr. Walberg, collective bargaining agreements for over 45 years, and many of those agreements were first contracts. While the Association comments Senator Hawley for starting the discussion, unfortunately, he just lifted provisions from the Pro-Union Act, the PRO Act and put them in a bill.

As noted by my colleagues here this morning, that bill imposed by government fiat, an agreement on the parties, union and employers, if no contract is reached within 180 days, or similar in that timeframe, that is unrealistic.

It has constitutional defects. It is seriously in conflict with the National Labor Relations Act. It was written without any input, any meaningful input from other stakeholders and I respectfully would disagree, and my Association does, with the entire approach that Senator Hawley is taking.

Mr. WALBERG. Along that line do you believe the Faster Contracts Act would result in contracts that are substantially different than the ones derived under current law?

Mr. KING. Perhaps. We have this outside group of arbitrators, Mr. Walberg, that ultimately is going to be required to write the contract for the parties, and if we go under what is interests arbi-

tration approach, which is what is in the Hawley bill, the arbitrators generally just split the baby and come out somewhere in the middle.

No meaningful collective bargaining occurs, so yes, they could be quite different, quite detrimental to both employees and employers. Again, this proposal is defective in so many different ways. It was not well thought out, and it is something that hopefully the House will not take seriously in any way, shape or form.

Mr. WALBERG. I hear you. Mr. Solem, your written testimony describes various bars to elections, even though the NLRA only has a 1-year election bar. Can you explain how all of these other election bars developed, and whether they apply to elections both certifying and decertifying union representation?

Mr. SOLEM. Thank you, Chairman Walberg. Very quickly, there are several non-statutory bars, like the contract bar with prevents an election for up to 3 years when there is a collective bargaining agreement in effect, except during a 30-day period, voluntary recognition bar, the successor bar.

You cannot get an election when your employer sells its business. In terms of their development, I think former Chairman Miscimarra said it best, when he has developed as incumbent protection devices.

Mr. WALBERG. I think my time has expired, but I appreciate the thought. I yield back.

Chairman ALLEN. Chairman, I am just following your example here. I now recognize Mr. Mannion of New York for his questions.

Mr. MANNION. Thank you, Mr. Chairman. I do not mean to correct you, I am sure you are also a great boss, Mannion, which misspells to man union sometimes. Not a joke. Thank you all of you witnesses for being here today. Thank you, Ms. Abruzzo, for your leadership at the NLRB, and for the reforms you have achieved to support organized labor and protect workers' rights.

I fear that some of that progress is now at risk due to this administration's efforts to weaken worker protections and undermine independence and capacity of the NLRB. Regional offices, especially in Central and UpState New York have been confronting serious staffing and resource shortages for years now, leading to unacceptable backlogs.

Workers with valid complaints are waiting months, many times over a year for action. These are not just delays, they are denial of these workers' rights, and when we pair that with the proposed budget cuts to the NLRB, it is clear that we are headed in the wrong direction.

The Ranking Member mentioned the popularity of labor unions. Well, in UpState New York, in Syracuse and Utica, where I am from, it is upwards of 80 percent, and the people who represent those union workers here in Washington and in Albany, are pro-union and pro-worker.

If they are not, they are not there for very long, and it is not because of union bosses; it is because of trust, it is because of securing pensions, it is because of the grievance process, it is because of collective bargaining. The people of Central New York understand that the pathway to the American dream is not just a good job, it is a good union job, and you can look back at almost any

family's history in this country, and you will find that good union job that took people out of poverty.

Before my time in Congress, I was a President of a 400-member teachers association, teachers, nurses, school psychologists and social workers. I led two successful contract negotiations, including one that was unanimously ratified 366 to zero, so I understand the power of collective bargaining, and the importance of a fair and a functioning system.

That is why I strongly support legislative reforms like the PRO Act, that would ensure workers' rights and that those rights would be better protected. Ms. Abruzzo, in your view, what statutory reforms beyond the adequate funding that you referenced, citing four items, four actions by this Congress or others, are most urgently needed to empower workers and ensure that the NLRB can fully carry out its function?

Ms. ABRUZZO. Thank you. As I said first of all you need to bring Board Member Wilcox back and have a quorum. You need a well steeped, well experienced labor lawyer in that role, otherwise there will be continued violations of the law. You know, corporations make a ton of money off the backs of their workers, and those that need the most protections and the most tax breaks are workers and their families.

That is first and foremost. Second, as I said, there has to be independent decisionmaking at the Board. If there is not, then the power and balance will just get even more skewed, corporations will just use their money to influence the White House, and again, that affects workers detrimentally, and affects their workplaces, making them less safe, inequities, losing their voice.

Third, as I said, pass legislation that actually is more fair and more balanced for protections of workers' rights. Cover more employees: domestic workers, agricultural workers, those that are misclassified as independent contractors. Cover more employers that are actually joint employers who are trying to avoid liability or are trying to not get at the bargaining table.

Penalize violators of the law, that is how you deter violations from happening. Those are and of course, as you said, fund the NLRB. That is, you know, I believe the NLRB needs to be fully funded, and that requires at least 100 million dollars more to their budget to actually protect the rights of workers in this country.

Mr. MANNION. Thank you.

Chairman ALLEN. The gentleman from New York yields. I now recognize my neighbor and friend across the river, Representative Joe Wilson, for his questions.

Mr. Wilson Thank you very much Chairman Rick Allen for your leadership, and it is very humbling on this side. I get to follow two great chair people, can you imagine? Tim Walberg and Rick Allen, but I am grateful to be here, and with that too, I want to thank all the witnesses for being here.

The National Right to Work Committee to me for decades has just been a pioneer for workers' rights and successfully promoting workers' rights and right to work laws in a majority of the American states. South Carolina is a prime example of success, with workers having rights to join a union or not.

No forced unionization. The consequence has been that South Carolina now has become the largest manufacturer of tires in America, with Michelin Tires, Bridgestone Tires, Continental Tires, GT Tires of Singapore, and the leading exporter of tires of any State in the union. Additionally, South Carolina is the leading exporter of cars, with BMWs, the largest manufacturing plant, X–5's for everyone in Spartanburg, South Carolina, along with Volvo and Mercedes.

Especially extraordinary is Boeing, with 10,000 jobs in the Charleston area building 787–10 jet liners, and my constituents directly benefit with Boeing by having tubing by Zeus Corporation, cable by Brisbee Incorporation, and with ATY providing the interiors.

Last year I was happy to actually be in Riyadh, Saudi Arabia where they announced the purchase of 39 billion dollars-worth of 787 jet liners, and of course President Trump topped that. Last month he worked with Qatar to buy 100 billion dollars-worth of 787s. We really benefit by having workers having a choice of jobs, unionization or not.

Ms. Abruzzo, I want to thank you for your service with NLRB with Michael Nicaro, Sr. I am grateful that the National Right to Work Act has been introduced over the years. I am grateful to be the lead. 100 co-sponsors in the House, which erases forced dues clauses in Federal statute, without adding a single letter to Federal law.

South Carolina's right to work law State has seen tremendous economic growth, as I have indicated, expanding economic freedom for businesses and workers, and we need to continue to promote job creation and ending forced unionization to extend workers' rights to the American people.

Mr. Solem, the work that you do at the National Right to Work Foundation is so critical, and how is it that you assess the bill of workers choice to be?

Mr. SOLEM. Thank you, Congressman. I think you just hit the nail in the head is that right to work, you know, drives job creation. If you look at a study that was done by Benjamin Austin, Matthew Lilly, who are at Harvard and Duke now, they found that there was higher employment and population growth in right to work states.

You know, the best thing about right to work is not necessarily economic growth, it is about employee free choice. The economic growth is just a positive externality of that.

Mr. WILSON. Indeed. The Trump administration is proposing to pursue a pro-worker agenda. What would you look to as a pro-worker agenda?

Mr. SOLEM. Yes, so how they can pursue a pro-worker agenda at the NLRB is to concentrate—the way I think about it is the three B's, blocks, stop blocking charges, stop bars, and enforce back and move to an opt-in, opt-out system, so employees no longer have to fund union politics without jumping through hoops.

Mr. WILSON. Indeed. What a difference because during the Obama administration there was an effort to stop Boeing from being able to develop in Charleston. Out of the blue they came and

acted against our Governor, Nikki Haley. They indicated that the plant could not be built.

It already had 1,000 workers. It had 100,000 square foot facility, and NLRB came in and said you cannot do it, but thank goodness we also have a very good Attorney General, Alan Wilson, in South Carolina working with our U.S. Senators Tim Scott and Lindsey Graham, and it was a real team effort.

With leadership, we were actually able to succeed. What a difference. It is inconceivable to try to block such a development, which has been so beneficial to all of American workers, and with that I yield back to our great Chairman, Rick Allen.

Chairman ALLEN. I thank my friend from South Carolina for yielding, and now I recognize Mr. Takano for his 5 minutes of questioning from California.

Mr. TAKANO. Thank you, Chairman, Allen, and thank you for the witnesses for being here today. Ms. Abruzzo, I just want to followup on a question that got asked by one of my colleagues. I want to ask you, is card check required by law?

Ms. ABRUZZO. Sorry, so yes, by law in 1935 the NLRA gave employees the right to designate or select their collective bargaining representative. What that means is that they can sign cards, and if a majority of those employees support unionization, then that union can then bring that forth to the employer and seek voluntary recognition.

Voluntary recognition is actually in the statute right now, and to Mr. Vernuccio's point, that is a majority of people who are supporting being represented by a union, and that is through cards, or some other mechanism that shows that they have majority support.

Mr. TAKANO. Are employers or workers ever barred from asking for a secret ballot election?

Ms. ABRUZZO. Well, under the Cemex decision they are not. They can voluntarily recognize the union, that is their employees' choice, and they should respect their employees' choices, but they have the option under the Cemex decision to file a petition and get a Board conducted election.

However, if they violate the law during the election process, between the filing of the petition and the election being conducted, in ways that do not allow for a free and fair election,they will be subject to a bargaining order.

Mr. TAKANO. The assertion made earlier that somehow rulemaking, or the Biden administration had somehow done away with secret ballot election, is that not a correct assertion?

Ms. ABRUZZO. That is not a correct assertion.

Mr. TAKANO. Employers or employees could request a secret ballot instead of the card check?

Ms. ABRUZZO. Correct, and oftentimes unions will file a petition to have a Board conduct an election.

Mr. TAKANO. Thank you. Thank you. My colleagues have spoken about the seismic changes that have occurred for workers and organized labor since the Trump administration took office, including the unprecedented removal of member Gwynne Wilcox from the National Labor Relations Board.

As you stated, the removal of Member Wilcox deprived the Board of a quorum. What does that mean for the workers on the ground, and can you give some examples of how this has impacted American workers?

Ms. ABRUZZO. Right now, the Board cannot make—issue any sort of decisions, so that means that workers who are fired, for example, cannot return to work, cannot get the back pay that they are owed. We are seeing delay tactics, whether it is in unfair labor practice cases where employers now are not settling cases, but rather litigating, and then letting it sit at the Board where a decision cannot be made, so those unlawfully fired people cannot get relief in any timely fashion.

We are seeing it in election cases, where the employers will appeal after an election, and have it sit at the Board, so when a union wins an election, there will be an appeal by the employer, and then it will just sit, and so nothing can happen until the Board reaches a quorum.

Third, just one other thing, they can also test cert, meaning that—and have been doing this, where union wins, they just say we are not going to recognize and bargain with you, with your representative, and then that is it. What happens is it undermines employee choice, and it undermines union support because the union cannot get to the bargaining table.

Mr. TAKANO. Okay. I would like to note for the record that as of last week there were 459 cases pending before the Board. That is 459 cases of workers who won their union, but their bosses are refusing to bargain if their contract workers who have been fired, but have not gotten their jobs back, and workers illegally denied raises, including thousands of Starbucks workers waiting to get back pay.

On February 18th, the Trump administration issued an executive order that mandates that the NLRB submit new regulations to the Director of Office of Management and Budget for review, but it also allows for OMB to control, and OMB's apportionment to advance the President's policies and priorities, requires NLRB staff to—oh my goodness, I have run out of time.

I will have to let that—some other member ask that question. I will yield back.

Chairman ALLEN. I thank the gentleman for yielding and now call on Dr. Onder from Missouri for your questions.

Mr. ONDER. Thank you, Mr. Chairman, and thank you to the witnesses for taking time to come and be with us here today. We are holding this hearing today at an exciting time in the world of labor policy. The American people elected a President who is committed to improving worker freedom, so workers could have a stronger voice.

Workers have a right to organize and join unions. At the same time, workers' rights of free speech and free association must be respected as well. Nowhere is this principle more important than in workplace unionization elections. Unions have at times hijacked these processes, sometimes with surprising results.

According to research from the Institute for the American Worker, just 4.9 percent of current union workers have voted for the union that represents them. Unions frequently discourage workers who they know will vote against them during elections from voting

altogether, leading to elections where only a handful of workers show up to vote and unionize an entire workplace.

An example is the United Football League, where only 13 percent of players voted the union into power. Unionization elections should empower American workers, not cherry pick the few workers who favor unionization. We must ask ourselves how we got to this point.

A study published by the Institute for the American Worker in the Mackinac Center for Public Policy released this week entitled, "Misread, How Legal Authorities Allow Tyranny of the Minority to Subvert Worker Enfranchisement," addresses this question.

The study shows how flawed Court interpretations of the Railway Labor Act, and the National Labor Relations Act have given rise to our current predicament. Mr. Vernuccio, could you share with us some of the key findings of this study?

Mr. VERNUCCIO. Thank you, Representative Onder, and it is good to be testifying in front of you again, this time in front of Congress, so thank you very much.

Mr. ONDER. Yes.

Mr. VERNUCCIO. Thank you for your leadership on the Worker Enfranchisement Act that would require a quorum of workers to bring in a union in order for that union to have exclusive representation and represent all workers. The misread study that you cite, it has several findings, the first of which it sites an earlier Institute for the American Worker Study that shows that, as you said, only 4.9 percent of workers had ever voted for the union at their workplace.

The reasons for that is many first, as you pointed out, unions can organize with a minority, a slim minority of workers voting for that union. It is also, as my fellow witness, Mr. Solem, has pointed out, the difficulty of removing a union when it is formed.

This is why having a quorum or having as the clear language of the National Labor Relations Act says, the majority of employees select the union is so important.

Mr. ONDER. Yes. Well, no, thank you. Thank you for that. Yes, thank you for your mention of my own bill, the Worker Enfranchisement Act. I think clearly, we need a legislative solution to fix this problem. That is why my bill would require two-thirds quorum of eligible workers to be present at a workplace unionization election for the election to be deemed valid.

I believe this ensures a fair elections process, and before we subject the entire workplace to monopoly representation by the union, this is important. My bill, as you know, would also require secret ballot voting. The NLRB has long recognized that in person voting via secret ballots results in the highest level of participation in union representation elections.

The Supreme Court, in fact, in NLRB vs. Gissel Packing Company recognized that card checks are, "admittedly inferior to the election process," and noted that, "We would be closing our eyes to obvious difficulties if we did not recognize that there have been abuses, primarily arising out of misrepresentation by union organizers."

Mr. Solem, I was wondering if you could highlight some of those abuses, particularly in light of the NLRB's Cemex decision?

Mr. SOLEM. Thank you, Congressman. Well, if you look at what Cemex does, it is rather radical. Cemex says we take an election, and we throw out the election results, install the union by government fiat to rule, even when they lost. I am running out of time, so just very, very quickly, card check is vastly inferior because all of the protections of the secret ballot election are missing in a card check.

There is no secrecy, there can be coercion, and you can be asked time and time again to sign a card, whereas an election you just vote once.

Mr. ONDER. Thank you, I yield back.

Chairman ALLEN. I thank the gentleman for yielding. Now, I recognize Ranking Member DeSaulnier for your 5 minutes of questioning.

Mr. DESAULNIER. Thank you, Mr. Chairman. Ms. Abruzzo, the importance of the independence of all independent Boards and Commissions, but in this instance in particular, the danger of that independence as prescribed by statute, could you address that, and the attack on that by this administration?

