Protecting the Right to Organize Act of 2021: Whom and What Does It Really Protect?

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Introduction

For decades—indeed for the past forty years—organized labor has experienced a decline in union membership.[1] Particularly notable is the sixty-five-year decrease in union density of the United States workforce, which peaked at just under 35% during World War II and in the early 1950s.[2] By 2018, union membership declined to 10.5% of the workforce with only 6.4% membership rate in the private sector workforce.[3] Notwithstanding a purported renewed interest in union representation in part due to the COVID-19 pandemic, in 2022, the share of the U.S. workforce represented by unions dropped to a record low—a total of 10.1% union representation with only 6% union representation in the private sector.[4]

Organized labor has attributed this decline in union membership and represented worker density to a broken or deficient legal system that frustrates the right of workers to form unions.[5] The political allies

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1. United States union membership peaked in 1979 at 21 million workers. Thereafter, union membership declined to approximately 14.7 million in 2018. *See* H. Comm. on Educ. & Lab., Protecting the Right to Organize Act of 2019, H. Rep. No. 116-347, at 113–14 (2019); *see also infra* Appendix A: 1880–2021 U.S. Union Membership and Employment.

2. Union density is the ratio of union members to total U.S. workers. Because of the dramatic growth of the total U.S. workforce since World War II and the much less dramatic growth in union membership, union density has precipitously declined since the 1950s. *See infra* Appendix A: 1880–2021 U.S. Union Membership and Employment.

3. News Release, Bureau of Lab. Stats., Union Members—2018 (Jan. 18, 2019), https://www.bls.gov/news.release/archives/union2_01182019.pdf [https://perma.cc/PLP3-JMBY].

4. Lauren Kaori Gurley, *Union Membership Hits Record Low in 2022*, Wash. Post (Jan. 19, 2023, 10:11 AM EST), https://www.washingtonpost.com/business/2023/01/19/union-membership-2022 [https://perma.cc/YE9X-G6HJ] ("The labor movement could not keep up as the booming job market added 5.3 million jobs, and non-union jobs grew at a faster clip than union positions.").

5. H.R. Rep. No. 116-347 at 9. Indeed, the Economic Policy Institute asserts that union density decline is due to "a combination of employer tactics and weaknesses in the law that undermined worker organizing." Econ. Pol'y Inst., Explaining the Erosion of Private Sector Unions: How Corporate Practices and Legal Changes Have Undercut

of organized labor have therefore made periodic efforts to amend the National Labor Relations Act (NLRA) to make it easier for unions to organize U.S. workers and be certified as their exclusive bargaining representative.[6] "Protecting the Right to Organize Act of 2021," known as the PRO Act, which passed the House in March 2021, and was reintroduced in the Senate as "The Richard L. Trumka Protecting the Right to Organize Act," on February 28, 2023, is the latest proposed iteration of "fixes" to NLRA provisions that organized labor and their political allies believe are preventing their success in organizing employees.

There is, however, no evidence for the premise that the structure or provisions of the NLRA, or how it is applied, have frustrated unionization or the effectuation of employees' choice, or caused this decline in union membership.[7] Indeed, the evidence suggests otherwise and points to other factors—much larger societal factors, such as the growth and change in composition of the U.S. workforce away from traditionally organized blue-collar jobs to white collar and technology positions, the enactment of federal and state employment laws providing greater protections and benefits to workers, technological advances that have transformed the workplace and society as a whole, and the actions of unions themselves[8]—for the decline in interest in traditional

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WORKERS ABILITY TO ORGANIZE AND BARGAIN 45 (2020), https://files.epi.org/pdf/215908.pdf [https://perma.cc/6VFD-YW9L]; ROBERT P. HUNTER, MACKINAC CTR. FOR PUB. POL'Y, MICHIGAN LABOR LAW: WHAT EVERY CITIZEN SHOULD KNOW 55 (1991), https://www.mackinac.org/archives/1999/s1999-05.pdf [https://perma.cc/SPN4-BEMN] ("Officials in the organized labor movement consistently state that the two greatest causes for the continuing decline in union membership are the anti-union attitudes of employers and the weaknesses in the National Labor Relations Act that make organizing difficult and provide ineffective remedies for employer labor law violations.").

