Statement of

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

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

The principal purpose of the NLRA is to protect employee free choice. Unfortunately, the NLRA fails to do so in one major respect: it authorizes forced fee arrangements that compel employees to pay union fees upon pain of losing their jobs. Until that problem is solved, unions and their political allies will continue pushing the anti-employee policies I am discussing today. That is why the single most effective way to address the issues we're discussing at this hearing would be to pass the National Right to Work Act (H.R. 1200) and outlaw forced union dues across the country.

Section 7 of the NLRA grants employees a right to join or organize a union and it grants an equal right for employees to *refrain* from these activities.[1] NLRA

[1] 29 U.S.C. § 157 (emphasis added) provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all such activities . . . ." *See also*

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

Some claim the purpose of the NLRA is to promote collective bargaining, but this is misleading. Nothing in the NLRA supports collective bargaining for its own sake or in the absence of employee support for it. Only when a majority of employees make a free choice to designate a union as their representative does the NLRA favor collective bargaining. It is otherwise unlawful under the Act. As the Supreme Court has said, "[t]here could be no clearer abridgment of § 7 of the [NLRA]," than "grant[ing] exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority."[3]

Since the NLRA's passage, the "gold standard" for determining majority support is a secret ballot election. The secret ballot is the bedrock of democracy. And for good reason. A secret ballot protects voters from intimidation, coercion, and serves as the best measure of what individuals' truly support or oppose.

Yet, NLRB General Counsel Abruzzo, the Biden-appointed majority on the NLRB, and even some in this Congress are attempting to undermine employee free choice by ending or limiting the secret ballot. General Counsel Abruzzo is seeking to virtually end secret ballot elections and mandate unreliable, undemocratic union card checks as the primary method of union selection. The Board is also making it harder to oust a minority union by bringing back the disreputed and heavily criticized "blocking charge" policy. This policy will make it harder for individual employees to decertify unwanted unions through secret ballot elections, even if 100% of the employees no longer wish to be represented.

Finally, some in this Congress have introduced the so-called Protecting the Right to Organize Act (PRO Act), which would permit unions to impose forced fee requirements on private sector workers notwithstanding state Right to Work laws.

Baltimore Sun Co. v. NLRB, 257 F.3d 419, 426 (4th Cir. 2001) (the NLRA "guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all.").

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

[3] *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961); *Dura Art Stone, Inc.*, 346 NLRB 149 (2005).

While this effective repeal of state Right to Work laws is the worst feature of H.R. 20, it is not its only negative feature. The PRO Act also gives union officials more power to impose compulsory unionism on individual workers, fulfilling nearly all of Big Labor's wish list.

To justify these radical proposals, many claim it is problematic that the percentage of Americans in the private sector who are represented by a union is at an all-time low. But this reflects the fact that most Americans do not want to submit to the union yoke. A recent Gallup poll of Americans' attitudes towards unions asked nonunion workers whether they would be interested in joining a union and only 11% said they were "extremely interested." Sixty-five percent (65%) said they had little or no interest in joining a union.

It is employee disinterest that has caused a drop in union organizing, not restrictive laws and employer meddling, and certainly not Right to Work laws. Many of the employees I represent find unions divisive, too political, too corrupt, or just ineffective in fulfilling their promises. Union officials should address the issues that have led to their alienation from rank-and-file employees. Instead, union officials are demanding more government power to force employees involuntarily into monopoly union representation and into paying forced union fees.

Many workers do want to escape monopoly union representation. Despite extensive media coverage of a few high profile unionization votes, there were hundreds of times last year when workers voted against union representation or to remove an existing union via a decertification election. When you consider that only a fraction of workplaces have a union that could be removed at any one time due to the Board's various election bars, decertification elections are surprisingly pervasive among the small group of workers able to obtain them.

Rather than ratify the Board and General Counsel's attempts to undermine secret ballot elections and entrench unpopular unions, this Committee should look to other solutions. Those solutions should grant employees more choices—ideally, the choice not to be forced to pay dues to a union. At the very least, the solution should guarantee employees a right vote in a secret ballot election. These are far better solutions than the divisive policies being pursued by the Biden Administration and its politically motivated appointees to the Board.