Ms. ABRUZZO. Yes. Thank you. Workers again will not have an independent agency, and independent decisionmaking, so what that means is that there will be thumbs on the scale of justice. The system will be rigged. It means the people with more money, corporate billionaire donors, and other corporations will be able to spend their money to influence the White House to then avoid liability.

It actually encourages corruption, and those that are at the effect of this are workers who will have less power in their workplaces, and less opportunity to make gains, and to actually profit for the value that they add to their employers' profit-making enterprises.

Mr. DESAULNIER. We have heard a lot about intimidation. You were there for 30 years. Maybe some of that just happens in these kinds of situations, but I think of the situation right now that is happening in Southern California with David Huerta, a labor leader for SEIU and what happened to him, and what is happening seems incredibly heavy handed.

Could you speak to that? If we are going to be—get to what I hear all four of you say, and my Republican colleagues, is we want to balance. It certainly seems we are out of balance from our perspective, and that is an extreme example right now where fortunately, he has been released, and due process should go ahead if he has broken the law, he should be held accountable.

The interpretation and the pretty heavy-handed application of the law in this instance and others is directed, I think, at labor, at silencing them.

Ms. ABRUZZO. Yes, I thank you for that. You know, it's an injury to one is an injury to all, and this is an assault on immigrant communities who are being indiscriminately rounded up and detained, but it's also an assault on this esteemed labor leader. It is an assault on the labor movement, and it is an assault on all workers around the country and their rights in this country, including under the Constitution.

Their right to free speech, their right to freely associate, their right to engage together, their right to protest peacefully, and the weaponization of the Federal Government to squelch those rights

and squelch those actions cannot be tolerated. When I was General Counsel, I took an oath to protect and defend the Constitution of the United States from all enemies, foreign and domestic.

Just because I was removed from my role as General Counsel does not mean that I do not feel that I had that duty to this day, and we all need to do our part to ensure that we remain a country of the people, by the people, and for the people.

Mr. DESAULNIER. Ms. Abruzzo, history is repeating itself to me right now. I remember growing up in Lowell, Massachusetts listening to my grandparents and their generation talking about the 30's when the Women's Federation of Textile Workers was the first labor union, and they were largely immigrants who realized how they were being abused.

The immigration and I like to tease my friend, good friend, former Chairman Foxx, that when she says this country was founded on freedom, I always add, and cheap labor, so it is a dynamic in our history that is replaying itself right now in Southern California from my perspective.

More people come here to aspire to get jobs, but on the other hand unfortunately there have been employers and political people who wanted them to work for nothing, or next to nothing. Could you talk to that? Whether it is the Irish, the Italians, or people from Central and South American now today. We keep going through this struggle, and we cannot forget the original sin of this country in terms of enslavement.

Ms. ABRUZZO. Yes. I would say that, you know, rather than villainize immigrant communities, we should be embracing these hard-working people. They take care of our parents, they take and serve our food, they build our homes, they are a part of the fabric of this country, and so we should—you know, we have more in common than that what separates us.

We should be embracing everyone who makes sure that this country can function as well as it does, so certainly I couldn't agree with you more, there should be no intolerance when it comes to whether it is immigrant population or the LGBTQ population for example.

Mr. DESAULNIER. For the good of the country.

Ms. ABRUZZO. That is right.

Mr. DESAULNIER. Thank you. I yield back.

Chairman ALLEN. I thank the gentleman for yielding, and now it is my privilege to recognize our great Chairman Emeritus of this Committee, Ms. Foxx of North Carolina.

Mrs. FOXX. Thank you very much Mr. Chairman. I appreciate it, and I thank our witnesses for being here. Mr. Solem, the NLRB, during the first Trump administration issued an Election Protection Rule, could you explain and provide examples of how this rule safeguarded employee free choice?

I have some followups, so I will ask you to be as succinct as you can because I would like to get all my questions answered.

Mr. SOLEM. Chairman Emeritus Foxx, I will be very succinct. It guarded employee free choice because it meant a mere allegation could derail an employee's decertification election.

Mrs. FOXX. Thank you. Let me followup. In August of last year, the Biden-Harris NLRB issued a Final Rule titled, "Fair Choice

Employee Voice," which rescinded the Trump's Board's Election Protection Rule and reinstated the Obama era, "blocking charge ending policy," which allows certain types of unfair labor practice charges to "block" a Board's scheduled election.

Can you explain the differences between the Trump and Biden policies as they relate to unfair labor practice charges, and do you believe the Biden era blocking charge policy effectively weaponized unfair labor practice claims to stop workers from voting to decertify a union?

Mr. SOLEM. Chairwoman Foxx, you are absolutely correct. The difference between the two is under the Trump One Rule, a mere allegation could not stop an election from occurring. Under the Biden Rule means that any unfair labor practice that is filed, regardless of whether it is meritorious or not will stop an election, so it incentivizes filing charges just to increase delay.

Mrs. FOXX. Thank you. Mr. King, welcome back.

Mr. KING. Nice to see you, Dr. Foxx.

Mrs. FOXX. You are coming so often. You say in your written testimony that you believe the restrictions the Biden NLRB General Counsel imposed on parties engaged in settling unfair labor practice charges proved deeply harmful. Could you explain why this was harmful?

Mr. KING. Before General Counsel and her staff took an unrealistic approach to settlements it cost the agency millions of dollars. Pursuant to the agency's own formula, for every decrease in the settlement rate, the agency suffers at least a 2 million dollar hit, if you will. The settlement rate, Dr. Foxx, under the previous administration dropped at least 5 percent, so that is 10 million dollars right now.

Finally, the time to get to settlement, when and if you could get to settlement, has lengthened considerably. The budget of the NLRB has been adversely impacted by the prior administration.

Mrs. FOXX. Thank you very much. Mr. Vernuccio, in 2023, the Biden Board decided the Lion Elastomers case, which held that racist, sexist and vulgar rhetoric is permissible in the workplace, so long as it occurs in the context of union activity. What is your opinion of the Board's decision in this case?

Mr. VERNUCCIO. I think it opens up the workplace for—it creates an unsafe work environment. It opens up the workplace to harassment, to vile language and conduct, and it prohibits employers from taking action to protect their employees. Those employees deserve that respect and that protection.

Mrs. FOXX. We are quite well aware of the vulgarity that has been used by union bosses in recent times, and this is I think really disgusting. Thank you, Mr. Chairman. I yield back my time to you.

Chairman ALLEN. Thank you, Dr. Foxx, and now I recognize my friend Joe Courtney for 5 minutes of questions from the great State of Connecticut.

Mr. COURTNEY. Thank you, Mr. Chairman and thank you to the witnesses for being here today. This is sort of the annual sort of, you know, union trashing event that we have in this Committee, and you know, it is interesting because I usually try to point out with the latest polling from Gallup is in terms of the American peo-

ple's view of labor unions. Again, last December was the latest version, 70 percent approval, second highest in history.

Again, that is not always been the case, if you go back even a couple decades ago where it had dipped closer to 50 percent. You know, I also was privileged to join a bipartisan delegation to the Vatican a couple of weeks ago for Pope Leo the XIV's first papal mass, which was unbelievable to have an American pope up there.

His choice of the name Leo, I think, sent a very powerful message because the last Leo, Leo the XIII, wrote the papal and cyclical Rerum Novarum in 1891, which recognized basically the dignity of work, and the right of workers to "withhold their labor," as a way, again, of trying to improve their life.

It was written actually as sort of a counter to the sort of rising Marxism and socialism in Europe, but again, it was a recognition that, you know, we have to in a free market economy, give workers a legal pathway to make sure that the value of their work is also reflected in terms of the labor market.

Again, I think that is really what the genesis of the National Labor Relations Act was all about. A couple months ago in my district, we had a successful outcome of collective bargaining between Electric Boat and the UAW Marine Draftsmen Association.

Again, Congress recognizing that we need to accelerate submarine construction, actually appropriated some wage improvement funds, which were incorporated into the collective bargaining agreement. 30 percent wage increase over the next 5 years. The metal trades union, which had an earlier contract, was reopened to again, you know, match that level.

Again, it is because frankly if we want to get people into the metal trades, we need to basically increase the entry level wage rates, as well as to retain workers who were further along. I have a column in the Connecticut Mirror, "Collective Bargaining is Rebuilding America's Defense Industrial Base," which I would ask to be admitted to the record.

Chairman ALLEN. Without objection.

[The information of Mr. Courtney follows:]

Congressman
Joe Courtney
Serving Connecticut's Second District

PRESS RELEASE

FOR IMMEDIATE RELEASE
June 6, 2025

Contact: Sam Varie, 202-503-6102

ICYMI: Rep. Courtney Pens New Piece
Collective Bargaining is Rebuilding America's Defense Industrial Base

WASHINGTON, D.C. – Rep. Joe Courtney (CT-02), Ranking Member of the House Seapower and Projection Forces Subcommittee and a senior Member of the House Education & Workforce Committee, penned a new opinion piece in CT Mirror following ratification of the record MDA-UAW labor contract at Electric Boat's Groton shipyard. Simultaneous with this contract, the Electric Boat Metal Trades Council and Carpenters Union 2023 labor contracts were reopened, and over 2,700 members received a comparable boost in hourly rates.

"The successful agreement reached last month is a clear example of how collective bargaining can effectively address one of the most pressing challenges in our national economy: rebuilding America's manufacturing industrial base. Realigning wage rates is a significant step forward to achieve our goal," wrote Courtney.

The contract came after months of intense negotiations. The turning point, Rep. Courtney writes, came on April 30 when special funding approved by Congress was released to Electric Boat which surged management's offer.

Rep. Courtney played a leading role in securing the special funding. Rep. Courtney secured the authority in the FY25 National Defense Authorization Act for the Secretary of the Navy to increase wages for non-executive shipyard workers. Congress passed this bipartisan measure in December 2024, and later that month, approved funding through the Continuing Resolution to allow the Navy to underwrite the cost of these wage increases for shipbuilders. In April, Rep. Courtney called on the Secretary of the Navy to exercise the new authorities and funding to deliver the wage increases Congress and the Navy agree are urgently required. On April 30, the Navy acted on its new authority and awarded General Dynamics Electric Boat a $12.4 for the construction of two Virginia class boats, productivity improvements at shipyards, and workforce support at nuclear-powered vessel programs.

Read the piece here or below.

As the dust settles following the hard-fought, months-long negotiations between Electric Boat and the Marine Draftsmen Association Local 571, both sides deserve tremendous credit for reaching a record-setting agreement and finding a fair path forward for the next five years.

Reaching the "sweet spot" of this historic contract for the members of MDA Local 571 required a lot of intense advocacy and dialogue between management and labor, as well as the roughly 2,500 members of this unique workforce that designs the most advanced, complex nuclear-powered submarines in the world.

A contract that boosts general wages by more than 30% over the course of the contract, while retaining superior health and retirement benefits, sends a strong signal that this workforce is respected and valued. The five-year term of the contract also highlights the workload of the designers will be enduring in the coming years, given the strong demand for submarines by the U.S. Navy and Congress.

A notable turning point in the contract negotiations came on April 30, just weeks before the agreement was finalized. That day, new funding approved by Congress in December 2024 was released to Electric Boat, specifically designated for wage improvement for the submarine industrial workforce.

The impact of this funding surge transformed management's offer of a 21.4% raise to the final 30% general wage increase agreement (over the course of the contract). The hourly wage improvement offer saw a significant boost, with a much larger increase in the first year and steady raises in the years that follow —well above what was initially proposed.

Simultaneous with this upgrade, the Electric Boat Metal Trades Council and Carpenters Union 2023 labor contracts were reopened, and the machinists, boilermakers, electricians, and painters also received a comparable boost in hourly rates. It is unprecedented for Congress to single out one shipbuilding production enterprise in the entire Department of Defense for such a boost in salary. There was no "wage improvement" funding for aviation, munitions, space technology, or missiles in the December spending bill or any other spending bill in recent memory.

This extraordinary Congressional anomaly is a recognition that the existing 2025 labor wage rates for shipbuilding trades were failing to match the hiring and retention demand for the Navy's growing fleet size — particularly the submarine fleet.

Although Electric Boat has brought on record levels of new hires over the last three years and maintained a significantly higher retention rate compared to other shipyards, the "churning" of new workers hindered faster production goals for both Virginia and Columbia class submarines. It did not take much analysis by Congress, the Navy, or industry to recognize that wages —especially for entry-level trades— were no longer competitive with those in retail, hospitality, and transportation, to name a few. Compared to the Cold War era from the 1970s to 1990s —when Electric Boat's workforce was at its peak—the pay gap between shipbuilding trades was significantly wider than other sectors, which helped drive greater workforce stability and higher employment levels in the shipyard back then.

The successful agreement reached last month is a clear example of how collective bargaining can effectively address one of the most pressing challenges in our national economy: rebuilding America's manufacturing industrial base. Realigning wage rates is a significant step forward to achieve our goal.

More work needs to be done, including sustaining job training programs like the Manufacturing Pipeline Initiative and Career and Technical Education. These programs should operate not only in technical high schools, but also in traditional comprehensive high schools, where their presence is steadily expanding across eastern Connecticut with each new school year. Such efforts benefit not just Electric Boat, but other supply chain and non-defense manufacturers.

That is how to build a strong Navy and how to build a strong middle-class economy that's here to stay.

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Congressman Joe Courtney was elected in 2006 to represent the Second Congressional District of Connecticut in the U.S. House of Representatives. He serves as the Ranking Member of the House Armed Services Subcommittee on Seapower and Projection Forces and is a senior member of the House Education and the Workforce Committee. Congressman Courtney is as an Honorary Officer in the General Division of the Order of Australia (AO).

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Mr. COURTNEY. Thank you, Mr. Chairman. Again, it is an example of where collective bargaining again helps individual workers, but it also provides a very efficient way to address critical needs in our economy and national defense. General Counsel, former General Counsel Abruzzo, maybe you could comment on that?

Ms. ABRUZZO. Thank you. Well, on that last point I would say that you know in 1935 the NLRA was enacted because employees lacked channels of communication with their employers. Congress rightfully said we need to empower workers here. We need to—we know there is strength in numbers, we need to make sure that they can collectively bargain through representatives of their free choosing and improve their wages and working conditions.

Congress rightfully understood that through those improved negotiated wages and benefits it would help the failing economy. It helps everyone to have workers that have power to improve their wages, but also other working conditions: making sure there is no discrimination in the workplace, making sure there are safe workplaces, making sure there is a grievance in arbitration proceeding so that workplace conflict can be diminished. That is what the NLRA was enacted for, to promote productive labor management relations.

I will just say one other thing, if there is no independent NLRB anymore, then I fear, and I expect, that workers are going to go back to the pre-1935 self-help activities of mass protests and mass strikes to gain or regain the benefits that they earned through their hard work.

We take governance of our country and get the dignity and respect and recognition that they deserve for the value that they add to their employer's operations.

Mr. COURTNEY. Build a stronger navy. Could you just respond to again the comments made about some of your actions as General Counsel?

Ms. ABRUZZO. Yes. I mean my goal over my almost 30 years at the agency has always been to educate workers about their rights and employers and unions about their obligations under the statute, and to protect workers' rights to freely associate with one another to improve their circumstances.

Chairman ALLEN. I thank the gentleman for yielding, and I now recognize Ms. Lee of Pennsylvania for your questions.

Ms. LEE. Thank you, Mr. Chair. I am always a bit worried about the misinformation and the propaganda that exists and floats around, not just in this hearing, but also just from the administration as a whole about unions, and about what the NLRB is. Especially using the phrase "restoring balance," when we are talking about the power dynamics between, you know, a corporate conglomerate, and a conglomerate of bus drivers or nurses, or fast-food workers.

I think that is nasty work. There is a blatant attempt to mischaracterize what a union is and why they are necessary in the first place, so to clear it up we all understand that an individual worker has very little, if any, power at all over a corporation or CEO. Any other framing is disingenuous.

People in power in this country would never answer to the needs of an individual, say, a janitor, alone, but when all the janitors

come together in a union and work as a group, that is when the power, the boss, the worker, or the corporation has to respond. Power attacks unions because they create a more fair and balanced economy in favor of working-class people over the 1 percent. Unions help us adjust the racial and gender race gap.

