G. Roger King[1]

SENIOR LABOR AND EMPLOYMENT

HR POLICY ASSOCIATION

TESTIMONY BEFORE THE U.S. HOUSE SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

HEARING ON "PROTECTING WORKERS AND SMALL BUSINESSES FROM BIDEN'S ATTACK ON WORKER FREE CHOICE AND ECONOMIC GROWTH"

Wednesday, December 13, 2023

[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 Gregory Hoff, Associate Counsel, Director, Labor & Employment Policy HR Policy Association, and Beth Tursell, former Associate to the General Counsel in the Division of Operations-Management at the National Labor Relations Board and is currently working with BT Consulting, LLC, in the preparation of his testimony.

Chair Good, Ranking Member DeSaulnier, and Members of the Subcommittee:

Thank you for the opportunity to again testify before the Subcommittee. I serve as the Senior Labor and Employment Counsel for the HR Policy Association. HR Policy is a public policy advocacy organization that represents the chief human resource officers of nearly 400 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 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. I respectfully request that my written testimony and the exhibits thereto be included as part of the record of the hearing.

Summary of Testimony

I am going to emphasize the following areas in my testimony today:

- Composition of the NLRB

The National Labor Relations Act ("NLRA" or "Act") provides for the National Labor Relations Board ("NLRB" or "Board") to have five members, and, by longstanding practice, three members are nominated and confirmed from the party occupying the White House and the remaining two members from the other political party. **At present, there are three Democrat members and one Republican member serving on the Board, and there is a vacant Republican seat on the Board. This vacant seat has not been filled for almost a year, dating back to December 16, 2022, when former Board Member John Ring's term expired.** By comparison, the recently vacant Democrat seat was filled after only 14 days, when Member Wilcox was reconfirmed for another term.

The continuing existence of a Republican vacancy on the Board significantly restricts the diversity of viewpoints in case adjudication before the Board and maintains a substantial imbalance in the number of staff attorneys – approximately forty to fifty attorneys are on the staffs of Democrat Board members compared to the twelve staff attorneys for the lone Republican member of the Board. **The President and the Senate should expeditiously fill the vacant Republican seat.**

Further, given the continued delays in both Democrat and Republican administrations over the years in filling Board seats, **I would recommend that the Congress consider enacting legislation establishing a procedure beginning in 2025 that when a Board member's term has expired such member would continue to serve until either a new member is confirmed for such seat, or the member is reconfirmed.** This approach is followed, in part, by several

other boards and agencies, including the National Mediation Board, the Equal Employment Opportunity Commission, and the National Transportation and Safety Board.[2]

- Importance of Precedent

Precedent matters – precedent is important – to everyone, except the National Labor Relations Board. **Approximately 4,760 years of precedent has been overturned over the last 15 years by both Democrat and Republican Boards.[3] Indeed, illustrative of this disturbing trend of the ever-changing nature of Board law is the Biden Board's recent overruling of approximately 124 years of precedent just in the last 24 months.[4]** The NLRB has increasingly become a highly politicized agency engaged in pre-determined and result-oriented decision-making. Its "jurisprudence," to the extent that it exists at all, is harmful to all stakeholders and particularly to small and medium-sized business entities that may not have the resources to monitor the continual changes in Board law or to pursue appeals of Board decisions in the courts.

Further, given the result-oriented decision-making process of the Board and its constant changing of precedent, the courts should give little or no deference to its decisions. The Board has become "Exhibit A" as to why the United States Supreme Court should reexamine the *Chevron* deference doctrine and consider reducing the level of deference the courts give to administrative agency decisions.[5]

- The PRO Act (H.R. 842 and S. 567) and the Employee Rights Act (ERA) (H.R. 20 and S. 567)

The PRO Act proposes to make more than 50 significant changes to federal labor laws.[6] These changes would radically impact employee and employer rights embedded in longstanding precedent that have served as the basic foundation of U.S. labor law for decades. In addition to the lack of sound legal support for the PRO Act's proposals, there is not a factual basis for this legislation to be enacted, and Congress should not provide unions an "organizing bailout" to increase their membership.

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[2] *See* 42 U.S.C. Sec. 2000e4; 45 U.S.C. Sec. 154; 49 U.S.C. Sec. 1111.

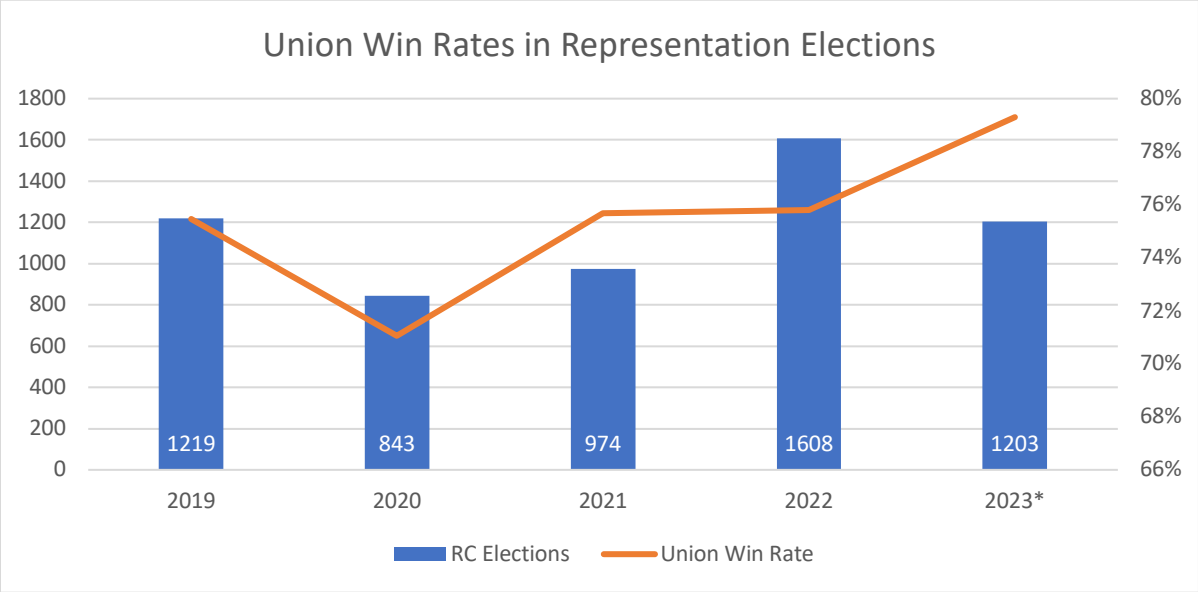
[3] The Obama-era Board overturned over 4,500 years of precedent, according to a report compiled by the Coalition for a Democratic Workplace and Littler Mendelson Workplace Policy Institute. "Was the Obama NLRB the Most Partisan Board in History?" (Dec. 2016) available at: https://myprivateballot.com/wp-content/uploads/2016/12/CDW-NLRB-Precedents-.pdf . The Trump Board and Biden Board have overturned 150 and 100 years (and counting) of precedent respectively. Those figures were calculated by identifying the date of the precedent-changing decision and the date of the decision that was overruled and finding the difference between the two years. Those numbers were added to the number identified by the CDW and Littler Mendelson report for the Obama-era Board to reach the 4,750 approximate figure cited in this testimony.

[4] *Id*.

[5] There are also questions as to whether the Board has usurped its authority as an independent agency and is in violation of Article III jurisdiction of the federal courts. See Alexander T. MacDonald, *The Labor Law Enigma: Article III, Judicial Power, and the National Labor Relations Board*, 24 Fed. Soc'y Rev. 304 (2023).

[6] Alan I. Model et al., *PRO Act Would Upend U.S. Labor Laws for Non-Union and Unionized Employers Alike*, Littler Mendelson P.C. (Feb. 10, 2023), https://www.littler.com/publication-press/publication/pro-act-would-upend-us-labor-laws-non-union-and-unionized-employers.

For example, labor unions are winning, on average, over 70 percent of the representation elections conducted by the NLRB.[7] See the chart below.



Further, one study showed that unions have approximately $32 billion in net assets (as of 2021), an all-time high. However, only a very small percentage of such financial resources is being used on traditional union organizing activity.[8]

Finally, when analyzing the available data, unions are only attempting to organize 0.09 percent of the eligible private sector workforce in the country. The union movement should be held accountable as to why it is not attempting to organize a greater percentage of eligible employees and why it is not more effectively using its considerable financial resources for organizing activities before it comes to Congress with legislative requests such as the PRO Act.

