

Testimony of

G. Roger King¹

For the

HOUSE COMMITTEE ON EDUCATION AND LABOR

Hearing on

“IN SOLIDARITY: REMOVING BARRIERS TO ORGANIZING”

Wednesday, September 14, 2022

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

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

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

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

State of Union Organizing Activity

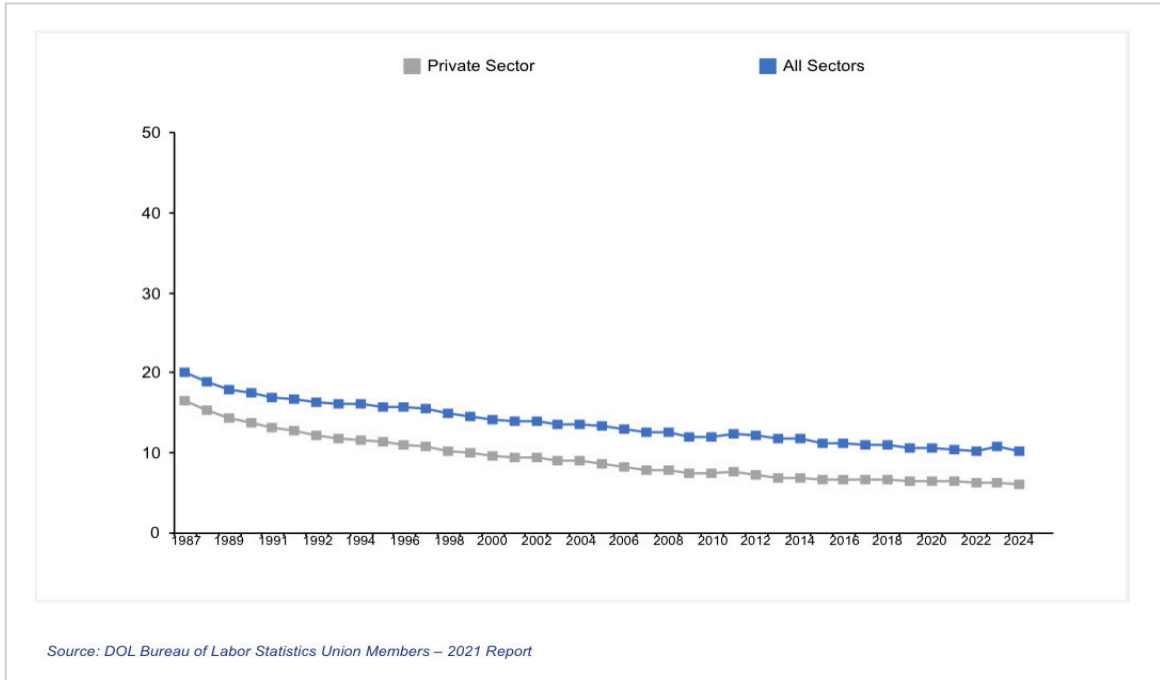
A recent Gallup poll found that 71% of Americans were generally positive toward unions, which was the highest level in Gallup polling dating back to 1965.² There also has been highly publicized union organizing activity among workers at Starbucks, Apple, Chipotle, and among other employers that have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

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

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

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

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



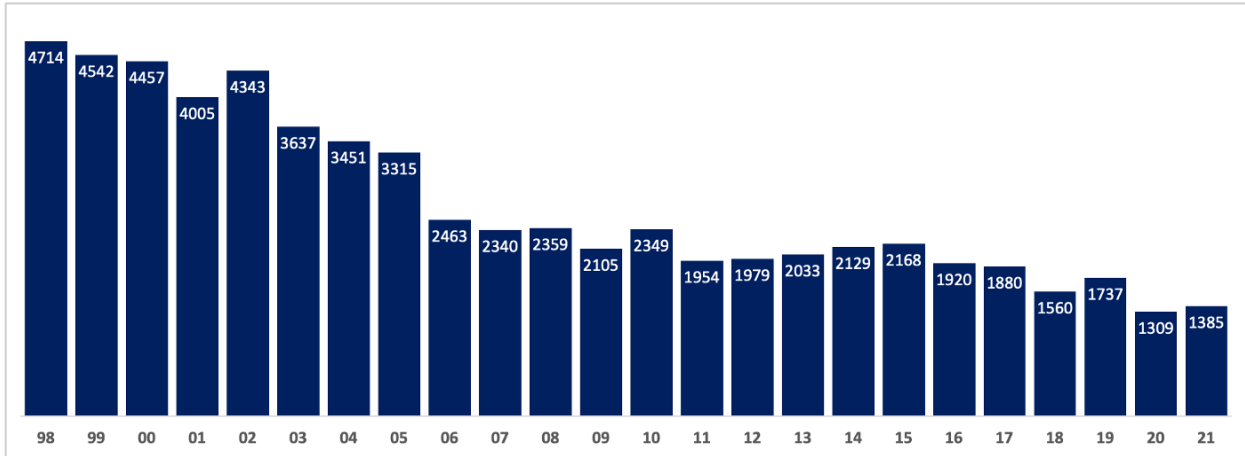
- Second, pursuant to the above noted Gallup poll, only approximately 11% of the respondents stated that they were interested in joining a union. Additionally, 58% of respondents stated that they were “not interested at all” in joining a union.⁴ These findings are consistent with other recent polling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