I. The General Counsel is undermining the secret ballot and attempting to institute mandatory card check.

A. The attempted revival of *Joy Silk*.

General Counsel Abruzzo is seeking to eliminate NLRB-conducted secret ballot elections, conducted under "laboratory conditions,"[4] whenever a union demands recognition after a "card check" campaign.[5] A card check is an abuse-prone strategy used by union organizers to coerce or cajole workers into union ranks. The strategy involves union organizers collecting union authorization cards from employees that will count as "votes" for the union. It is like ballot harvesting, but even worse, because in a card check a union also writes the ballots.

Under current law, if a union collects signatures from 30% of employees in a workplace, it may petition the NLRB for a Board-conducted secret ballot election. If a union collects signatures from more than 50% of employees in a workplace, it may request the employer voluntarily recognize the union without an election. However, an employer may deny the union's recognition request and ask it to prove its support in the crucible of a Board-conducted secret ballot election.

General Counsel Abruzzo wants to upend this neutral process by resurrecting a repudiated case from the late 1940's called *Joy Silk Mills*.[6] Under *Joy Silk*, employers would be required to immediately grant unions recognition, without a secret ballot, unless an employer can prove it possesses "good faith" reasons to believe the union lacked majority support. Under this perverse system an employer could be forced to recognize and bargain even with a union that *lost* a secret ballot election if that employer: (1) rejected a demand for recognition based on authorization cards prior to the election; and (2) did not have sufficient "good faith" reasons for believing the union did not have majority support at the time it rejected recognizing the union. Under *Joy Silk*, unions can obtain power over employees not based on true majority support for the union, but based solely on an employer's state of mind.

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[4] *General Shoe Corp.*, 77 NLRB 124, 127 (1948).
[5] See *Starbucks Corp.*, Case No. 14-CA-290968; *CEMEX Construction Materials Pacific, LLC*, Case No. 28-CA-230115.
[6] 85 NLRB 1263 (1949), *enforced* 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

What General Counsel Abruzzo seeks is a backdoor enactment of card check and a virtual end to secret ballot elections. Congress, however, has wisely rejected every attempt to amend the NLRA to end secret ballot elections and impose card check recognition. Congress famously rejected passing card check in 2009.[7] Similarly, the current Congress has not passed the PRO Act. The failure to achieve legislative support for card check strongly suggests the Board lacks the power to enact it on its own.[8]

The General Counsel's ambitions are also foreclosed by Supreme Court precedent. The Court in *NLRB v. Gissel Packing Co*. emphasized that secret ballot elections are "the most satisfactory–indeed the preferred–method of ascertaining whether a union has majority support" and that authorization cards are "admittedly inferior."[9] In *Linden Lumber Division v. NLRB*, the Court reiterated that secret ballot elections, not dubious card checks, are "favored" under the NLRA.[10] Given these precedents, it is clear the Board has no power to require mandatory recognition based on union cards.

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[7] H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009).

[8] It is "telling when Congress has considered and rejected bills authorizing something akin to the agency's proposed course of action. That too may be a sign that an agency is attempting to work around the legislative process to resolve for itself a question of great political importance." *West Virginia v. EPA*, 142 S. Ct. 2587, 2621 (2022) (Gorsuch, J., concurring) (cleaned up); *see also Railway Labor Executives' Ass'n v. NMB*, 29 F.3d 655, 667 (D.C. Cir. 1994) ("Congress' refusal to enact language . . . is strong evidence that Congress did not intend the Board to have the power to confer that right on its own.").

[9] 395 U.S. 575, 602-03 (1969). The Court in *Gissel* made it clear that authorization cards are unreliable: "We would be closing our eyes to obvious difficulties . . . if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue." *Id.* at 604.

[10] 419 U.S. 301, 307 (1974). In *Linden Lumber*, the Supreme Court reversed the D.C. Circuit, which held that an employer was required to recognize a union based on authorization cards. *See Truck Drivers Union Local 413 v. NLRB*, 487 F.2d 1099-1111-13 (D.C. Cir. 1973), *reversed sub nom. Linden Lumber*, 419 U.S. 301. The Supreme Court held "a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the Board's election procedure." 419 U.S. at 310 (footnote omitted).