In contrast, **the ERA makes a number of needed and important changes to our labor laws**. **One provision of the ERA that I believe merits particular attention is the Section that would require that a majority of employees in a petitioned for voting/ bargaining unit vote for union representation before the unit is certified by the NLRB.** Under the current approach by the NLRB, only a majority of employees who actually vote in an election can determine whether a union is certified. Accordingly, a very small percentage of a voting/bargaining unit can determine whether a unit is certified by the Board. Such a certification could be in place at an employer's place of business for decades and the certification generally remains in place unless or until the employer goes out of business. **In fact, 94 percent of employees in the country who work in previously certified bargaining units have never had**

[7] *Representation Petitions – RC*, NLRB, https://www.nlrb.gov/reports/nlrb-case-activity-reports/representation-cases/intake/representation-petitions-rc (last visited Oct. 13, 2023).
[8] Chris Bohner, *The Labor Movement's "Business Unionism" Has Transformed into "Finance Unionism"*, Jacobin, (Feb. 2, 2023), https://jacobin.com/2023/02/finance-unionism-union-density-decline-american-labor-movement-mass-organizing

an opportunity to vote on the question of union representation.[9] It is, therefore, extremely important that the process by which bargaining units are determined and the voting process utilized for employees to determine union representation is fair to all stakeholders.

- Attacks on Independent Contractor Status, the Franchisor/Franchisee Model, and Job Growth

Virtually every business entity in the country utilizes third-party arrangements to accomplish their business goals. These types of business arrangements come in many different forms and various terms are used to describe such arrangements. These arrangements are vital to the operation of our economy and provide work to hundreds of thousands of individuals. "Independent worker" business models have been the incubator for substantial innovation in the workplace and embody the ever-increasing desire and demand of employees for more flexible work arrangements and independence in their jobs.

Unfortunately, the "independent worker" concept has been under attack by the current Administration and organized labor due to the fact that such individuals are not classified as "employees" and, therefore, are not eligible for union organizing. **It is fair to ask why unions are so concerned about independent contractor classification issues when they are not attempting, as noted above, to organize a significant number of statutory employees.** The Biden Administration is engaged in an all-out assault on independent contractor status by proposing to adopt an ever-increasing number of regulatory hurdles for employers to meet to have individuals classified as independent contractors. Such "regulatory overreach" will increase the cost of doing business for virtually every type of employer in the country and will create a particularly heavy regulatory burden for small and independent business entities.

Finally, the numerous initiatives by this Administration to broaden the definition of joint employer status are equally troubling.[10] This approach to expand the definition of joint employer status is not only being carried out by the federal government but also on the state level. For example, California recently implemented a comprehensive set of controls over the fast-food industry based primarily on its definition of joint employer status and a perceived need to have governmental control over this part of our economy. These initiatives are not based on sound public policy. The franchisor/franchisee business model, as pointed out in Mr. Haller's testimony, is a model that should be encouraged as it has created hundreds of thousands of jobs in this country and also provided the opportunity for individuals to better their economic status through ownership of franchisee operations. This business model should be encouraged and upheld – it should not be subject to attack.

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[9] James Sherk, *Unelected Representatives: 94 Percent of Union Members Never Voted for a Union*, The Heritage Foundation (Aug. 30, 2023), https://www.heritage.org/jobs-and-labor/report/unelected-representatives-94-percent-union-members-never-voted-union#:~:text=Unelected%20Representatives%3A%2094%20percent%20of,a%20Union%20%7C%20The%20Heritage%20Foundation.

[10] Notice of Proposed Rulemaking: Standard for Determining Joint Employer Status, 87 Fed. Reg. 54641 (Sept. 7, 2022).

HR Policy Association urges Congress to be particularly watchful for adverse actions narrowing the definition of independent contractor status and also the assaults on the franchisor/franchisee business model. The Association urges the Committee to take appropriate oversight action where necessary, including the potential to enact appropriation riders to restrict overreach by Executive agencies.

The Board's Joint Employer Rule and the Congressional Review Act Challenge

On October 26th, the Board issued its final joint employer rule. Such rule was promulgated under the theory that the common law requires the Board to include in the definition of joint employer status reserved or indirect control as a factor to consider in determining whether joint employer status has been established. The Biden Board rule expressly overruled the Trump Board's joint employer rule. The Trump Board rule required actual control by an entity over the terms and conditions of employees of a third party before joint employer status could be established.

The joint employer doctrine is one of the most expansive and consequential parts of our nation's jurisprudence. This doctrine potentially imposes liability on non-actors and parties that have little, or no control or knowledge of actions undertaken by others. Accordingly, any joint employer rule should be carefully drafted to recognize the potential reach and associated liability that can be imposed upon parties found to be joint employers.

Regulations should provide stakeholders with a clear understanding of their legal obligations and promote efficient compliance. The Board itself ostensibly recognizes this goal, stating that the purpose of its proposed rule is to establish a "definite, readily available standard that will assist employers and labor organizations in complying with the Act," while also "promoting collective bargaining and stabilizing labor relations."[11]

Unfortunately, the Board's final rule fails to achieve these purposes, and in practice would in fact work to undermine the very same. The proposed rule is overly broad and leaves key terms undefined and unlimited, with the result being a standard that is seemingly deliberately vague regarding where joint employer liability begins and ends. Rather than assisting stakeholders in compliance and promoting collective bargaining, the proposed rule instead leaves employers and other parties left to speculate on whether they are a joint employer with collective bargaining obligations.

Further, the final rule disincentivizes employers from setting standards for parties with which they do business through corporate social responsibility programs, job training programs, safety and health initiatives, and other mechanisms. Such efforts benefit workers and society by establishing minimum standards throughout a company's business and supply chain for worker safety, benefits, sustainability, and many other areas that promote a better economy for all. The final rule's overly expansive approach would attach joint employer liability to employers for setting such standards and therefore disincentivize employers from doing so, to the detriment of American workers.

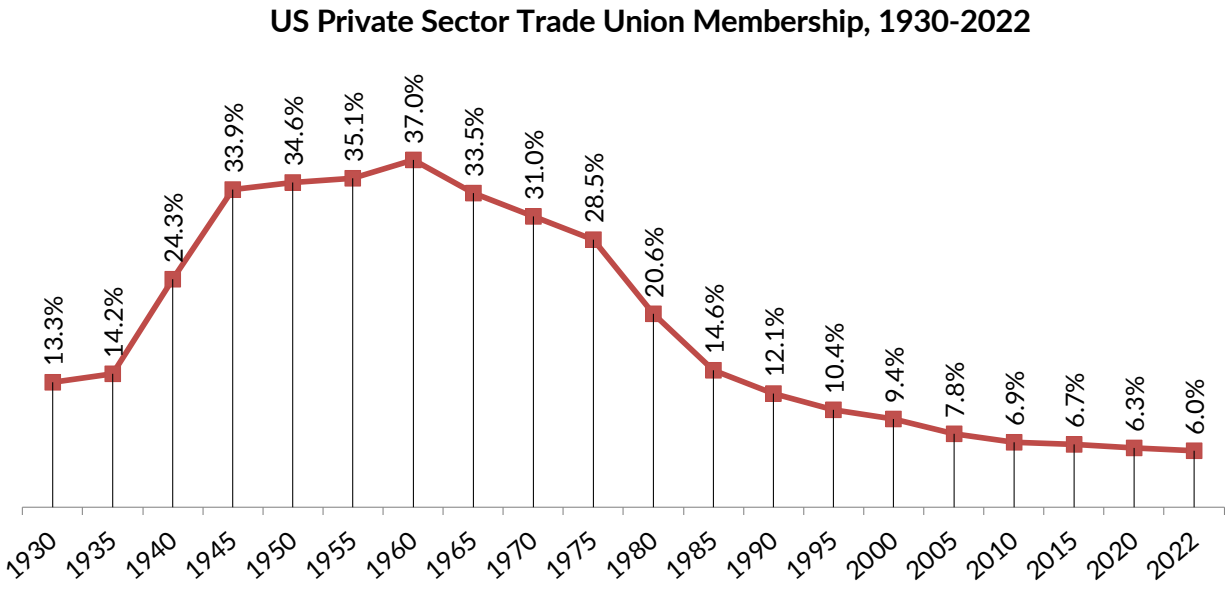
[11] *Id.*

The Association urges Congress to pass the pending Congressional Review Act proposal to invalidate the Board's joint employer rule. A copy of the Association's statement position to the Board regarding the proposed rule is attached.

