MERRY 2022: THE WAR BETWEEN CAPITAL AND LABOR MUST BE OVER FOR THE SAKE OF UNIONS, EMPLOYERS, EMPLOYEES, CONSUMERS, AND THE UNITED STATES ECONOMY

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In 1935, Congress drafted articles of war for the age-old battle between labor and capital. The National Labor Relations Act (NLRA) is based on the theory that capital and labor are at war, that both sides have weapons, and that the goal is peace (for example, Title II, Section 201 of the NLRA states the goal is industrial peace, and then the Act discusses the use of economic weapons such as the strike, the lock out, picketing, and boycotts).[1] That war was in full force in 1954, when just under 35% of the workforce was unionized.[2] By 1979, the rate had fallen below 25%,[3] and in 2021, the overall rate had further dropped to 10.3%.[4] In the private sector, the unionization rate fell to a record low of 6.1%.[5] It seemed that the battle was over, capital had won, and organized labor would go the way of carbon paper and switchboards—common aspects of employment that are no longer part of the employment experience. Then, a strange thing happened on the road to obsolescence—organized labor suddenly made a comeback in early

1. 29 U.S.C. §§ 151–69 (1935).

2. Drew DeSilver, *American Unions Membership Declines as Public Support Fluctuates*, PEW RES. CTR. (Feb. 20, 2014), https://www.pewresearch.org/fact-tank/2014/02/20/for-american-unions-membership-trails-far-behind-public-support/ [https://perma.cc/NZ58-ESJN] ("At their peak in 1954, 34.8% of all U.S. wage and salary workers belonged to unions, according to the Congressional Research Service.").

3. Raymond J. Keating, *The 40-Year Decline in Labor Union Membership and the Modern Economy*, SBE COUNCIL (Jan. 24, 2020, 11:58 AM), https://sbecouncil.org/2020/01/24/the-40-year-decline-in-labor-union-membership-and-the-modern-economy/ [https://perma.cc/G3C3-UR8U] (stating that in 1979 union density was 24.1%).

4. News Release, U.S. Dep't of Lab., Union Members – 2021 (Jan. 20, 2022), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/7VM3-6CXP].

5. *Id.*; *see also* David Brancaccio & Rose Canlon, *Union Membership Fell in 2021, Despite High-Profile Campaigns. Where Do Workers Go from Here?* (Jan. 31, 2022), https://www.marketplace.org/2022/01/31/union-membership-fell-in-2021-despite-high-profile-campaigns-where-do-workers-go-from-here/ [https://perma.cc/R8VW-LUZW].

2022, and it seemed like the battle was back on. One question is whether this trend is something sustainable or just a momentary, positive upward tick in an otherwise long, slow decline. The second, and more important, question is whether the battle between labor and capital should be a battle at all. The purpose of this Article is, in the wake of organized labor's apparent new-found relevance, to examine the failed attempts at labor law reform by pro-union administrations, contend that the failure is due to the perceived "battle," and propose new legislation based on a novel approach to union/management relations.

I.
ARE UNIONS BACK?—MAYBE

The pandemic fundamentally changed the perception of both front-line workers and unions. The same employees who historically had toiled as the faceless providers of cheap goods and services emerged during the pandemic as "essential." Grocery store clerks, meat packers, restaurant cooks, servers, and nurses were now lauded and applauded.[6] When the applause subsided, however, these same people compared their wages, hours, and conditions of employment with those of the so-called knowledge workers who enjoyed working from home while watching their 401(k)'s grow to record levels.[7] In addition, as the service world opened back up, customers came roaring back with pent-up demands and expectations. Retail and hospitality employees reported record numbers of negative interactions and abuse from their customers.[8] Owners and

6. *See Interim List of Categories of Essential Workers Mapped to Standardized Industry Codes and Titles*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 29, 2021), https://www.cdc.gov/vaccines/covid-19/categories-essential-workers.html [https://perma.cc/4TP8-8NG8]; Todd Hollingshead, *Praising Essential Workers Is Not Just a Good Thing, It's Critical, BYU Study Finds*, BYU NEWS (Apr. 12, 2022), https://news.byu.edu/praising-essential-workers-is-not-just-a-good-thing-its-critical-byu-study-finds [https://perma.cc/V5GD-5EHQ].

7. David Caplinger, *How the Stock Market Fared in 2021*, THE MOTLEY FOOL (Dec. 31, 2021, 6:00 PM), https://www.fool.com/investing/2021/12/31/how-the-stock-market-fared-in-2021/ [https://perma.cc/L92Y-PVCY]. *See also Frequently Asked Questions About 401(k) Plan Research*, INV. CO. INST., https://www.ici.org/faqs/faq/401k/faqs_401k [https://perma.cc/X3P7-WDM6].

8. Biyan Xiao et al., *Service Staff Encounters with Dysfunctional Customer Behavior: Does Supervisor Support Mitigate Negative Emotions?*, FRONTIERS IN PSYCH., at 1 (2022), https://www.frontiersin.org/articles/10.3389/fpsyg.2022.987428/full#:~:text=importantly%2C%20support%20from%20leaders%20or,or%20preventing%20stress%20assessment%20responses. [https://perma.cc/VBK9-2PMA]; Amanda Mull, *American Shoppers Are a Nightmare*, THE ATLANTIC (Aug. 3, 2021), https://www.theatlantic.com/health/archive/2021/08/pandemic-american-shoppers-

managers, who had suffered unprecedented losses, were caught between the need to recoup losses and retention of their employees. Employees, now both empowered and fed up, began searching for alternatives.[9] Some quit and found other jobs, others just quit, and finally, some turned the clock back and sought protection and voice from what only two years before seemed nearly obsolete—organized labor.[10]

Between 1936 and 1967, the union approval rate in the United States averaged 68% and included record-high 75% approval ratings in 1953 and 1957.[11] Then, from 1972 through 2016, support slowly declined, with very few years recording an approval rate over 60%.[12] In 2009, the rating hit an all-time low of 48%—the only time that that the approval fell below 50%.[13] Since 2016, approval has steadily increased and is now 71%, more than 20 percentage points above the historical low.[14] Moreover, union approval ratings for those 18–34 is now at 77%![15] As the pandemic continued longer

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nightmare/619650/ [https://perma.cc/5CYK-TJFE]. *See also* Doug Robertson, *The Rise of the Abusive Customer (And How to Defuse Their Anger)*, PRACTICA LEARNING (July 2020), https://www.practica-learning.com/blog/the-rise-of-the-abusive-customer [https://perma.cc/D9DL-U6YR].

9. *See* Alí R. Bustamante, *A New Era for Worker Power: Labor Wins During the Pandemic, and the Policies We Need to Sustain the Momentum*, ROOSEVELT INST., at 6 (Sept. 21, 2022), https://rooseveltinstitute.org/wp-content/uploads/2022/09/RI_ANewEraForWorkerPower_IssueBrief_202209.pdf [https://perma.cc/YCG7-SFN8]; Anna Kramer, *This Was the Year Tech Workers Found Their Power*, PROTOCOL (Dec. 31, 2021), https://www.protocol.com/workplace/2021-year-workers-found-power [https://perma.cc/9UKA-KTM3]; Mark John, *Analysis: Workers Seize Their Moment to Shift the Balance of Power*, REUTERS (July 26, 2022, 10:09 AM), https://www.reuters.com/world/the-great-reboot/workers-seize-their-moment-shift-balance-power-2022-07-26/ [https://perma.cc/D8BD-XVVT]. *See also* Andrew Moreo, *Why Record Numbers of Hospitality Workers Are Quitting the Industry for Good*, BRADENTON HERALD (Jan. 31, 2022, 11:59 AM), https://www.bradenton.com/news/business/article257886823.html#storylink=cpy [https://perma.cc/B7DK-S94V]; Robertson, *supra* note 8.

10. Jennifer Dorning, *A Chance for More Worker Power*, THE PROGRESSIVE MAG. (Nov. 11, 2021, 10:52 AM), https://progressive.org/op-eds/more-worker-power-dorning-211111/ [https://perma.cc/H3WE-6GKW]; Jennifer Elias & Amelia Lucas, *Employees Everywhere Are Organizing. Here's Why It's Happening Now*, CNBC (May 7, 2022, 12:05 PM), https://www.cnbc.com/2022/05/07/why-is-there-a-union-boom.html [https://perma.cc/H9PH-2GKE].

11. *See* Megan Brenan, *Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Sept. 2, 2021), https://news.gallup.com/poll/354455/approval-labor-unions-highest-point-1965.aspx [https://perma.cc/4G78-GEGU].

12. *Id.*

13. *Id.*

14. *Id.*

15. Elias & Lucas, *supra* note 10.

than expected and then subsided, workers' attitudes towards unions changed even more. With the momentum of a 71% approval rating, successful grass roots union organizing emerged in the service and retail sectors. As of the date of this Article, Starbucks has won over 200 separate elections.[16] Even more surprising, employees at an Amazon warehouse in Staten Island, New York successfully organized without the backing of a traditional labor union.[17]

The reason for this change in America cannot be explained solely by the pandemic. The Biden Administration has proudly billed itself as the most pro-union administration in the last half-century. When President Biden speaks of job creation, he calls for "good union jobs!"[18] He credits unions for building the middle class and has declared he would become the most pro-union president in history.[19] He operationalized his pro-union beliefs on his first day in office when he, in an unprecedented move, fired National Labor Relations Board (NLRB) General Counsel Peter Robb, and replaced him, less than a month later, with Jennifer Abruzzo.[20] Abruzzo has a strong policy agenda that she began implementing

16. Emma Goldberg, *Starbucks Asks for a Suspension of Union Elections*, N.Y. TIMES (Aug. 15, 2022), https://www.nytimes.com/2022/08/15/business/starbucks-union-elections.html [https://perma.cc/5CYL-5YC9].

17. *See* Karen Weise, Noam Scheiber & Coral Murphy Marcos, *Amazon Union Loses Vote at Second Staten Island Warehouse*, N.Y. TIMES (May 2, 2022), https://www.nytimes.com/2022/05/02/technology/amazon-union-staten-island.html [https://perma.cc/C9K9-V9Y9].