Right now, nothing is more frightening to a wannabe autocrat than organized labor and an educated electorate. Corporations have grown accustomed to having an open lane to influence politics, however they see fit, and they want you to think that it is unfair that their political influence might be challenged by some workers, by working class people who have come together to advocate for themselves.

Organized labor in this country is not about big business versus big unions. There is no such thing as big unions. Working class people versus the people in power or David and Goliath as some of us know it, but that is why they do not want you to unionize.

That is why they want to divide union workers versus non-union workers because their biggest fear is that all the Davids recognize that we are on the exact same team, and they realize that if we were to work together against the Goliath, then we would be significantly stronger.

It makes a lot of sense why the rich and the powerful people want to attack unions and NLRB, who enforces workers rights to form a union. It is not because they think working class people have more power than a corporation, but it is because they are terrified of what would happen if they actually did.

Over the last 20 years regional NLRB offices across the country have lost 50 percent of their staff, while cases have skyrocketed. In my district, Pittsburgh NLRB Region 6 office have experienced 30 percent decrease in staff without any reduction in the case load.

Then the Trump administration has of course deputized DOGE to cut worker protections, and remove the Board member, to prevent the Board from maintaining or establishing a quorum. Nurses at the University of Pittsburgh Medical Center Magee Hospital have consistently advocated for investing in bedside nursing, retaining qualified nurses more direct care for their patients.

UPMC met their concerns with mass layoffs, and they paid their former CEO 30 million dollars, and they are leasing a 50-million-dollar private jet at the end of May. The nurses filed for a union election, but UPMC, our state's largest private employer, is trying to exploit the National NLRB's Trump-induced dysfunction to claim our local NLRB office cannot hold a union election.

Legal precedent and practice affirm that local labor boards are fully authorized to hold elections, even if the national board lacks a quorum. Ms. Abruzzo, is that your understanding?

Ms. ABRUZZO. Yes. The regional offices can of course conduct elections and certify the results. The issue is that there is too many employers out there that are abusing the processes and then pushing it to the Board by appealing when a union wins an election, and that appeal then gets stuck at the Board because there is no quorum.

Ms. LEE. I have two questions, and we have 1 minute. Very quickly, can you speak to the broader impact the NLRB understaffing has had on workers over the last decade, and what the fur-

ther cuts may do? If you could compare the NLRB's record on fairness and transparency during your time, in your tenure to now would be very helpful.

Ms. ABRUZZO. Yes, thank you. In terms of the funding, so you know, we have—I say we, the NLRB has the same case intake now or around that than they had in 2011, and yet the staffing in the field offices has decreased by 62 percent. That means that these really dedicated, talented Board agents are doing more with less.

They are trying to process cases as fast as they can, but they just cannot keep up because of the chronic understaffing. I do not understand the two current agency heads asking for less money when the agency needs even more money to ensure that they can protect workers in this country.

Ms. LEE. I appreciate that. I think we could all go on and on about the power imbalance, but I will yield back, and thank you for the time.

Chairman ALLEN. I thank the gentlelady for yielding. Now I call on my friend, Ranking Member Scott, for your questions, sir.

Mr. SCOTT. Thank you, Mr. Chairman. Ms. Abruzzo, is it true that members of unions tend to get higher wages, work in safer workplaces and get better benefits?

Ms. ABRUZZO. Yes, it is absolutely true.

Mr. SCOTT. Do union members—does membership in a union reduce the racial and gender disparities and pay?

Ms. ABRUZZO. Yes.

Mr. SCOTT. In a right to work State, if a person is not a member of a union, but a union pays for experts to negotiate a good contract, do the non-union members who did not pay any dues, get the benefits of higher wages and the other benefits?

Ms. ABRUZZO. They absolutely do.

Mr. SCOTT. Mr. King, if a union wins an election fair and square, what happens if an employer just stonewalls and refuses to effectively negotiate? Without the fine provisions in the Hawley legislation, what happens?

Mr. KING. Well, right now Mr. Scott, a Section 885 charge would be filed by the union for failure to bargain in good faith. That charge is then processed by the agency. I just want to make one comment. The H.R. Policy Association and employers generally want a quorum on the Board. We want the Board to function, Mr. Scott, and in the case you just mentioned, we want the Board to expeditiously proceed.

We urge in our testimony that the President fill two vacancies on the Board at present.

Mr. SCOTT. Even with those vacancies, without any requirement then you are up to what is good faith and if the employer really does not want a contract, winning the election did not do much good, is that not right?

Mr. KING. Mr. Scott, I would agree with you.

Mr. SCOTT. Unless you get that nice language that Mr. Hawley, Senator Hawley's proposing that he took right out of the PRO Act.

Mr. KING. The Pro Union Act, I think Mr. Scott.

Mr. SCOTT. That comes right out of the NLRA, we are supposed to be encouraging collective bargaining.

Mr. KING. Mr. Scott, we would agree with you that contract negotiations, first contracts, could be done better. The Hawley approach is not the way to go.

Mr. SCOTT. Ms. Abruzzo, if someone—if a business is committing an unfair labor practice, like firing a person for organizing unions, what are the sanctions?

Ms. ABRUZZO. Well, currently there are no sanctions because there is no functioning Board, so workers that are fired, and we see this, or the agency has seen this quite often that when employers get wind of an organizing drive, they try to nip it in the bud by firing the main union activist, for example.

Right now, without a full quorum, workers—fired workers, cannot get the relief that they deserve.

Mr. SCOTT. Even if they were to be a quorum, what would be the sanctions?

Ms. ABRUZZO. If there were to be sanctions, they would then have to come back. You know, an offer of reinstatement would have to be made, and they would get whatever back pay that they were owed as well as any direct or foreseeable pecuniary harms that resulted from the——

Mr. SCOTT. The fact that it matters what they made in the meantime?

Ms. ABRUZZO. Correct, right, where they had to work elsewhere, that would be deducted, the interim earnings would be deducted. I do just want to say one other thing. You know whether there becomes a quorum, as Mr. King just said that he also, or the H.R. Policy wishes there to be a quorum as well, when you don't have independent decisionmakers, that quorum can be lost at any time because the President could just fire a decisionmaker whose decision he does not agree with.

That just creates chaos at workplaces where you could just keep losing quorums because the President does not like the decisions being made.

Mr. SCOTT. Can you say a word about captive audience meetings, how extensive they can be?

Ms. ABRUZZO. Yes. When I was at the agency—so first of all knowledge is power, and employers bank on the lack of knowledge of employees, especially during nascent organizing drives and violate their rights by firing them, by holding these captive audience meetings where they are subjected to anti-union rhetoric by their employer, often combined with threats, or interrogation and the like.

Mr. SCOTT. Whose choice is it to join a union? Is it the employees or the employer?

Ms. ABRUZZO. It is the employee's choice of course.

Mr. SCOTT. What—and did the employers have to say about it?

Ms. ABRUZZO. Nothing.

Mr. SCOTT. Thank you, Mr. Chairman.

Chairman ALLEN. I thank the gentleman for yielding. I believe that concludes our questions. Thank you panel for your expert testimony today. Now, I would recognize myself for a closing statement. Would you like to make a closing statement, Mr. Scott?

Mr. SCOTT. Sure.

Chairman ALLEN. Okay. All right. I recognize our Ranking Member Mr. Scott for a closing statement.

Mr. SCOTT. Thank you, Mr. Chairman, and once again I would like to thank everyone for coming, and thank our witnesses for speaking with us today, particularly Ms. Abruzzo for specifically for her testimony and good work on the NLRB. Committee Republicans would have you believe that labor unions are the enemy of workers, but as Ms. Abruzzo just testified, they do much better when they join a union.

The fact is that the game has been rigged against workers, union and non-union. For decades, unions were popular with the American people because they enabled workers who strongly advocate for higher wages, safer workplaces and better benefits.

Right now, the fundamental right to unionize is in danger. The Trump administration's relentless attacks against the NLRB, its staff and its independence are an attack on workers themselves. Without proper enforcement of the NLRA and independence of the NLRB, workers' rights are compromised.

These are the people who provide for their families and simply want to come home at the end of the day with their whole paycheck, healthy and safe, and they deserve to be protected by an agency that works for them, not for law breaking employers. Forming a union must be a protected right, not an endless fight.

By gutting the NLRB and eliminating its quorum, the Trump administration and congressional Republicans undermine working people, businesses, the economy and America as a whole. Thank you, Mr. Chairman, I yield back.

Chairman ALLEN. I thank the Ranking Member for yielding, and now I will offer my closing statement. Again, on behalf of the members of the Subcommittee I thank our witness for giving your perspective on how the NLRB can fulfill its mission. Restoring balance and ensuring fairness and transparency at the NLRB I think is a worthy cause, and I think we have made it clear today we have got some work to do there.

Today's hearing makes clear that we need labor policies that put individual worker choice at the forefront with reasonable expectations for job creators. You know it is hard to believe just 6 years ago we had the best economy in my—our lifetime. Workers' wages were increasing at a pace not seen before.

You know, today we even have 7 million openings for jobs in this country, and I think in this Golden Age there is going to great opportunity for workers if we can put the proper policies forward that will make us again, the greatest economy in our lifetime because folks, it is all about jobs, jobs, jobs, and opportunity.

I believe every American should be given that privileged, and also the privilege to be an entrepreneur as well, and so that's what we are fighting for. As our witnesses testified today, the NLRB should implement policies that allow employees the freedom to choose how they want to be represented, through the use of secret ballot elections and clear, predictable guidelines for employees, employers, and I again emphasize secret ballot.

The NLRB should also serve as a neutral authority on the issues of joint employment and independent contractor status. The Biden-Harris Board, however, was not a fair or neutral agency. They put

the interest of put labor first at every turn, and workers across America are paying for it today.

I look forward to working with the members of this Subcommittee and administration to find much of these solutions that advance worker and employer freedom. This hearing is about the worker, it is not anti, it is about workers. The people who have made this country.

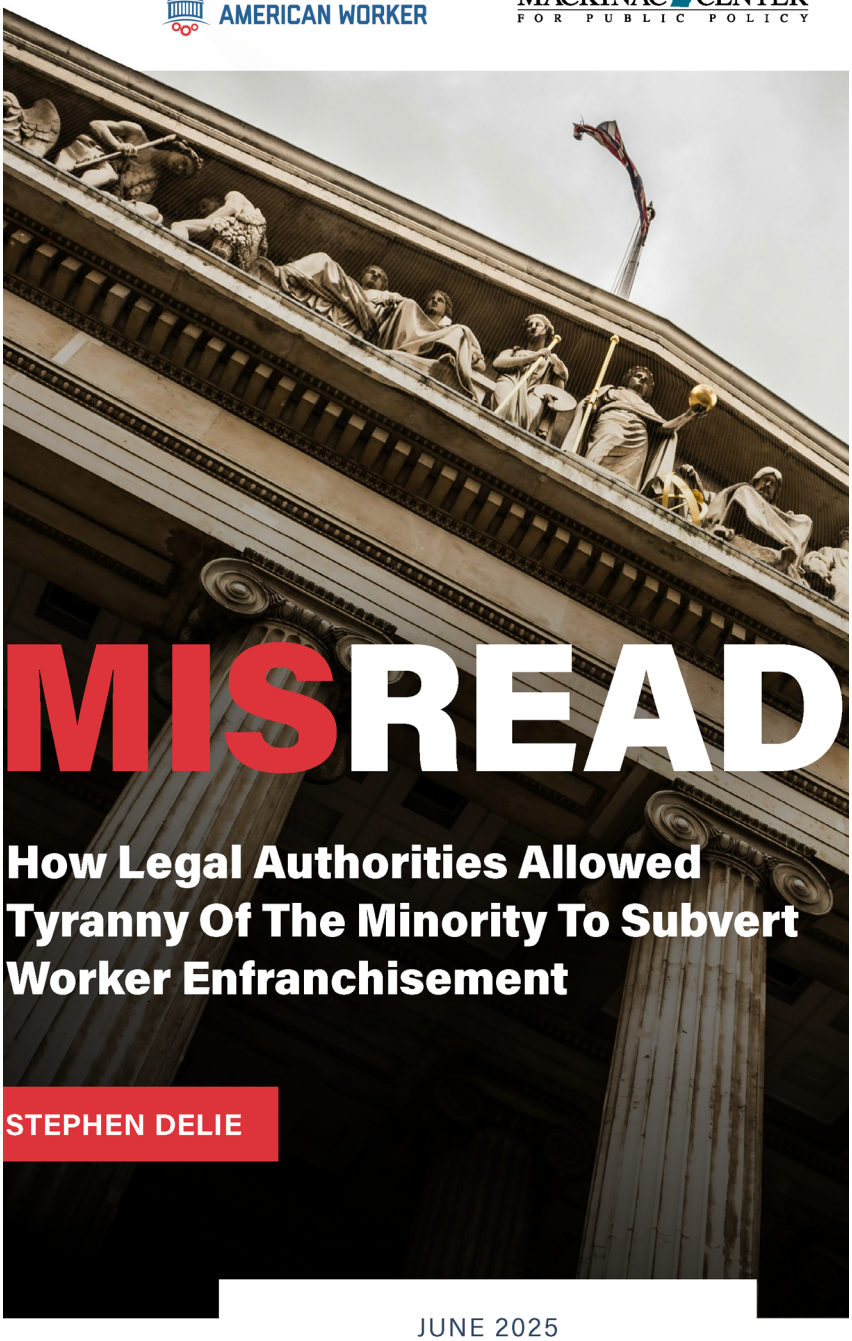
This body did not create the greatest economy in our lifetime it is our great workers that created the greatest economy in our lifetime. I would like to again thank our witnesses for taking the time to testify before this Subcommittee today. Without objection, there being no further business, the Subcommittee stands adjourned.

[Whereupon, at 11:54 a.m., the Subcommittee was adjourned.]

[Additional submissions from Rep. Onder follows:]

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MISREAD

How Legal Authorities Allowed Tyranny Of The Minority To Subvert Worker Enfranchisement

STEPHEN DELIE

JUNE 2025


INSTITUTE FOR THE
AMERICAN WORKER


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EXECUTIVE SUMMARY

For almost a century, private sector unions have been elected based on the majority support of the employees who voted in the union election. In these elections, groups of employees facing unionization are offered the opportunity to vote on whether a union should represent them and, if so, which union. If a majority of the employees who voted in the election choose a union, that union gains the authority to speak on behalf of all employees in the group, which is known as a bargaining unit.

There's a problem with this approach: It is contrary to the plain language of the National Labor Relations Act, the federal law that governs private sector unions.

The relevant text of the Act is clear:

> Representatives designated or selected for the purposes of collective bargaining **by the majority of the employees in a unit** appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment [...].[1] (Emphasis added.)

As drafted, the Act could be interpreted as permitting unions to be elected in one of two ways. A strict reading of the statute would allow unions to represent employees only when a majority of the employees in a bargaining unit eligible to vote voted in favor of unionization. This could be considered the "absolute majority standard." A less strict but still plausible approach is to require a majority of the employees in the bargaining unit to vote, with the union being elected if a majority of this quorum approves of it. This "quorum majority standard" would allow a union to represent employees after winning the majority support of just those employees who voted in the election, so long as a quorum of employees voted.

The logic behind these approaches is plain: The decision to unionize should be representative of the opinion of a majority of the employees who will be affected by it. Yet for almost 90 years, unions have been selected not by a majority of those eligible to vote or by the majority of a quorum of employees, but instead only by a majority of those who actually voted. This has resulted in unions representing bargaining units even when the majority of employees in those units did not vote in favor of the union.

This report shows how the plain language of the National Labor Relations Act was misinterpreted by the National Labor Relations Board and the courts in the 1930s and 1940s to accomplish what the judiciary determined was the Act's "purpose." Such judicial activism coincided with President Franklin Roosevelt's infamous threats to pack the Supreme Court, which until that point had acted as a "an active check on progressive legislation."[2] The Court's approach to statutory interpretation during this period stands in stark contrast to the current Supreme Court's adherence to textualism. This legal doctrine holds that the text of a statute, rather than its perceived legislative intent, is the superior method of interpreting laws.