I now would like to return to certain of the above issues in greater detail.

Union Density in the Country, the PRO Act, the ERA, and Other Related Legislative Proposals[12]

Supporters of the PRO Act maintain that its passage is critical for the survival of the union movement. Such supporters point to the fact that union density has continued to decline, and Congressional action to amend the NLRA is necessary. As the chart below indicates, union density in the country has been declining for a considerable time and is only currently in the six percent range for private sector employees. The PRO Act, however, is not the correct solution to address this issue.



First, as shown earlier, the PRO Act fails to recognize unions already win, on average, over 70 percent of NLRB-conducted elections.[13]

Further, unions are not pursuing organizing initiatives for a substantial number of employees in the country. **For example, in 2022, there were approximately 118,019,417 potential private sector employees available for organizing under the NLRA. The number of employees petitioned for in that same year, according to NLRB statistics, was 111,000. Accordingly, unions only sought to increase their membership by 0.09 percent – a concept which I label**

[12] The HR Policy Association also supports and urges Congress to pass Modern Workers Empowerment Act and the Save Local Business Act.
[13] NLRB, supra note 4.

the "union organizing index" (UOI). Data for 2022 shows a further decline in the UOI – see Exhibit 1.

Additionally, unions have decided not to spend any significant amount of their ever-increasing budget surpluses on organizing activity. A recent study by Chris Bohner entitled, "The Labor Movement's 'Business Unionism' has Transformed into 'Finance Unionism,'" convincingly makes this point with the following findings:

- Labor's net assets (assets minus debt) rose from $11 billion in 2000 to $32 billion in 2021, a 191% increase. Over the same period, union membership declined by 2.3 million members, a 14% decline.
- Mr. Bohner asked the rhetorical question, "How is this possible to grow union assets while losing millions of members?" He explained that membership dues are typically tied to a percentage of wages, so as union wages rise, membership revenue also increases, notwithstanding the overall decline in union membership.
- According to Mr. Bohner, labor also generates significant investment and rental income from its growing balance sheet, including investments in the stock market (and even private equity and hedge funds). Correspondingly, he concludes that labor spends less money on activities like organizing and strikes than it brings in from dues and investment revenue, running annual budget surpluses that boost assets.
- The Bohner article also contains considerable research support to establish that organized labor's $32 billion net assets are undervalued because unions are only required to report the *cost* of their investments rather than the *market value*.
- Finally, during the height of union organizing in the 1930's, the American Federation of Labor (AFL) spent 50% of its budget on organizing, and the Congress for Industrial Organizations (CIO) spent an even greater amount of their resources for organizing (the AFL and CIO merged in 1955).

Another article also written by Chris Bohner[14] makes additional points that I believe should be considered by the Committee:

- Mr. Bohner noted that according to the Census Bureau, organized labor had 23,440 fewer employees in 2020 compared to 2010, a 19% decline in the workforce. However, management positions within organized labor at various levels have increased by 28%, with more than 10,000 employees earning a gross salary of $125,000, putting labor leaders and senior management in the top 10th percentile of income in the U.S.
- If the financial trends of the last decade continue (all things being equal), according to Mr. Bohner, organized labor's assets could more than double by 2030, rising from $35.8 billion to $75.6 billion.
- Mr. Bohner concludes his article by stating, "The trends are clear: over the last decade, organized labor has nearly doubled its net assets, run large surpluses, reduced its

[14] Chris Bohner, *Labor's Fortress of Finance*, Radish Research (2022).

workforce while increasing pay at the top, and has spent less than the rate of inflation – all while union membership has declined."

Mr. Bohner's conclusions are borne out by recent data reported by the AFL-CIO and by various unions, as illustrated in the following charts:

AFL-CIO Disbursements by Category
(Information from the AFL-CIO's Form LM-2 FY 2023)

Representational Activities: $20,791,506
Political Activities and Lobbying: $33,635,427
Contributions, Gifts and Grants: $1,427,875
General Overhead: $17,425,362
Union Administration: $8,723,977
Benefits: $19,638,072
Per Capita Tax: $2,552,141
Purchase of Investments and Fixed Assets: $622,586
To Affiliates of Funds Collected on Their Behalf: $40,036,132
Direct Taxes: $4,661,008
Subtotal: $149,743,489

The percentage of the AFL-CIO's total disbursements dedicated to "representational activities" is 13.8 percent.

The percentage of money expended by various unions for organizing purposes is also low as outlined in the following chart.

Union	Overall Disbursements	Representational Activities	% on Representational Activities
Service Employees (SEIU)	383,893,568	129,050,929	33.6
Office and Professional Employees (OPEIU)	15,269,337	3,882,354	25.4
Int'l Association of Machinists and Aerospace Workers (IAM)	198,054,117	50,368,598	25.4
Teamsters (IBT)	195,571,281	47,517,778	24.2
Communication Workers (CWA)	280,388,308	50,122,482	17.8
Steelworkers (USW)	526,988,573	90,268,135	17.1
Sheet Metal Workers (SMART)	151,130,529	20,636,238	13.6
Operating Engineers (IUOE)	103,846,396	11,570,486	11.1
United Food and Commercial Workers (UFCW)	300,971,964	44,410,921	14.7

Union	Overall Disbursements	Representational Activities	% on Representational Activities
AFL-CIO	149,740,755	20,791,506	13.8
Laborers (LIUNA)	112,944,735	13,120,435	11.6
Electrical Workers (IBEW)	1,453,385,410	72,285,663	4.9
Carpenters (CJA)	215,687,910	2,959,622	1.3

Accordingly, the inescapable conclusion is that unions continue to increase their assets but refuse to spend a significant portion of these assets on organizing activity. Given this fact, and for the other reasons outlined above, it is not necessary or appropriate for Congress to provide an "organizing bailout" to the union movement.[15]

In contrast, however, the Employee Rights Act should be passed by Congress. One particular provision of the ERA that I would command to the attention of this Committee is the Section that would require a majority of employees in a voting/bargaining unit to vote in support of union representation before a unit could be certified by the Board. Given the longevity of bargaining units in the workplace, there should be a much higher standard of certification for such units. Stated alternatively, unlike elections for members of Congress for two-year terms, the certification process of a bargaining unit in a workplace setting can last for decades without a reoccurring vote and such units continue to exist, in most instances, for the life of an employer's business at a certified unit location.

The NLRB Should Function with a Full Complement of Members

As noted above, the current composition of the Board is three Democrat members and one Republican member. There has been a vacant Republican member position on the Board for almost a year. This composition of the Board results in the three Democrat members having a staff of approximately 50 attorneys, which includes a majority of the attorneys from former Republican Member John Ring's staff, as his staff was assigned to the Democrat Chair of the Board, Lauren McFerran. By contrast, the lone Republican Member of the Board, Marvin Kaplan, has only 12 staff attorneys. This 4-1 imbalance in Board resources provides the Democrat majority members with significant legal research and decision-writing advantages and places undue pressure on the lone Republican member, especially in the research and writing of potential dissents.

[15] There are a number of other reasons why union density in this country is not increasing, including: (1) global competition; (2) the ever-increasing number of local, state, and federal enactment of employee protection laws; (3) innovations in technology and productivity procedures in the workplace; and (4) employee desire for greater flexibility in their jobs, including the increasing interest in "gig" economy and independent contractor positions.

The current composition of the Board also does not permit three-member Board panels – the general approach utilized by the Board to decide cases – from ever having two Republican members on a three-member panel.

Finally, such an imbalance supports the continuing concerns that the Board is simply implementing the policy agenda of this Administration to increase union membership and is engaged in arbitrary and capricious decision-making.

The Importance of Precedent

Precedent matters to everyone except the NLRB. As the Supreme Court has stated:

> Overruling precedent is never a small matter…Application of that doctrine…is the 'preferred course because it promotes the even handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' It also reduces incentives for challenging settled precedents, saving parties and the courts the expense of endless relitigation.[16] (Internal case citations omitted).