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

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

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

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

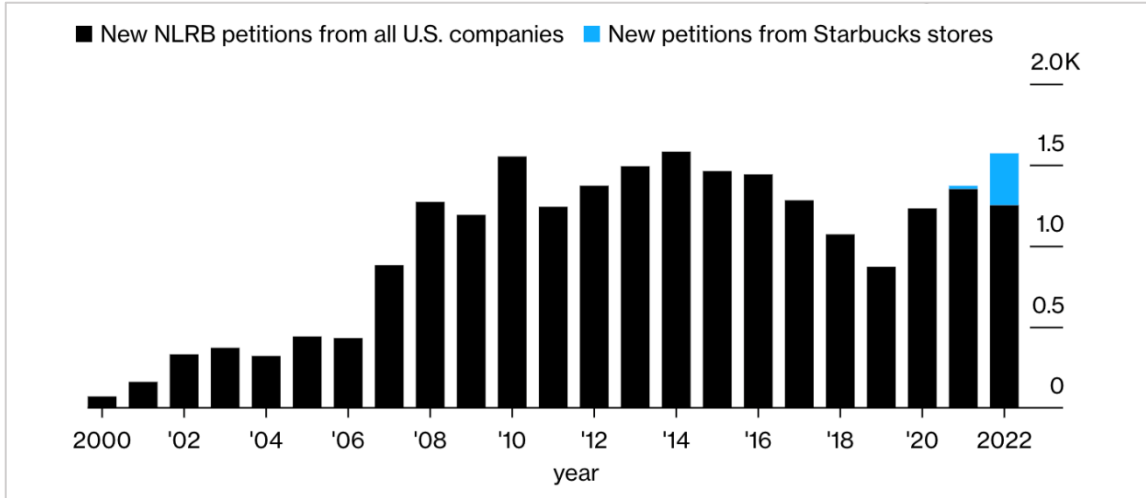


U.S. Department Bureau of Labor Statistics

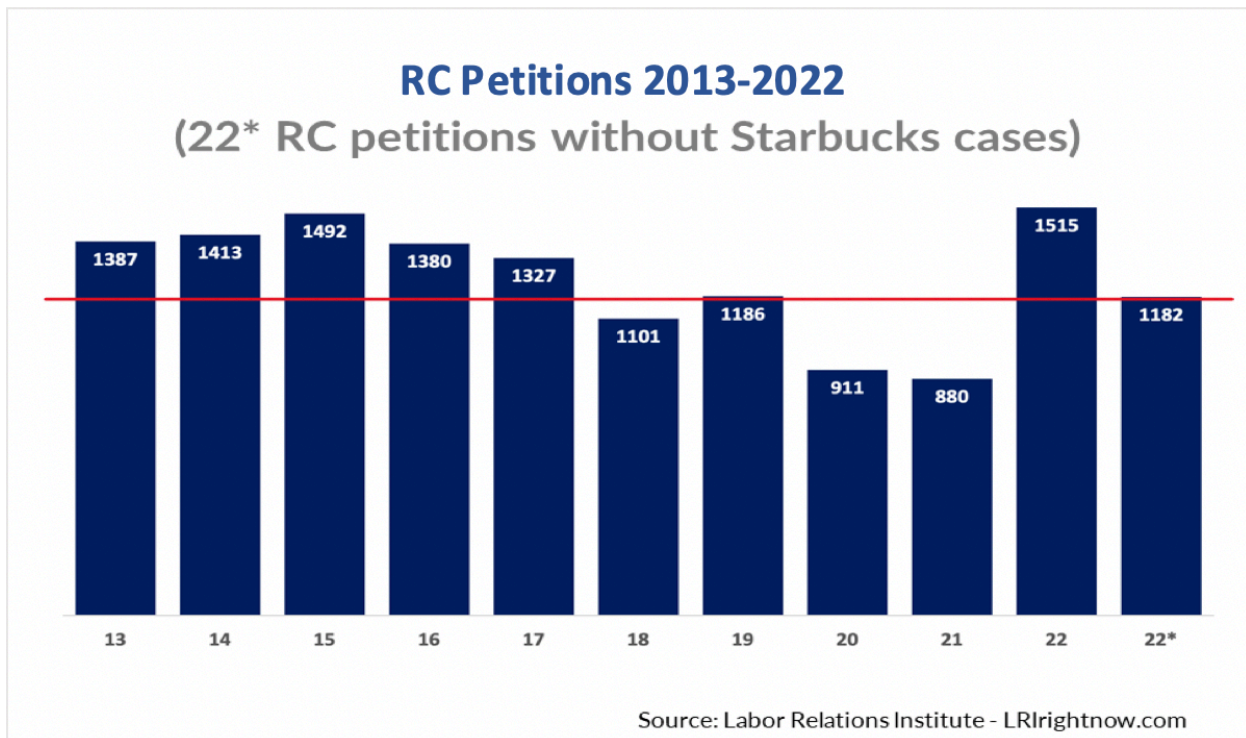
- Fourth, a closer examination of the Starbucks union petition activity also needs to be undertaken. While there have been numerous petitions filed by Workers United, the Union also has also been rejected in a number of NLRB elections or withdrawn their petition. For example, there have been 337 petitions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

The following graphs illustrate this point:

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



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



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

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

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

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

Representational Activities: \$16,090,702

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

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

General Overhead: \$16,220,225

Union Administration: \$3,547,819

Benefits: \$19,138,343

Per Capita Tax: \$2,734,264

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

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