Given the current Court's preference for textualism, it is unlikely these initial interpretations of the Act would be decided in the same manner today. Amendments that have been made to the Act since its inception, however, may have undermined such a textualism-based legal challenge by inadvertently supporting these initial interpretations.* It will likely require an act of either Congress or the National Labor Relations Board to reverse these flawed legal interpretations and restore the original purpose of the Act by establishing a new majority standard for union elections.

Such action would be welcome. Recent data from the National Labor Relations Board shows that 20% of private sector unions were elected with less than a quorum of the collective bargaining unit voting, and 40% were elected without majority support from all employees eligible to vote.[3] Of the approximately 74,000 employees collectively eligible to vote in these elections, only 32,000, or 43%, actually did.[4] In one extreme case, a union was elected with only 11% of a unit voting in its favor, after 85% of the unit chose not to cast a vote.[5] Despite this, the union will represent 100% of the employees. Under a proper interpretation of the National Labor Relations Act, this would no longer happen.

Amending the voting requirements of the Act would return labor law to its intended state without drastically changing how union elections are currently conducted. Roughly 60-80% of bargaining units won elections that would be consistent with a textualist interpretation of the statute, depending on whether an absolute majority or quorum standard is applied. Under such a standard moving forward, unions should expect to win a similar portion of elections. For approximately 20-40% of cases, unions would either have to work harder to achieve majority support, or those employees would not be subject to unionization. This approach would return union elections to the standards originally passed by Congress and ensure that, moving forward, workers are only represented by unions selected by a majority of those who would be subject to unionization.

HISTORICAL BACKGROUND

1. Interpretation of the Railway Labor Act

The groundwork for the misinterpretation of the National Labor Relations Act was laid by the 1926 Railway Labor Act, which governs employees of railroads, airlines and freight companies. The statute's text about union elections formed the basis for similar language found in the National Labor Relations Act. It reads:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purposes of this chapter.[6]

Although this language on its face appears to call for elections by a majority of the employees in a bargaining unit, courts quickly determined otherwise. The National Mediation Board, which was responsible

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* The Railway Labor Act, a precursor to the NLRA governing primarily transit employees, contains a substantially similar requirement for an election to be decided by a majority of eligible employees. In fact, questionable interpretations of the RLA lie at the heart of courts' determinations that the NLRA allows the selection of a union by the majority of those voting. See Section 3(b) *infra*.

for administering elections under the Railway Labor Act, was asked in 1934 to review a case in which a union had won a majority of votes cast but not a majority vote of all employees eligible to vote. The board certified that the union had won the election. The employer refused to bargain, and the union subsequently sued.

The Eastern District of Virginia initially heard the case. When analyzing the issue of a sub-majority election, the court concluded that the results would be valid only when a quorum of eligible employees voted. The court stated:

> It is also contended by the Railway [employer] that the election is void because one of the rules under which it was held was in violation of the act (§ 2, par. 4) among other things, that the 'majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class,' etc. It seems to me that this defense is also without merit. A reasonable interpretation of the act is that the election must be open to each craft or class with full untrammeled opportunity to each eligible employee in such craft to vote, although he may not be compelled to exercise that right.
>
> [...]
>
> But in the craft (carmen and coach cleaners) where less than a majority of those eligible to vote, actually voted, it would seem to follow that there was no election by that craft, and as to that craft the certificate of the Board is without force or effect.[7]

Without analyzing the language of the governing statute, the district court relied on an analogous understanding of other laws to conclude that only the majority support of a quorum of eligible voters was required to elect a union. This departure from the plain text of the law would soon become a trend, with more and more courts straying from standard interpretations of statutory language in favor of reviews based on the broader animating principles believed to be behind the adoption of federal labor laws.

The case eventually made its way to the Fourth Circuit Court of Appeals, which issued its opinion in *Virginian Railway Co.* on June 18, 1936. The court determined that the union would represent the employees, despite not having been selected by a majority of all employees eligible to vote. It reasoned, "Where a majority of the craft participated in the election, we think that a majority of votes cast was sufficient to determine a choice of representatives, even though these did not constitute a majority of all those eligible to vote."[8]

The court's reasoning was not primarily based on a textual analysis of the Railway Labor Act, but instead a more general discussion of the Act's purpose and the consequences of an alternative ruling:

> If a majority of those qualified to vote is required, elections must frequently fail as a result of the failure of those qualified to vote to participate in them. If the employees are already represented, the failure to vote will be a vote against change; and where the employer, as in the case at bar, is opposed to change, the effect of the secret ballot will be in large member nullified. In the case of the blacksmiths' election which is before us, for example, it appears that, of 46 members qualified to vote, 22 voted for the Federation [union challenger], 8 for the Association [incumbent union], and 16 did not vote. If a majority of those qualified to vote be necessary to a choice in such election, the action of the 16 in not voting will be given the same effect as though they had voted for the Association, the existing representative; and the fact that they had abstained from voting and thereby favored the plan of the employer would be known to him. If there had been no existing representative, the voting would have resulted in no representative being chosen, and the purposes for which the act was so carefully drawn, so far as this craft is concerned, would have been impossible of attainment.*

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* *Virginian Ry. Co. v. Sys. Fed. No. 40, Ry. Emp. Dep't of Am. Fed'n of Labor*, 84 F. 2d 652-653 (4th Cir. 1936). It is worth noting that while *Virginian Railway Co.* formed the basis for the current "majority of those voting" approach, the Court's core contention regarding the success of elections is simply incorrect, at least for elections held under the NLRA. A full 80% of union elections conducted under the NLRA in 2022 would have succeeded even under the stricter textual standard.

> While the court did briefly review the language of the Railway Labor Act, its interpretation was less focused on what the text of the Act meant and more on its broader "reason and spirit:"
>
> We do not think the act should be given an interpretation leading to such results, if any other interpretation is possible; and we think that such other interpretation is not only possible, but is required by the language of the statute and by its reason and spirit. The clause of the act which we have quoted does not in terms require a majority vote of the craft.*

It is unclear precisely how the court came to this conclusion, given that the language of the Railway Labor Act specifically states that elections were to be based on "[t]he majority of any craft or class of employees."[9] Without discussing that conflict, the court relied on general principles of election law to justify its position:

> The clause of the act which we have quoted does not in terms require a majority vote of the craft. It merely prescribes the political principle of majority rule. Another section of the act provides the means of determining the majority, the political device of the secret election. Nothing is said as to whether the choice at such election shall be by a majority of the qualified voters, or merely by a majority of the votes cast; but the act clearly does not contemplate that there shall be such a failure of election as could easily result if the obtaining of a majority of the qualified voters were required. The universal rule as to elections of officers and representatives is that a majority of the votes cast elects, and that those not voting are presumed to acquiesce in the choice of the majority who do vote.[10]

This logic is flawed. While the court correctly summarized general principles of political elections, it relied on those principles, rather than the language of the Railway Labor Act, as its core reasoning. While the Act's language is susceptible to this interpretation, and the court's final holding was arguably reasonable, its failure to rely on the actual text of the statute was not. This departure from the text would later allow other courts to further depart from the plain statutory language.

The court's position is also undermined by the fact that it is inconsistent with how the Railway Labor Act is administered in other contexts. As an example, a union can be recognized as the representative of a bargaining unit through either a secret ballot election or through a process known as card check. Recognition through card check requires more than 50% of employees sign a card indicating their approval of a union to represent them.† Thus, under card check, unions must show the support of a majority of the entire unit, not just a majority of those who were presented cards to sign.

This argument was raised by the employer in *Virginian Railway Co.*, but it was summarily dismissed by the Court, stating, "We have carefully considered these arguments, but are of the opinion, for the reasons above stated, that the act should not be given so strict a construction, and that if a majority of the craft participate in an election, the majority of those voting

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* *Virginian Ry. Co. v. Sys. Fed. No. 40, Ry. Emp. Dep't of Am. Fed'n of Labor*, 84 F. 2d 653 (4th Cir. 1936). Interpretations such as this, which rely on the practical outcomes of a particular statutory interpretation as opposed to the plain meaning of a statute's text are now heavily disfavored. See, *Niz-Chavez v. Garland*, 593 U.S. 155, 171 (2021).

† See, "Overview & FAQ" (National Mediation Board), https://perma.cc/YG22-MLEQ. While outside the scope of this paper, it should be noted that card check is generally an inferior gauge of support for a union. Because cards are signed in public, there is significant opportunity for an employee to face fraud, coercion, or intimidation. An in-depth discussion of these issues can be found here: F. Vincent Vernuccio, "Protecting the Secret Ballot: The Dangers of Union Card Check" (Mackinac Center for Public Policy, 2019), https://www.mackinac.org/s2019-09.

Additionally, card check is less reliable than a secret ballot election. According to the NLRB, unions that presented cards demonstrating the support of between 50 and 70% of employees in a bargaining unit only won their certification election 48% of the time. "Decisions of the National Labor Relations Board: Dana Corporation and Metaldyne Corporation" (National Labor Relations Board, September 29, 2007), https://perma.cc/QCX5-4UHB.

is sufficient."* Essentially, this early interpretation endorsed a quorum approach to union elections.†

In short, the court did not meaningfully analyze what the text of the Railway Labor Act required and reached a conclusion based on its interpretation of the law's intent and generalized principles borrowed from election law. While the court's quorum interpretation does express one reasonable policy position, it ignores the fact that Congress may well have considered this option but chose to adopt a policy requiring the support of a true majority of those who would be represented by a union to be the requirement for winning union elections. Under a strict textualist interpretation, the court should have instead focused on finding the objective meaning of the Railway Labor Act based on the language that was actually passed by Congress. Its failure to do so would ultimately undermine the legitimacy of elections under both the Railway Labor Act and the National Labor Relations Act, with future courts going well beyond a reasonable interpretation of the text.‡

It would not take long for the effects of the 1936 *Virginian Railway Co.* case to be felt on labor law more broadly. The Seventh Circuit Court of Appeals heard a similar challenge the same year, and the court adopted the Fourth Circuit's reasoning to reach the same conclusion.[11] Shortly thereafter, the United States Supreme Court accepted the Virginian Railway Co. case for consideration on petition for certiorari. The Court upheld the Fourth Circuit's decision, adopting its reasoning wholesale.§

Like the Fourth Circuit before it, the Supreme Court based its decision on an analogy to election law and the Act's purpose, rather than the strict statutory language. The court did not explain why preventing a minority from exercising a pocket veto by not voting is inherently more unreasonable than allowing a different

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* *Virginian Ry. Co. v. Sys. Fed. No. 40, Ry. Emp. Dep't of Am. Fed'n of Labor*, 84 F. 2d 654 (4th Cir. 1936). It should be noted that the Court reserved the question of whether an election would be valid where a majority of those voting approved the union, but a majority of eligible voters did not participate in the election.

† Strictly speaking, the *Virginian Railway Co.* line of cases did not definitively conclude that a quorum approach was permissible, as a majority of eligible voters had, in fact, voted in that case. *Air Trans. Assoc. of Am. v Nat. Mediation Bd.*, 663 F. 3d 476 (D.D.C. 2010). As such, neither the Fourth Circuit nor the Supreme Court were asked to evaluate whether a quorum approach was consistent with the law. Thus, while these courts' endorsement of a quorum approach are dicta, they are nevertheless compelling evidence of how they were likely to approach a challenge to union representation based on the quorum theory.

‡ Interestingly, while the Supreme Court's language in *Virginian Railway Co.* endorsed a quorum theory, the National Mediation Board (the body responsible for administering the Railway Labor Act) did not. Despite the Court's interpretation, the NMB continued to require unions be recognized pursuant to a true majority standard and rejected the quorum approach. The NMB did not adopt an alternative approach until 2010, when it did so through the issuance of an administrative rule. *Air Trans. Ass'n of Am., Inc. v. Nat. Mediation Bd.*, 663 F. 3d 476 (D.D.C. 2011). Under this new rule, only the majority vote of employees who voted was necessary to elect a union. A subsequent challenge to this rule failed, with the D.C. Circuit ultimately adopting many of the same arguments advanced in *Virginian Railway Co.* This opinion is flawed and repeatedly characterizes the new rule as a "quorum" standard, which it was not, as the dissenting opinion astutely identifies. Id. at 491-492.

The D.C. Circuit's opinion also relied on *Chevron* deference, a legal principle that is no longer valid, and can be challenged on that basis. *Loper Bright v. Raimondo 603 US (2024)*, available at: https://www.oyez.org/cases/2023/22-451. Congress later attempted to require the NMB to return to a true majority standard through legislation, but that attempt was removed from the final version of the relevant legislation. "House Approves Measure that Places Restrictions on NMB Representation Election" (Littler Mendelson, Feb. 21, 2012), https://perma.cc/R63N-K3RK.

§ "Section 2, Fourth, of the Railway Labor Act provides: 'The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purpose of this act (chapter).' Petitioner construes this section as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote but is silent as to the manner in which that right shall be exercised. Election laws providing for the approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. Those who do not participate 'are presumed to assent to the express will of the majority of those voting.'

We see no reason for supposing that section 2, fourth, was intended to adopt a different rule. If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest, and thwart the purpose of the act, which is dependent for its operation upon the selection of representatives. There is the added danger that the absence of eligible voters may be due less to indifference than to coercion by the employer." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 560-61 (1937) (citations omitted).

minority to choose who represents all employees. There are plenty of reasons, discussed in greater detail below, why requiring a union to demonstrate the support of a majority of eligible voters prior to being recognized as their bargaining representative is a better choice.* Ultimately, however, the Court's policy error is not as significant as its improper choice to rely on a nebulous understanding of legislative intent, rather than the text of the Railway Labor Act.

This Supreme Court opinion would form the basis upon which courts would ultimately conclude that the National Labor Relations Act requires unions to be selected by a majority of those voting, rather than a majority vote of all eligible employees or the quorum approach adopted by the early railway cases. Only the latter two options are even arguably supported by the text of the underlying law.

2. Interpretations of the National Labor Relations Act

While these railway cases were being litigated, Congress passed the original version of the National Labor Relations Act, commonly known as the Wagner Act. Like the Railway Labor Act before it, Wagner contained language regarding union elections:

> Representatives designated or selected for the purposes of collective bargaining *by a majority of the employees in a unit* appropriate for such purposes shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.[12]

After the 1935 passage of the Wagner Act, employers began challenging elections where less than a majority of employees eligible to vote favored unionization. Initially, the National Labor Relations Board interpreted this language as requiring a true majority of all voters, consistent with the statutory language quoted above. In 1936, the Board decided *In the Matter of Chrysler Corp. and Society of Designing Engineers*, in which Chrysler challenged whether a union claiming to represent a majority of employees within a bargaining unit had demonstrated such support. The Board ordered a secret ballot election, in which only 125 ballots were cast out of an eligible voting pool of 700 employees. The vast majority of these ballots were cast in favor of unionization — 121 out of 125. Despite the union winning the majority of ballots cast, the Board denied the union's petition for representation.

The Board would reverse course only months later with its decision in *In the Matter of the Associated Press and American Newspaper Guild*. In doing so, the Board explicitly acquiesced to the reasoning applied by the Fourth Circuit in Virginian Railway Co.:

> A majority of those eligible voted; a majority of those voting, though less than a majority of those eligible, voted for the American Newspaper Guild. In certifying the Guild, we are following the rule established by the Circuit Court of Appeals for the Fourth Circuit in *Virginian Railway Co. v. System Federation No. 40*, decided June 18, 1936. The Court had before it the provision in the Railway Labor Act, 45 U.S.C. § 131 et seq., that: 'The majority of any craft or class shall have the right to determine who shall be a representative of the class or craft." It decided that where a majority of the eligibles voted, a majority of those voting, though less than a majority of those eligible, determined the representative.

The Board, quoting the Fourth Circuit's language regarding political elections, adopted that reasoning wholesale.† It then proceeded to certify the Newspaper

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* See Sections 3(c), 4 *infra*.