Precedent is important – it establishes predictability and stability in the law. Precedent is especially important in the labor and employment area for employers, employees, and unions. Indeed, one of the important goals of Congress in enacting the NLRA was to reduce and minimize industrial strife and conflict and stabilize labor relations, principles that are consistently recognized by the Supreme Court.[17]

The Board has forgotten the importance of precedent. For example, in the last 24 months, the Biden Board has overruled approximately 124 years of precedent.[18] In some of these precedent-reversing decisions, the Biden Board has overruled important labor policies that have been in place for decades during both Democrat and Republican Boards. Examples of the recent significant changes in labor law by such precedent-reversals by the Biden Board include the following:

- *Valley Hospital Medical Center II*, 371 NLRB No. 160 (Sept. 30, 2022) – dues checkoff – 3 years

[16] *Kimble v. Marvel Entertainment, LLC* 576 U.S. 446, 455-6 (2015).
[17] *See, e.g. Auciello Iron Works v. NLRB*, 517 U.S. 781, 785 (1996) ("The object of the National Labor Relations Act is industrial peace and stability"); *Carey v. Westinghouse Electric Corp*., 375 U.S. 261, 271 (1964) ("The Act, as has been repeatedly stated, is primarily designed to promote industrial peace and stability..."); *Colgate-Palmolive-Peet Co. v. NLRB*, 388 U.S. 355, 362 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act").
[18] The Biden Board has also reversed a number of important Board election regulations and has reinstated the previously withdrawn "blocking charge" procedure, which, unfortunately, either places a hold for substantial periods of time or negates altogether election petitions for decertification. 29 C.F.R. Sec. 102, 103 (2023).

- *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 – 17 years
- *Tesla*, 371 NLRB No. 131 (Aug. 29, 2022) – dress codes/uniform policies – 3 years[19]
- *Lion Elastomers*, 372 NLRB No. 83 (May 1, 2023) – offensive language/conduct in the workplace – 3 years
- *Thryv, Inc*., 372 NLRB No. 22 (Dec. 13, 2022) – remedies – new policy
- *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) and Wendt Corporation, 372 NLRB No. 135 (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
- *West Shore Home, LLC,* 372 NLRB No. 143 (Sept. 16, 2023) – employer handbook rules had to be analyzed due to the Board's new *Stericycle* standard – 6 years

Rejection of precedent by the Biden Board, however, is not a recent development. During the Obama Board era, the Board "overturned a total of 4,105 collective years of precedent in 91 cases and rejected an additional 454 collective years of case law by adopting comprehensive new election rules. Overall, the Obama Board upended 4,559 years of established law."[20]

[19] The United States Court of Appeals for the Fifth Circuit issued a decision on November 14, 2023 rejecting the Board's reasoning and refused the Board's Order. *Tesla, Inc. v. NLRB*, 5th Cir., No. 22-60493 (2023).
[20] "Was the Obama Board the Most Partisan Board in History?" Coalition for a Democratic Workplace and Littler's Workplace Policy Institute, December 6, 2016.

The Trump Board that followed then reversed a number of rulings by the Obama Board, including particularly reinstating longstanding precedent that had been overruled by the Obama Board. The Trump Board's reversals include:

- *Baylor Univ. Med. Ctr.*, 369 NLRB No. 43 (Mar. 16, 2020) – severance agreements – new policy
- *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017) – bargaining unit size determinations – 6 years
- *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017) – workplace rules/policies – 13 years
- *WalMart, Inc.*, 368 NLRB No. 146 (Dec. 16, 2019) – uniform policies/dress codes – new policy
- *Kroger*, 368 NLRB No. 64 (Sept. 6, 2019) – access to employer property – 10 years
- *UPMC*, 368 NLRB No. 2 (Jun. 24, 2019 - access to employer property – 38 years
- *Bexar County Performing Arts Center I*, 368 NLRB No. 46 (Aug. 23, 2019) – access to employer property – 8 years
- *Apogee Retail LLC*, 368 NLRB No. 144 (Dec. 16, 2019) – confidentiality provisions – 4 years
- *Alstate Maintenance, LLC*, 367 NLRB No. 68 (Jan. 11, 2019) – protected concerted activity – 8 years
- *Caesars Entertainment*, 368 NLRB No. 143 (Dec. 16, 2019) – use of employer email for Section 7 activity – 5 years
- *General Motors*, 369 NLRB No. 127 (Jul 21, 2020) – offensive language/conduct in the workplace – 41 years
- *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (Jan. 25, 2019) – independent contractor status – 5 years
- *MV Transportation*, 368 NLRB No. 66 (Sept. 10, 2019) – unilateral actions – 12 years
- *Valley Hospital Med. Ctr. I*, 368 NLRB No. 139 (Dec. 16, 2019) – dues checkoff – 4 years
- *Raytheon*, 365 NLRB No. 161 (Dec. 15, 2017) – unilateral changes – 1 year

The constantly changing nature of the law under the NLRA is especially harmful to employers as it interferes with the formation of policies and procedures and also interferes with the ability of employers to create stable relationships with their employees. These constant policy changes are

particularly harmful to small and medium-sized business entities as they may not have the resources to monitor or challenge constantly changing Board law in the courts.[21]

NLRB Decisions of Particular Concern

- Secret ballot elections

The apparent underlying philosophy and foundation of much of the current Board's decision-making can be summarized along the lines that the sole goal of the NLRA is to encourage collective bargaining. That rationale, while correct in part, has the proverbial "cart before the horse." Before collective bargaining is to occur, employees must be provided with a fair and appropriate decision-making process to determine whether they desire to be represented by a union. At the heart of this important process is the need to preserve secret ballot elections and employer free speech rights.

- The *Cemex* case[22]

Employee selection of union representation has historically been decided by secret ballot elections conducted by the NLRB. The future of the secret ballot election process, however, is at great risk given the Biden Board's recent decision in the *Cemex* case.[23] In this precedent-setting decision, the Board established a "road map" for the secret ballot election process to be eliminated based on a union's declaration that it has majority support of any grouping of employees that it deems appropriate for collective bargaining. Upon such a declaration by a union and a request for recognition to an employer, the employer has essentially three choices: (1) recognize the union and engage in collective bargaining; (2) file, within two weeks of the recognition request, an RM petition with the Board requesting an election; or (3) take no action and risk being found guilty by the Board of an unfair labor practice and, thereafter be required to bargain. There are numerous legal and practical problems with this approach.

First, employers (and employees) are not permitted, as a general rule, to litigate or challenge a union's claim that it has support from a majority of employees in the proposed unit. The claims that the union makes in this area are based primarily on employees signing union authorization

[21] The Committee should reexamine the provisions of the Equal Access to Justice Act (5 U.S.C. Sec. 504, 28 U.S.C. Sec. 2412) and amend the statute to provide small and medium-sized business entities greater opportunity to recover their attorneys' fees and court costs from the NLRB and other government agencies where there was no reasonable basis in law or fact for the agency action in question to proceed.

[22] *Cemex Construction Materials Pacific LLC*, 372 NLRB No. 130. The Board, in this extremely important precedent-changing case, refused to permit stakeholders to file amicus briefs to discuss the precedent-setting issues decided in this case.

[23] It is also concerning that the Board is continuing to overly use mail ballot election procedures that reduce employee voter turnout compared to the Board's traditional on-site/manual procedures. While mail ballot procedures had a certain degree of utility during the pandemic, there is no compelling reason to continue to utilize them at the rate that various Board regional offices are using them, particularly given the technical and procedural problems associated with mail ballot procedures. An additional problem with these procedures is the reliance on the U.S. Postal Service to complete the delivery of mail ballots. There are also other questions as to whether NLRB voting procedures are being properly conducted. For example, in a recent report, the Board's Inspector General found that the Board's regional personnel in a Starbucks election engaged in gross misconduct. This report was filed on July 8, 2023, with the Board. It can be found at Report of Investigation – OIG-I-569.

cards and the union filing such cards with a regional office of the Board. Authorization cards can be obtained manually or electronically and filed with a Board regional office either in written or electronic form. [24] These cards can be obtained through pressure tactics that call into question their validity as a source of employee sentiment and choice.[25] In any event, authorization cards can be obtained without an opportunity for all viewpoints to be heard regarding issues with respect to union representation. Further, this procedure can also permit employers and unions to reach "sweetheart" arrangements for union recognition and thereby bypass the desires of the previously unrepresented employees. It is virtually impossible for employers and employees to challenge the union's assertion of majority support as the proof of this support is not publicly filed unless or until a case has reached a bargaining order litigation stage – there is little or no transparency in this process.

