G. Roger King[1]
SENIOR LABOR AND EMPLOYMENT COUNSEL
HR POLICY ASSOCIATION

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

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

Wednesday, June 11, 2025

[1] Mr. King is a graduate of Miami University (1968) and Cornell University Law School (1971). Mr. King is a member of the District of Columbia and Ohio State Bar Associations, and his professional experience includes serving as a legislative staff assistant to Senator Robert Taft Jr. and professional staff counsel to the United States Senate Labor Committee (1971-1974), associate and partner with Bricker & Eckler (1974-1990), partner and of counsel at Jones Day (1990-2014), and Senior Labor & Employment Counsel at HR Policy Association (2014-Present). Mr. King acknowledges the assistance of Greg Hoff, his colleague at the HR Policy Association, in the preparation of his testimony.

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

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

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

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

The National Labor Relations Board Office of General Counsel

- Scope of Board Jurisdiction

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

- Protection of Board Jurisdiction - Preemption

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

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

- Overly Rigid Settlement Procedures

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

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

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

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

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

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

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

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

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

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

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

- Presentation of Cases to the Board for Review

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

- Senate Confirmation

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

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

The Board's Case Law Agenda

- Biden Board reversal of precedent

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

- The *Cemex* Decision

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

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

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

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

- The *Amazon* Decision

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

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

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

…

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

- Establishment of the Trump II Board

[12] Amazon has appealed this decision to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit case law in this area includes a decision in *Honeyfund.Com Inc. v. Florida* No. 22-13135 (Mar. 4, 2024), where the Circuit Court held that a Florida law prohibiting employers from holding mandatory meetings to discuss the virtues of DE&I policies was an unlawful content-based violation of the First Amendment. The Circuit Court may apply the same rationale in the *Amazon* case and find that the Board's decision constituted a content-based violation of the First Amendment.
[13] *Thryv, Inc.*, 373 NLRB No. 22 (Dec. 13, 2022).
[14] *See Thryv, Inc. v. NLRB*, 102 F.4th 727* (May 24th, 2024).

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

The Need for a Labor Court[15]

- Constant reversal of Board precedent

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

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

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

- The Unitary Executive Theory

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

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

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

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

- An Article I Court Solution

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

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

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

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

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

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

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

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

Labor Law Reform

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

- The Hawley Labor Framework

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

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

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

- S.844 – The Faster Labor Contact Act

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

- Bargaining Unit Composition Appeal Statutory Defect

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

- Short Duration Period to Conclude First Contracts

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

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

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

- Government Imposed Arbitration – Interest Arbitration

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

- Elimination of the Impasse Option

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

- Adverse Practical Impact on the Collective Bargaining Process

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

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

- Constitutional Violations

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

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

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

[19] *Cedar Pt. Nursery v. Hassid*, 594 U.S. 139 (2021).
[20] An article by Alex MacDonald provides an excellent discussion of these and other constitutional defects of S.844. *See* ALEX MACDONALD, *"Pro-Worker" but Anti-Constitution: A New Labor Framework Raises Serious Legal Doubts*, THE FEDERALIST SOCIETY (Feb. 20, 2025), https://fedsoc.org/commentary/fedsoc-blog/pro-worker-but-anti-constitution-a-new-labor-framework-raises-serious-legal-doubts
[21] The Association's position with respect to the Hawley Framework is outlined in the attached letter that the Association sent to Congress on February 6, 2025 and is attached as Exhibit E to my testimony.