B. Authorization cards are unreliable and should not be elevated over secret-ballot elections.

What the General Counsel seeks is also wrong because, as a practical matter, secret-ballot elections are far superior to union card check campaigns. The *Joy Silk* standard ensnared the Board and the federal courts in innumerable disputes over an employer's state of mind and the validity of employee signatures on union-collected authorization cards. Moreover, the *Joy Silk* standard improperly elevated unreliable union authorization cards to equal legal status with secret ballot elections. It makes far more sense for the Board to rely on secret ballot elections to ascertain actual employee wishes than to indulge in open-ended disputes over employer motives and the validity of union authorization cards.

Union collected authorization cards are inherently unreliable gauges of employee free choice because they are conducted without Board oversight or safeguards to prevent union misrepresentations or coercion of card signers. Unions can and often do engage in coercive conduct and misrepresentations during card check campaigns that would not be tolerated in Board-conducted elections. For example, the following activity has been held to contaminate the "laboratory conditions" necessary to employee free choice in Board conducted elections: electioneering at the polling place;[11] prolonged conversations with prospective voters in the polling area by union or employer representatives;[12] electioneering among employees waiting in line to vote;[13] speechmaking by a union or employer to massed groups or captive audiences within twenty-four hours of the election;[14] a union or employer keeping a list of employees who have voted as they entered the polling place (other than the official eligibility list);[15] and a union or employer handling ballots.[16]

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

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

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

These issues are why the Supreme Court[17] and nearly ever federal appellate court has made the common-sense observation that card check campaigns are inferior to secret ballot elections.[18] The Fourth Circuit perhaps put it best: "[i]t would

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

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

be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands. The one is no more reliable than the other."[19]

A high profile case illustrates the inherent unreliability of card checks. On September 11, 2013, the UAW publicly proclaimed that a majority of employees at Volkswagen's Chattanooga plant signed UAW authorization cards and wanted the UAW to represent them.[20] Volkswagen and the UAW signed a "neutrality" agreement that required Volkswagen to petition the NLRB for an election and not oppose the union in any way. Even with this electioneering advantage, Volkswagen employees soundly rejected UAW representation in a secret-ballot election by a vote of 712 to 626, with almost 90% voting. The free choice that employees made in the privacy of a voting booth was thus quite different than what UAW officials claimed the employees had chosen in a card check campaign.[21]

C. The Board's election-bar doctrines make it difficult to remove unions installed through card check recognition.

General Counsel Abruzzo's crusade to revive the discredited *Joy Silk* doctrine threatens to subject employees to years upon years of unwanted union representation and compulsory fee payments. Once an employer recognizes a union to be its employees' exclusive representative, it is very difficult for employees to get a secret ballot election to remove that union due to a plethora of Board-created election bars.

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indication of majority status"). *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460, 469 n.4 (3d Cir. 1981).

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

[20] *Volkswagen Group of America, Inc*, Case No. 10-RM-121704; *see* UAW: Majority of Workers at Chattanooga VW Plant Have Signed Union Cards, Local 3 News, http://www.wrcbtv.com/story/23405004/uaw-majority-at-vw-plant-have-signedunion-cards (last updated Dec. 2, 2021).

[21] To offer another example, at Proletariat, a subsidiary the video game company Blizzard, the CWA recently withdrew an election petition even though it had publicly proclaimed to possess a "supermajority" of employee signatures, presumably because it did not believe it had sufficient support to win the secret ballot election. Stephen Totilo, Game Developers at Blizzard Studio Proletariat Pause Union Effort, Axios, https://www.axios.com/2023/01/25/activision-blizzard-proletariat-cwa-vote (Jan. 25, 2023); *see also* Proletariat, Inc., Case No. 01-RC-309453.