Second, even if an employer questions a union's assertion of majority status and, pursuant to the requirements of *Cemex*, files an RM petition requesting an election, such an election is not guaranteed.[26] Such a petition can be blocked and dismissed altogether if the employer has been found by the Board to have committed an unfair labor practice. Given the Board's recent decision in *Stericycle,*[27] it is increasingly probable that an employer can be found guilty of an unfair labor practice, even on minor matters such as the inclusion of commonly used civility in the workplace requirements in employer handbooks and other policies.[28] In such situations, the Board could issue a bargaining order, and employees and employers would lose their opportunity for a secret ballot election.

Third, even if the RM petition results in an election being held and the employees reject union representation, the election results could nevertheless be invalidated if the Board finds that an employer committed an unfair labor practice, which, as noted above, is increasingly probable. The Board then could issue a bargaining order invalidating the secret ballot election.

Fourth, the Board, pursuant to its *Cemex* decision, could also require an employer to bargain with the union, if the employer makes no response to the union recognition request, by the union declaring majority support filing a Section 8(a)(5) Refusal to Bargain charge. Accordingly, there

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[24] In situations where union recognition cards are filed electronically, employers (and employees) should make certain, to the extent possible, that the Board's regional office has completely complied with the requirements for acceptance of electronic cards. *See* NLRB Office of General Counsel Memorandum GC 15-08 (October 26, 2015).
[25] *See. e.g,* Brishen Rogers, *Passion and Reason in Labor Law*, 47 Harv. C.R.-C.L. L. Rev. 313, 333 (2012) ("The federal courts have long viewed card signatures with suspicion...and often described them as 'notoriously unreliable'").
[26] This approach is also particularly troubling from a practical viewpoint as an employer may not be aware of this option altogether. Even if an employer is cognizant of this option, it may miss the two-week filing window. This option or requirement to hopefully pursue the opportunity for a secret ballot election may be difficult for small and medium-sized entities to comply with as they may not be aware of the *Cemex* decision requirements.
[27] *Stericycle, Inc*., 372 NLRB No. 113.
[28] Indeed, in his dissent to the majority's decision in *Cemex*, Member Kaplan articulated this very concern, and noted that the Board has in fact previously found maintenance of certain workplace rules to be sufficient for overturning the results of an election. *Cemex Construction Materials, LLC*, 372 NLRB No. 130 (Aug. 25, 2023) (Member Kaplan dissenting); *See, e.g.*, *Iris U.S.A. Inc*., 336 NLRB 1013 (2001).

are a number of avenues under *Cemex* in which the secret ballot election process is lost altogether for employees and employers.

Finally, as noted above, the loss of the opportunity for secret ballot elections as a result of the *Cemex* case is especially concerning as once a bargaining unit has been established, it remains in place in virtually every instance for decades unless and until the location where the union is certified goes out of business.

- Bargaining Unit Definitions

The initial determination by the Board as to which employees are to be included in a voting/bargaining unit and who is eligible to vote in a secret ballot election has also been substantially changed by the Board's recent decision in *American Steel*.[29] Pursuant to this decision, in virtually every instance, the decision as to which employees are to be included in the voting/bargaining unit is determined solely by the scope of the union's petition. Employers and employees, as a practical and legal matter, have virtually no input in this decision-making process. This type of "regulatory gerrymandering" not only provides an unfair advantage to unions in NLRB secret ballot election situations but also can foreclose employees from having any say whatsoever as to who they are grouped with for collective bargaining purposes. Such determinations can also have an adverse job impact on employees in one unit who may want to be promoted to or switched to a job in another union-represented bargaining unit as they would be at a substantial disadvantage because they would have no seniority in the other bargaining unit.

- Micro/Fractured Bargaining Units

The Board's decision in *American Steel* also can permit the establishment of small or "micro" units and "fractured" units. This haphazard approach to unit determination can lead to increased instability in the workplace as a strike by one small or fractured unit could cause the entire operations of an employer to be immobilized because the employees in the non-striking units could refuse to cross picket lines established by the striking employee unit.

The Attack on Employer Free Speech and Interference with Employer Management of the Workplace

- "Captive Audience" Communications

The highly respected jurist Benjamin Nathan Cardozo once stated, "Freedom of expression is the matrix, the indispensable condition, of nearly every other form of freedom."[30] The General Counsel of the Board should note this sage advice from Jurist Cardozo. Unfortunately, however, the General Counsel has proposed to prohibit employers, in many situations, from conducting meetings with their employees or even hallway conversations if any part of the subject matter of such meetings or conversations concerns terms and conditions of work. The General Counsel argues that if there is any "mandatory" aspect to such encounters between employers and

[29] *American Steel Construction, Inc*., 372 NLRB No. 23 (2022).
[30] *Palko v. Connecticut*, 302 U.S. 319 (1937).

employees, the NLRA has been violated. Section 8(c) of the NLRA, however, provides free speech rights to employers, provided no threat or coercive statements are made by employers in communications with their employees. While the Board has not yet issued a decision on this controversial proposal by its General Counsel, its current record of issuing decisions that are universally adverse to employer rights signals that it may agree with its General Counsel. The fundamental right of free speech in the workplace is critical and must be preserved. Before employees make the important decision of whether they desire to be represented by a union, they should have the opportunity to hear all points of view over a reasonable timeframe and before an election is conducted.

The Biden Board, as noted above, has also issued a number of recent decisions restricting or prohibiting altogether employer speech and employer entrepreneurial rights in the workplace, including the following:

- *McLaren Macomb*[31]

For example, in its *McLaren Macomb* decision, the Board overruled four previous decisions and found that the employers had no right under the NLRA to even proffer to former employees severance agreements that contained facially neutral confidentiality and non-disparagement clauses. In its decision in *McLaren*, it held that such agreements have a "tendency" to interfere with employees' Section 7 rights, and "reasonable employees" should never be bound by such agreements. This decision clearly restricts employers from dealing with their employees regarding severance arrangements. This case is currently being appealed by the employer and is pending in the United States Court of Appeals for the Sixth Circuit.

- *Tesla*[32]

Here, the Board determined that the employer had to establish that "special circumstances" were present in the workplace before it could establish a dress code/uniform policy. The Board then proceeded to find that no such special circumstances were present at the Tesla plant in question and invalidated the employer's dress code/uniform policy. This approach unfairly and unlawfully shifts the burden of proof on employers to initially establish the terms and conditions of work and otherwise control of the workplace. There should be no special burdens on the employer, and both unions and employers should start at the same place with respect to the balancing test that is required to adjudicate employer rights and employee Section 7 rights. Fortunately, however, the United States Court of Appeals for the Fifth Circuit issued a decision on November 14, 2023 agreeing with Tesla's position and refused to enforce the Board's Order.

- *Tecnocap LLC and Wendt*[33]

[31] *McLaren Macomb*, 372 NLRB No. 58 (2023).
[32] *Tesla*, 371 NLRB No. 131 (Aug. 29, 2022).
[33] *Tecnocap LLC*, 372 NLRB No. 136 (2023) and *Wendt*, 372 NLRB No. 135 (2023).

In two important precedent reversal decisions in *Tecnocap* and in Wendt, the Board held that after a union is certified, an employer could not utilize its past practices to make operational decisions for unit employees without first bargaining with the union if any part of such past practice included discretionary decision-making. This type of bargaining requirement can significantly delay important operational decision-making by employers and increase an employer's cost of doing business.

- *Lion Elastomers LLC*[34]

The Biden Board again reversed precedent and reinstated a standard that will make it much more difficult for an employer to maintain a workplace free from profanity or other abusive and/or harassing behavior. This decision also unfortunately places employers in the difficult situation of attempting to concurrently comply with both Title VII of the Civil Rights Act, which requires employers to have a hostile-free work environment, and the Board's expanded definition of employee Section 7 rights.

- *Stericycle Inc.*[35]

Finally, in yet another precedent reversing decision, the Board, in the *Stericycle case,* reinstated a standard to review employer handbooks and other employer policies to determine if employee Section 7 rights could conceivably have been violated. This new standard not only lessens the burden of proof that the General Counsel must establish to find a violation with the wording of employer policies but also reinstates the so-called "reasonable employee" standard, where the Board examines all employer policies from its perceived view of how a reasonable employee would read and interpret such policies. The Board majority states if a "reasonable employee" could conceivably find a violation of Section 7, the employer will be found guilty of an unfair labor practice. This unfortunate new Board precedent will impact all employers subject to the Act's jurisdiction whether they are in a union setting or not and will no doubt cause considerable confusion and additional litigation. The impact of this decision is again particularly harmful to small and medium-sized business entities given their general lack of in-house resources to monitor ever-changing Board law.