Direct Taxes: \$3,326,663

Subtotal: \$149,541,869

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

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

Electronic Voting

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

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

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

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

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

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

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

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

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

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

The CDW study identified the following problems with electronic voting:

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

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

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

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

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

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

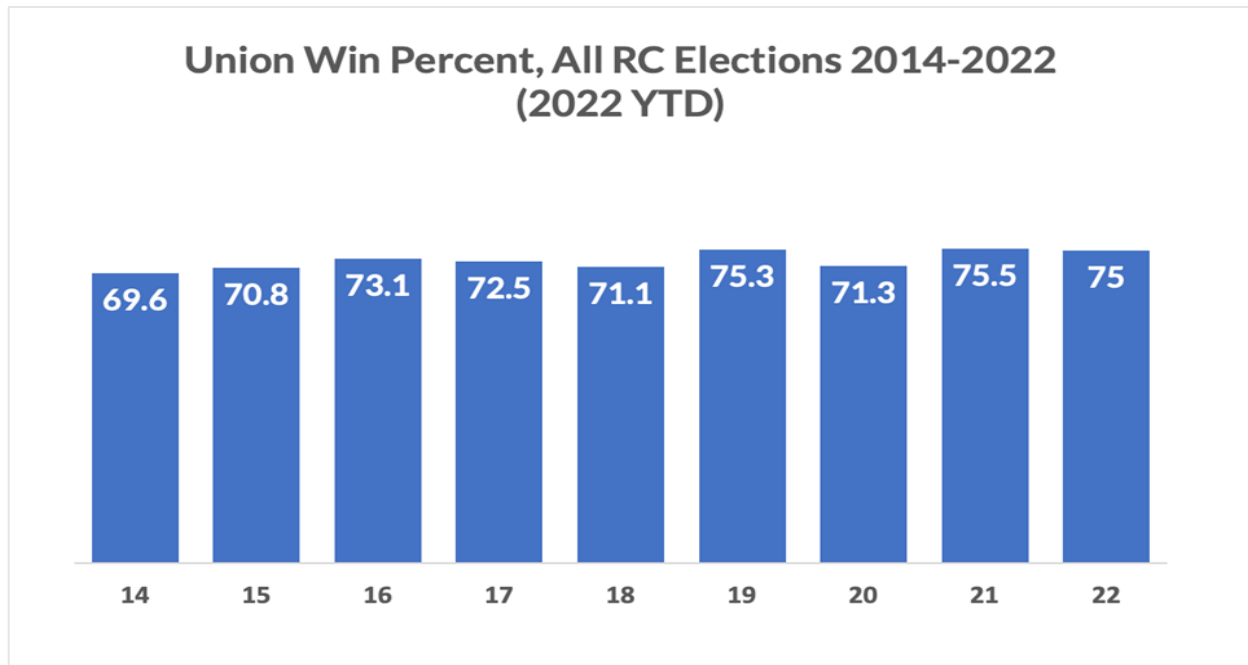
Accordingly, it would appear that no compelling case can be made for the expenditure of public funds to implement electronic voting procedures at the National Labor Relations Board, and that such proposals from a fiscal, practical, and technological perspective have little, if no, merit.