The purpose of these bars to elections is to frustrate employee free choice and entrench unwanted unions.[22]

The Board-created "voluntary recognition bar" prohibits petitions for a secret ballot election for between six months and one year from the first date of bargaining after an employer recognizes a union.[23] During the period between six months and one year, any decertification petitions are subject to a complex five factor test seeking to determine whether a union has been given a reasonable time to bargain.[24]

An employee faced with the unpredictable five-part test has little choice but to successively file multiple election petitions, one after another, in the hope that eventually one might be processed by the NLRB. For example, in *Student Transp. of Am., Inc.*,[25] my former client, Bob Williams, faced a similar test used under the Board's "successor bar" doctrine. He filed four successive decertification petitions over a year-long period until the NLRB Region finally granted an election—which the union lost by an overwhelming vote of 88-13.

And Mr. Williams was one of the lucky ones—employees opposing a card check may never receive an election. In *Americold Logistics, LLC*,[26] my former client Karen Cox was subject to a card check campaign at her workplace. After the

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

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

[24] *Lamons Gasket*, 357 NLRB at 748 (establishing five factor test); *MGM Grand Hotel, Inc.*, 329 NLRB 464 (1999) (voluntary recognition bar can last for over eleven months).

[25] Case No. 06-RD-127208.

[26] 362 NLRB 493.

union was voluntarily recognized she collected a decertification petition and filed three successive requests for a secret ballot election. After her third election petition, the NLRB Region granted her request and held a secret ballot election. Because the Union appealed the Region's decision, the Region impounded the ballots after the vote, pending appeal. On appeal, the Obama NLRB majority overturned the election, finding the union was not granted sufficient time to bargain, despite the fact the union had been recognized for more than one year.[27] The impounded ballots were subsequently destroyed. Because the employer and union had entered into a collective bargaining agreement after the final petition was filed, the employees could not seek another election until the end of the Board's contract bar period.[28]

D. *Joy Silk* bargaining orders conflict with D.C. Circuit precedent.

If the Board reinstitutes *Joy Silk* card checks, the Board will enforce those card checks by issuing "bargaining orders" that compel employers to recognize unions that claim to have majority employee support, but have not won a secret-ballot election. Bargaining orders, once enforced by a federal court, require an employer to bargain with a union for a reasonable period. During this period employees are barred from decertifying the union. A decertification bar "touch[es] at the very heart of employees' rights' by preventing them from dislodg[ing] the union no matter their sentiments about it."[29] Consequently, courts have found bargaining orders are "extreme remed[ies]" that cannot be treated as a "snake oil cure for whatever ails the workplace."[30]

A *Joy Silk* bargaining order should be dead on arrival in the appellate courts. The D.C. Circuit has repeatedly warned the Board that compulsory bargaining orders are an inappropriate remedy in "run-of-the-mill cases."[31] Nothing is more run of the mill than asking a union to prove its majority support in a secret ballot election. Bargaining orders should continue to be reserved, if they are used at all, for extreme and "hallmark" violations, such as "discharge, withholding benefits, and threats to

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[27] *Id.*

[28] *General Cable Corp*., 139 NLRB 1123 (1962) (contract bar prohibits employees from filing a decertification petition for the term of a CBA, or for three years, whichever is shorter).

[29] *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147, 1156 (D.C. Cir. 2017) (cleaned up).

[30] *Avecor, Inc. v. NLRB*, 931 F.2d 924, 938-39 (D.C. Cir. 1991).

[31] *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1461 (D.C. Cir. 1997).

shutdown the company operation."[32] The courts will not treat *Joy Silk* bargaining orders as a substitute for elections.

To protect employees' Section 7 and 9 rights to seek a Board-conducted election, the D.C. Circuit has adopted a test[33] that requires the Board to explicitly balance three considerations before imposing a bargaining order: (1) employees' Section 7 rights; (2) whether other purposes of the NLRA override employees' rights to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the NLRA.[34] *Joy Silk* bargaining orders fail all three parts of this test.