† "Section 2, Fourth, of the Railway Labor Act provides: 'The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for purpose of this act (chapter).' Petitioner construes this section as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote but is silent as to the manner in which that right shall

Guild, despite it not having received a majority of all eligible votes. Importantly, however, a majority of all eligible voters had voted — thus, this decision reflects the first switch from a true majority standard to a quorum standard.*

The Board would further liberalize the majority requirement that same year, in 1936, in *In the Matter of R.C.A. Manufacturing Company, Inc. and United Electrical and Radio Workers of America*. There, the Board squarely addressed the three possible interpretations of the National Labor Relations Act's majority requirement — true majority, quorum, or majority of those voting. After explicitly recognizing that *Virginian Railway Co.* had upheld a quorum standard for purposes of the Railway Labor Act, the Board recognized that the court had not expressly addressed the issue of a sub-quorum vote.† The Board ultimately held that Congressional intent necessarily required the Board to adopt a majority of those voting standard, as an alternative holding would defeat the Board's understanding of the purpose of the Act. To do so, the Board relied heavily on consequential proclamations relating to the practical impacts of a more stringent standard, without significant textual analysis. The Board's reasoning is worth quoting at length:

> [A quorum] interpretation defeats the purpose of the Act by placing a premium upon tactics of intimidation and sabotage. Minority organizations merely by peacefully refraining from voting could prevent certification of organizations which they could not defeat in an election. Even where their strength was insufficient to make a peaceful boycott effective, such minority organizations by waging a campaign of terrorism and intimidation could keep enough employees from participating to thwart certification. Employers could adopt a similar strategy and thereby deprive their employees of representation for collective bargaining.
>
> In all such situations, the purpose of the Act would be thwarted. One of its basic policies is to encourage 'the practice and procedure of collective bargaining' between an employer and his employees. Section 9(a), and especially the election procedure, is designed to promote collective bargaining by means of a prompt determination of the representative of the employees to carry on that bargaining. The object of the whole procedure is the elimination of obstructions to the free flow of commerce caused by the refusal to accept the procedure of collective bargaining. The realization of that object thus depends upon the efficacy of the election device as a peaceful means of settling disputes between contesting labor organizations. If an election is allowed to fail on account of the causes mentioned above, the results will be the continuation of unrest and strife consequent upon the doubt as to which organization is entitled to represent employees.
>
> [...]
>
> The 'quorum' interpretation thus introduces a qualification that places in the hands of employer and rival labor organizations a weapon which may easily defeat the collective bargaining sections of the Act.
>
> [...]

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be exercised. Election laws providing for the approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. Those who do not participate 'are presumed to assent to the express will of the majority of those voting.'

We see no reason for supposing that section 2, Fourth, was intended to adopt a different rule. If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest, and thwart the purpose of the act, which is dependent for its operation upon the selection of representatives. There is the added danger that the absence of eligible voters may be due less to indifference than to coercion by the employer." *Virginian Ry. Co. v. Sys. Fed'n No.* 40, 300 U.S. 515, 560-61 (1937) (citations omitted).

* The Board would subsequently affirm its commitment to the quorum standard in *Matter of New England Transportation Co. and International Association of Machinists*, 1 N.L.R.B. 130 (1936).

† In *Virginian Railway Co.*, a majority of eligible employees had voted, so the Fourth Circuit reserved the question of whether even that was a necessary requirement for recognition under the NLRA. ("Whether the choice of a majority of those voting would also be valid even if a majority of eligible voters do not participate in the election is a question we need not now decide." 84 F. 2d, at 653).

> It is an accepted cannon of statutory construction than an unwise and unworkable interpretation is to be rejected if another, and sensible, interpretation is at hand. Consequently, we feel that the third interpretation mentioned above, a majority of the eligible employees voting in the election, is required if the intent of Congress in enacting the Act is to be fulfilled.[13]

In adopting a majority-of-those-voting standard, the Board looked to results, while simultaneously adopting the position that the Act was inherently designed to promote collective bargaining. Conspicuously absent from the Board's reasoning, however, was the type of textual analysis that is now the routine method courts use in statutory interpretation.

Perhaps unsurprisingly, employers eventually challenged representation proceedings that fell short of a true majority in court. One of the first courts to do so was the Fifth Circuit, in *N.L.R.B. v. Whittier Mills Co.*[14] There, the Court adopted the quorum standard, relying almost entirely on the reasoning of *Virginian Railway Co.*[*]

The Seventh Circuit Court of Appeals quickly expanded the Fifth Circuit's reasoning in the 1940 case of *New York Handkerchief Mfg. Co. v. N.L.R.B.*[15] There, a union had been elected by a majority of the 56 employees who voted in a representation election. That number was significantly smaller than the 225 employees eligible to vote, but of those voting, only three voted against the union. The court ultimately recognized the union, but did so reluctantly, focusing on the need for the newly created National Labor Relations Board to rely on special rules needed to address the coercive actions taken by the employer in that case.[†]

While it adopted the reasoning of *Virginian Railway Co.*, the court did so reluctantly, stating that it was "not as confident concerning the plain language of the [National Labor Relations Act] as is the [National Labor Relations Board]," but agreed that *Virginian Railway Co.* provided strong persuasive authority in favor of interpreting the Railway Labor Act and the Wagner Act consistently with one another. The court also recognized that the Board could not approve every election where less than a quorum of the unit approved of unionization.[‡]

> Other circuit courts rapidly followed the Fifth and Seventh Circuit's lead and allowed unions to be elected without the support of an absolute majority.[§] This is true even when the court in

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* "There is no express provision as to what sort of majority shall control the results of such an election. The general rule, in the absence of a clear provision otherwise, is that voters who could have voted in a formal election but do not are considered to assent to the will of the majority of those who do vote; so that if those who do vote make up a majority of all, the will of all is expressed by those who vote. This rule was applied to different language, but of the same general import, used in the Railway Labor Act, 45. U.S.C.A. § 151 et seq., in *Virginia Railway Co. v. Federation No. 40*, 300 U.S. 515. It should be applied here. Where with fair opportunity to all members of the unit to vote, a majority do vote, they are, so to speak, a quorum to settle the matter, and the majority of that quorum binds those not voting and suffices to select the bargaining representative of the unit." *N.L.R.B. v. Whitter Mills Co.*, 111 F. 2d 474, 477-78 (5th Cir. 1940).

† "The authority of the Board to certify the Union under such circumstances presents an important question, not free from doubt. In this connection, it must be kept in mind that we have sustained the Board's finding to the effect that petitioner was guilty of coercion and intimidation against its employees, which, no doubt, prevented many of them from participating in the election." *N.Y. Handkerchief Mfg. Co. v. N.L.R.B.*, 114 F. 2d 144, 148 (7th Cir. 1940). The employer in this case had engaged in coercive acts, including not posting notice of the election until 4:30PM on the day it was scheduled (when polls had been officially opened since 3:00PM), placing company representatives in front of the polling place to observe how employees voted and allowing company representatives to observe while employees publicly circulated a pro-company position while urging employees not to vote. See: *New York Handkerchief Co.*, 7 N.L.R.B. 624 (N.L.R.B-BD 1938) (available at: https://perma.cc/JQP4-YNG6).

‡ "It does not follow, however, that the Board could justify itself in the exercise of such authority in every case regardless of the number who participated in the election. Like any other authority, it must not be employed arbitrarily. In the instant case, as found by the Board, petitioner, by its unlawful conduct, interfered with the right of its employees to participate in the election and, no doubt, was responsible for the small proportion of its employees voting. Under such circumstances, we are of the opinion that the Board not only was within its authority but was justified in concluding that the Union was the proper representative. To hold otherwise would place a premium upon the unlawful conduct of an employer and enable it to frustrate one of the major purposes of the Act—that is, the determination of a proper bargaining agent." *N.Y. Handkerchief Mfg. Co. v. N.L.R.B.*, 114 F. 2d 144, 149 (7th Cir. 1940).

§ See, for example, *Marlin-Rockwell Corp. v. N.L.R.B.*, 116 F. 2d 586, 588 (2d Cir. 1941).

> question had reservations about the language of the Wagner Act. The Second Circuit, as an example, admitted that "[r]ead literally, section 9(a) of the Act, 29 U.S.C.A. § 159(a), seems to require [election by a majority of those eligible to vote]; but it is so generally the custom in elections to permit a majority of those voting to decide the result, that we think the argument cannot be accepted."*

It had become generally accepted by 1944 that general election law principles, and a quorum standard, applied to the Wagner Act. Subsequent courts proceeded to stretch the logic even further. In *N.L.R.B. v Central Dispensary & Emergency Hospital*, the D.C. Circuit Court of Appeals limited the caveat established by the Seventh Circuit in *N.Y. Handkerchief*. After quoting portions of the Seventh Circuit's opinion, the court stated:

> It does not follow from this, however, that any rigid rule requiring the vote of the majority of all employees, in the absence of employer coercion, should be adopted. The real test is whether the election is actually representative. This is always a question of fact in the particular case. The Board has recognized this principle by an administrative ruling that in minority elections it will investigate and determine whether the election was actually representative.[16]

Thus, the D.C. Circuit expanded the circumstances under which a minority election could result in a union's recognition. The prior rule permitted recognition via quorum, with minority election results allowed only in circumstances where an employer's coercive actions impacted the fairness of the election. *Central Dispensary*, meanwhile, required only that the Board determine the minority election was "actually representative." Under *Central Dispensary*, the Board now had discretion to reach its own conclusion as to whether an election was representative. The court reasoned:

> This interpretation seems to be within the spirit of the warning given by the court in the New York Handkerchief case, supra, and we think should be approved. While the standards by which the Board determines whether a minority election is truly representative are necessarily vague, they may still be subject to judicial examination and review in case the judgment of the board is arbitrary.[17]

To summarize, *Central Dispensary* modified and loosened the standard for union elections. It handed the Board the authority to certify results from any minority election, despite recognizing the standards for making these decisions are "necessarily vague." The only stipulation was that the Board's decision could not be arbitrary.

For all intents and purposes, *Central Dispensary*'s approach to the National Labor Relations Act is now the generally accepted position.† The U.S. Supreme Court has never considered whether the logic of *Virginian Railway Co.* should apply to the Act and has rejected several opportunities to do so.‡ The Court should revisit that question, which does not appear to have been posed to it in almost a century.

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* *Marlin-Rockwell Corp. v. N.L.R.B.*, 116 F. 2d 586, 588 (2d Cir. 1941). It should be noted this holding was more consistent with Virginian Railway Co.'s quorum requirement than *N.Y Handkerchief*'s authorization of a true minority election.

† See generally, *N.L.R.B. v. Standard Lime & Stone Co.*, 149 F. 2d 1945 (4th Cir. 1945), *N.L.R.B. v. Deutsch Company*, 265 F. 3d 473, 481 (9th Cir. 1959); *N.L.R.B. v. Singleton Packing Corp.*, 418 F. 2d 275, 279 (5th Cir. 1969). (It should be noted that in *Standard Lime* a portion of the opinion concluded *Virginian Railway Co.* applied to the NLRA in light of congressional report indicating the NLRA was intended to amplify and clarify the principles of the RLA, and a separate, subsequent Senate Report that highlighted the application of the *Virginian Railway Co.* decision to RLA elections).

‡ *Central Dispensary*, *N.Y. Handkerchief*, *N.L.R.B. v. National Mineral Co.*, 134 F. 2d 424, 426-28 (7th Cir. 1943) (applying *N.Y. Handkerchief* to another election in which the employer committed unfair labor practices) and *Marlin-Rockwell Corp.* were each appealed to the Supreme Court, which declined to hear them.

3. A textualist analysis of the National Labor Relations Act's voting provisions

A. Basics of textualism

A better approach to interpreting both the Railway Labor Act and the National Labor Relations Act would be to analyze the actual meaning of the text of those statutes. This would be consistent with a method of statutory interpretation known as textualism. Under this approach, judges attempt to understand the best objective interpretation of the text of a law as written.* Championed by Justice Antonin Scalia, this approach is now the dominant theory of legal interpretation, with Justice Elena Kagan declaring in 2015, "We're all textualists now."†

The general principle of textualism is that legal interpretations should be "guided by the text and not by intentions or ideals external to it, and by the original meaning of the text, not by its evolving meaning over time."[18] The logical underpinning of this approach is that laws are passed by specific people, at specific points in history, and the words chosen should be interpreted based on what a reasonable person at that time would understand a particular piece of legislation to do.‡

Textualism generally rejects reliance on legislative history — documents and other information created when a proposed law is considered by Congress — as a means of interpreting the law.§ It acknowledges that the language of a law often reflects compromises that may not be captured in an Act's legislative history but are in its final language. Further, legislative bodies consist of several representatives, who have their own opinions about what a statute means and how it should be applied. Attempts to discern an entire legislature's intended meaning of a law are practically impossible. Interpreting the statutory text as it was understood at the time is the best method for determining how a law should be applied.

Textualists fear that alternative approaches allow judges to insert their own bias into interpreting law. As Justice Scalia described: "[T]he main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law."[19] Textualism attempts to prevent this by focusing on the language of the statute as it would have been understood when lawmakers enacted it. Under a textualist approach, the meaning of laws does not change with evolving societal standards — statutes exist as they were passed. If standards have since changed, it's up to elected officials to change them — it is not a job for the courts.

B. Textualism as applied to the National Labor Relations Act

A proper textualist analysis of the National Labor Relations Act's section on union certification elections requires a 1935 dictionary.¶ Despite this, the plain meaning of the Act is relatively straightforward. The Act states:

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* An in-depth review of the theories of statutory interpretation is beyond the scope of this study. Nevertheless, a basic understanding of textualism is necessary to understand why prior decisions interpreting the NLRA are inconsistent with the Supreme Court's modern approach to statutory analysis.

† Harvard Law School, "The 2015 Scalia Lecture Series: A Dialogue with Justice Kagan on the Reading of Statutes," YouTube, at 08:29 (Nov. 24, 2015), http://youtu.be/dpEtszFT0Tg. Justice Kagan later repudiated this position when arguing that a majority of the court had engaged in nontextual judicial activism. *West Virginia v. E.P.A.*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

‡ Strictly speaking, pure textualism is only concerned with discerning the objective meaning of a statutory text. A corollary, originalism, further narrows a textualist review to an attempt to understand the objective meaning of a statutory text as it would have been understood at the time it was passed. For purposes of this study, we assume a textualist review through that lens.

§ Legislative history looks to contemporaneous accounts regarding what the intent of a legislature was in passing a law. To do so, courts will look to congressional reports, statements and correspondence of individual legislators, and similar documents to put the adopted legislation into context. Textualism rejects these sources as less reliable and reflecting only the intent of these secondary source's authors, rather than the intent of the legislature as a whole.

¶ Textualism looks to the meaning of a word at the time the statute in question was adopted, as that would have been the meaning intended by the drafters. Definitions far removed from the date of drafting, and future definitions in particular, are significantly less helpful in interpreting a statute's intended meaning under this approach.

> Representatives designed or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.[20]

The text is clear that representatives are to be selected "by a majority of the employees in a unit," but it does not define the term "unit." Subsequent sections of that Act give some context to what "unit" means:

> The Board shall decide in each case, whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.[21]

Based on this context, it is clear that the authors of the Act contemplated discrete groups of employees acting in concert. Today, the Board applies this language as generally requiring a subset of employees who are similarly situated, known as a bargaining unit. Those units can be based on employers, crafts (or professions), or facilities or plants. This is consistent with other portions of the Act, which specifically prohibit organizing different professions or types of employees into a bargaining unit, absent special exceptions.*

The remainder of the relevant language of the Act requires little interpretation. Once an appropriate group of employees has been identified by the Board, the question of unionization is to be decided "by a majority of the employees" in that unit. Under the plain language of that requirement, unions could only organize if a majority of employees in a bargaining unit voted in their favor. This could be called the absolute majority standard.

An argument could be made, however, that the text allows for a union to be elected without the support of a majority of the employees. The text — "[r]epresentatives … selected … by a majority of the employees in a unit" could be read as only requiring that a majority of the employees in a bargaining unit do the selecting, or voting. If so, unions could be elected when a majority, or quorum, of employees vote, and a majority of that quorum selects the union. Under this interpretation, when a majority of a unit votes, a majority has selected its representative, even if only a minority of employees vote for the union. The text of the statute — "a majority of the employees in a unit" — is arguably ambiguous enough to allow for a quorum of employees to select a union, as long as at least a majority of all eligible employees cast a vote on the question. This was essentially the position adopted in *Virginian Railway Co.* Had that decision been reached based on the text of the Railway Labor Act, rather than a generalized understanding of that Act's "reason and spirit," the Court's conclusion would have been significantly strengthened.