6. The most recent of these efforts include the Employee Free Choice Act, which was introduced in 2007, H.R. 800, 110th Cong. (2007), in 2009, H.R. 1409, 111th Cong. (2009), and again in 2016, H.R. 5000, 114th Cong. (2016), and the Protecting the Right to Organize Act, which was introduced in 2019, H.R. 2474, 116th Cong. (2019), and again in 2021, H.R. 842, 117th Cong. (2021), and now again on February 28, 2023, as the Richard L. Trumka Protecting the Right to Organize Act, H.R. 20, 118th Cong. (2023).

7. *See* H.R. REP. NO. 116-347, at 9. The studies that purport to show that deficiencies in the NLRA and employer animus have caused the decline in union membership and density do not actually proffer any proof of such causation. At least one pro-union movement supporter has labeled this argument "a false narrative." *See* William B. Gould IV, *Union Growth Will Not Ride on Amending the NLRA*, BLOOMBERG L.: DAILY LAB. REP. (June 8, 2022, 3:00 AM), https://news.bloomberglaw.com/daily-labor-report/union-growth-will-not-ride-on-amending-the-nlra [https://perma.cc/2LW9-2YHX]. According to William B. Gould IV, a former Chairman of the National Labor Relations Board appointed by President Clinton, "Labor law is a subordinate factor to union growth and decline." He calls the argument that union decline is caused by deficiencies in the law and would be ameliorated by reform of the NLRA a "false narrative." He attributes the decline in union membership and density to the failure of organized labor to put its money and resources into organizing.

8. Scholars not allied with Big Labor attribute union density decline to the following major societal shifts that have occurred over the past five decades: globalization and deregulation, changes in the U.S. economy and workforce demographics, changes to federal and state employment laws, and the lack of interest by employees today in what traditional unions are offering. HUNTER, *supra* note 5, at 54–55. Specifically, many of

labor union membership. Despite the assertion of PRO Act proponents that "[a]ntiunion campaigns by some employers and weak penalties for unlawful conduct have significantly contributed" to the decline in union membership, there is no evidence of a causal link between purported weaknesses in the NLRA and union membership decline.[9] Rather, for reasons that cannot be addressed here, for decades now, the idea of joining a union has not been a persuasive concept to most American workers. Thus, the evidence that the legal system is somehow broken with respect to effectuating employee choice concerning organizing and that the NLRA needs fixing in the ways that the PRO Act proposes is, to put it charitably, weak.

Although the PRO Act is made up of a decades-long Big Labor wish list, this paper focuses on two provisions of the PRO Act: (1) Section 105(1)(A)(5)(B)—the provision that sets aside the results of an election, certifies a union, and orders bargaining if an employer cannot prove that its unfair labor practices did not influence the outcome of the election; and (2) sections 104(2)(A) and 104(5)—the provisions that repeal the prohibition on coercive secondary activities against

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the industries traditionally most heavily unionized have contracted due to technological advances and transfer abroad due to global competition. The U.S. workforce has dramatically grown and expanded in sectors not traditionally organized such as in white collar, service, and technology occupations and in industries using a contingent or more transient workforce. Federal and state employment laws enacted in the past sixty years have provided to all U.S. workers those protections and benefits previously achieved through union representation. *Id.* at 55.

Finally, unions' own actions and strategies have not convinced generations of workers that membership in unions would benefit them. Unions have not changed their message or business model in decades to effectively attract new members; instead, rather than organizing, they have put their large war chests into political action to protect their own institutional interests. *See, e.g.*, H.R. Rep. No. 116-347, at 132 ("In reality, the union membership rate continues to plunge because of unions' own failings. Unions have failed to evolve to meet the needs of a 21st century workforce resulting from a lack of accountability and transparency that has fostered corruption while union bosses have failed to dedicate adequate resources and attention to organizing efforts."); Hunter, *supra* note 5, at 54–55; Chris Bohner, Radish Rsch., Labor's Fortress of Finance: A Financial Analysis of Organized Labor and Sketches for an Alternative Future (2022), https://www.radishresearch.org/_files/ugd/2357dd_5b4c90b0932c4a6e9aa5c0a4d9addc0a.pdf [https://perma.cc/Y7QR-XSJA]; Gould, *supra* note 7.