First, the issuance of a bargaining order and a decertification bar based on authorization cards cannot be squared with the principle of employee free choice embedded in Section 7 of the NLRA. When a union is imposed on employees without a secret-ballot election, there is a significant risk the union lacks the free and uncoerced support of an actual majority of employees. The accompanying decertification bar then further nullifies employee free choice by prohibiting employees from obtaining a secret-ballot election for up to a year or more. Worse, if the employer and union agree to a contract during the period when employees are barred from seeking an election, employees could be denied the chance at a secret ballot election for up to four years.[35] A bargaining order would impermissibly elevate (for up to four years) the right to choose a union over the right to reject a union by a secret ballot vote.

Second, the stated purpose of *Joy Silk* bargaining orders cannot override employees' free choice right to vote in a secret ballot election. The General Counsel claims *Joy Silk* bargaining orders are necessary because they serve as a prophylactic against employer unfair labor practices. But, the D.C. Circuit has rejected "an approach which mechanically places deterrence above employee free choice on the scale of values under the Act."[36] The goal of deterrence cannot override employees' choice to seek a secret ballot election.

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[32] *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 650 (D.C. Cir. 2013).
[33] While this test was developed in *Gissel* bargaining order cases, the D.C. Circuit has rejected arguments that its three part test is only limited to *Gissel*. *Lee Lumber*, 117 F.3d at 1461 (noting the D.C. Circuit has required "the Board to make detailed findings" in non-*Gissel* cases).
[34] *Skyline Distributors v. NLRB*, 99 F.3d 403, 410 (D.C. Cir. 1996).
[35] *Lamons Gasket Co.*, 357 NLRB at 745, n.22.
[36] *Peoples Gas System, Inc. v. NLRB,* 629 F.2d 35, 45, n.18 (D.C. Cir. 1980).

Lastly, there is a long settled effective "alternative remedy" for the Board to utilize to determine employee sentiment: an election. A bargaining order is only appropriate when a fair election cannot be held.[37] An employer simply saying "no" to a recognition demand does not continually harm or scar employees to the point an election is never possible. The import of the General Counsel's position is that elections can only occur when the union wants one, and only on the union's terms.

II. The Board is undermining employee free choice by repealing the Election Protection Rule and bringing back the "blocking charge" policy.

The Board has issued proposed rules to bring back its "blocking charge" policy to make it harder for employees to decertify unpopular unions.[38] For years, the Board adhered to a blocking charge policy of refusing to conduct elections while an unfair labor practice charge was pending.[39] This incentivized unions to file unfair labor practice charges against an employer when employees petitioned for an election because such charges would unilaterally halt the election process until the unfair labor practice charge was adjudicated. Even the Obama Board had recognized that "at times, incumbent unions may abuse the policy by filing meritless charges in order to delay decertification elections."[40]

In 2020, the prior Board under Chairman Ring modified the blocking charge policy in a rulemaking called the "Election Protection Rule."[41] The modification of

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[37] *Avecor*, 931 F.2d at 935 ("[a] bargaining order is appropriate only where the unfair practices have so intimidated employees that an election, even with the full complement of traditional NLRB remedies, would not reflect their true sentiments.").

[38] 87 Fed. Reg. 66890 (proposed Nov. 4, 2022).

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

[40] 79 Fed. Reg. at 74419.

[41] The Election Protection Rule consists of three additions to the Board's Regulations. First, it amended 29 C.F.R. §103.20, overturning the prior "blocking charge" policy in order to streamline and prevent undue delay in representation elections. Second, it added 29 C.F.R. § 103.21, requiring unions and employers who seek to utilize the "voluntary recognition bar" to notify employees and give them a forty-five day window period to seek an election should they wish to challenge the

the blocking charge policy was a success. It ensured that unfounded unfair labor practice charges no longer block an election. Based on the rule and additional Board decisions,[42] an election may only be blocked after a Region has found a charge meritorious.

The Biden Board's proposed rulemaking, however, would bring back the Board's prior blocking charge policy.