18. *See* News Release, U.S. Dep't of Lab., US Secretary of Labor Announces Biden-Harris Administration's Coordinated Effort to Improve Job Quality Nationwide (Jan. 21, 2022), https://www.dol.gov/newsroom/releases/osec/osec20220121 [https://perma.cc/5A6Z-LS4U].

19. *See* President Biden, Remarks by President Biden in Honor of Labor Unions (Sept. 8, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/08/remarks-by-president-biden-in-honor-of-labor-unions/ [https://perma.cc/F3KE-WR34]. *See also* President Biden, Remarks by President Biden at North America's Building Trades Unions (NABTU) Legis. Conf. (Apr. 25, 2023), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/04/25/remarks-by-president-biden-at-north-americas-building-trades-unions-nabtu-legislative-conference/ [https://perma.cc/S3LX-TSMP]; Steven Greenhouse, *Biden Stakes Claim to Being America's Most Pro-Union President Ever*, THE GUARDIAN (May 2, 2021), https://www.theguardian.com/us-news/2021/may/02/joe-biden-unions [https://perma.cc/R9YP-6L7K].

20. Ian Kullgren & Josh Eidelson, *Biden Fires NLRB General Counsel After He Refuses to Resign*, BLOOMBERG L. (Jan. 20, 2021), https://news.bloomberglaw.com/daily-labor-report/biden-moves-to-oust-top-labor-board-attorney-robb [https://perma.cc/2TWZ-LWVV]; *see also* Allen Smith, *Biden Nominates NLRB General Counsel*, SOC'Y FOR HUM. RES. MGMT. (Feb. 18, 2021), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/biden-nominates-nlrb-general-counsel.aspx [https://perma.cc/3X8W-CR3L].

immediately after accepting her appointment.[21] In addition, the House of Representatives passed the Protecting the Right to Organize Act (PRO Act)—an extremely union-friendly bill that has since stalled in the Senate.[22]

All this positive union news may not, however, result in positive material change for unions and employees in the medium or long term. Despite their numerous victories, Starbucks employees have not signed a collective bargaining agreement with the Company.[23] The changes being proposed by the NLRB may not be enacted and, if they are, they will almost certainly be reversed when there is a Republican administration and a 3–2 Republican majority on the NLRB. Finally, as stated above, the PRO Act is stalled in the Senate and will remain so as long as the filibuster exists. Thus, one can argue that this positive union news is simply a blip on the screen and that the battle between labor and capital will continue and, once again, tip decidedly in capital's favor. Conversely, this can be an opportunity for both sides to seek meaningful labor law reform to bring labor law into the twenty-first century.

II.
LABOR LAW REFORM HAS BEEN A FAILED DEMOCRATIC PROMISE FOR OVER 45 YEARS

Since 1976, there have been four Democratic presidents: Carter, Clinton, Obama, and Biden. The first three tried and failed to pass major labor law reform.[24] While the Biden Administration still has time, passing the PRO Act with a Republican controlled House of Representatives and 51–49 Senate is at best unlikely, and

21. Press Release, NLRB Off. of Pub. Affs., NLRB General Counsel Jennifer Abruzzo Issues Memo on Captive Audience and Other Mandatory Meetings (Apr. 7, 2022), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-captive-audience-and [https://perma.cc/GC44-YQ75]; *see also* Office of the Gen. Couns. Mem. GC 21-04 (Aug. 12, 2021).

22. Nick Niedzwiadek, *PRO Act Allies Stick Senate Battlegrounds in Their Crosshairs*, POLITICO (Sept. 12, 2022, 10:00 AM), https://www.politico.com/newsletters/weekly-shift/2022/09/12/pro-act-allies-stick-senate-battlegrounds-in-their-crosshairs-00056078 [https://perma.cc/625P-78HT].

23. Lauren Kaori Gurley, *Inside the Battle for the First Union Contract at Starbucks*, WASH. POST (Mar. 24, 2023, 6:00 AM), https://www.washingtonpost.com/business/2023/03/24/starbucks-union-shareholder-howard-schultz-bargaining/ [https://perma.cc/X29P-3376].

24. *See, e.g.*, William R. Corbett, *The More Things Change: Reflections on the Stasis of Labor Law in the United States*, 56 VILL. L. REV. 227, 232 n.32 (2011) (describing how labor law in the U.S. remains unchanged from administration to administration).

realistically impossible.[25] Along with failing to pass the new labor laws they each pursued, the four administrations' proposals have one thing in common: they all have sought to "reform" labor law simply by making the law more union friendly. Below, we set forth each of the Democratic administrations proposed "labor law reforms" and show that the driving force is not to modernize the union/management relationship in order to improve America's economy, efficiency, and ability to compete against global competition and, instead, is to increase union density and power.

A. The Carter Administration

When one looks back at the Carter Administration, the first thoughts are likely to be the aftermath of Watergate, the Iran Hostage crisis, and the so-called stagflation. Labor historians do not, of course, dismiss these vital issues, but instead focus on the changing American economic condition. With income disparity on the rise, foreign competition affecting U.S. manufacturing and the inflation and interest rates both at double digits, the way of life for the "American worker" had changed. No longer could a blue-collar worker support a family on a single income. No longer could a high school degree result in a middle-class life. No longer did unions have the power to protect and advocate for American workers.[26]

As unions attempted to garner national support for American manufacturing with an advertising campaign featuring the catchy jingle, "look for the union label,"[27] the Carter Administration, which arguably owed its victory to union support,[28] sought to "pay back" organized labor with labor law reform. Below, we set forth what the administration attempted to do. Fitting with the thesis of this paper, labor law reform was not to address foreign competition or to address problems with the American economy. Instead, the Carter Administration's labor law reform was simply an attempt to make it easier for unions to organize and secure contracts. As described below, the Carter White House attempted to balance organized labor's wish list with that which could get Congressional

25. Moreover, even if all that occurs, red and purple state Democratic senators would be unlikely to support the bill.

26. Jefferson Cowie, Stayin' Alive: The 1970s and the Last Days of the Working Class 464 (2010).

27. *Look for the Union Label 1978 ILGWU Ad*, YouTube (May 22, 2010), https://www.youtube.com/watch?v=7Lg4gGk53iY [https://perma.cc/CZY5-Z7S5].

28. Warren Weaver Jr., *Labor's Drive for Carter Is Biggest It Has Made in a Presidential Race*, N.Y. Times (Oct. 26, 1976), https://www.nytimes.com/1976/10/26/archives/labors-drive-for-carter-is-biggest-it-has-made-in-a-presidential.html [https://perma.cc/UG7E-7G3A].

support—not what was best for the U.S. economy, unless, of course, one believes that increasing union density is always the best thing for the U.S. economy regardless of any intended or unintended consequences.

The Carter Set of Reforms are laid out in a June 1977 memo to the President from Stu Eizenstat, Carter's Chief Domestic Policy Adviser, and Executive Director of the White House Domestic Policy from 1977–1981.[29] The memo begins by explaining that the proposals were the result of a series of negotiations between the Labor Department, the White House, and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), during which the AFL-CIO agreed to a series of concessions in exchange for White House support.[30] Specifically, the AFL-CIO gave up, among other things, their proposal for union certification without elections when a majority of employees signed authorization cards (*i.e.*, "card check") and to allow new employers to disavow prior union contracts and "[some] lesser ones."[31] The memo made clear its intended purpose: "*The effect of this set of proposals is generally to streamline the labor laws and to make it easier for unions to organize.*"[32]

The final proposals, none of which were ever adopted,[33] included the following:

1. An efficiency proposal that would increase the number of NLRB Members from five to seven and allow two-member panels to affirm or decide cases and affirm Administrative Law Judge's decisions;[34]
2. Time Limits for Elections: if a majority of employees signed authorization cards, an election would be scheduled within 15 days from the filling for units under 250 employees, and 25 days for units of 250 or greater. If the union did not have a majority supporting the petition—which is rare—an election would be scheduled within 45 days except for complex or novel cases where the time limit would be 75 days. At the time, the median timing for an election was 57 days for uncontested elections, 75 days

29. Memorandum from Stu Eizenstat, Chief Domestic Policy Adviser, to President Jimmy Carter (June 29, 1977), *in* OFFICE OF THE CHIEF OF STAFF FILES, HAMILTON JORDAN'S CONFIDENTIAL FILES (1977).

30. *Id.* at 1.

31. *Id.*

32. *Id.* (emphasis added).

33. *The Death of Labor Law Reform*, N.Y. TIMES (June 23, 1978), https://www.nytimes.com/1978/06/23/archives/the-death-of-labor-law-reform.html [https://perma.cc/K4UH-QWM9].

34. *Id.* at 4.

for cases resolved by the Regional Director, and 275 days for cases decided by the NLRB (1% of the cases);[35]

3. Bargaining Unit Determination: instead of following case law and allowing the Regional Director to determine the appropriateness of a bargaining unit by holding a hearing and examining Board precedent, the memo proposed rulemaking to establish standard rules for unit determination;[36]
4. Equal Opportunity for Unions to Address Employees: the proposal recommended that the Board be instructed to promulgate rules granting unions the ability to come onto company property and receive "equal assured opportunity to address employees prior to an election consistent with the unimpeded operation of the business";[37]
5. Increasing the Penalties for Unfair Labor Practices by employers:[38]
   a. Willful violators would be banned from participating in federal contracts for three years;
   b. Employees unlawfully terminated during union campaigns would receive reinstatement and double back pay;
   c. Employers who refused to bargain first contracts would have to provide the employees with their current wages and benefits multiplied by the average percentage increases in all union contracts signed in the time period in which the contract was delayed;
   d. Preliminary injunctions would be granted against employers who refused to bargain and/or who were accused for illegally firing employees;
   e. Employees who worked at foreign flag ships would be protected by the NLRA;
   f. Guards (*i.e.*, employees who protect employer's property) would be covered by the NLRA;
   g. Employers could no longer permanently replace strikers and, instead, economic strikers would be entitled to their jobs back at the cessation of the strike.