The pattern is clear. The Board, in the above cases, is clearly going to great lengths to restrict the rights of employers to communicate with their employees and manage the workplace unless or until a union first approves of such communication. This Committee, in its oversight role of the Board, should closely monitor the all-out attack on employer free speech and basic employer entrepreneurial rights, and take appropriate actions to safeguard these rights.

The Right of Employees to Refrain from Union Activity

While it is true that employees have rights under the NLRA to organize unions, engage in collective bargaining, and participate in group concerted activities, the statute also contains an

[34] *Lion Elastomers LLC*, 372 NLRB No. 83 (2023).
[35] *Stericycle*, 372 NLRB No.131 (2023).

important provision in Section 7 of the NLRA that permits employees to refrain from such activities. Section 7 of the Act states:

> 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 or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).[36] (emphasis added).

The Board, in the above-related decisions and other recent decisions, completely reads out of the statute the rights of employees to decide that they have no interest or desire to participate in union-related activities that other "reasonable employees" might engage in. Such "reasonable employee" doctrine approach by the Biden Board is extremely subjective and subject to considerable manipulation. If the Board is going to continue to utilize this "reasonable employee" approach to decide cases, it should require that its General Counsel prove, by direct evidence, that employee Section 7 rights have been violated, or that the policy in question is on its face a violation of employee Section 7 rights (e.g., a policy that states employees are not permitted to engage in union activity on non-work time in non-work areas). Further, even if the Board attempts to utilize any hypothetical "reasonable employee" standard, by the terms of the Act, it must also conversely consider evidence that "reasonable employees" may wish to refrain from engaging or exercising their Section 7 options.

The Need for Labor Law Reform

The scope of this hearing does not permit a review and discussion of labor law reform proposals, including the need to reexamine the current structure of the National Labor Relations Board. I have attached to my testimony a series of recommendations that I made earlier this year at a labor law conference sponsored by the New York University School of Law. One proposal from this paper I would particularly command to the Committee's attention is to have NLRB Members continue to serve on the Board until they have either been reconfirmed or their replacement has been confirmed by the Senate. This approach would provide for greater continuity in Board decision-making and ensure a full composition of the five-member Board in situations where member terms have expired. This approach is embedded, at least in part, in the statutory structure of other agencies, including the National Mediation Board, National Transportation Safety Board, and the Equal Employment Opportunity Commission.[37]

Members of the Committee, this concludes my testimony. Again, thank you for the opportunity to testify today. I would be pleased to answer any questions that Committee members may have.

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[36] 29 U.S.C. § 157

[37] *See* 42 U.S.C. Sec. 2000e4; 45 U.S.C. Sec. 154; 49 U.S.C. Sec. 1111.

UNION ORGANIZING INDEX (UIO)

The Union Organizing Index is the percentage of employees petitioned for (RC) at the National Labor Relations Board in relation to the average number of private sector employees eligible for union organizing.

The methodology used is as follows:

1. The average number of private sector employees in FY 2022 eligible for union organizing is calculated using:
    a. The average number of non-agricultural private sector employees in FY 2022.
    b. Less the average number of private sector employees in FY 2022 in the following categories:
        i. Air transportation
        ii. Rail transportation
        iii. Management of companies and enterprises
    c. Less the total number of employees whose jobs are covered by a union or an employee association in CY 2022[1].

2. The total number of employees petitioned for at the National Labor Relations Board in FY 2022 is calculated by extracting the number of employees listed on RC petitions filed in FY 2022.

3. The Union Organizing Factor is calculated by dividing the total number of employees petitioned for in FY 2022 (#2) by the average number of private sector employees in FY 2022 eligible for union organizing (#1).

UNION ORGANIZING INDEX			
	Average Number of Private Sector Employees (1)*	# of Employees Petitioned For (2)*	Union Organizing Index
FY 2022	118,059,417	111,000	0.09%

[1] The total number of represented employees is reported only on a calendar year basis.

HRPA HR POLICY ASSOCIATION®

EXHIBIT 2

Labor Law Reform for the Long Haul

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

75th Annual NYU Conference on Labor Employment Law
May 23-24, 2023
NYU School of Law

Overview

Due to the narrow margins that the Democrat and Republican parties have in Congress, and particularly the continued presence of the filibuster rule in the Senate, there are no prospects in the near term for a "labor law reform" legislative package to be approved in the 118th Congress. There are, however, three pending legislative proposals that should be noted.

- Richard Trumka PRO Act
  - Legislation has 48 Democrat and Independent sponsors and co-sponsors in the Senate and 212 sponsors and co-sponsors in the House (210 Democrats and 2 Republicans)
  - PRO Act (H.R. 842 and S. 567) key provisions:
    - Card check elections
    - First contract arbitration
    - Legalization of secondary boycotts
    - Removal of procedural rights for employers in election proceedings
    - Ban on right to work laws
    - Codification of the ABC test for independent contractor status
    - Personal liability for corporate reps
    - Ban on class action restrictions in arbitration agreements
    - Ban on captive audience meetings
  - The PRO Act passed the House on March 9, 2021, 225-206 (5 Republicans supporting)
- A response to the PRO Act is the Employee Rights Act (H.R. 20 and S. 567)(Sponsored by Republicans in the Senate and the House)
  - Among other provisions, this proposal includes the following:
    - National Labor Relations Board ("NLRB" or "Board") secret ballot election requirement
      - Prohibits card check elections and requires a majority vote of all employees who are part of the voting unit before a union can be certified
    - Union fund expenditures

        - Requires unions to receive opt-in permission from each member to use their union dues for purposes other than collective bargaining
    - Employee privacy
        - Gives employees the right to opt-out of having their personal information shared with the Board and a union petitioning for an election
    - Employee benefits and advancement
        - Amends the National Labor Relations Act ("NLRA" or "Act") to allow unionized employers to give merit-based compensation increases to their employees even if these increases are not part of a collective bargaining agreement
    - Benefits for gig economy workers
        - Permits employers to offer benefits such as retirement and health benefits without forcing them into an employer-employee relationship
- A detailed NLRB reform legislative proposal was introduced this year by Senator Marsha Blackburn (R-TN), along with Bill Cassidy, M.D. (R-LA)(Ranking Republican Member of the Senate HELP Committee), Tim Scott (R-SC), and Mike Braun (R-IN) - (S. 991) and includes the following provisions:
    - Increase the number of Board members from 5 to 6
    - Require an even split of Republicans and Democrats sitting on the Board
    - Impose new term appointments for Board members that ensure one Republican and one Democrat seat each expire every two years
    - Require four members to approve all decisions
    - Grants parties the right to seek review of the General Counsel's complaints in federal district court
    - Provides for new discovery rights for involved parties, allowing access to memoranda and other documents relevant to the complaint within 10 days
    - Allows parties to appeal to a federal Court of Appeals if the Board fails to reach a decision in a pending case within one year

"Long Haul Proposals"

As noted, none of the above legislative proposals will be enacted in this session of Congress. Accordingly, any discussion of labor law reform will have to be considered from a long-range perspective. The following are areas that perhaps should be considered in "long haul" discussions:

- NLRA preemption
    - Amend the Act to incorporate U.S. Supreme Court rulings regarding the preemption of the NLRA over the state and local laws and ordinances

    - Broaden federal preemption to prohibit state and local statutes and ordinances from interfering with collective bargaining between private sector employers[1]
- Board Composition/term/procedures
    - Amend the Act to codify that three members of the Board are of the same political party as the president and the two other positions on the Board are individuals from the opposite political party
        - This amendment to the Act would codify long-standing past practice as to the composition of the Board
    - Utilize the EEOC statute for term continuation of Board members
        - Under this approach Board members would continue to serve after their term has expired until such time as a replacement is nominated and confirmed by the Senate or the session of Congress in which their term expired has ended
        - This approach would reduce the number of vacant days of Board positions
    - After 3/1/2028 require four affirmative votes to overturn precedent
        - This phase-in approach will permit the Board to be composed of nominees of the next president to respond to recent precedent-setting rulings of the Biden Board
    - Codify recusal procedures
    - Permit any party to a case that has been pending decision by the Board for more than 365 calendar days to remove the case to an appropriate U.S. Court of Appeals
- Office of General Counsel
    - Provide statutory removal protection after 3/1/2025, similar to statutory language presently in the Act protecting the summary removal of Board members by a president
        - This phase-in approach will permit the next president to summarily remove the present General Counsel similar to the approach taken by President Biden with respect to his removal of former Republican General Counsel Peter Robb and Deputy General Counsel Alice Stock
- Administrative law judge trial (ALJ) procedures
    - Review selection and removal procedures of administrative law judges
    - Apply the Federal Rules of Civil Procedure to all ALJ Board adjudication proceedings and replace the current language in the Act that the Civil Rules of Procedure only apply "to the extent practical" with the following modifications:
        - Limited 30-day discovery period prior to the commencement of an ALJ trial
        - The General Counsel would be required to provide respondents with all affidavits pertaining to the case at least 30-days prior to the trial

[1] See CalExit and the Rebellion of Other States in the Labor and Employment Area – A Dangerous Policy Development and a Need for Federal Labor and Employment Safe Harbor for Employees and Employers, NYU Center for Labor and Employment Law 71st Annual NYU Conference on Labor, G. Roger King (2018).