This blocking policy—favoring union interests in not being decertified over employee interests in free choice—had been "widely criticized" by the courts.[43] The Fifth Circuit found: "the Board is [not] relieved of its duty to consider and act upon an application for decertification for the sole reason that an unproved charge of an unfair practice has been made against the employer. To hold otherwise would put the union in a position where it could effectively thwart the statutory provisions permitting a decertification when a majority is no longer represented."[44]

While the former blocking charge policy required unions to provide "offers of proof" in support of blocking charges, in practice, such offers required little, perhaps no more than the names of the potential witnesses and a summary of each witness's anticipated testimony. In my experience, Regional Directors reflexively blocked elections in all such cases, even when the underlying offers of proof were weak and the charges were frivolous, minor, or false. Below is just a small (but highly representative) sample of Foundation-assisted cases demonstrating how the prior blocking charge policy was employed by unions and Regional Directors to the detriment of employee free choice.

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union's allegation of majority support. Third, it added 29 C.F.R. § 103.22, which requires employers and unions in the construction industry to retain proof of majority support beyond mere contract language if the employer recognizes the union as a Section 9(a) representative without an election.

[42] *See Rieth-Riley Constr. Co., Inc.*, 371 NLRB No. 109 (June 15, 2022).

[43] *NLRB v. Hart Beverage Co.*, 445 F.2d 415, 420 (8th Cir. 1971); *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064, 1069 (5th Cir. 1971); *NLRB v. Midtown Serv. Co.*, 425 F.2d 665, 672 (2d Cir. 1970); *NLRB v. Minute Maid Corp.*, 283 F.2d 705, 710 (5th Cir. 1960); *Pacemaker Corp. v. NLRB*, 260 F.2d 880, 882 (7th Cir. 1958); *TMobile v. NLRB*, 717 Fed. App'x 1, 3-5 (D.C. Cir. 2018) (Sentelle, J., dissenting).

[44] *Minute Maid Corp.*, 283 F.2d at 710.

In *Scott Brothers Dairy/Chino Valley Dairy Products*,[45] Petitioner Chris Hastings filed a decertification petition on August 17, 2010. The union filed blocking charges,[46] claiming the employer was unlawfully involved in the petition. Based on these spurious and unproven charges, the Regional Director blocked the election for several months while he investigated. Eventually, the charges were either dismissed as meritless, or voluntarily withdrawn to avoid a merit dismissal. The election was not held until August 10, 2011, a full year after the decertification petition was filed. The union overwhelmingly lost the election by a vote of 54-20, but managed to retain its exclusive bargaining power and compulsory dues collections for an entire year due to filing these non-meritorious charges.

In *ADT Security Services (IBEW Local 110)*,[47] Petitioner Lance Oelrich filed a decertification petition with signatures he collected in a hotel parking lot following a regularly scheduled employer quarterly meeting. Oelrich collected other signatures on his own time, away from work. IBEW Local 110, however, filed a blocking charge alleging that the decertification petition was circulated during a company-wide mandatory meeting, ostensibly with employer support. The Region immediately blocked the petition. Oelrich and some of his supporters filed a Request for Review, providing affidavits unequivocally stating that the employees collected the petition on their own time and without employer support or encouragement. IBEW eventually withdrew its unfounded charges against ADT, presumably to avoid their dismissal. Yet, despite the fact that its blocking charges were not meritorious, the union's tactics succeeded in preventing an election for several months.[48]

In *Arizona Public Service Co. (USPA, Local 08)*,[49] Petitioner Wayne Evans filed a decertification petition on March 13, 2017. On March 20, 2017, the Regional Director halted the election based on blocking charges the union filed that alleged the petition was collected during work time and under employer supervision. The employees who collected the petition filed a Request for Review and submitted affidavits demonstrating they had collected the signatures during non-work time and at non-work locations, away from management personnel. The union eventually

[45] Case No. 31-RD-001611

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

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

[48] ADT eventually withdrew recognition from the IBEW because Oelrich had collected a decertification petition signed by the majority of his co-workers.

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

withdrew its blocking charges on May 31, 2017, presumably to avoid their dismissal. The Region finally held an election and the union lost. Yet, aided by its spurious blocking charges, the unpopular incumbent union was able to delay its ouster for nearly three months.