The current jurisprudence has not resolved this ambiguity and goes beyond allowing a quorum of employees to elect a union. The *Central Dispensary* test only asks the Board to determine if an election is "actually representative" and defers to the Board so long as its interpretation is not arbitrary. This interpretation, as shown in *Central Dispensary* itself, permits a union to be appointed as a collective bargaining representative even when less than a majority of the employees vote. It is difficult to square this interpretation with the Act's requirement that unions be selected "by a majority of employees in a unit."

Judge Karen Henderson makes exactly this point in her compelling dissent in *Air Trans. Ass'n of Am., Inc. v. Nat. Mediation Bd.* In that case, the National Mediation Board, which is responsible for administering the Railway Labor Act, adopted a rule that recognized unions based only on the majority vote of employees who had cast a vote. Prior to this change, the Board required unions to be elected by a true majority of employees. The rule was challenged, but the D.C. Circuit Court of Appeals upheld the rule.

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* As an example, it is generally inappropriate for security guards to be included in the same bargaining unit as non-guard employees, giving their disparate job duties and hours.

Judge Henderson's dissent in the D.C. Circuit case argues that the majority's interpretation runs counter to the text of the Railway Labor Act. She stated:

> Section 2, Fourth provides: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class...." Were I writing on a clean slate—that is, without knowing the background of section 2, Fourth's enactment, without reading the Supreme Court's decision in *Virginian Railway v. System Federation No. 40*, and, most important, without using the *Chevron* invention—I would conclude, as urged by Appellant American Transport Association of America, Inc., that section 2, Fourth means the majority of the relevant craft/class must vote for, or otherwise endorse, unionization. While the overlay created by the provision's background, by the Supreme Court's reading of it and even by the *Chevron* sequence has complicated otherwise straightforward language, what it has *not* done is to replace "majority" participation with a lesser number.[22]

Judge Henderson continued, explicitly noting that the language of the Railway Labor Act requires, at least, a quorum approach:

> While *Virginian Railway* addresses many other issues, its resolution of the section 2, Fourth issue makes one critical point unmistakably clear: the majority of the craft/class *must participate in* any unionization election. That majority participation is a condition precedent is manifested by the fact that the carmen and coach cleaners election in which the majority of the craft did *not* participate was declared invalid and, although the declaration was not appealed, the Court saw fit to note the declaration in its six-paragraph discussion of section 2, Fourth. Moreover, in adopting its majority-of-votes-cast-*with*-majority participation interpretation, the Court expressly described majority participation as "necessary" when it declined to make, "in addition," the majority of those eligible to vote necessary to choose a representative. And its use of the phrase "indifferent *minority*" makes clear that "majority participation" is required; otherwise the "indifferent" (i.e., non-participating) members of the craft/class could have just as easily comprised a majority.[23]

Thus, Judge Henderson's position appears to be consistent with the position being advanced by this study: The best interpretation of the Railway Labor Act requires a true majority standard, or, at minimum, requires the majority vote of a quorum of employees. Given that much of the National Labor Relations Act's jurisprudence is based on *Virginia Railway Co.*'s interpretation of similar language from the Railway Labor Act, a nearly identical argument can be made that the National Labor Relations Act also includes a majority or at least quorum requirement.

The strongest argument in favor of the *Central Dispensary* interpretation is, ironically, one relying on statutory interpretation. In 1947, Congress amended the National Labor Relations Act by enacting what is commonly known as the Taft-Hartley Act. These amendments — backed with broad, bipartisan support — attempted to better balance U.S. labor relations, which had become too favorable to unions. Via Taft-Hartley, Congress provided that a union-shop agreement — where employers agreed to only hire dues-paying union members — could not be entered into if "a majority of the employees eligible to vote in such election" rescind the union's authority to enter into such an agreement.[24] As noted in a letter by Attorney General Tom Clark to President Truman, this language was passed after the *Central Dispensary* test had been decided, but Congress did not modify the Wagner Act's "majority of the employees in a unit" language.* General Clark's letter stated:

> Moreover, it is clear that when the Congress desires that an election shall be determined by a majority of

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* Attorney General Tom Clark was later Justice Clark of the United States Supreme Court.

> those eligible to vote rather than a majority of those voting, the Congress knows well how to phrase such a requirement. For example, in section 8(a)(3)(ii) of the National Labor Relations Act, [as amended by Taft-Hartley], the Congress has required that before any union shop agreement may be entered into, the National Labor Relations Board must certify 'that at least a *majority of the employees eligible to vote* in such election have voted to authorize such labor organization to make such an agreement." (Italics supplied.) It is worth noting that this language was enacted by the Congress in the very act in which it readopted section 9 (a) of the National Labor Relations Act which, as shown above, contains language similar to that in section 2, Fourth, of the Railway Labor Act.[25]

In short, Attorney General Clark argued that had Congress wished to clarify the National Labor Relations Act's election language to correct *Central Dispensary*, it had the ability to do so, as shown by its adoption of the above language regarding union-shop agreements. Congress' failure to do so arguably shows its tacit endorsement of the *Central Dispensary* standard.

While this is the most compelling argument against an interpretation that a union can be certified only by an absolute majority employees eligible to vote, it is not entirely dispositive. The "majority of the employees in a unit" language remains unchanged. While Congress could have amended this language to make it more precise, its inaction does not necessarily mean that Congress intended to support, much less cement in statute, the courts' interpretation of the Act's election requirements. While courts will presume that the decision not to clarify these requirements reflect Congress' tacit endorsement of how the Act had been interpreted by courts, that presumption may not reflect reality.*

Given Congress' use of alternative language in Taft-Hartley, a legal challenge to the initially flawed interpretation of the National Labor Relations Act becomes more difficult. While a compelling case can be made that the decisions highlighted above improperly interpreted the Act's language, the subsequent amending language used in the statute can be used to argue otherwise. This would likely be a significant hurdle in any legal challenge to how the Act's election provisions are currently interpreted. Thus, the best way to correct the issue would be for Congress to clarify that the statute specifically requires a union to be approved by "a majority of the employees eligible to vote." Barring congressional action, the National Labor Relations Board should return to its earliest interpretations of the statute as requiring either an absolute majority vote, or a quorum, as either approach is more consistent with the statutory language of the Act.

C. Policy considerations

One significant issue with the various courts' conclusions regarding the purpose of the National Labor Relations Act is that the application of general election law makes little sense in a union context. In political elections, it would be far more difficult to determine whether the winner of an election had obtained majority support from all eligible voters. In those contexts where the total number of those eligible to vote is known and relatively finite, quorum requirements are far more common. By way of example, the Constitution requires a quorum of both the House of Representatives and the Senate for either body to conduct business.† The National Labor Relations Act imposes a quorum requirement for the National Labor Relations Board.[26] The Railway Labor Act similarly restricts the National Mediations Board from acting

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* Nevertheless, courts reviewing the National Labor Relations Act's election-related language must presume knowledge on Congress' behalf. Without perfect knowledge of what every individual legislator was thinking, any attempt to read into motive is impossible. Thus, courts must assume that any amendments were undertaken with full knowledge of how the Act had been interpreted at the time those amendments were passed.

† U.S. Const., art. 1, § 5. Although certain procedures have weakened the quorum as an absolute requirement, legislators maintain the ability to suggest an absence of a quorum and thereby prevent further business until a quorum is established. See, *Voting and Quorum Procedures in the Senate*, Congressional Research Service, March 26, 2020, available at: https://perma.cc/WE33-52KP.

absent a quorum.[27] Thus, in most instances, a quorum is necessary for policymakers to conduct business.

Perhaps more importantly, political elections are of a significantly different character than unionization elections. If political candidates needed the support of a majority of eligible voters to get elected, not enough candidates would get elected for governments to function. In other words, political elections must allow for a majority those voting to elect representatives because an absolute majority standard is unworkable. Furthermore, political elections are cyclical and held on a regular basis, allowing the outcome of one election to be easily reversed by the next. Eligible voters who failed to vote in the last election are guaranteed another opportunity to exercise this right after only a short period.

Union elections differ in important ways. First, they are not regular. Once a union is elected, it maintains its position as an exclusive representative for all employees in the bargaining unit indefinitely, or until it is decertified in a special election. Decertification elections of incumbent unions are rare, so most employees will only ever get one chance to vote for or against unionization. In fact, one study estimates that 95% of union members have never voted for a union.[28]

Second, the stakes are different for employees in union elections. Whether or not they are unionized impacts employees' salaries, working conditions, job safety, access to health care, retirement planning and more. While the decisions of elected officials obviously affect voters, the impacts of those decisions are often drawn out over time and occur less frequently than the impacts of unionization to the individual workers involved. Policy decisions at the local, state and federal level, such as minimum wage, health and safety requirements, overtime pay, and similar topics certainly have an impact on individuals, but a union contract not only directly addresses these topics, it dictates almost everything about an individual's working environment. The outcome of these elections are likely to be felt quite deeply by workers, who experience the consequences day in, day out. In a union election where only a minority of employees vote, one voter or a small group of voters can have an outsized impact on the livelihoods of many employees.

The stakes are even higher in states that permit unions to force all employees, under threat of losing their job, to pay them. Twenty-four states currently allow this, while the other 26 have right-to-work laws on the books that prohibit unions from doing so. This coercive practice is of such concern that the U.S. Supreme Court banned it for public employees in 2018, reasoning that forcing these employees to pay a union against their will violates their First Amendment rights.[29]

Given these realities, requiring an absolute majority standard in union elections is not only supported by a plain reading of the statutory text but also employees' reasonable expectations. The power to gain a monopoly in representing employees and negotiate indefinitely on their behalf should not be easily won. It is a significant authority that should only be permitted when it has passed a substantial test of approval, such as winning the support of a majority of the employees eligible to vote.

The consequential reasoning used by the Board in *RCA* to justify a lesser standard is flawed. Even assuming that the Board's concerns about employers being able to quash unionization campaigns through "intimidation and sabotage" were valid in the context of labor relations in the 1930s, they are significantly less relevant today.[30] The National Labor Relations Act, as currently constituted, provides robust protections against intimidation and coercion, with Section 9 clearly prohibiting both employers and unions from interfering with, or otherwise restraining or coercing employees in the exercise of their labor rights.[31] Those rights expressly include the right to "form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining." Employees also have the right to refrain from any of those activities. Any employer (or union) engaging in "a campaign of terrorism and intimidation" is almost certain to run afoul of an unfair labor practice. And, to the extent that unfair labor practice charges are insufficient to purge the taint of otherwise

impermissible behaviors, it would still be possible for the Board to apply either a quorum or true majority approach except in cases where misconduct makes the administration of a fair election impossible. This was the approach adopted in *New York Handkerchief*.

The Board's concerns regarding the risk of empowering minorities are equally unavailing. In *RCA*, the Board was concerned that minority groups would prevent certifications of unions that they could not otherwise defeat in an election, and that this concern helped to justify a majority-of-those-voting standard for representation. In doing so, the Board enshrined an opposite tyranny of the minority — namely, allowing a true minority of employees to speak for the entire majority. The consequences are significant, particularly given the difficulties of removing a union once one has been established in a workplace.

If the majority of workers represented by a union wish to remove their union, they must do so via a process known as decertification. Decertification, however, is an extremely difficult process. Once a union is recognized, workers are prohibited from even attempting to decertify it for a one-year period. If the union can negotiate a final collective bargaining agreement during that year, the prohibition on decertification is extended for up to three years in what is known as a contract bar. Thus, if a majority of employees find themselves unionized by a minority of their coworkers, they can nevertheless be forced to accept unionization for a period of up to four years. Even employees who wait out these prohibitions on decertification must clear additional hurdles. Employees seeking decertification have only a 45-day window to file a decertification with the Board.

By allowing unions to be recognized by only a majority of those voting, the Board has allowed that minority to exercise far more control than what it feared from competing unions in *RCA*. Under the current standard, a majority of employees can not only be bound by the decision of a minority but are also largely prohibited from overruling that majority for years.

4. Textual application of the National Labor Relations Act is a superior approach

A textualist approach would result in a more reasonable application of the National Labor Relations Act. Under the current system, a minority of employees can determine who speaks for all employees. If the "majority of the employees in the unit" language is applied properly, however, unions could only speak for all employees in a bargaining unit when either an absolute majority, or a majority of a quorum, of employees have voted for union representation.

An illustrative example can be found in the case of a Starbucks in Riverside, California. In 2022, employees at that Starbucks were given the opportunity to vote on union representation.[32] There were 28 employees eligible to vote in the election but only four of them did. Of the four who voted, three voted in favor of the union and one opposed it. Starbucks challenged the results of the election, and it is unclear whether the store has been unionized at time of writing.* Under the *Central Dispensary* standard, however, the National Labor Relations Board could certify this result if it finds it "actually representative" and no court finds this decision to be arbitrary. If this result prevails, it would mean that a group representing just over 10% of the employees will force a union on the 90% of employees who either abstained from voting or opposed unionization.

Results like these undermine the democratic principles underlying employees' rights to choose their representatives. Employees working under a collective bargaining agreement do not have the right to negotiate terms or conditions of employment on their own behalf. Instead, unions act as the "exclusive bargaining representative" for a group of employees, and all issues related to an employee's working conditions must be negotiated through the union alone. To prevent this arrangement from disenfranchising dissenting

* The NLRB docket reflects that objections to an election were filed but does not indicate that the matter has been resolved. See, *Starbucks Corp. and Workers United a/w Serv. Emp. Int'l Union*, 21-RC-296247, available at: https://www.nlrb.gov/case/21-RC-296247.

employees, these powers should only be bestowed on a union following a vote of a substantial portion of the affected employees.

This position could be defended theoretically as the most democratic when the majority of employees for whom the union speaks has consented to their representation. But when a majority of employees do not vote, the unit has not expressed a strong opinion on whether a union should represent it. In the Starbucks example above, three employees decided how the other 25 will engage with their employer with respect to their terms and conditions of employment, at least for now. The current interpretation of the National Labor Relations Act is flawed because it assumes the opposite — that silence essentially equates to implied consent. It is unlikely that those who choose not to vote do so because they do not care about how their wages, hours, and working conditions are determined. It is just as likely that employees who chose not to vote are implicitly endorsing the status quo of a nonunionized workplace.

In short, the current interpretation of the National Labor Relations Act allows for scenarios where a majority of employees do not support a union but are nevertheless forced to accept its representation. If those same employees decide that unionization is not what's best for them, they have little practical ability to decertify their union. In states without right-to-work protections, these employees could also be forced to financially support the union in their workplace. Requiring unions to receive the support of a majority of those they represent better ensures that employees are not trapped into being represented by, and forced to pay, a union they disapprove of.

5. Restoring a Proper Understanding of the National Labor Relations Act

Restoring a proper application of the National Labor Relations Act is challenging. A purely textualist interpretation of the statute's election requirements must overcome both the additional ramifications presented by the Taft-Hartley amendments and what is now almost a century's worth of legal precedent. While it is certainly possible for an employer to challenge a minority union election by filing a lawsuit attacking the long-standing interpretation of the statute, that lawsuit would face an uphill battle. There are at least two other approaches to restoring the Act's original meaning that should be considered.

