

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

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

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

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

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

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

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

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

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

### **The NLRA was established to achieve workplace democracy.**

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

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

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

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<sup>1</sup> 29 U.S.C. § 151.

<sup>2</sup> 29 U.S.C. § 151.

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

<sup>4</sup> Dau-Schmidt, et al., at 48.

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

<sup>6</sup> *Id.* at 33.

<sup>7</sup> *Id.* at 22.

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

<sup>9</sup> [www.jwj.org/collective-bargaining-101](http://www.jwj.org/collective-bargaining-101).

<sup>10</sup> 465 U.S. 822 (1984).

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

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

Core provisions of the NLRA have been eroded by overly narrow NLRB and court interpretations which frustrate the Congressional intent behind the creation of the NLRA. The right to engage in protected concerted activity has withered away over decades of judicial attack and the policies of labor-hostile NLRB majorities. From 1980 until its recent 2018 temporary spike<sup>11</sup>, the worker's statutory right to strike over working conditions and for mutual aid and protection has been curtailed almost to the point of ineffectiveness by policies that allow employers to permanently replace economic strikers without a showing of exigency.

### **The recent increase in organizing and other labor activism**

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

The most recent Gallup poll as of August 2022 reports that seventy-one percent of Americans now approve of labor unions. These numbers are up from sixty-four percent before the pandemic and is the highest Gallup has recorded on this measure since 1965.<sup>13</sup>

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

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

The Brookings Institution recently reported<sup>14</sup> the pay practices and financial outcomes of the past two years, for twenty-two of the nation's best known companies, employing more than seven million frontline workers in sectors spanning retail, delivery, fast food, hotels, and entertainment—more than half of whom are nonwhite. The shareholders of these companies grew \$1.5 trillion richer, while their 7 million workers received additional pay equaling less than 2% of shareholders' gains. At seven of these companies, the wealth of 13 billionaire founders and heirs alone would have grown by nearly \$160 billion since the start of the pandemic—more than 12 times all extra pay to the 3.4 million U.S. workers those companies employed.

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

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

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

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

*Pandemic exposure of worker vulnerability and corporate insensitivity.*

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

The disparate impact on immigrants and people of color, in particular, has been huge. According to the Nebraska Department of Health and Human Services, Hispanics accounted for sixty percent of COVID–19 cases in the summer of 2020 despite only comprising eleven percent of the overall state population. This was largely due to the spread in meatpacking plants, whose workforce is made up of over fifty percent immigrants.<sup>17</sup> At least 269 workers across these meatpacking companies died of COVID-19 between February and March of 2020.<sup>18</sup>

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

### **Unions protected workers *during* the pandemic.**

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

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

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

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<sup>15</sup> Covid cases and deaths grossly underestimated among meatpackers, House investigation finds

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

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

<sup>18</sup> Id.

<sup>19</sup> Id.

have negotiated additional pay<sup>20</sup>, health and safety measures,<sup>21</sup> paid sick leave, and job preservation.<sup>22</sup> Furthermore, unionized workers have felt more secure speaking out about the hazards they face.<sup>23</sup>

On November 5, 2021, the U.S. Department of Labor issued an Emergency Temporary Standard to Protect Workers from Coronavirus (ETS). Five days later, the NLRB advised workers that employers still had certain bargaining obligations. Memorandum OM 22-03<sup>24</sup>, informed the public that although an employer may be relieved of its duty to bargain where a specific change in terms and conditions of employment is statutorily mandated, the employer may not act unilaterally so long as it has some discretion in implementing those requirements.<sup>25</sup>

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

### *The Great Resignation*

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

### *Striketober*

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

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

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

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

<sup>23</sup> Economic Policy Institute August 25, 2020 “Why unions are good for workers—especially in a crisis like COVID-19” <https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/>

<sup>24</sup> [NLRB, Operations-Management Memorandum, Responding to ...](#)

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

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

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

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

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

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

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

## **A Surge in Organizing**

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

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

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

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

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

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

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

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

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

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

**The surge in organizing has been met with increased ULPs.**

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

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

### *Union Busting*

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

### *Chipotle*

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

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

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

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

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

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

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



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

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

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

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

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

### *Starbucks*

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

#### A. Store Closures

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

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

its basis for closing the location. It was reported that these conditions existed since 2018.<sup>37</sup> Since its July, 2022 announcement of store closures, Starbucks has in fact, closed 19 stores - 42% of which had union activity. Among those slated for closure was the second busiest store in Kansas City, Missouri and another in Starbucks' hometown of Seattle. Both of these stores had just filed petitions of election with the NLRB.

#### B. The Memphis Seven

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

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

#### **The Pro Act would make the Persuader Rule Law.**

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

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

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

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

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

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

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

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

## **The Microsoft Approach - Good but not Perfect.**

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

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

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

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

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

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

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

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

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

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

## Need for the ProAct

### *The Need to Strengthen Protections during the Bargaining Process*

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

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

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

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

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

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

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

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

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

### *Procedural Obstacles to Relief*

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

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

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

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

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<sup>50</sup> [NLRB v Ampersand Publishing, LLC DBA Santa Barbara New- Press; No. 21-71060 Ninth Cir.](#), Aug 11, 2022

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

<sup>52</sup> 29 U.S.C. § 160(j).

<sup>53</sup> See <https://www.nlr.gov/sites/default/files/attachments/basic-page/node1674/nlrpar2018508.pdf> (last accessed 4/30/19).

<sup>54</sup> See 29 U.S.C. § 160(l).

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

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

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

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

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

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