EXHIBIT A

Roger King
Senior Labor and Employment Counsel
HR Policy Association

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

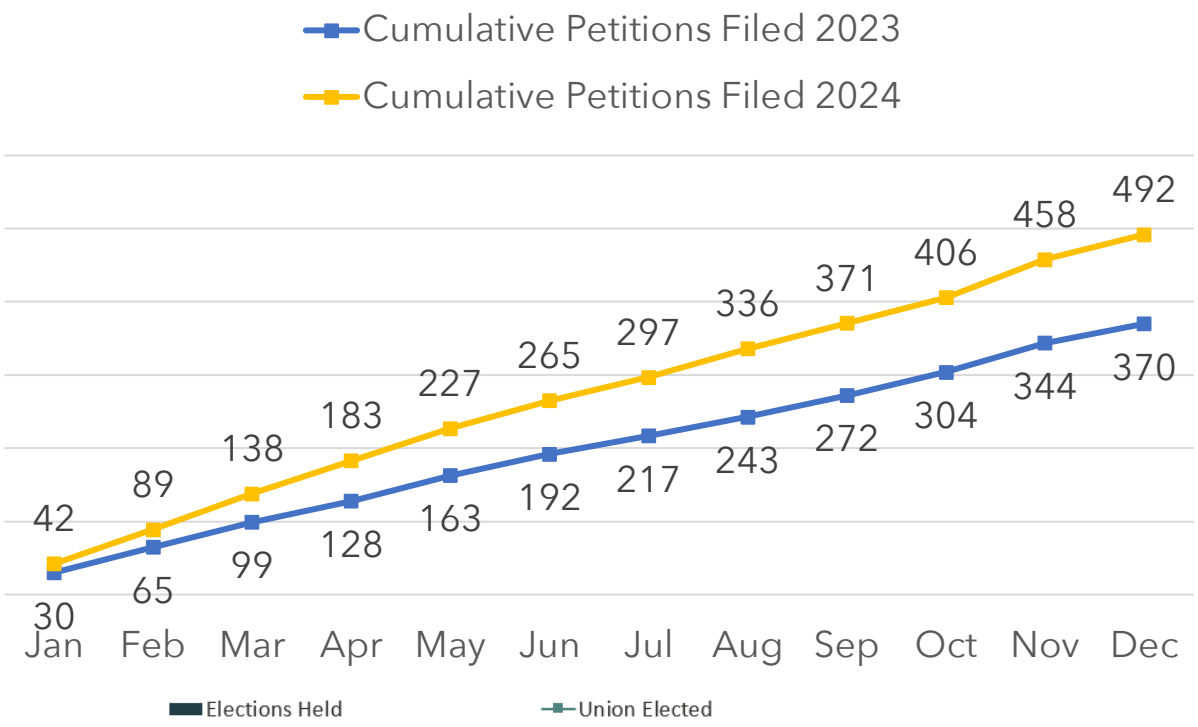
After graduating from Cornell University Law School, he was a Captain and Legal Services Officer in the United States Air Force, on the Staff of United States Senator Robert Taft, Jr. and, subsequently, was appointed as Professional Staff Counsel to the United States Senate Labor Committee.

Roger has testified before various Congressional Committees, is a fellow of the College of Labor and Employment Lawyers and is a past president of the Ohio State Bar Association Labor and Employment Section.

He is a nationally recognized author/speaker on employment matters and has represented employers regarding labor and employment issues both before administrative agencies and in federal and state courts. He has represented the U.S. Chamber of Commerce, the Society for Human Resource Management (SHRM), the HR Policy Association (HRPA), the National Manufactures Association (NAM), the American Hospital Association (AHA), the Coalition for a Democratic Workplace (CDW), and the Retail Industry Leaders Association (RILA) in federal courts regarding numerous labor law issues.