The first and most obvious solution would be for Congress to amend the election language in Section 9(a) of the Act. It should mirror the language added by Taft-Hartley in Section 8(a)(3) and thereby require union representation to be decided by "a majority of the employees eligible to vote in such election." Such a solution, while consistent with basic constitutional principles and well within congressional authority, is unlikely to occur. The relevant language of both sections has remained untouched by Congress since 1947. Further, given the large divide in how the two dominant political parties view labor relations, a legislative solution would almost certainly fail to overcome a filibuster. Thus, while amending the Act through legislation would be the ideal solution, it is not likely to succeed in the near future.*

An approach with a greater chance of success would be for the National Labor Relations Board to reinterpret its statutory authority to be consistent with the plain language of the statute. The Board's initial interpretation of its authority, eventually upheld by the court in *New York Handkerchief*, was extremely sparse. After noting the impact of the employer's

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* The difficulties associated with a legislative solution can be clearly seen in the dispute over Railway Labor Act elections. There, the NMB adopted a quorum approach through administrative rulemaking, which was ultimately upheld by the D.C. Circuit. *Air Trans. Ass'n of Am., Inc. v. Nat. Mediation Bd.*, 663 F. 3d 476 (D.D.C. 2011). Congress subsequently tried to amend the Railway Labor Act to require a true majority standard, but the realities of political compromise resulted in that provision being removed from final legislation. "House Approves Measure that Places Restrictions on NMB Representation Election" (Littler Mendelson, Feb. 21, 2012), https://perma.cc/R63N-K3RK.

coercive activity, the Board conducted no analysis of its underlying statutory authority, instead concluding that the union had been selected as the exclusive representative despite not having even a quorum of employees voting:

> The Board has carefully considered the Intermediate Report on the secret ballot, the exceptions filed by the Company; and an additional report made by the Regional Director relative to said election. Upon such consideration the Board finds that the employees of the Company had adequate knowledge relative to the holding of the election and that the majority of employees within the appropriate unit have selected and designated the [union], as their bargaining representative.[33]

Remarkably, in reaching this decision, the Board offered no other justification. A textualist approach could re-examine this question and conduct a more thorough analysis of the Act's text to establish a new absolute majority or quorum requirement.

While the longstanding nature of the Board's approach to determining whether a union election has been "actually representative" poses an obstacle to an administrative reinterpretation of the statue, it is far from disqualifying. The Board is a partisan entity, and its priorities typically reflect those of the political party in power. The end result is that the Board is well known for reversing positions on major policy questions when the presidency swaps from one political party to another.* This includes, at times, precedent which stretches back decades.† A reversal, even on an issue that has not been addressed for a significant period of time, would hardly be shocking to labor law practitioners.

Admittedly, that interpretation will be subject to greater judicial scrutiny than has been the norm in recent decades. In *Loper Bright Enterprises v. Raimondo*, the United States Supreme Court reversed the administrative law principle known as *Chevron* deference.[34] Under that rule, courts were required to defer to agency interpretations of law unless the agency interpretation was clearly contrary to statute. This strengthened agency rulemaking by insulating it from extensive judicial review. *Loper Bright*, meanwhile, lays the duty to interpret the meaning of law to the courts. Under such a review, a textualist interpretation of the National Labor Relations Acts would result in an absolute majority standard, or, at the very least, a quorum standard.

Ultimately, however, *Loper Bright* presents an opportunity for the Board to restore a textualist interpretation of the National Labor Relations Act. As noted above, multiple courts have acknowledged that the text of the Act seems to require either an absolute majority or quorum standard. While courts have traditionally deferred to the Board's interpretations, *Loper Bright* now requires courts to determine the best meaning of the law, without undue deference to the agencies that administer them. If the Board were to reinterpret the Act to restore its original, correct ruling that the law requires an absolute majority, courts would be forced to address that conclusion by evaluating the best meaning of that statute's text. A textualist court, such as the current U.S. Supreme Court, is unlikely to view the evolution of this standard favorably, given the plain language of the National Labor Relations Act.

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* For example, see: George J. Miller, "The NLRB 'Flip-Flops' Again" (Wyatt, Tarrant & Combs, September 17, 2011), https://perma.cc/IN3F-ASAE; Paul Galligan and Jade M. GIlstrap, "Flip-Flops, Not Just For the Beach or Boardwalk: NLRB (Again) Buries Consent Requirement for Bargaining Units with Temps" (Seyfarth, July 14, 2016); Peter L. Albrecht and Christine L. McLaughlin, "Important Flip-Flop: NLRB Changes Course on Confidentiality and Non-Disparagement Provisions" (Godfrey & Kahn, February 23, 2023), https://perma.cc/HXM2-Q6L6. July 14, 2016.

† *The Atlanta Opera, Inc v. Make-Up Artists and Hair Stylist Union, Loc. 798 IATSE*, NLRB Case No. 10-RC-276292 (available at: https://www.nlrb.gov/case/10-RC-276292). The amicus brief of the House Republican Study Committee specifically notes that the legal standard which was eventually overturned by the NLRB had existed for over 70 years and had survived numerous prior lawsuits. That brief is available at: https://perma.cc/BN6G-ES6F.



CONCLUSION

The proper interpretation of the National Labor Relations Act's election provisions would restore balance to private sector labor law by ensuring that unions are only vested with the power to speak for employees when a majority of employees who will be represented by the union vote in favor of that representation. This is consistent with both the language of the statute, and the fundamental principles of labor law, which intend for collective representation to be based on majoritarian support. While this change would be impactful, affecting an estimated 20% of union elections, it would also be a workable solution and ensure that unions represent the wishes of the majority of employees in a workplace.

The most likely avenue for restoring this approach rests with a principles reinterpretation of the Act by the National Labor Relations Board. That reinterpretation would almost undoubtedly face legal challenges, but those challenges would not be unwelcome. Instead, they would present courts with the opportunity to meaningfully consider language that has been glossed over for over a century. **The Board should act, and if it refuses to do so, Congress should assert its constitutional authority to clarify the statute.**

INSTITUTE FOR THE AMERICAN WORKER

MACKINAC CENTER FOR PUBLIC POLICY

ENDNOTES

1. 29 U.S.C. § 159(a).
2. John Q Barrett, "Attribution Time: Cal Tinney's 1937 Quip, 'A Switch in Time'll Save Nine,'" *Oklahoma Law Review* 73, no. 2 (2021): 229–243.
3. F. Vincent Vernuccio, "In Union Votes, 11% Can Make a Majority," *Wall Street Journal*, June 23, 2023, https://perma.cc/T95M-4TNX; "Election Reports - FY 2022" (National Labor Relations Board), https://perma.cc/Z76R-QBEC.
4. F. Vincent Vernuccio, "In Union Votes, 11% Can Make a Majority," *Wall Street Journal*, June 23, 2023, https://perma.cc/T95M-4TNX; "Election Reports - FY 2022" (National Labor Relations Board), https://perma.cc/Z76R-QBEC.
5. F. Vincent Vernuccio, "In Union Votes, 11% Can Make a Majority," *Wall Street Journal*, June 23, 2023, https://perma.cc/T95M-4TNX; "Election Reports - FY 2022" (National Labor Relations Board), https://perma.cc/Z76R-QBEC.
6. 45 U.S.C. § 152.
7. *Sys. Fed. No. 40, Ry. Emp. Dep't of Am. Fed'n of Labor v. Virginian Ry. Co.*, 84 F. 2d 627-28 (E.D. Vir. 1935).
8. *Virginian Ry. Co. v. Sys. Fed. No. 40, Ry. Emp. Dep't of Am. Fed'n of Labor*, 84 F. 2d 641, 652 (4th Cir. 1936).
9. 45 U.S.C. § 152.
10. *Virginian Ry. Co. v. Sys. Fed. No. 40, Ry. Emp. Dep't of Am. Fed'n of Labor*, 84 F. 2d 653 (4th Cir. 1936).
11. *Ass'n of Clerical Emp. Of Atchison, T. & S.F. Ry. Sys. v. Bhd. Of Ry. and S.S. Clerks*, 85 F. 2d 152, 156 (7th Cir. 1936).
12. 29 U.S.C. § 159(a) (emphasis added).
13. *In the Matter of R.C.A. Manufacturing Company, Inc. and United Electrical and Radio Workers of America*, 002 N.L.R.B. 159, 176-77 (1936).
14. *N.L.R.B. v. Whitter Mills Co.*, 111 F. 2d 474 (5th Cir. 1940).
15. *New York Handkerchief Mfg. Co. v. N.L.R.B.*, 114 F. 2d 144 (7th Cir. 1940).
16. *N.L.R.B. v. Central Dispensary & Emergency Hospital*, 145 F. 2d 852, 853-854 (D.C. Cir. 1944).
17. *N.L.R.B. v. Central Dispensary & Emergency Hospital*, 145 F. 2d 852, 853-854 (D.C. Cir. 1944).
18. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, edited by Amy Gutmann (Princeton University Press, 1997), p. viii.
19. Antonin Scalia, "Originalism: The Lesser Evil," 57 University of Cincinnati Law Review 849, 863 (1989).
20. 29 U.S.C. § 159(a).
21. 29 U.S.C. § 159(b).
22. *Air Trans. Ass'n of Am., Inc. v. Nat. Mediation Bd.*, 663 F. 3d 476 (D.D.C. 2011).
23. *Air Trans. Ass'n of Am., Inc. v. Nat. Mediation Bd.*, 663 F. 3d 476 (D.D.C. 2011).
24. 29 U.S.C. § 158(a)(3).
25. Tom C. Clark, Majority Vote Under Railway Labor Act, 40 Op. Att'y Gen. 541 (1949).
26. 29 U.S.C. §153(b).
27. 45 U.S.C. §154.

28. F. Vincent Vernuccio and Akash Chougule, "Unions Need Democracy: 95 Percent of Union Workers Never Voted for Their Union" (Institute for the American Worker, September 2024), https://perma.cc/RA8A-6T7F.

29. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018).

30. *R.C.A.*, 002 N.L.R.B. at 176.

31. 29 U.S.C. § 158.

32. F. Vincent Vernuccio, "In Union Votes, 11% Can Make a Majority," *Wall Street Journal*, June 23, 2023, https://perma.cc/T95M-4TNX.

33. *New York Handkerchief Co.*, 7 N.L.R.B. 624 (N.L.R.B-BD 1938) (available at: https://perma.cc/JQP4-YNG6).

34. *Loper Bright Enterprises v. Raimondo*, 603 US __ (2024), available at: https://www.oyez.org/cases/2023/22-451.

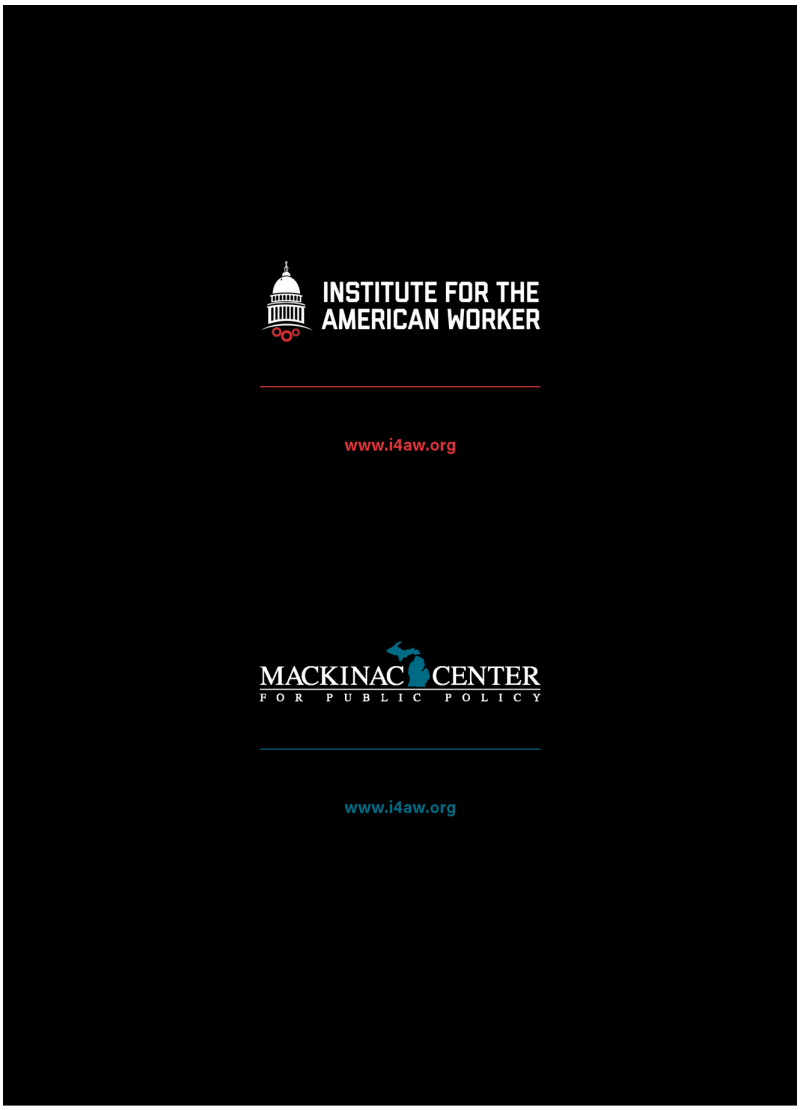
ABOUT THE AUTHOR



Steve Delie is the director of labor policy at the Mackinac Center for Public Policy. In this role, he is in charge of researching, developing and promoting labor reforms through studies, commentary, speaking, media relations and legislative testimony. Steve also serves as a policy advisor for Workers for Opportunity and My Pay My Say. Additionally, Steve leads the Center's government transparency efforts as the director of transparency and open government.

Steve is a graduate of Hillsdale College with a degree in political science. While there, he was a member of Hillsdale's George Washington Fellowship Program, a competitive fellowship awarded to students for outstanding academic achievement, leadership and interest in public service.

Following college, Steve obtained his law degree from Michigan State University College of Law, where he graduated summa cum laude in the top 10% of his class. During law school, Steve also served as an Associate Editor of the Michigan State Law Review and as a teaching assistant. As a law student, he worked for former Chief Justice Young of the Michigan Supreme Court, as well as for the Federal Reserve Bank of Richmond. After passing the bar, Steve entered private practice, specializing in employment and labor law, municipal law, contract law, the Freedom of Information Act and business licensing.



[Questions and responses submitted for the record by Mr. Aaron Solem follows:]

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June 30, 2025

Aaron Solem
Staff Attorney
National Right to Work Legal Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160

Dear Mr. Solem:

Thank you again for testifying before the Subcommittee on Health, Employment, Labor, and Pensions at the hearing titled "Restoring Balance: Ensuring Fairness and Transparency at the NLRB." Enclosed are additional questions following the hearing. Please provide a written response no later than July 21, 2025, for inclusion in the hearing record. The response should be sent to Katerina Kerska of the Committee staff who can be contacted at (202) 226-9435 or Katerina.Kerska@mail.house.gov.

We appreciate your contribution to the work of the Subcommittee.

Sincerely,

Rick W. Allen
Chairman
Subcommittee on Health, Employment, Labor, and Pensions

Questions for the Record from
REPRESENTATIVE JOE WILSON

Committee on Education and Workforce
HELP Subcommittee hearing titled: "Restoring Balance: Ensuring Fairness and Transparency at the NLRB"

Wednesday, June 11, 2025
10:15 A.M.

Representative Joe Wilson (R-SC)

Question(s) for Aaron Solem, Staff Attorney, National Right to Work Legal Defense Foundation

1. Mr. Solem, Ms. Abruzzo has described the *Cemex* framework as a lawful evolution of the National Labor Relations Board's authority under the Act, but many see it as a radical departure from precedent.

    a. Can you point to where in the Act—textually or by precedent—the Board finds authority to impose bargaining orders based on such minimal showings of support, effectively treating the mere filing of an RC petition as creating a near-irrebuttable presumption of majority status?

    b. Given that the Supreme Court in *Gissel* expressly limited bargaining orders to cases involving egregious employer conduct that undermines a fair election, how can *Cemex* be reconciled with that standard—especially when even the Ninth Circuit, hardly a conservative court, has cautioned against stretching *Gissel* too far?

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Dear Congressman Wilson:

On June 30 you asked me to respond to the following questions. My responses are below.

1. Ms. Abruzzo has described the *Cemex* framework as a lawful evolution of the National Labor Relations Board's authority under the Act, but many see it as a radical departure from precedent.

(a) Can you point to where in the Act—textually or by precedent—the Board finds authority to impose bargaining orders based on such minimal showings of support, effectively treating the mere filing of an RC petition as creating a near-irrebuttable presumption of majority status?

(b) Given that the Supreme Court in *Gissel* expressly limited bargaining orders to case involving egregious employer conduct that undermines a fair election, how can *Cemex* be reconciled with that standard—especially when even the Ninth Circuit, hardly a conservative court, has cautioned against stretching *Gissel* too far?

There is no support, either in the text of the National Labor Relations Act or in precedent, for the notion that the Board has authority to impose bargaining orders based on the mere filing of an election petition or an employer's commission of a single, minor unfair labor practice.