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

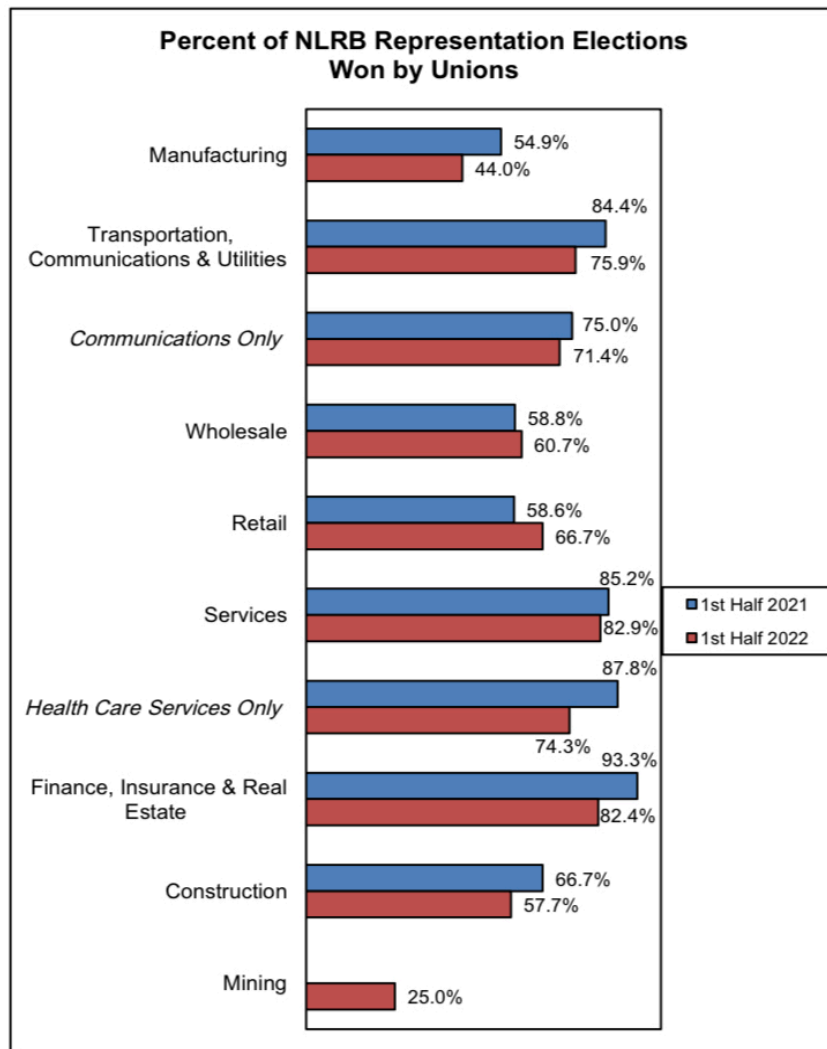
The PRO Act

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

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



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



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

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

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

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

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

Specific Objections to H.R. 842

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

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

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

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

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

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

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

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

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

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

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

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

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

- **Section 104 - Prohibition on Lockouts**

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

- **Section 104 – Employer Speech Restrictions**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- **Section 110 –Intermittent Work Stoppages**

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

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

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

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

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

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

Roger King

Senior Labor and Employment Counsel
HR Policy Association

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

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

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

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

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