35. *Id.* at 5.
36. *Id.* at 6.
37. *Id.* at 7.
38. *Id.* at 7–8.

B. The Clinton Administration

By the end of the Reagan and H.W. Bush years, organized labor was reeling. Between 1983 and 1993, unions density rate dropped from 20.1% to 15.7%[39] in a time period where employment increased from 108 million[40] to 122.8 million jobs.[41] Several factors contributed to this decline. First, the economy had shifted. While traditional union strongholds (steel, textiles, paper, rubber, and coal) were all in decline, traditional non-union sectors (healthcare, finance, retail, and technology) began rapid expansion. Consequently, union elections declined from 5,116 in 1982[42] to only 3,599 in 1992.[43] At the same time, employer resistance to unionization became more sophisticated and effective. While labor was heartened that Bill Clinton defeated George H.W. Bush, the new president was not seen as being beholden to or strongly aligned with traditional labor. In response, organized labor became divided on how to approach this new Democratic administration, such that labor law reform during the Clinton Administration was as much a battle between factions of organized labor as it was between labor and the business community.

Organized labor was divided between trying to invoke sweeping reform and simply trying to achieve small concessions to grow their ever-decreasing ranks. What seemed like the proverbial low hanging fruit was the bill introduced to overturn the 1938 *Mackay Radio* decision, which held that employers need not bring strikers

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39. *Rate of Union Membership of Employees in the United States from 1983 to 2022*, STATISTICA (2023), https://www.statista.com/statistics/195349/union-membership-rate-of-employees-in-the-us-since-2000/ [https://perma.cc/8CZD-J3U9].

40. Susan E. Shank & Patricia M. Getz, *Employment and Unemployment: Developments in 1985*, MONTHLY LAB. REV., at 13 (Feb. 1986), https://www.bls.gov/opub/mlr/1986/02/art1full.pdf [https://perma.cc/R97J-ZRX6].

41. Valerie A. Personick, *A Second Look at Industry Output and Employment Trends Through 1995*, MONTHLY LAB. REV. (Nov. 1985), https://www.bls.gov/opub/mlr/1985/11/art3full.pdf [https://perma.cc/36CE-NJRZ]; *see also* G. William Domhoff, *The Rise and Fall of Labor Unions in the U.S.* (Feb. 2013), https://whorulesamerica.ucsc.edu/power/history_of_labor_unions.html [https://perma.cc/4KMB-QAGN].

42. NAT'L LAB. RELS. BD., FORTY-EIGHT ANNUAL REPORT OF THE NLRB FOR THE FISCAL YEAR ENDED SEPT. 30, 1983 (1983), https://www.nlrb.gov/sites/default/files/attachments/pages/node-131/nlrb1983.pdf [https://perma.cc/86HQ-VZ49].

43. NAT'L LAB. RELS. BD., FIFTY-SEVENTH ANNUAL REPORT OF THE NLRB FOR THE FISCAL YEAR ENDED SEPT. 30, 1992, at 13 (1992), https://www.nlrb.gov/sites/default/files/attachments/pages/node-131/nlrb1992.pdf [https://perma.cc/9S32-26DC].

back to work if replacements[44] were still employed.[45] The issue in the case was whether the employer violated the law when it refused to recall the employees most active in a union strike.[46] In holding that such actions violated the NLRA, the Supreme Court stated, in dicta, that, while the employer did not have to terminate replacements to make room for strikers, the company could not base recalls on union activity.[47] At the time of the bill, and to this day, that case still controls the striker recall process.[48] Organized labor believed that effectively firing those who exercised their right to strike would strike a chord with the public, clergy, and politicians. Labor was wrong. Despite the fact that the end of permanent strike replacements had little real effect on broader labor policy or practice,[49] and that it seemed to be a simple and fair request, Congress declined to overturn *Mackay Radio*. The remainder of organized labor's wish list stalled out. The NLRB did issue a number of pro-labor decisions and rules affecting elections, 10(j) injunctions, and the ability for supplied labor to join in bargaining units, but, per usual, these cases were overturned by the subsequent Bush Board.[50] In addition, the Clinton Administration passed the WARN Act and FMLA. While these new laws were both supported by organized labor, they protected union and non-union employees alike.[51] At the conclusion of the Clinton Administration, organized labor believed

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44. *Id.*; *see also* Michael H. LeRoy, *The Mackay Radio Doctrine of Permanent Striker Replacements and the Minnesota Picket Line Peace Act: Questions of Preemption*, 77 MINN. L. REV. 843 (1993).

45. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 347 (1938). *See also* Julius G. Getman & Thomas C. Kohler, *The Story of* NLRB v. Mackay Radio & Telegraph Co.: *The High Cost of Solidarity*, in LAB. L. STORIES (L.J. Cooper & C.I. Fisk eds.; New York: Foundation Press, 2005).

46. Mackay Radio, 304 U.S. at 339.

47. *Id.* at 348.

48. Matt Austin, *NLRB GC to Undo 60-Year Law and Strictly Limit Permanent Replacement Workers*, AUSTIN LEGAL (Mar. 1, 2023), https://mattaustinlaborlaw.com/nlrb-gc-to-undo-60-year-law-and-strictly-limit-permanent-replacement-workers/ [https://perma.cc/XRP2-F9KK].

49. *Striker Replacements: The Law, The Myths, The Realities*, FINDLAW (Jan. 12, 2018), https://corporate.findlaw.com/law-library/striker-replacements-the-law-the-myths-the-realities.html [https://perma.cc/SBW3-XWPG]; Howard M. Wexler, Samuel Sverdlov & Kyllan B. Kershaw, *A Costly Lesson for Employers on Replacement Workers*, SEYFARTH SHAW LLP (June 6, 2016), https://www.employerlaborrelations.com/2016/06/06/1391/ [https://perma.cc/B5MP-ZDTY].

50. Robert B. Moberly, *Labor-Management Relations During the Clinton Administration*, 24 HOFSTRA LAB. & EMP. L.J. 32, 54–57 (2006).

51. *Id.*

a Gore presidency would be more fruitful than Clinton's had been.[52] That, of course, never occurred.

C. The Obama Presidency and EFCA

Labor's hopes were revived with the election of Barack Obama. While still a Senator, Obama had co-sponsored the Employee Free Choice Act (EFCA).[53] With his election and the accompanying 60-seat Senate majority, the passing of EFCA seemed not only possible, but likely. However, EFCA represented a sea change in labor law that even some Democrats in Congress could not abide.

EFCA had three main parts. Section 2 required employers to recognize a union if a majority of employees signed authorization cards and eliminated employers' ability to demand an election.[54] Section 3 allowed the union to demand interest arbitration if the parties could not reach a contract in 90 days.[55] Section 4(a) of the bill would have increased the penalties available to the Board after it found employers violated the law during a union campaign. Specifically, the NLRB could seek injunctions against employers who "engaged in any other unfair labor practice"[56] that would have restrained the rights under NLRA Section 7, including, but not limited to, threatening, discharging, or discriminating against an employee who sought representation by a union. In addition, instead of the current penalty of backpay (lost wages less what the individual earned in the time period) for unlawful discharges, EFCA would have allowed for back pay plus liquidated damages in an amount equal to double the original back pay—treble damages.[57] Lastly, in addition to treble damages, the Board could fine employers who willfully or repeatedly violated the law concerning

52. *My Opinion: Gore Is the Workers' Champion – It's a Matter of Record*, COMMC'NS WORKERS OF AM. (Feb. 1, 2000), https://cwa-union.org/news/entry/in_my_opinion_gore_is_the_workers_champion__its_a_matter_of_record [https://perma.cc/Z76M-SVZF].

53. H.R. 1409, 111th Cong. (2009). *See also* Martha M. Hamilton, *Change in Control of the House Probably Dooms Any Chance of Passage*, POLITIFACT (Apr. 20, 2011), https://www.politifact.com/truth-o-meter/promises/obameter/promise/43/sign-the-employee-free-choice-act-making-it-easie/ [https://perma.cc/65HV-DY2Z].

54. H.R. 1409, 111th Cong. § 2 (2009).

55. *Id.* § 3. In theory, the employer could demand interest arbitration too, but, in reality, the employer always prefers status quo to arbitration and it would never happen.

56. *Id.* § 4(a)(1)(A)(iii).

57. *Id.* § 4(b)(1).

employees' rights in regard to organizing and first contract negotiations to organize in an amount of $20,000 per violation.[58]

EFCA overwhelmingly passed the House of Representatives in June 2007 with a vote of 241 to 185.[59] In June, however, it received only 51 votes in the Senate and thus could not overcome the filibuster.[60] The 111th Congress began in 2008 with 60 Democrats in the Senate, and thus there initially was hope that EFCA could survive the filibuster, especially since the President had co-sponsored the bill.[61] However, two Democratic Senators, Ben Nelson (CO) and Arlen Spector (PA), refused to support the bill while two others, Blanche Lincoln (AK) and Tom Carper (DE), stated that they would not vote for EFCA in its current form.[62] And Democratic Senator Diane Feinstein (CA) stated she would prefer alternative legislation. At the same time, the Obama Administration quickly pivoted to focus on economic recovery and the Affordable Care Act, leaving EFCA, like previous attempts to amend labor law, by the wayside.[63]

Notably, the Obama Administration did make real changes to labor law at the agency level. The NLRB engaged in rule making

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58. *Id.* § 4(b)(2)(b).

59. *2007 House Voting Record*, AFGE, https://www.afge.org/take-action/afge-on-capitol-hill/voting-records/2007-house-voting-record/ [https://perma.cc/Z7SN-U32M].

60. Ben Smith, *Specter Deals a Blow to EFCA*, POLITICO (Mar. 24, 2009, 2:46 PM), https://www.politico.com/blogs/ben-smith/2009/03/specter-deals-a-blow-to-efca-017047 [https://perma.cc/G3ZM-2T5F].