Start with the statute. Section 7 of the NLRA guarantees employees an equal right to choose or reject a union. 29 U.S.C. § 157. Section 8(a)(2) makes it unlawful for an employer to recognize a union that lacks majority support. 29 U.S.C. § 158(a)(2). As the Supreme Court has made clear, "[t]here could be no clearer abridgement" of the Act than imposing exclusive representation on a majority of employees who do not want it. *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737–39 (1961).

While Section 9 of the NLRA allows an employer to voluntarily recognize a union upon a valid showing of majority support, the Supreme Court held in *Linden Lumber Div. v. NLRB*, 419 U.S. 301, 310 (1974), that if an employer declines recognition, the burden is on the union to request a Board-supervised secret-ballot election. It is not an unfair labor practice for the employer to insist on an election. Indeed, the Supreme Court in *Gissel* described elections as the "preferred" method

for determining majority support, noting that union authorization cards are "admittedly inferior." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602–03 (1969).

The *Cemex* framework defies these precedents. Under *Cemex Construction Materials Pacific*, 372 NLRB No. 130 (2023), if a union claims majority support and demands recognition, the employer must either: (1) accede, or (2) file an election petition within two weeks. If the employer fails to do either the Board will order the employer to recognize and bargain with the union. And even if the employer moves for a secret ballot election and the employees reject the union in the secret-ballot election, the Board may still impose the union on employees through a bargaining order if the agency finds that *any* unfair labor practice was committed during the election period, no matter how minor. See *Cemex*, slip op. at 25 & n.139; 51 (Kaplan, dissenting) (noting the "zero-tolerance standard").

This approach directly contradicts *Gissel*, which limited bargaining orders to exceptional cases involving "hallmark" violations that make a fair election impossible. *Cemex*, by contrast, makes bargaining orders the rule rather than the exception—even for trivial or technical violations. The *Cemex* rule also violates *Linden Lumber*, where the Court rejected placing the burden to request elections on employers. Yet under *Cemex*, an employer that fails to act within two weeks of a union demand may face a bargaining order regardless of actual employee support.

There is no way to reconcile *Cemex* with *Gissel*. Courts, even the Ninth Circuit, have called bargaining orders "extreme" remedies, *Gardner Mech. Servs., Inc. v. NLRB*, 115 F.3d 636, 642 (9th Cir. 1997), because imposing a union without an election poses a great risk of overriding the will of the majority of employees. Worse, the Board's various bars prevent employees from challenging a union's representation for up to a year—and up to four years if the parties agree to a contract in the meantime. The result is that the right to *choose* a union is elevated far above the right to *reject* one.

While the Biden Board and former General Counsel Abruzzo claim bargaining orders are necessary to deter employer misconduct, courts have consistently rejected any approach that "mechanically places deterrence above employee free choice." *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 45 n.18 (D.C. Cir. 1980). And even where an employer commits a serious unfair labor practice, the Board has a long history of competently holding re-run elections. Secret ballot elections, not *Cemex* bargaining orders, truly uphold employee free choice.

In short, *Cemex* is a radical and legally unsupported departure from the text, structure, and purpose of the NLRA. It upends employee free choice, marginalizes secret-ballot elections, and defies controlling Supreme Court precedent. It should be swiftly overturned.

/s/ Aaron Solem
Aaron Solem

[Questions and responses submitted for the record by Ms. Jennifer Abruzzo follows:]

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June 30, 2025

Jennifer Abruzzo
Senior Advisor to the President
Communications Workers of America
501 3rd Street NW
Washington, DC 20001

Dear Ms. Abruzzo:

Thank you again for testifying before the Subcommittee on Health, Employment, Labor, and Pensions at the hearing titled "Restoring Balance: Ensuring Fairness and Transparency at the NLRB." Enclosed are additional questions following the hearing. Please provide a written response no later than July 21, 2025, for inclusion in the hearing record. The response should be sent to Katerina Kerska of the Committee staff who can be contacted at (202) 226-9435 or Katerina.Kerska@mail.house.gov.

We appreciate your contribution to the work of the Subcommittee.

Sincerely,

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Chairman
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REPRESENTATIVE JOE WILSON

Committee on Education and Workforce
HELP Subcommittee hearing titled: "Restoring Balance: Ensuring Fairness and Transparency at the NLRB"

Wednesday, June 11, 2025
10:15 A.M.

Representative Joe Wilson (R-SC)

Question(s) for Jennifer Abruzzo, Senior Advisor to the President, Communications Workers of America

1. Ms. Abruzzo, you've described the *Cemex* framework as a lawful evolution of the National Labor Relations Board's authority under the Act, but many see it as a radical departure from precedent.

    a. Can you point to where in the Act—textually or by precedent—you believe the Board finds authority to impose bargaining orders based on such minimal showings of support, effectively treating the mere filing of an RC petition as creating a near-irrebuttable presumption of majority status?

    b. Given that the Supreme Court in *Gissel* expressly limited bargaining orders to cases involving egregious employer conduct that undermines a fair election, how do you reconcile *Cemex* with that standard—especially when even the Ninth Circuit, hardly a conservative court, has cautioned against stretching *Gissel* too far?

Below please find Jennifer Abruzzo's response to questions for the record from Representative Joe Wilson (R-SC) relating to the Committee on Education and Workforce HELP Subcommittee hearing titled: "Restoring Balance: Ensuring Fairness and Transparency at the NLRB" Wednesday, June 11, 2025 10:15 A.M.

1. Ms. Abruzzo, you've described the Cemex framework as a lawful evolution of the National Labor Relations Board's authority under the Act, but many see it as a radical departure from precedent.

a. Can you point to where in the Act—textually or by precedent—you believe the Board finds authority to impose bargaining orders based on such minimal showings of support, effectively treating the mere filing of an RC petition as creating a near irrebuttable presumption of majority status?

You may wish to review or re-review GC Memorandum 24-01, dated April 29, 2024, which I issued in response to practitioners' inquiries regarding the application of *Cemex*, as well as the Board's *Cemex* decision and its subsequent order denying the related motion for reconsideration, all of which address this issue.

Specifically, the Board states that its *Cemex* decision is consistent with the Supreme Court precedent of *Gissel*—which makes clear the Supreme Court's view that "a 'Board election is not the only method by which an employer may satisfy itself as to the union's majority status'".

Further, as to statutory authority, it says that, in order to carry out its mandate, Congress in Section 10(a) expressly empowered the Board to prevent unfair labor practices, including, under Section 8(a)(5), employers' refusal to bargain collectively with representatives "designated" for that purpose under Section 9(a). Congress additionally expressly directed, in Section 10(c), that "[i]f . . . the Board shall be of the opinion that any person . . . has engaged in or is engaging in any such unfair labor practice, then the Board shall issue . . . an order requiring such person . . . to take such affirmative action . . . as will effectuate the policies of the Act."

Finally, it notes that the Supreme Court long ago expressly held it "too plain for anything but statement" that the Board has the statutory authority under Section 10(a) and (c) to do what it did here: "[F]oreclose the probability" that "procedural delays necessary fairly to determine charges of unfair labor practices . . . be made the occasion for further procedural delays in connection with repeated requests for elections," by "requir[ing] that an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain. See *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704-705 (1944) (citing 29 U.S.C. §§ 160(a), 160(c)),

b. Given that the Supreme Court in Gissel expressly limited bargaining orders to cases involving egregious employer conduct that undermines a fair election, how do you reconcile Cemex with that standard—especially when even the Ninth Circuit, hardly a conservative court, has cautioned against stretching Gissel too far?

As the Board explained in *Cemex*, a bargaining order will issue when an employer has satisfied the requirements for a violation of Sec. 8(a)(5) by refusing to bargain with a majority designated union in an appropriate unit (consistent with Sec. 9 of the Act) and, if an election petition has been filed, has engaged in unlawful conduct that would require a rerun of the election that otherwise would have served to determine the union's majority status. Thus, a bargaining order under *Cemex* will not be issued to remedy any unfair labor practices, no matter how minor or less extensive. Rather, the bargaining order remedies the employer's unlawful refusal to bargain with the union under Sec. 8(a)(5), and, if an election petition has been filed, the bargaining order will be issued only when the employer's separate unfair labor practices interfered with the election. This framework is entirely consistent with the Act's language and its statutory mandate to further the policy of the United States set forth in Section 1 of the Act "to encourag[e] the practice and procedure of collective bargaining" and to protect, among other things, workers' "full freedom to . . . designat[e] . . . [collective-bargaining] representatives of their own choosing."

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February 19, 2026

Jennifer Abruzzo
Senior Advisor to the President
Communications Workers of America
501 3rd Street NW
Washington, DC 20001

Dear Ms. Abruzzo:

Thank you again for testifying before the Subcommittee on Health, Employment, Labor, and Pensions at the hearing titled "Restoring Balance: Ensuring Fairness and Transparency at the NLRB." Enclosed are additional questions following the hearing. Please provide a written response no later than March 12, 2026, for inclusion in the hearing record. The response should be sent to Katerina Kerska of the Committee staff who can be contacted at (202) 226-9435 or Katerina.Kerska@mail.house.gov.

We appreciate your contribution to the work of the Subcommittee.

Sincerely,

Rick W. Allen
Chairman
Subcommittee on Health, Employment, Labor, and Pensions

Questions for the Record from
1. REPRESENTATIVE MARK TAKANO
2. REPRESENTATIVE DONALD NORCROSS

Committee on Education and Workforce
Health, Employment, Labor, and Pensions Subcommittee hearing entitled "*Restoring Balance: Ensuring Fairness and Transparency at the NLRB*"
Wednesday, June 11, 2025
10:15 A.M.

Representative Mark Takano (D-CA)
Question(s) for Witness Jennifer Abruzzo

1. On February 18, the Trump Administration issued an Executive Order that mandates the NLRB submit any new regulations to the Director of the Office of Management and Budget for review. It also allows for OMB to control NLRB's apportionment to "advance the President's policies and priorities," and requires the NLRB to staff a White House Liaison in their office.

   In other words, the White House has a huge role in the oversight and operations of the NLRB.
   a. What impact do you think this dynamic will have when the NLRB's General Counsel is looking to prosecute a large Trump campaign donor over union busting? Why?

   b. What does a future of politicized labor law enforcement look like?

Representative Donald Norcross (D-NJ)
Question for Jennifer Abruzzo

1. As you know, the right of workers to form a union and collectively bargain is central to improving wages, hours, working conditions, and more. Unfortunately, when workers vote to form a union, they don't immediately reap the benefits of collective bargaining. Instead, they need to obtain first contract with management who, because the law currently doesn't impose a negotiation deadline, often stall, delay, and drag out negotiations. For example, Starbucks workers in Buffalo, NY first voted to unionize in December 2021. Since then, more than 12,000 Starbucks workers at over 500 stores around the country have voted to unionize. More than 3 years later, they are still waiting on their first contract. In fact, according to Bloomberg Law, it takes an average of 458 days for unions and employers to agree on a first contract. This hurts workers who, despite exercising their right to bargain collectively, are prevented from doing so by employers who enjoy the benefits of the status quo.
   a. How would a bill like the *Faster Labor Contracts Act*, which imposes negotiation deadlines during the process of securing the first union contract, support workers?

Chairman Allen,

For the record, below are my responses to the supplemental questions following my testimony before the Subcommittee on Health, Employment, Labor, and Pensions at the June 11, 2025 hearing titled "Restoring Balance: Ensuring Fairness and Transparency at the NLRB."

Representative Mark Takano (D-CA)

Question(s) for Witness Jennifer Abruzzo

1.On February 18, the Trump Administration issued an Executive Order that mandates the NLRB submit any new regulations to the Director of the Office of Management and Budget for review. It also allows for OMB to control NLRB's apportionment to "advance the President's policies and priorities," and requires the NLRB to staff a White House Liaison in their office. In other words, the White House has a huge role in the oversight and operations of the NLRB.

a. What impact do you think this dynamic will have when the NLRB's General Counsel is looking to prosecute a large Trump campaign donor over union busting? Why?

Section 1 of the NLRA establishes the policy of the United States to encourage collective bargaining and protect workers' freedom of association to minimize industrial instability caused by unequal bargaining power at the workplace. This pro-worker statute was enacted to level the playing field and give workers the rights to organize, collectively bargain, and act concertedly for mutual aid or protection to improve their wages and working conditions.

Congress's intent when enacting the NLRA and establishing the NLRB was to have an independent federal agency comprised of subject matter expert decision-makers, free from political influence. The current agency decision-makers, including the General Counsel, are under constant threat of removal should the President be displeased by a decision made, such as one addressing whether a corporate billionaire donor has violated the law.

Thus, one can expect that Trump-appointed NLRB decision-makers, including the General Counsel, will elevate corporate interests above workers' rights, contrary to their Congressional mandate in enforcing a pro-worker statute. As an example, on February 6, 2026, an NLRB Regional Director, who is overseen by the General Counsel, dismissed a Space X case for lack of jurisdiction two years after a complaint issued during the Biden administration alleging the unlawful firing of eight employees. The ones most detrimentally

affected by the failure to fully protect the rights afforded under the NLRA are workers, families and communities.

b. What does a future of politicized labor law enforcement look like?

As noted above, we are already seeing the effects of politicized labor law enforcement in the present. See, also, for example, a letter to AG Pam Bondi where those regulated lobbied the Trump Administration to direct the NLRB's actions. E.g. https://myprivateballot.com/wp-content/uploads/2025/04/CDW-letter-to-AG-Bondi_EO14215_Apr-2025.pdf.

That is why it is more important than ever that Congress strengthens the current NLRA to ensure that more workers feel empowered to exercise their rights free from intimidation and retaliation by holding more violators of those rights accountable through robust enforcement and strong penalties that deter bad behavior. New and improved federal legislation should not preempt state action but should be a floor from which states cannot go below when using police powers to protect their citizens' freedoms of speech, assembly and association and their rights to organize, collectively bargain, and act together to improve their circumstances.

Representative Donald Norcross (D-NJ)

Question for Jennifer Abruzzo

1.As you know, the right of workers to form a union and collectively bargain is central to improving wages, hours, working conditions, and more. Unfortunately, when workers vote to form a union, they don't immediately reap the benefits of collective bargaining. Instead, they need to obtain first contract with management who, because the law currently doesn't impose a negotiation deadline, often stall, delay, and drag out negotiations. For example, Starbucks workers in Buffalo, NY first voted to unionize in December 2021. Since then, more than 12,000 Starbucks workers at over 500 stores around the country have voted to unionize. More than 3 years later, they are still waiting on their first contract. In fact, according to Bloomberg Law, it takes an average of 458 days for unions and employers to agree on a first contract. This hurts workers who, despite exercising their right to bargain collectively, are prevented from doing so by employers who enjoy the benefits of the status quo.

a. How would a bill like the Faster Labor Contracts Act, which imposes negotiation deadlines during the process of securing the first union contract, support workers?

Based on my experience at the NLRB, organizing drives themselves are fraught with employer-created obstacles interfering with workers' right to freely choose whether to be

unionized. And, even after a successful effort where workers have chosen a union to be their representative in negotiating a collective bargaining agreement that will inure to their benefit, too often employers either completely refuse to bargain with the chosen union, or they come to the bargaining table, but stall negotiations or engage in bad faith, in order to undermine union support and avoid paying increased wages and benefits. Because of this abuse of processes, it typically takes much more than a year for the parties to reach a collective bargaining agreement, if one is reached at all.

While there is much more to be done, through legislation, enforcement, and otherwise, to address employer conduct that continues to substantially violate workers' rights to act together, organize, and collectively bargain, the Faster Labor Contracts Act's imposed requirements for first contract negotiations would require employers to come to the bargaining table with employee-chosen unions immediately, and, if the parties cannot reach agreement on their own in short order, then mediation and potentially arbitration would follow, with the ultimate result being that workers and their families would much more quickly enjoy improved negotiated wages and benefits. These increases would, among many other things, enable them to feed and clothe their families, put roofs over their heads, and allow for educational opportunities, as well as would help the broader economy through more robust consumerism.

Sincerely,

Jennifer Abruzzo

March 12, 2026