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

EXHIBIT B


Cumulative Petitions Filed 2023
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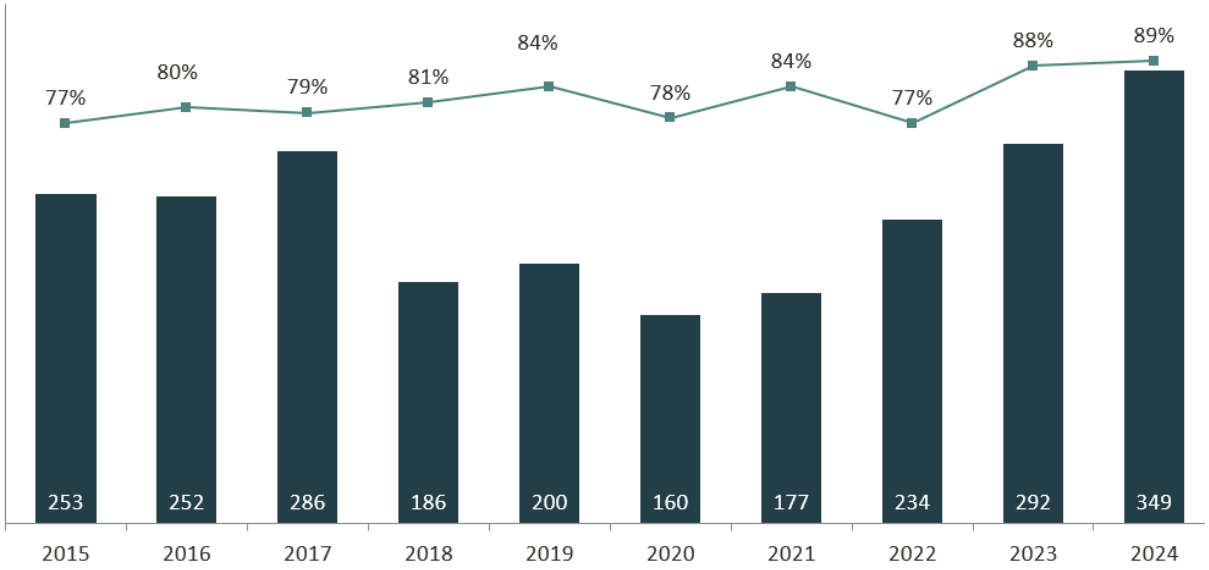
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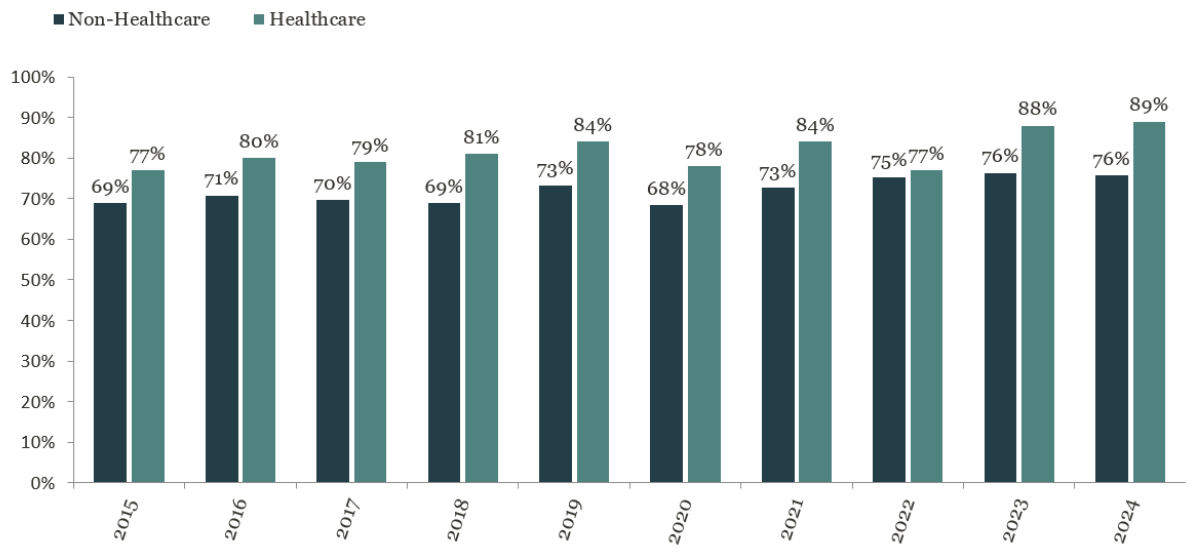
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89%
2015
2016
2017
2018
2019
2020
2021
2022
2023
2024

EXHIBIT C

LIST OF BIDEN BOARD DECISIONS OVERRULING PRECEDENT

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

LIST OF BIDEN BOARD CASES ESTABLISHING NEW PRECEDENT

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

EXHIBIT D

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HRPA HR POLICY ASSOCIATION®

EXHIBIT E

March 6, 2025

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

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

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

Dear Chair Cassidy and Majority Leader Thune:

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Gregory Hoff
Assistant General Counsel,
Director of Labor &
Employment Law and Policy
HR Policy Association

G. Roger King
Senior Labor &
Employment Counsel
HR Policy Association

Chatrane Birbal
Vice President, Public Policy
& Government Relations
HR Policy Association

CC: U.S. Senate

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