61. Gavin S. Appleby et al., *Obama Presidential Election Victory Could Lead to Dramatic Increase in Unionization of Employers in the U.S.*, LITTLER: INSIGHT (Nov. 5, 2008), https://www.littler.com/es/publication-press/publication/obama-presidential-election-victory-could-lead-dramatic-increase [https://perma.cc/2KTJ-FZPH]; *Obama on EFCA*, WORKPLACE PROF BLOG (Jan. 20, 2009), https://lawprofessors.typepad.com/laborprof_blog/2009/01/obama-on-efca.html [https://perma.cc/CA3G-URS7]; Jon Hyman, *Unions Should Not Bet o the EFCA as a Sure Thing*, OHIO EMP. L. BLOG (Jan. 21, 2009), https://www.ohioemployerlawblog.com/2009/01/unions-should-not-bet-on-efca-as-sure.html?m=1 [https://perma.cc/X2XN-BDZJ].

62. *See* Sam Stein, *Democrat Blanche Lincoln to Oppose Employee Free Choice Act, as Is*, HUFFPOST (May 7, 2009), https://www.huffpost.com/entry/key-democrat-blanche-linc_n_183613 [https://perma.cc/GX44-W43N].

63. David Freddoso, *Feinstein on EFCA*, NAT'L REV. (June 3, 2009, 7:11 PM), https://www.nationalreview.com/corner/feinstein-efca-david-freddoso/ [https://perma.cc/MEA3-VARD]; *see also* Mike Elk, *Abandoning EFCA Is Obama's Political Suicide: Lessons from Three Presidents on Workers' Rights*, TRUTHOUT (Jan. 6, 2010), https://truthout.org/articles/abandoning-efca-is-obamas-political-suicide-lessons-from-three-presidents-on-workers-rights/ [https://perma.cc/QX5Q-JT5R].

and issued a number of decisions and rules that organized labor had long sought to have changed.[64]

1. The "Quickie Election" Rules

Despite its broad rulemaking authority and unlike most other major federal agencies, the NLRB historically had avoided administrative rulemaking and relied almost exclusively on case-by-case adjudication to develop national labor policy. The NLRB successfully promulgated only one substantive rule during its first 75 years of existence (in 1989, relating to acute care hospital bargaining units).[65] In 2014, however, the Board implemented a significant set of rule changes related to its election procedures, often referred to as the "quickie" election rules.[66]

The quickie election rules substantially shortened the period between the date that a representation petition is filed with an NLRB regional office and the date the election would be held. Prior to the new rule, the goal was an election in 42 days, but the new rule sought to cut that time by more than half. Prior to the rule, elections could not occur until the Board resolved election issues that the parties did not agree upon through litigation (*e.g.*, the correct bargaining unit, a showing of interest by enough employees, etc.). In order to shorten time period, the rule provided that almost all election-related disputes were to be resolved after the election. In addition, the revised election rules required the production of more information in expedited fashion to unions and employees.[67]

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64. C. Thomas Davis, *Trump NLRB Modifies Obama Board's Union Election Case Regulations*, Ogletree Deakins Insights (Dec. 13, 2019), https://ogletree.com/insights/trump-nlrb-modifies-obama-boards-union-election-case-regulations/ [https://perma.cc/8XPZ-S8LS]; *Back to the Future: It's Time to Prepare for a Rollback of Employer Rights at the NLRB*, Fisher Phillips News-Insights (Nov. 16, 2020), https://www.fisherphillips.com/news-insights/back-to-the-future-it-s-time-to-prepare-for-a-rollback-of-employer-rights-at-the-nlrb.html [https://perma.cc/4BSW-979Q].

65. 29 C.F.R. § 103.30 (1989). *See* Braden Campbell, *Biden NLRB Seen as Likely to Continue Rulemaking Trend*, Law360 (Aug. 13, 2021, 8:01 PM), https://www.morganlewis.com/-/media/files/news/2021/law360_bidennlrbseenaslikelytocontinuerulemakingtrend.pdf [https://perma.cc/2Z84-ZR7H].

66. Representation–Case Procedures, 79 Fed. Reg. 74308 (Dec. 15, 2014) (to be codified at 29 C.F.R. pts. 101–03). *See also* John Raudabaugh, *NLRB Watch: With "Quickie Elections" Rule, NLRB Quick to Sell Out Workers*, Nat'l Right to Work Found.: NLRB Watch (Apr. 2012), https://www.nrtw.org/nlrb-watch-with-quickie-elections-rule-nlrb-quick-to-sell-out-workers/ [https://perma.cc/WS7U-JCYQ].

67. Raudabaugh, *supra* note 66.

2. Caselaw Under Obama (and then reversed under Trump)

While the Obama NLRB was more active than most Boards, NLRB caselaw decisions have fluctuated dramatically with changes in the administration. Board Members have five-year terms, and there is an agreement that the President's party will have a 3-2 majority. Since the terms are five years long, the party in power does not immediately secure a majority; instead, the party must wait until Members from the previous administration end their terms, at which point the President can replace the outgoing Member. Of course, if the first Member with an expired term is from the President's party, there will still no change in the majority until a Member from the opposing party "rolls off" and can be replaced. This political change results in unstable law. Former Board Member Harry Johnson, a Republican, once lamented that as a minority on the Obama Board, all he wrote were dissents. "Don't worry," Wilma Leibman, an Obama NLRB Chair, told Harry—when there is an administration change, your dissents will be adopted by the majority.[68] Wilma was prophetic. As one labor relations professional stated at a Cornell University Roundtable, "Can we just go from the 40 to the 40 instead of the goal line to the goal line?"[69] The Obama Board went all the way to the goal line and the Trump Board ran it all the way back. The following cases illustrate this phenomenon.

a. Work Rules: Lutheran Heritage

Lutheran Heritage Village-Livonia[70] holds that a work rule need not explicitly restrict Section 7 protected activity[71] to be found unlawful. Instead, a work rule will be deemed to be unlawful if: (i) employees would reasonably construe the rule's language to prohibit Section 7 activity; (ii) the rule was promulgated in response to union or other Section 7 activity; or (iii) the rule was actually applied to restrict the exercise of Section 7 activity.[72] Because (i) is so amorphous, the Obama Board used this rule to find many em-

68. Interview with Harry Johnson, former NLRB Board Member, in Big Sky, Mt. (Aug. 10, 2022).

69. 8th Annual Labor Relations Roundtable, presented by Cornell Ctr. for Innovative Hosp. Lab. and Emp. Rels. (CIHLER), in Boca Raton, Fla. (Feb. 28, 2020).

70. Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646 (2004).

71. *See* 29 U.S.C. § 157. Section 7 of the NLRA provides employees with the right to engage in concerted activity for the purposes of improving wages, hours, and terms and conditions of employment. In other words, Section 7 is the portion of the statute that provides employees with the right to join unions and collectively bargain.

72. Lutheran Heritage, 343 N.L.R.B. at 647.

ployer work rules to be unlawful.[73] The Trump Board, however, in Boeing Company[74] (Boeing) articulated a new method for testing the facial validity of work rules, overturning Lutheran Heritage and holding that it would now evaluate two things when testing the facial validity of work rule language: (1) the nature and extent of the rule's potential impact on NLRA rights and (2) an employer's legitimate justification associated with the rule that may shed light on the purpose(s) served by a challenged rule or on the impact of its maintenance on Section 7 conduct.[75]

b. Joint Employer

In *Browning-Ferris*,[76] the Obama Board expressly eliminated the requirement that the employer exercise "direct and immediate control."[77] Instead, it held that "we will evaluate the evidence to determine whether a user employer affects the means or manner of employees' work and terms of employment, either directly or through an intermediary."[78] The Trump Board, in a 2020 rule, then required that an entity possess and exercise substantial and immediate control over one or more essential terms and conditions of employment.[79] The difference between the amorphous "affects the means or manner of employees' work" as opposed to substantial and immediate control is at the heart of the joint employer debate. Franchises that have systems (*e.g.*, fast food processes for preparing food) arguably affect employee work, but they would not be considered to be substantial immediate control. Thus, the franchise model was in jeopardy after *Browning-Ferris*, but no longer an issue after the Trump rule.[80]

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73. Christine Fuqua Gay, *NLRB Flips Rule on Employment Policies*, HOLLAND & KNIGHT LEGAL NEWS (Dec. 20, 2017), https://www.jdsupra.com/legalnews/nlrb-flips-rule-on-employment-policies-38446/ [https://perma.cc/AQQ8-TYWF].

74. The Boeing Co., 365 N.L.R.B. No. 154 (2017).

75. *Id.* at 155.

76. Browning-Ferris Indus. of Cal., 362 N.L.R.B. 1599 (2015).

77. *Id.* at 1605.

78. *Id.* at 1614.

79. 29 C.F.R. § 103.40 (2020); *see also* Adam Primm, *NLRB Finalizes Joint Employer Rule to Take Effect on April 27, 2020*, BENESCH (Feb. 25, 2020), https://www.beneschlaw.com/resources/nlrb-finalizes-joint-employer-rule-to-take-effect-on-april-27-2020.html [https://perma.cc/E6WZ-2J46]. *See also* Margaret Poydock & Heidi Shierholz, *New Trump Administration Joint-Employer Rule Has $1 Billion Price Tag for Workers*, ECON. POL'Y INST.: NEWS FROM EPI (Jan. 13, 2020), https://www.epi.org/press/new-trump-administration-joint-employer-rule-has-1-billion-price-tag-for-workers/ [https://perma.cc/7UAL-QC5E].