    - Trial dates would be controlled by the Chief Administrative Law Judge's scheduling office and any continuances would be by motion only and for good cause
- 10(j) Injunctions
    - After the General Counsel has obtained Board approval to proceed to seek a 10(j) injunction, such case would be assigned to an expedited hearing docket before an administrative law judge
    - A decision from the administrative law judge would be required to issue within 10 days after the completion of the expedited proceeding
    - Any adversely impacted party by a ruling of the ALJ could appeal to a U.S. district court where venue is proper
- Representation case procedures
    - Secret ballot elections required before certification of a bargaining unit except in *Gissel* situations
    - Majority of all eligible voters in the unit would have to vote for representation before a union could be certified
    - Permit employees to opt-out of furnishing their personal cellphone number and email address to the Board and a petitioning union in representation case proceedings
    - Rescind blocking charge procedure
    - Require a minimum of 30 calendar days between decision and direction of election and the election date
    - Restrict mail balloting to situations where a majority of the voting unit is widely geographically dispersed or there is a clear and present danger to voters and Board personnel in holding an on-site manual election
    - Voter eligibility issues to be decided pre-election in a representation case hearing
    - All parties to a representation case hearing would be permitted to participate in the hearing, including taking position on the proposed voting unit, and have a right to file post-hearing briefs
    - Require Administrative Procedure Act procedures to be followed before election rules are modified, rescinded, or stayed for more than 30 calendar days
- Voting/bargaining unit determinations
    - Statutorily require the Board to apply the community of interest test and prohibit the Board from applying the overwhelming community of interest test in determining the composition of a voting or bargaining unit
        - The overwhelming community of interest test could only be utilized by the Board in accretion cases
- Increased remedies in addition to remedies presently available to the Board
    - Employers that are found to have engaged a pattern and practice of egregious violations of the Act would not be eligible to bid on government contracts or be a government subcontractor for one year and would be required to reimburse unions and the General Counsel for their attorney fees and costs incurred in the identified cases

    - Unions that are found to have engaged in a pattern and practice of egregious violations of the Act would lose their right to file petitions for representation for a one-year period and be required to reimburse employers and the General Counsel for fees and costs incurred in the identified cases
- Codify employers' right to have mandatory meetings with their employees
- Prohibit speculative damages from being awarded
- Transfer jurisdiction over the United States Postal Service from the NLRB to the Federal Labor Relations Board
- Require the position of Solicitor to the Board to be a presidential nominee and confirmed by the Senate for a four-year term
    - Require that one of the principal duties of the Solicitor would be to negotiate all collective bargaining agreements with any union representing Board employees
- Codify right of employers to temporarily or permanently replace economic strikers and prohibit intermittent strike by unions
- Collective bargaining issues
    - Information requests served during the period that a contract is being negotiated would have to state the specific need for the information/documents sought and further establish that information/documents are needed to assist in reaching an agreement
    - No internet transmittal access to negotiating sessions unless agreed upon by all parties
    - If no agreement was reached by parties within 360 calendar days from the termination date of a collective bargaining agreement, or after an initial union certification date, either party would have a right to require FMCS mediation for a period of 90 calendar days
    - If no agreement was reached during the mediation period, FMCS would be statutorily required to conduct fact finding for 60 calendar days and issue a report within 30 calendar days, including recommendations for the parties to reach a settlement
    - Parties conduct in response to mediation and fact finding could serve as a potential basis for a Section 8(a)(5) violation
- Codify U.S. Supreme Court holding in *Epic Systems/Murphy Oil* authorizing class action waivers and mandatory arbitration procedures
- Define independent contractor status pursuant to traditional common law standards and prohibit the Board from using the ABC Test
- Define joint employer status under the NLRA utilizing a direct and immediate control test and prohibit a finding of joint employer status based on indirect or theoretical control
- Prohibit the Board from requiring an employer to prove the existence of "special circumstances" before establishing workplace polies such as dress code and employee monitoring policies
- Statutorily define managerial and confidential employee classifications based on previous Board decisions

- Miscellaneous areas
  - Implement a $500 filing fee for each unfair labor practice charge filed by an entity and a similar fee for each petition for election filed by a party
    - Fees would not be applicable for individual employee filings
    - This approach would discourage filing of frivolous unfair labor practice charges and re-filing of election petitions on a reoccurring basis
  - General Accounting Office requirement to file a report with Congress and the Board every two years regarding Board operations and finances
    - Include recommendations for potential consolidation of Board regional and sub-regional offices, review of Board staffing levels and productivity, employee classifications, and other related metrics
  - Right to Work
    - Relieve unions of any duty of fair representation (DFR) requirements for employees who opt-out of union representation and do not pay dues and fees to the union
  - Section 8(a)(2)
    - Amend this Section of the Act to permit employers and employees to interact regarding terms and conditions of employment, including the opportunity for employers to directly deal with their employees
    - Overrule Board cases such as the recent decision in *T-Mobile USA, Inc*., 372 NLRB No. 4 (November 18, 2022)
  - Permit direct appeals to the federal circuit court of appeals from NLRB representation case decisions
    - Current "technical 8(a)(5)" results in unnecessary delays and expense for all parties
      - It should not be necessary for an employer to go through the refusal to bargain process to file an appeal of a Board decision regarding representation case issues

Exhibit 3

December 7, 2022

Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

RE: Notice of Proposed Rulemaking, Standard for Determining Joint Employer Status, 2022-19181

Dear Ms. Rothschild:

The HR Policy Association ("HRPA" or "Association") welcomes the opportunity to submit the following comments[1] for consideration by the National Labor Relations Board in response to the published Notice of Proposed Rulemaking ("NPRM") and Request for Comments regarding joint employer status under the National Labor Relations Act ("NLRA" or "Act").[2]

HR Policy is a public policy advocacy organization that represents the most senior human resources officers in more than 400 of the largest corporations doing business in the United States and globally. Collectively, these companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. The Association's member companies are committed to ensuring that laws and policies affecting the workplace are sound, practical, and responsive to the needs of the modern economy.

Executive Summary

The joint employer doctrine is one of the most expansive and consequential parts of our nation's jurisprudence. This doctrine potentially imposes liability on non-actors and parties that have little or no control or knowledge of actions undertaken by others. Accordingly, any joint employer rule should be carefully drafted to recognize the potential reach and associated liability that can be imposed upon parties found to be joint employers.

Regulations should provide stakeholders with a clear understanding of their legal obligations and promote efficient compliance. The Board itself ostensibly recognizes this goal, stating that the purpose of its proposed rule is to establish a "definite, readily available standard that will assist

[1] The Association is also a signatory to comments filed by the Coalition for a Democratic Workplace. The Association offers these additional comments in its individual capacity to further address specific aspects of the proposed rule on behalf of its member companies.
[2] Notice of Proposed Rulemaking: Standard for Determining Joint Employer Status, 87 Fed. Reg. 54641 (Sept. 7, 2022).

employers and labor organizations in complying with the Act," while also "promoting collective bargaining and stabilizing labor relations."[3]

Unfortunately, the Board's proposed rule fails to achieve these purposes, and in practice would in fact work to undermine the very same. The proposed rule is overly broad and leaves key terms undefined and unlimited, with the result being a standard that is seemingly deliberately vague regarding where joint employer liability begins and ends. Rather than assisting stakeholders in compliance and promoting collective bargaining, the proposed rule instead leaves employers and other parties left to speculate on whether they are a joint employer with collective bargaining obligations.