In *Apple Bus Co.*,[50] Elizabeth Chase filed her first decertification petition on July 31, 2017. The petition was dismissed due to the Board's "successor bar" doctrine.[51] After the successor bar expired, on March 15, 2018, Chase filed a second decertification petition. Between the filing of the petition on March 15, 2018, and March 28, 2019, Teamsters Local 959 filed nine different blocking charges alleging unlawful employer misconduct. The Region blocked the election despite Chase filing three separate Requests for Review. Local 959 ultimately withdrew seven of its meritless charges. Among the charges withdrawn were baseless allegations that Apple Bus aided Chase in the collection of her petition. The remaining minor allegations were settled with a non-admissions clause, which allowed an election to be scheduled after the notice-posting period. Before an election could take place after settlement, on March 28, 2019, Local 959 filed a new unfair labor practice charge, which was resolved on May 14, 2019, by settlement with non-admissions clause. But before an election could be conducted, between July and August, Local 959 filed an additional five blocking charges. In total, the union filed 15 charges against Apple Bus and withdrew over half of them due to their lack of merit. Chase made five different attempts to appeal requesting the Board to modify its blocking charge policy and to grant the employees an election. Despite majority support for the decertification petition since March 2018, the Region continued to postpone the decertification election based on the notion that some connection might exist between the petition and allegedly unlawful employer conduct. In November 2019, over two years from the filing of Chase's first petition, the union *disclaimed interest* and walked away rather than face the voters it claimed to represent.

As these examples illustrate, under the prior blocking charge policy employees often had their elections blocked by unfounded charges. After the Election Protection Rule, the vast majority of employees receive prompt elections. This policy, not interminable blocks, supports employee free choice.

The Board's proposal to repeal the Election Protection Rule claims that holding an election while an unfair labor practice charge is pending imposes unnecessary costs on the Board and the parties, and might not resolve the question

[50] Case Nos. 19-RD-203378 and 19-RD-2166369.
[51] See 2017 WL 6403493 (Dec. 14, 2017).

of representation.[52] This is incorrect for at least two reasons. First, the Election Protection Rule's vote and impound procedures have not resulted in a wave of elections that have been impounded and the results not counted. I know of only three cases in over two years in which that has occurred.[53] The lack of dismissed election results demonstrates the Board's professed fears of unresolved questions of representation are unfounded. Instead, the Election Protection Rule incentivizes unions and other parties to file unfair labor practice charges only in situations that actually warrant such filings, rather than as a strategic delaying tactic. Consequently, Regional Directors are not bogged down by investigations of charges that unnecessarily delay the election, and can quickly enter into stipulated election agreements so employees can vote on their choice of representative.

Second, the Board cites no data that supports its hypothetical fear that it has held futile elections under the Election Protection Rule. If anything, it is the Board's proposed rule that will impose significantly higher costs on the Board and parties because it incentivizes the filing of strategic and non-meritorious unfair labor practice charges that must be investigated.

Based on now Chairman McFerran's data in her April 2020 dissent,[54] in FY 2016 and 2017 NLRB Regions blocked 45 petitions because of non-meritorious charges.[55] Thus, Regions investigated at least 45 unfair labor practice charges over those two years (an average of 22.5 investigations per year), which incurred significant costs for the parties and the Board. For comparison, based on a survey of information available on the Board's website for decertification petitions filed in 2021, there were only seven decertification petitions that involved unfair labor

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[52] See 87 Fed. Reg. at 66903.

[53] See *Rieth-Riley Construction Co*., 371 NLRB No. 109 (June 15, 2022); *Hood River Distillers, Inc*., No. 19-RD-271944 (Board Decision Nov. 2, 2022); *Spanish Broadcasting Sys*., No. 31-RD-299877.

[54] That data is not entirely accurate because it counts settlements as "meritorious" charges. 87 Fed. Reg. 66894, n.10. Parties can decide to settle charges, regardless of their merit, particularly if the party is concerned about undue delay for an election—a delay which would be exacerbated by litigating the charge. See *Pinnacle Foods Grp., LLC*, 368 NLRB No. 97 (Oct. 21, 2019) (settlement with a nonadmissions clause cannot block an election).