80. It is well established fact that franchises take a percentage of the units' gross revenue and may also charge an advertising fee. The franchisee must follow

c. Independent Contractor Standards

In *FedEx Home Delivery*,[81] the Obama Board issued a decision "restating and refining" its analysis in independent contractor cases.[82] When determining whether an individual is a contractor or an employee, the Board said it will consider common law agency factors, such as: (i) the extent of the company's control over the work; (ii) whether the individual is engaged in a distinct occupation or business; (iii) whether the work is typically performed at the direction of the employer or without supervision; (iv) whether the individual supplies the work tools and place of work; and (v) whether the work is part of the employer's regular business.[83] The Board stressed that these factors are non-exclusive, and they should be viewed in totality with regard to the specific facts at hand, with no one factor being determinative.[84]

The Trump Board rejected that test, stating that it failed to properly weigh workers' ability to grow their business. Thus, in *SuperShuttle DFW, Inc.*, the Trump Board held that drivers for an airport shuttle service are not employees, because they invest in their own vans, set their own hours, and are ultimately responsible for their profit or loss.[85]

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established brand standards. The franchisor receives revenue but is not liable for employee or other business-related lawsuits. The business model is not sustainable if the franchisor must create an infrastructure to ensure legal compliance, and the franchisee, not the franchisor, is the employer. *See* FED. TRADE COMM'N, A CONSUMER'S GUIDE TO BUYING A FRANCHISE 8 (Sept. 2020), https://www.ftc.gov/business-guidance/resources/consumers-guide-buying-franchise#business-model [https://perma.cc/25JS-CQVH]. *See also What a Trump Administration Means for Franchising*, QSR MAG. (Feb. 2017), https://www.qsrmagazine.com/outside-insights/what-trump-administration-means-franchising [https://perma.cc/5ZYY-DDSY]; Peter Romeo, *'Joint Employer' Threat to Franchising Is Back*, REST. BUS. ONLINE (Sept. 9, 2020), https://www.restaurantbusinessonline.com/operations/joint-employer-threat-franchising-back [https://perma.cc/9GTY-JT2J].

81. FedEx Home Delivery, 361 N.L.R.B. 610, 610 (2014).

82. *Id.* at 619.

83. *Id.* at 611.

84. *Id.* at 610 (citing NLRB v. United Insurance Co. of America, 390 U.S. 254, 258 (1968)).

85. SuperShuttle DFW, Inc., 367 N.L.R.B. No. 75, 14 (Jan. 2019). "The Board majority in SuperShuttle returned to the traditional test prior to FedEx, agreeing with member Johnson. In rejecting FedEx, the majority noted that it is not necessary to apply the entrepreneurial opportunity principle to each and every common law factor in each and every case. 'Instead, consistent with Board precedent . . . the Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the . . . circumstances of the case make such an evaluation appropriate." Applying this new (old) approach, the Board held that SuperShuttle's driver-franchisees were independent contractors under the traditional test." Harry

d. The Use of Company Email

In *Purple Communications*,[86] the Obama Board overturned the prior Board's precedent in *Register Guard*, which had held that "employees have no statutory right to use the Employer's e-mail system for Section 7 purposes."[87] There, the Board reasoned that an employer may impose nondiscriminatory restrictions on company email systems, because employers have a basic property right to regulate.[88] *Purple Communications* reversed *Register Guard*, but the Trump Board reversed it back in *Caesars Entertainment*.[89] Thus, employees could no longer use the company email systems for Section 7 purposes.[90]

e. Other Obama Board Rulings Overturned by the Trump Board

In *Alan Ritchey, Inc.*,[91] the Board held that when a union has been certified but has not yet entered into a collective bargaining agreement, the employer must give notice and an opportunity to bargain before imposing certain types of serious, discretionary discipline.[92] In *Oberthur*, the Trump Board effectively overturned *Alan Ritchey, Inc.*, when it held that there was no obligation to bargain over discipline if it were based on pre-existing work rules.[93]

The Obama Board held that future wage increases,[94] health and welfare payments,[95] and dues checkoffs needed to continue post contract expiration.[96] In *Valley Hospital Medical Center, Inc.*, the Trump Board overruled *Lincoln Lutheran of Racine* and held that an

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I. Johnson, III, Crystal S. Carey & Christopher A. Parlo, *NLRB Returns to Independent Contractor Fundamentals in* Supershuttle, Morgan Lewis (Jan. 30, 2019), https://www.morganlewis.com/pubs/2019/01/nlrb-returns-to-independent-contractor-fundamentals-in-supershuttle [https://perma.cc/75RB-MA8M] (quoting Super-Shuttle, 367 N.L.R.B. at 9).

86. Purple Commc'ns, Inc., 361 N.L.R.B. 1050 (2014). Jones Day authored two of the *amicus* briefs filed in support of the employer in the case, including one on behalf of the American Hospital Association and another on behalf of the United States Chamber of Commerce.

87. The Guard Publishing Co., 351 N.L.R.B. 1110, 1110 (2007).

88. Register Guard Publishing Co., 351 N.L.R.B. 70 (2007); Purple Commc'ns, Inc., 361 N.L.R.B. at 1069.

89. Caesars Ent., 368 N.L.R.B. No. 143, 144 (2019).

90. *Id.*

91. Alan Ritchey, Inc., 359 N.L.R.B. 396 (2012).

92. *Id.* at 403.

93. *See* Oberthur Techs. of Am. Corp., 368 N.L.R.B. No. 5, 3 (2019).

94. Finley Hosp., 362 N.L.R.B. 915, 926 (2015), *aff'd*, Finley Hosp. v. NLRB, 827 F.3d 720 (8th Cir. 2016).

95. StaffCo of Brooklyn, LLC, 364 N.L.R.B. 1500, 1514 (2016).

96. Lincoln Lutheran of Racine, 362 N.L.R.B. 1655, 1656 (2015).

employer's statutory obligation to check off union dues ends upon expiration of the collective-bargaining agreement containing the checkoff provision.[97]

The Trump Board overruled other Obama Board decisions including those that: held confidentiality polices unlawful,[98] found it unlawful to permanently replace economic strikers in certain circumstances,[99] allowed so-called micro-bargaining units,[100] and protected speech critical of the company.[101]

In *Pier Sixty, LLC*,[102] two days before employees at a catering company were to vote in a representation election, a manager scolded a group of three employees to "stop chitchatting" and attend to guests.[103] One of the employees promptly used his iPhone to post on Facebook, "Bob is such a NASTY MOTHER F[ ]ER don't know how to talk to people!!!!!! F[ ] his mother and his entire f[ ]ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!"[104] The employee was fired for the posting about two weeks later.[105] The Board found the speech protected.[106] The Trump Board overturned *Pier Sixty* in *General Motors LLC*.[107]

D. The Biden Administration

The Biden Administration started with a pro-labor bang. President Biden, as stated above, replaced the General Counsel of the NLRB on inauguration day[108] and gained a majority on the NLRB in July of 2021.[109] Since then, the Biden Administration has worked

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97. Valley Hosp. Med. Ctr., Inc., 368 N.L.R.B. No. 139, 1 (2019).

98. Banner Health Sys., 362 N.L.R.B. 1108 (2015), *overruled by* Apogee Retail LLC, 368 N.L.R.B. No. 144 (2019).

99. Am. Baptist Homes of the W., 364 N.L.R.B. 75 (2016).

100. Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. 2119, 2120 (2011), *overruled by* PCC Structurals, Inc., 365 N.L.R.B. No. 160 (2017).

101. Pier Sixty, LLC, 362 N.L.R.B. 505 (2015), *overruled by* General Motors LLC, 369 N.L.R.B. No. 127 (2020).

102. *Id.* at 506.

103. *Id.* at 505.

104. *Id.*

105. *Id.* at 506.

106. *Id.* at 508.

107. General Motors LLC, 369 N.L.R.B. No. 127 (2020).

108. *President Biden Ousts NLRB General Counsel; Changes NLRB Chairman*, The Nat'l L. Rev., (Jan. 21, 2021), https://www.natlawreview.com/article/president-biden-ousts-nlrb-general-counsel-changes-nlrb-chairman-us [https://perma.cc/UBM4-Y6ZG].

109. Ian Kullgren, *Tsunami of Change Forecast Once Democrats Regain NLRB Majority*, Bloomberg L. (Aug. 26, 2021, 7:44 PM), https://news.bloomberglaw.com/

to overturn the Trump Board in the cases that had overturned the Obama Board (which had overturned the Bush Board. . .).[110]

The Biden Administration also led with the PRO Act[111]—the most comprehensive labor law reform proposal since the Carter Administration.

The PRO Act

As a comprehensive labor law reform bill, the PRO Act:

1. Prohibits state "right to work" laws;
2. Codifies the California "ABC" law, which results in what were once independent contractors being classified as employees;[112]
3. Prohibits employers from requiring employees to attend the so-called captive audience meetings where the employer gives its side of the unionization story;
4. Codifies the so-called "persuader rule" under which employers are required to report payments for labor relations advice and services they receive from attorneys;[113]
5. Mandates that employers provide the union with employees' personal contact information (home address, home phone number, personal cell phone, and personal email address) to union organizers in advance of any election;
6. Removes the prohibition against secondary boycotts. (Thus, for example, if a union was trying to organize a Coca-Cola bottler, it could call for a boycott of the stores that sell Coke products.);
7. Increases the use of bargaining orders (the union is certified despite losing the election). Currently, bargaining orders are issued if the union had a majority support at one

daily-labor-report/tsunami-of-change-forecast-once-democrats-regain-nlrb-majority [https://perma.cc/S7WL-6X7N].

110. Arguably, the NLRB under Biden has been slow to overturn Trump Board decisions. *See* David J. Pryzbylski, *Labor Board Has Yet to Issue Significant Decisions Under Biden – Why?*, BARNES & THORNBURG LLP (Mar. 25, 2022), https://btlaw.com/insights/blogs/labor-relations/2022/labor-board-has-yet-to-issue-significant-decision-under-biden-why [https://perma.cc/BX6X-HUGQ]. General Counsel Jennifer Abruzzo announced her enforcement priorities. *See* Memorandum GC 21-04 from Jennifer A. Abruzzo, Gen. Couns., NLRB, to All Reg'l Directors, Officers-in-Charge, and Resident Officers, NLRB (Aug. 12, 2021).

111. H.R. 842, 117th Cong. (2021).

112. *Id.* § 101 (2021).