Further, the proposed rule disincentivizes employers from setting standards for parties with which they do business through corporate social responsibility programs, ESG initiatives, job training programs, safety and health initiatives, and other mechanisms. Such efforts benefit workers and society by establishing minimum standards throughout a company's business and supply chain for worker safety, benefits, sustainability, and many other areas that promote a better economy for all. The proposed rule's overly expansive approach would attach joint employer liability to employers for setting such standards and therefore disincentivize employers from doing so, to the detriment of American workers.

A final rule should provide clear definitions of its key terms accompanied by examples illustrating the limits of the rule's reach so as to provide stakeholders certain understanding of their legal obligations under the rule. Similarly, a series of questions and answers should also be included in a final rule to provide greater clarity as to the scope and meaning of the rule. A final rule should also limit the extent of joint employer liability such that employer efforts to establish certain minimum standards with the parties with which it does business do not establish a joint employer relationship.

- **The proposed rule is overly broad and undefined, and does not provide clearly defined limits or boundaries to joint employer liability.**

The proposed rule would establish that two or more employers of the same particular employees are joint employers of those employees if the employers share or codetermine those matters governing employees' essential terms and conditions of employment.[4] Section 103.40(c) would specifically define "share or codetermine those matters governing employees' essential terms and conditions of employment" to mean "for an employer to posses the authority to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment." More specifically, §103.40(e) states that "possessing the authority to control is sufficient to establish status as a joint employer, regardless of whether control is exercised. Exercising the power to control indirectly is sufficient to establish status as a joint employer, regardless of whether the power is exercised directly."

To put it more succinctly, the proposed rule would establish that a joint employer relationship could exist solely on the basis of one employer's hypothetical indirect or unexercised control over just one essential term or condition of employment of another employer's workers. This is an unprecedentedly broad expansion of what it means to "codetermine" employees' essential

[3] *Id*.
[4] *Id*.

terms and conditions of employment. The Board has never before explicitly held that a joint employer relationship could be established solely on the basis of a single instance of unexercised hypothetical and/or indirect control.

The improper breadth of the proposed rule is further exacerbated by the proposed rules' failure to adequately define its key terms. The proposed rule fails to offer any meaningful definition or explanation of what "possessing the authority to control" means; in fact, it offers no such definition whatsoever. The same holds true for "exercising the power to control indirectly." Under the proposed rule, both of these terms are key indicators of joint employer status, and yet they are left undefined and non-delineated. As a result, employers and stakeholders are left speculating whether their relationships and actions within such relationships constitute "authority to control" or "indirect control," and accordingly are left in a quandary whether they may be a joint employer with collective bargaining obligations.

The proposed rule is similarly unclear regarding "essential terms and conditions of employment." While the proposed rule offers a small list of terms and conditions the Board deems essential, it also explicitly states that such a list is not exclusive. The proposed rule declines to provide a relevant definition of "essential" and accordingly does not offer any clear limits or bounds to what the Board might consider an "essential" term or condition of employment. Under the proposed rule, then, any term or condition of employment could potentially be considered "essential" by the Board and relevant to a joint employer analysis. Indeed, in the Board's explanation for the rule, it vaguely acknowledges that "unforeseen circumstances may arise in the future" that make certain terms and conditions of employment essential (or non-essential), and that the Board should have "some flexibility in future adjudication" to determine whether a term or condition of employment is essential for purposes of its joint employer rule.[5] Such an open-ended and undefined approach once again leaves employers and other stakeholders guessing where joint employer liability may begin and end.

Regulations should offer stakeholders a clear understanding of their legal obligations and potential liability and promote efficient compliance. As articulated above, the proposed rule is overly broad, leaves key terms undefined, and has indefinite limits, and accordingly makes it nearly impossible for an employer to clearly understand their obligations and determine whether their business relationships and actions within such relationships comply with the letter of the law.

The Board's final rule should also provide clear definitions of its key terms, particularly for "indirect control" and "possess the authority to control." Examples illustrating the metes and bounds of these terms should accompany such definitions. Similarly, a series of questions and answers should also be included in a final rule to provide greater clarity as to the scope and meaning of the rule. Further, a final rule should ideally provide a clearly defined and exhaustive list of terms and conditions of employment that the Board deems "essential." In the absence of such an exhaustive list, the final rule should, at minimum, provide clear guideposts and contours of what constitutes an "essential" term and condition of employment.

- **Setting minimum standards or including industry standard contractual terms should not be a basis for establishing joint employer liability.**

[5] *Id*.

The proposed rule disincentivizes corporate social responsibility programs, ESG initiatives, and other standards-setting that benefits American workers. More than ever, American companies, including Association members, are voluntarily adopting corporate social responsibility initiatives that establish standards often exceeding legal obligations. These programs take many shapes and sizes and often impose minimum requirements on third party relationships with which an employer does business. An employer might commit to only working with suppliers with strong records of fair labor practices – user employers often require supply chain vendors to abide by child labor laws, minimum wage standards, and other similar labor and employment statutory and regulatory requirements. Similarly, an employer might only do business with third parties that have certain environmental standards, or with those that provide certain benefits to their own employees such as paid leave, or those that have robust workplace harassment polices, to name only a few examples. Similarly, employers often require third party relationships to agree to adhere to the employer's general code of conduct. These initiatives promote a more robust and sustainable economy for all while also safeguarding worker protections. Beyond CSR or ESG initiatives as described above, employers also set minimum standards with third party relationships for the purposes of quality control, including safety rules and precautions that ensure worker safety and protect employer property. Such minimum standards are often included as contractual provisions in agreements with third parties.

Setting such standards is also becoming increasingly expected or required by institutional investors, federal and state regulators, and globally. Investors such as Blackrock and Vanguard are increasingly factoring in company commitments to sustainability, diversity and inclusion, and labor rights, for example, in making investment decisions.[6] Meanwhile, the SEC is in the process of releasing proposed rules requiring human capital metric disclosures with the goal, among others, of furthering company efforts in these same areas. Further, the European Union recently adopted a directive requiring companies to safeguard human rights and the environment throughout their supply chains. In sum, employers are increasingly expected and required to ensure minimum standards are being met in several workplace policy areas throughout its supply chain and business relationships.

The proposed rule would improperly make such standards-setting indicative of a joint employer relationship. Such a result and the increased legal obligations and liability exposure it creates for employers will naturally disincentivize employers from engaging in these types of initiatives to the detriment of the economy and the American worker. Regulations should promote and facilitate better business practices, not disincentivize the same. At minimum, the Board should carve out CSR or ESG initiatives, routine contractual provisions, and similar minimum standards-setting from joint employer liability under any joint employer rule.

- **The proposed rule would needlessly add uninvolved parties to collective bargaining negotiations.**

As discussed above, one of the stated goals of the Board's proposed rule is to "promote collective bargaining." The expansive scope of its proposed rule, however, would unnecessarily add parties to collective bargaining agreement negotiations, which would only serve to bog down

[6] *See*, *e.g.*, Global Corporate Governance Guidelines and Engagement Principles, BLACKROCK (Jan. 2019), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsibleinvestment-engprinciples-global.pdf.

and complicate an already complex and often lengthy process. Having multiple employers at the bargaining table is inherently difficult – different employers have different costs, objectives, needs, and views on terms and conditions of employment, among other things. Further, because the proposed rule would establish a joint employer relationship on the basis of very little, if any control over employees, an employer could be forced to negotiate terms and conditions of employment for such employees that it has no direct working relationship with and with minimal knowledge of their working conditions. Such a result would undoubtedly protract and complicate the bargaining process, to the particular detriment of workers who benefit the most from swiftly executed collective bargaining agreements. Board policy and regulations should encourage and promote efficient and effective collective bargaining; the proposed rule would have the opposite effect.

Finally, if the Board is committed to overturning the current joint employer rule – which the Association submits is the incorrect course of action – it should postpone the adoption of any new rule until such time that has a full complement of five Board Members with proportionate representation of both Republican and Democrat Members.[7]

Sincerely,

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[7] Member Ring's term expires December 16th, 2022, and it is probable that his seat will remain unfilled for some time.

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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 co-counsel in the landmark U.S. Supreme Court case known as Noel Canning, which successfully challenged President Obama's authority to make recess appointments to the National Labor Relations Board.