[55]Dissent App'x, NLRB, https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-7583/member-mcferran-dissent-appendix.pdf.

practice allegations.[56] Even assuming some cases are incomplete on the Board's website, this data demonstrates the prior (and proposed) blocking charge policy incentivizes an excess of non-meritorious unfair labor practice filings, and thereby imposes unnecessary costs on the Board and the parties to the litigation.

The bottom line is this: blocking charges protect unpopular union incumbents and often make the valiant efforts of employee-petitioners to collect a showing of interest for naught. Employees deserve better. If an employee has the courage to publicly voice his opposition to his exclusive representative to his coworkers and collect a valid petition, the Board should timely process it and hold an election.

III. Some in Congress are attempting to undermine employee free choice by passing the PRO Act.

In conjunction with the Board and General Counsel, some in this Congress are attempting to undermine employee free choice through passage of H.R. 20, or the PRO Act. The "PRO Act" is only "pro" increased coercive powers for union officials at the expense of rank-and-file workers. It outlaws Right to Work laws, subjecting workers in all 50 states to forced union dues. The bill also gives union officials more power to impose compulsory unionism on individual workers, such as by:

- Empowering the Board to overturn secret ballot votes in which workers reject monopoly union representation and then impose that representation on the very workers who voted against it;

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[56] *ExxonMobil Corp.*, 16-RD-283976 (ballots impounded); *ExxonMobil Chem. Americas*, 15-RD-277466 (Letter from Executive Sec. July 6, 2021) (Regional Director blocked the election while an unfair labor practice was pending; charges withdrawn and processing of petition resumed, same outcome as proposed rule); *Wendt Corp.*, 03-RD-276476, 371 NLRB No. 159 (Sept. 30, 2022) (Regional Director dismissed petition without holding election, same outcome as proposed rule); *Mgmt. & Training Corp.*, 01-RD-275435, Board Order (Aug. 11, 2021) (Board denied union request to block the election, then Member McFerran noted in a concurrence that the union's request would have been denied under the former blocking charge policy); *Cheetah Precision, LLC*, 18-RD-274308 (petition dismissed prior to election, same outcome as proposed rule); *Hood River Distillers, Inc.*, 19-RD-271944; *Neises Constr. Corp.*, 13-RD-271580 (petition dismissed prior to an election, same outcome as proposed rule).

- Granting only unions and their agents the right to act as parties in certification election proceedings, cutting out employers as equal parties;

- Imposing forced unionism on millions of independent contractors, such as ridesharing drivers, via the California Supreme Court's concocted "ABC Test";

- Allowing union officials to collectivize employees across multiple employers at once and making it much harder for independent workers to achieve decertification, by codifying the Obama-era *Browning-Ferris* decision;

- Allowing union officials to engage in secondary coercion and to file harassing civil suits to coerce employers to succumb to union organizing demands; and

- Empowering union officials to impose first contracts with forced fee requirements on employees through binding-interest arbitration.

The PRO Act would also provide for the potential recovery of attorney's fees and punitive damages against employers, but not against unions. These one-sided changes would adversely affect employees. With the Damoclean sword of punitive remedies looming, employers facing organizing campaigns will be more likely to gag themselves to avoid unfair labor practice charges by unions, depriving employees of information opposing unionization, which will impact their own NLRA Section 7 rights.[57]

All of these provisions are designed to magnify union power over employees who may believe they would be better off without a union. Rank-and-file workers want Congress to protect them from both employers and union officials, not to give union officials even more power to control their lives and paychecks.

Steps Congress should take to reel in the rogue General Counsel and NLRB.

Instead of undermining secret ballot elections and increasing union power, Congress can take several steps to enhance employee free choice:

[57] *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008) ("[T]he amendment to § 7 calls attention to the right of employees to refuse to join unions, which implies an underlying right to receive information opposing unionization.").

(1) Congress should pass the National Right to Work Act (H.R. 1200), which would eliminate the need to depend on the NLRB to enforce workers' right not to subsidize union political and other non-bargaining activities;

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

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

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

(5) Amend NLRA Sections 9(b) and 9(c)(5) to authorize the Board to determine only the "most appropriate" bargaining unit.

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