113. A federal district court in 2016 blocked the "persuader rule" previously implemented during the Obama presidency. *See* Nat'l Fed'n of Indep. Bus. v. Perez, No. 5:16-cv-00066-C, 2016 U.S. Dist. LEXIS 89694 (N.D. Tex. June 27, 2016).

time (which is almost always the case) and if the employer's conduct was so egregious that a fair election was impossible. If that were not the case, the Board would "re-run" the election. The PRO Act would eliminate the re-run elections and declare the union the employees' collective bargaining representative so long as the union can demonstrate majority support at any time. Since unions rarely, if ever, seek an election without majority support, this would apply to virtually all elections;

8. Takes away employers' standing to "intervene in any representation proceeding under this section."[114] This means employers would be unable to contest issues like voter eligibility, appropriateness of bargaining units, and where and how the ballots will be counted;
9. Codifies Specialty Healthcare, which allows for so-called "micro-units" by changing the standard of "community of interest" to an "overwhelming community of interest";[115]
10. Allows the unions to choose the type (*e.g.*, in person or mail) and location of NLRB elections (instead of the work site, a neutral site)[116] by stating: "[a]t the request of the labor organization, the Board shall direct that the election be conducted through certified mail, electronically, at the work location, or at a location other than one owned or controlled by the employer";[117]
11. Alters the definition of "supervisor" by limiting the classification to those who perform such "supervisory" duties "for a majority of the individual's worktime,"[118] and eliminates two factors that often provide the indicia of supervisory

114. H.R. 842, 117th Cong. § 105(1)(A)(1) (2021).

115. *Id.* Unions seek smaller units when they perceive that they cannot prevail in an election with a larger unit. Employers recognize this fact and thus will seek to expand the smaller unit that the union proposed. The community of interest allowed employees who were not in the exact same job category but shared commonalities (*e.g.*, similar supervisors, break rooms, and schedules) to be included. Employers could no longer use this strategy.

116. *Id.* Employers believe that pro-union employees will almost always vote and that pro-company employees will vote if convenient. Thus, employers believe that an in-person election at the job site will result in the largest turnout and seek such. This section would allow, for example, the union to hold the election off site where employees would have to travel – employers can provide transportation as long as it offered to all employees.

117. *Id.* § 105.

118. *Id.* § 101(c)(1).

status: "assigning" work and having the "responsibility to direct" work of employees;[119]

12. Obligates the parties to commence negotiations no later than 10 days after the union's initial request to bargain, unless the parties agree to a different time period;
13. After the expiration of the 90-day period, either party can demand mediation;
14. If that mediation is not successful, either party may demand interest arbitration—meaning the arbitration will determine wages, hours, and terms and conditions of employment based upon statutory factors like the geographic cost of living, "the employees' ability to sustain themselves, their families[ ], their dependents on the wages and benefits they earn from the employer,"[120] and "the employer's financial status and prospects."[121] The panel's determination of contractual terms "shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties";[122]
15. Removes employees' rights to ratify a collective bargaining agreement;
16. Brings back *Purple Communications* and provides employees the right to "use electronic communication devices and systems (including computers, laptops, tablets, internet access, email, cellular telephones, or other company equipment) of the employer," absent "a compelling business rationale for denying or limiting such use";[123]
17. Increases the damages available to employees for unfair labor practices by (1) changing the backpay calculation to no longer provide an offset for interim earnings (*e.g.*, unemployment or earnings from a new job) and to provide front pay; (2) providing liquidated damages equal to twice the amount of other damages awarded; and (3) providing the right to file a private action and receive attorney's fees;[124]

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119. *Id.* § 101(c)(2)–(3). Employers rely on front line supervisors to take the pulse of the employees' union and to relay the employers' message.

120. H.R. 842, 117th Cong. § 104(3)(C)(iv) (2021).

121. *Id.* § 104(3)(C)(i).

122. *Id.* § 104(3)(C).

123. *Id.* § 104(7)(h)(2)(i).

124. *Id.* § 109(d).

18. Provides for penalties against employers to begin at $50,000 for each failure to comply with a Board order, which could be doubled where the employer committed a similar unfair labor practice in the prior five years and could apply to individual directors and officers of the employer;
19. Restores the *Browning-Ferris* rule in the NLRA, so that a putative joint employer's reserved and indirect control could subject it to joint-employer status and liability.[125] This new standard would nullify the Board's joint employer rule. In practice it would subject franchisors to potential liability for actions taken by their franchisees, and, in conjunction with the expansive new definition of "employee," would likely also define employees of franchisees as employees of the national brand. Employers that currently contract for leased or temporary workers would also be affected and may have to reassess or change their business practices;[126] and
20. Prohibits pre-dispute mandatory arbitration agreements.[127]

The PRO Act is more comprehensive than any of the legislative reform packages previously discussed. Consequently, the PRO Act is simply too pro-union to pass. Even with Democratic House and Senate majorities, and even if the Senate were to eliminate the filibuster, the odds of 50 Democratic Senators passing such sweeping "pro-union" legislation falls somewhere between unlikely and impossible.[128] Most employers have rallied against the extreme ele-

125. Employers fear that joint-employer liability could apply to franchising.

126. Carvell & Sherwyn, *It Is Time for Something New: A 21st Century Joint-Employer Doctrine for 21st Century Franchising*, 5 AM. U. BUS. L. REV. 5 (2017). *See also* Beth Ewen, *NLRB's Browning Ferris Ruling Could Apply in 'Crazy Ways'*, FRANCHISE TIMES (Aug. 28, 2015), https://www.franchisetimes.com/franchise_news/nlrbs-browning-ferris-ruling-could-apply-in-crazy-ways/article_ff3fc13a-9c8b-540a-9983-76df132442ca.html [https://perma.cc/4C29-LPUR]; James Shrimp, *Franchise Businesses Beware: The NLRB in Browning-Ferris Expands the Joint Employer Doctrine*, LINKEDIN (Sept. 1, 2015), https://www.linkedin.com/pulse/franchise-businesses-beware-nlrb-browning-ferris-expands-james-shrimp/ [https://perma.cc/75XG-HNU9].

127. H.R. 842, 117th Cong. § 202(b)(2) (2021).

128. Diana Furchtgott-Roth, *Democrats Can't Pass the PRO Act, So It's Buried in the Reconciliation Bill*, THE HILL (Oct. 9, 2011, 11:01 AM), https://thehill.com/opinion/white-house/575992-dems-cant-pass-the-pro-act-so-its-buried-in-the-reconciliation-bill/ [https://perma.cc/R5ZT-9G9R].

ments of the PRO Act.[129] But many employers today have voiced their concerns with the current state of labor law.[130] Does this open the door to a new version of labor law reform? Let's explore.

III.
EMPLOYERS ARE FRUSTRATED WITH LABOR LAW, TOO

While their complaints are not as visceral as those of organized labor, employers are not uniformly in favor of the labor law status quo. Many employers are frustrated by the instability of NLRB law, which, as illustrated above, fluctuates wildly from one Presidential administration to another.[131] While this instability is difficult for labor, it is arguably more disruptive for employers. For example, employers' business models rely on rules regarding joint-employer and independent-contractor status. Moreover, employers want to develop policies that support their employment culture, such as respectful interactions and social media guidelines; however, many of these policies have been deemed lawful one day and unlawful the next by a flipflopping Board. While unions can more nimbly react to the changes in their organization and administration, employers must continually alter employment policies, causing confusion and frustration in operations.

Employers also complain about the current organizing process because it limits employer speech while allowing unions to do ex-

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129. *Stop The PRO Act*, U.S. Chamber of Com., https://www.uschamber.com/major-initiative/stop-the-pro-act [https://perma.cc/27L5-33TD]; Mark McQueen, *Employers Beware: The Pro Act Is a Dramatic Change to Current Labor Laws*, Lab. & Emp. L. Update (Mar. 11, 2021), https://www.bairdholm.com/blog/employers-beware-the-pro-act-is-a-dramatic-change-to-current-labor-laws/ [https://perma.cc/Z5CR-NQBT]. *See also New Polling Shows How Small Businesses Might React if Lawmakers Pass the PRO Act*, Ams. for Prosperity (May 4, 2021), https://americansforprosperity.org/new-polling-shows-how-small-businesses-might-react-if-lawmakers-pass-the-pro-act/ [https://perma.cc/LK3B-NPJR].

130. Jessica M. Marsh et al., *D.C. Circuit Flips NLRB; Employer's Alleged 'Baseless' Statements of Opinion Lawful*, JacksonLewis: Lab. & Collecting Bargaining (June 14, 2021), https://www.laborandcollectivebargaining.com/2021/06/articles/collective-bargaining/d-c-circuit-flips-nlrb-employers-alleged-baseless-statements-of-opinion-lawful/ [https://perma.cc/WYY7-UYLS]; Ruth Kraft, *NLRB Presents: Flip-Flop Nation*, LinkedIn (May 4, 2023), https://www.linkedin.com/pulse/nlrb-presents-flip-flop-nation-ruth-kraft/ [https://perma.cc/A3TB-RRE3]; George J. Miller, *The NLRB "Flip-Flops" Again*, Wyatt: Emp. L. Rep. (Sept. 17, 2011), https://wyattfirm.com/the-nlrb-flip-flops-again/ [https://perma.cc/VXM3-5M4L].

131. At a Roundtable sponsored by Cornell University in February of 2019, Greg Talbot, VP of Labor Relations for Marriott stated: "I wish we could go from the 40 to 40 instead of goal line to goal line."

actly what the employer cannot. The law prohibits employers during a union campaign from engaging in the following: threats, interrogation, promises, or surveillance. This is often described by the acronym TIPS (or, more appropriately, SPIT).[132] Employers complain that no such prohibition applies to unions. Unions are permitted to mislead employees with explicit or implicit promises, negative or positive coercion to support the union efforts, and unwelcome visits to employees' homes. Unions can even ply employees with alcohol at happy hours and dinners in an effort to get them to sign authorization cards.

Even more frustrating to employers are corporate campaigns, which current labor law allows to proceed relatively unchecked. Workers United, a union formerly associated with UNITE HERE and now a division of the Service Employees International Union (SEIU), has published a well-known corporate campaign handbook. The handbook outlines how unions can pressure employers into acquiescing to union demands.[133] Using corporate campaigns is an integral part of the SEIU's strategy:

> *The SEIU, along with the American Federation of State County and Municipal Employees (AFSCME), targets, among other entities, hospitals and health care conglomerates.*
>
> *With today's corporate campaign strategy against hospitals, the unions launch, through a variety of means, a series of highly publicized attacks on target hospitals that are designed to embarrass the hospitals and to discredit the target hospitals in the minds of the public. The goal of the corporate campaign: to coerce management into agreeing to neutrality, card check, and master agreements, at which point the union will call off the dogs.*[134]

Indeed, this description of the SEIU's strategy is not simply that which is published in a law review; it is almost identical to that which the SEIU writes in its own materials. Multiple iterations of the SEIU's contract campaign manual (the Manual)[135] advise cam-

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132. Celeste Purdie & Jim Rhollans, *Union Communication Guidance: TIPS and FOE*, SHRM: LAB. RELS. (Apr. 26, 2016), https://www.shrm.org/resourcesandtools/hr-topics/labor-relations/pages/tips-foe.aspx [https://perma.cc/S3CG-P94U].

133. *See generally* U.S. CHAMBER OF COM., EMP. POL'Y DIV., HARDBALL: THE TACTICS OF UNION CORP. CAMPAIGNS (2018), https://www.uschamber.com/assets/archived/images/023532_union_corporate_campaign_report_fin.pdf [https://perma.cc/V7B2-82TC].

134. Anthony P. Merza, *Hospital Charity Care and the Corporate Campaign: Labor Union Exploitation of Dysfunctional Tax Exemption Laws*, 11 DEPAUL J. HEALTH CARE L. 203, 235 (2008) (emphasis added).

135. *Id.* at 232–37.

paigners that violating the law is often necessary and that they are to consider whether a potential tactic will threaten to, or actually: (1) reduce productivity; (2) increase costs; (3) affect a private company's relationship with sources of income, such as customers, clients, investors, or leaders; (4) create bad publicity which would, in turn, affect the relationships described above; (5) cause the courts or regulatory agencies to enforce laws or regulations that the employer has failed to obey; (6) directly affect the careers or interests of individual management officials; and (7) embarrass management officials in front of their superiors, associates, families, neighbors, or friends in the community.[136] The Manual actually lays out the positives of extortion, harassment, and trespass.[137]

In response, several employers, including Smithfield Meat Packing,[138] Sodexo,[139] a food service company, and Care One,[140] a senior living, nursing home, and rehabilitation service provider, have filed RICO lawsuits against unions who embarked on corporate campaigns. Each of these suits survived a motion to dismiss and the Care One case is still pending. The corporate campaign against the Terranea Resort included demonstrably false accusations of rampant sexual harassment by management during the height of the Me Too movement, as well as releasing a doctored defamatory video right before the Resort's annual Thanksgiving meeting.[141] The video featured the female Resort president's head superimposed on the body of a porn actress having sex with a male porn actor, with a male employee's head superimposed on that body.[142] Unions defend this type of treachery as necessary to combat the power imbalance between employers and unions and to respond to

136. *See id.*; U.S. Chamber of Com., *supra* note 133. *See also* Second Amended Complaint, Care One Mgmt., LLC v. United Healthcare Workers E., SEIU 1199, No. 2:12-cv-06371 (D. N.J. June 16, 2015), ECF No. 242, at 39–40.

137. Merza, *supra* note 134, at 232–37

138. Smithfield Foods, Inc. v. United Food & Com. Workers Int'l Union, 633 F. Supp. 2d 214 (E.D. Va. 2008).

139. *See* Complaint for Damages and Equitable Relief, Sodexo, Inc. v. Service Emps. Int'l Union, No. 1:11-CV-00276 (E.D. Va. Mar. 17, 2011), ECF No. 1.

140. Care One Mgmt., LLC v. United Healthcare Workers E., 22 F.4th 128 (3d Cir. 2021).

141. Lexy Perez, *Terranea Resort Employees Allege Years of Sexual Harassment*, The Hollywood Rep. (Oct. 18, 2018, 11:53 AM), https://www.hollywoodreporter.com/lifestyle/style/terranea-resort-employees-allege-years-sexual-harassment-1153253/ [https://perma.cc/3JTX-PPLU]. The video has neither been released or reported, but was described, in detail, to one of the authors by several different managers at the property.

142. The President of the resort relayed this story to the authors. She relayed this incident to the author in July of 2018 in a meeting at the Property.

employers' ability to violate the law (*e.g.*, by firing employees during campaigns, or threatening to close locations) during election campaigns. The reality is that both sides are correct—bad employers can manipulate the law to keep unions out or to avoid bargaining contracts, and corporate campaigns can cross the line of what is ethical and acceptable in a civilized society.

Employers' frustrations do not end with the current labor law governing elections. Employers contend that the current and proposed union contracts of today are obsolete, as they are based on an economy and workplace from a century ago.[143] Union contracts traditionally cover issues of wages, benefits, and discipline with an arbitration clause to resolve disputes. They also feature a no-strike clause in exchange for arbitration. Employers generally do not contest these articles in union contracts. Employees using collective action for higher pay and fair treatment is arguably pro-capitalist. It is an example of people using power to progress and succeed. The problem is that union contracts do not end with the wages, benefits, and fair treatment. Instead, union contracts of today are strikingly similar to contracts of the post-WWII period[144] when unions represented 35% of the private workforce and the workplace was completely different than today: (1) information flowed at a snail's pace; (2) the workplace was strife with danger as there was no occupational and health administration; (3) employers openly discriminated as there were no civil rights laws; (4) human resources was non-existent; and (5) most importantly, there was no global competition, as Europe was still recovering from the War and the developing economies had not developed at all. When there was no competition for American manufacturing, employers could pass inefficient production on to consumers. Today, with technology changing the rules of business on a seemingly daily basis, the contract, for example, between the Hotel Association of New York City and the New York Hotel and Motel Trades Counsel with 74 different articles totaling well over 100 pages, is simply not tenable.

Employees need collective action to combat the worst wage gap the United States has experienced since the 1920s.[145] To do this,

143. The author has conducted more than 70 management roundtables over the last 20 years, and this is a common theme.

144. The author just did a study examining more than 10 "first contracts" settled in the last two years. He also negotiated contracts in the 1990's and has studied union contracts.

145. Susan Dynarski, *Fresh Proof That Strong Unions Help Reduce Income Inequality*, N.Y. Times (July 6, 2018), https://www.nytimes.com/2018/07/06/business/labor-unions-income-inequality.html [https://perma.cc/U9D7-F4W5].

unions need a fair election process where they can explain their benefits to employees. However, employers need the opportunity to run their business efficiently. They also need the opportunity to explain to their employees why the company believes that a union is not necessary. Both employers and unions need a system where it is unacceptable to vilify and disparage the other's entire existence. Employees need the opportunity to receive full information and to make an informed choice without pressure, without fear, and with the knowledge that voting yes or no will not endanger their ability to work with their co-workers. We contend that labor law reform is necessary, but not to simply benefit one side. Instead, it is time to blow up a 1935 statue that was drafted as rules of war. The NLRA was created on the assumption that labor and capital were at war and the only goal is peace. To get peace, both sides can use weapons. A new NLRA needs to be created. The new NLRA must accept labor and capital as two essential parts of the economy, encourage both sides to work together to ensure that America can compete in a global economy, and ensure that the workers are compensated in a manner that will allow them an objectively fair standard of living. Below, we set forth the tenets of the new NLRA.

IV.
THE NEW NLRA

The new NLRA should focus on four areas: organizing, penalties for violations, first contracts, and contractual terms. This new NLRA should not be based on the belief that capital and labor are at war, but that capital and labor are both necessary for an economy to succeed and that both have common interests.

A. Union Organizing

The central tenet of the new NLRA is that employees deserve the right to make a fully informed choice as to joining a union or not, that both unions and employers have access to employees to give their pitch, and that employees should not be manipulated or coerced during the election process. With this in mind, we propose the following:

1. Access

Employees should have access to employer computer systems to organize. Since employers own the system, it is impossible to keep the communication confidential. Communicating with employees today is not nearly as difficult as it once was. Employees can

use the company email server to set up private forums for the employees. In addition, employers must provide union organizers with email addresses and cell phone numbers of employees upon request. The first union communication must state that employees may choose to be removed from the text, call, and email list, and the union must comply. Unions can call meetings in non-workplaces and may supply food and drinks, but the food and beverage meetings cannot occur within two weeks of the election. Unions are permitted to make house calls with email or text permission only.

2. Petition for Election

Under current law, the union needs 30% of the employees to sign cards stating that they want a union before an election is set.[146] In reality, few unions petition for an election without a clear majority of cards signed. We propose increasing the requirement to 50%, but the authorization card should *not* state that the employee wishes to be represented. Instead, it should simply state that the employee requests more information and the scheduling of a secret ballot election. This allows the union to sell what employees should want to buy: information and education instead of an immediate, and often ill-informed, demand for recognition.

3. Bargaining Units

The various tests for the appropriateness of bargaining units have caused far too much litigation over the past 85 years. Ambiguity in these tests has given rise to some absurd results. Moreover, many of the factors examined by the NLRB and courts, such as sharing the same break room or bathroom, are antiquated and do not reflect the modern work environment. The test should be simplified: a bargaining unit is a group of employees who share job titles, tasks, and supervision. Also, the modern work environment includes extensive cross-utilization of employees, which should be reflected in the legal standard for appropriate bargaining units. To eliminate the gamesmanship on both sides (the union selecting micro-units to the extent of organizational strength, and the employer attempting to include dubious job titles in the voting unit to dilute the union's support), the NLRB officer should be empowered to render a pre-election decision based on the criteria above.

146. National Labor Relations Act of 1935 § 159(e); 29 U.S.C. §§ 151–69.

4. Other Pre-Election Issues

The parties should meet and confer with each other, and then meet with the NLRB to reach a stipulated election agreement. In general, elections should occur between five and six weeks from petition. In a non-remote workplace, the election should take place at the jobsite and by secret ballot. The overriding goal should be 100% turnout, with no intimidation or coercion from either side. If the parties cannot reach an agreement, the NLRB officer will decide contested matters with these goals in mind.

B. The Campaign Period

In a 2012 article, one of the authors and our good friend, Zev J. Eigen, proposed a system that we did not create but one that we studied extensively.[147] We encourage unions, management, and ultimately Congress to adopt our modified version of the *Principles for Ethical Conduct During Union Representational Campaigns* developed by the Institute for Employee Choice (the Principles).[148] The Institute for Employee Choice is the brain-child of Richard Bensinger and Dick Shubert.[149] Bensinger is a long-time union organizer whose resume includes being the first head of organizing for the AFL-CIO, as well as working with UNITE HERE, the United Auto Workers, and other unions.[150] Shubert is the former CEO of Bethlehem Steel and former Deputy Secretary of Labor under the Nixon and Ford Administrations.[151] Both grew frustrated by the current system and its perverse incentives for both unions and management.[152] Despite coming from opposite sides of a polarized issue, Bensinger and Shubert shared the core beliefs listed above.[153] Their experiences and their beliefs led Bensinger and Shubert to create an institute grounded on two principles: (1) to do what is best for employees and (2) to be governed by ethics—not law.[154]

These principles define ethical conduct for both unions and employers and are based on the premise that employees will make

147. *See* Zev J. Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 HASTINGS L.J. 695 (2012).

148. *Id.* at 734–35.

149. *Id.* at 734.

150. *Id.*

151. *Id.*

152. *Id.*; *see also* Richard Bensinger, Co-Chair, Inst. for Emp. Choice, Lecture at Cornell University (Feb. 13, 2012).

153. Eigen & Sherwyn, *supra* note 147, at 734–35.

154. *Id.* at 735.

the decision about organizing through a contested secret ballot election.

1. Truthfulness. The Employer and the Union should be truthful and accurate in their campaigns. Although the law does not regulate honesty, the parties have the ethical obligation to present accurate information to employees. If either side contends that a statement by the other is not accurate and truthful, an agreed-upon neutral will provide an opinion.
2. No threats, implicit or explicit. Neither the Union nor the Employer should make threats, implicit or explicit, in order to gain votes. A free choice requires that there be no coercion or fear. Under current law, veiled threats are tolerated and there are no meaningful penalties for direct threats. An atmosphere of fear is antithetical to free expression of employee choice.
3. No promises. Just as threats are not acceptable, neither are promises or bribes. Under the NLRA, employers are prohibited, but unions are allowed, to make promises. Under these principles unions are also forbidden to make promises to gain votes.
4. Accuracy and completeness in information. The parties commit to providing truthful and complete information to the employees, and not distorting the truth by using extreme examples to support their message.
5. No corporate campaigns. If employers agree to these principles, then unions should not undertake "corporate campaign" strategies designed to pressure the employer. These principles presume that both parties engage directly with employees to present their respective arguments. Corporate campaigns are only ethical when there is an uneven playing field such that employee free choice is not meaningfully present.
6. Discharges. There should be no discharges, subcontracting of work, or layoffs aimed at discouraging union activity. This is the ultimate coercion, and immediately chills any possible free choice. Employers who terminate a known union supporter or member of the union's organizing committee should submit the termination to immediate arbitration. At the same time, unions and employees should not "use" the rule against discharges to put the employer in a corner by purposely violating work rules and forcing the employer's hand.

7. Equal time, equal access, equal posting rights, and all meetings voluntary. The union must have equal access to the electorate including equal time for all meetings conducted as part of the employer's campaign. A series of debates between the employer and the union is encouraged. The employees should have a right to hear both sides, without any advantage to either side. There should be no one-on-one meetings about the union between supervisors and employees unless union organizers are afforded the same right. The union must be granted equal space to post literature on company property. Once the petition is filed, the union can no longer have mass gatherings with food and alcohol. Small committee meetings with organizers are permissible, but mass meetings for both employers and employees need to be at the workplace with equal time for all.
8. Delays. The employer should agree not to engage in delaying tactics. Parties cannot ethically rely on lengthy legal maneuvers to thwart freedom of choice.
9. No pressure to sign union cards. The union should not pressure employees to sign cards. Peer pressure or coercion to get people to sign union cards is not ethical.
10. Respect. Neither party should demonize its adversary. An atmosphere of mutual respect is necessary for an ethical climate. Unions have an important role in a democracy. Employers also are entitled to be respected. Neither party should engage in smear tactics.
11. Stacking the deck. Neither party should attempt to "stack the deck." Since employers must follow these principles, the union may not plant undercover union-supporters (salts) into the workplace. Neither can employers seek to hire anti-union personnel in order to gain votes.
12. The Golden Rule—do unto others as you would have them do unto you. Both employers and unions have an important role to play in a vibrant democracy, and ethical behavior is an end in itself.[155]

For those viewing union campaigns as a war with union and management using their weapons to win and then hope for peace, the Principles may seem like a pipe dream with rules that would be difficult to enforce. These are legitimate criticisms, to a point. If we see the election as an opportunity to inform voters, these rules

155. *Id.* at 736.

make sense. Of course, like all our proposals, these need to be fleshed out, clarified, and refined. Still, they begin the discussion for what elections should look like under the new NLRA.

C. Enforcement & Penalties

During an election, there is confusion about violation of the rules from both sides. Alleged violations and the appropriate remedies need to be resolved in a quick and fair manner. Neutral arbitrators should be assigned to each election and empowered to resolve disputes within days, not weeks or months.

Violations should be divided into two types: those committed in good faith and those constituting intentional, bad faith violations. Good faith violations will result in a rerun of an election regardless of the side that violates the rule. Employers who act in bad faith will have a bargaining order invoked against them as long as 50% +1 of the employees have signed traditional authorization cards. While request-for-election cards are necessary for filing a petition, authorization cards, which clearly state that the employee wants to be represented by the union, will be used for a bargaining order. Unions that violate the law in bad faith will not be certified regardless of the election results and will be barred from organizing that employer, at the location, for one year.

D. Contracts

When it comes to first contracts, employers have a perverse incentive to negotiate in good enough faith to satisfy the law, but not good enough to get a contract. Indeed, it takes an average of more than 400 days to get a first contract, and nearly 33% of unions fail to get a contract in the first three years.[156] Historically, the pro-union solution has been interest arbitration.[157] However, interest arbitration gives the union an incentive to make very aggressive demands, forcing the employer to polarize its offer so it looks realistic, resulting in a situation where the employer is forced to accept an economically unviable contract. Employers and unions need an incentive to bargain in good faith and to get a contract. This goal

156. Robert Combs, *ANALYSIS: Now It Takes 465 Days to Sign a Union's First Contract*, BLOOMBERG L. (Aug. 2, 2022), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-now-it-takes-465-days-to-sign-a-unions-first-contract [https://perma.cc/4WTX-RKT4].

157. Barry Winograd, *An Introduction to The History of Interest Arbitration in the United States*, LAB. L.J. (2010), https://law.missouri.edu/arbitrationinfo/wp-content/uploads/sites/2/2015/05/An-Introduction-to-The-History-of-Interest-Arbitration-in-the-United-States.pdf [https://perma.cc/6HZ9-NNWC].

could be accomplished by substantially narrowing the field of mandatory subjects of bargaining.

Collective bargaining agreements have not substantially evolved over the past 50 years. In contrast, laws protecting employee rights have proliferated, and employers have become far more progressive. Indeed, some would argue that these trends have directly led to the rapid decline in unionization over the same period of time. Because the law and employers provide a more-than-adequate safety net for employees across a range of topics, the role of the union as an employee advocate should be narrowed by narrowing the field of mandatory subjects at the bargaining table.

1. A Leaner List of Mandatory Subjects of Bargaining

1. Wages: the income gap needs to be addressed, and unions are an effective vehicle;
2. Benefits: the United States is still the only industrialized country without national health insurance. Health insurance, retirement, and paid time off should remain mandatory subjects with the following exceptions:
    a. If requested by the employer, employees should have to share no less than 10% the cost of the health insurance premium;
    b. An employer may refuse to participate in a defined benefit pension plan if the employer offers a 401k, or a similar plan, with at least a 50% match up to 3%.
3. Predictive Scheduling: this is vital to employees who need to manage family and other issues;
4. Health & Safety: the union and the employer need to work together to keep employees safe;
5. Just Cause for Discharge and Discipline: employees should not be disciplined or discharged at will, but the decades of just cause arbitration awards have established a body of law holding that poor performance is seemingly no longer a reason to terminate the employment relationship. Poor performance, with proper notice and time to correct, should constitute just cause;
6. Arbitration to resolve disputes;
7. No strike / No lockout.

2. Permissive Subjects

All other subjects than listed above should remain permissive. Thus, common topics in union negotiations, such as seniority, hours, work rules, enhanced overtime, job classifications, dues

checkoff, etc., can be discussed but need not be. Further, the union would not be permitted to call a strike based on any of the topics on the expanded list of permissive subjects.

3. First Contracts

Limiting the number of mandatory subjects of bargaining as proposed above will result in fewer "no contract" situations. If no contract is reached within six months of negotiating, either party can request mediation. The mediator will attempt to get the parties to agree. If an agreement is not reached through mediation, the parties will submit to interest arbitration. However, the parties will each be fined the amount of one year's worth of bargaining unit dues for failing to reach an agreement. At interest arbitration, if the arbitrator finds bad faith, that party will be subject to punitive damages.

V.
CONCLUSION

The new NLRA needs to recognize that the war between labor and capital must be over. United States capital and labor cannot succeed with a perpetual war. Instead, the parties and the government must recognize that the United States cannot compete with foreign competition completion in a global economy when it is at war with itself. We need to seize the opportunity presented by recent union organizing trends and the highest approval ratings for unions in the last 80 years. Our proposals represent a sea change over the status quo, and they are admittedly imperfect. Nonetheless, we intend this Article to start an important conversation that may lead to a more balanced and streamlined NLRA for a modern world.