9. H.R. Rep. No. 116-347, at 9. Indeed, the decline in union membership and density is an international phenomenon that most developed nations are experiencing. According to reports by the Organization for Economic Cooperation and Development (OECD), which encompasses thirty-eight countries, union density in OECD countries averaged thirty percent in 1985 and had fallen to sixteen percent by 2018. Niall McCarthy, *The State of Global Trade Union Membership*, Forbes (May 6, 2019, 6:40 AM EDT), https://www.forbes.com/sites/niallmccarthy/2019/05/06/the-state-of-global-trade-union-membership-infographic [https://perma.cc/DYW9-SS78]; Jelle Visser, *Trends in Trade Union Membership*, *in* OECD, Employment Outlook 1991, at 97, 102 (1991), https://www.oecd.org/els/emp/4358365.pdf [https://perma.cc/GA46-G5DQ]. That these trends of plummeting union density are international further supports the proposition that the causes of the downward trend of union membership in the United States are not NLRA deficiencies but global and non-legal societal factors.

neutrals, such as pickets, boycotts, and strikes.[10] These provisions are representative of many of the PRO Act's amendments in that their purposes and effects contravene core purposes and principles of the NLRA. Indeed, these PRO Act provisions effectively turn such principles on their head. They principally affect the core NLRA principles of workplace democracy and the containment and resolution of labor disputes. The first provision is undemocratic in imposing unelected bargaining representatives upon employees who cast their vote otherwise, and the second embroils multiple parties in labor disputes, thus expanding their scope and effect, making them more difficult to resolve, and causing economic injury to neutral parties.

The NLRA and the Taft-Hartley Act amendments were enacted in the wake of, and in response to, violent strikes of the 1930s and 1940s that crippled certain industrial sectors.[11] The core purpose of the NLRA, as promulgated in the Wagner Act, and refined by the Taft-Hartley Act in 1947 and the Landrum-Griffin Act in 1959, was to create a mechanism for the prevention of industrial strife—i.e., strikes—that were obstructing the free flow of commerce and impeding economic recovery and growth—through the encouragement of collective bargaining for resolution of labor disputes. According to section 1, Findings and Policy, of the NLRA:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstruction to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and the designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[12]

To achieve this policy, the NLRA established rules (1) to protect employee free choice in the selection of their collective bargaining representatives, (2) to provide a road map for parties to resolve labor disputes themselves through collective bargaining, and, (3) if the parties were unable to resolve such disputes themselves, neutrally resolve such disputes through National Labor Relations Board adjudication.[13] While the NLRA promotes collective bargaining as an alternative to the strikes and violence that prevent the free flow of commerce, it did not intend to, nor was meant to, promote or favor the election of collec-

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10. H.R. 842, §§ 105(1)(A)(5)(B), 104(2)(A), 104(5), 117th Cong. (2021).

11. *See, e.g.*, H.R. REP. NO. 116-347, at 113; G. William Domhoff, *The Rise and Fall of Labor Unions in the U.S.*, WHO RULES AMERICA (2023), https://whorulesamerica.ucsc.edu/power/history_of_labor_unions.html [https://perma.cc/KH47-XY27]; THE DEVELOPING LABOR LAW chs. 2.II, 3.I.A (2022).

12. 29 U.S.C. § 151.

13. *See id.* §§ 151, 153, 157, 158, 159.

tive bargaining representatives, or to impose upon employees collective bargaining representatives not of their own choosing.

The Taft-Hartley Act and the Landrum-Griffin Act amendments to the NLRA corrected the one-sidedness of the NLRA[14] and furthered the core purposes of the NLRA by, among other things, providing protections to employees and employers from union abuses and coercive tactics that were inconsistent with NLRA principles. These changes enabled employees to bring unfair labor practice charges against unions for unlawful interference with their section 7 rights, including their right to choose not to join a union[15]—finally effectuating employees' right to exercise their free choice free of employer or union intimidation. The changes prohibiting secondary strikes, boycotts, and picketing of neutral parties in order to pressure employers into recognizing a union furthers the NLRA's purposes of containing the repercussions of labor disputes to the disputants themselves so as not to impede the free flow of commerce.

The PRO Act amendments to the NLRA discussed in this paper do not promote the purposes of the NLRA and, indeed, operate against them, particularly the principles of employee free choice in the selection of employee representatives and the containment of labor disputes to prevent the obstruction of the free flow of commerce—both core purposes of the NLRA. "It not only undermines employers' and workers' rights—but also makes it easier for unions to unilaterally inflict economic pain on workers, employers, and the economy as a whole by increasing and expanding strikes."[16] The real purpose of the PRO Act is to save unions and protect union leaders from the results of their own failures to attract workers to the union movement. These provisions enable labor unions to expand their membership without having to win the support of workers through a secret ballot election through the mechanisms of employer recognition of authorization cards or economic coercion of employers.[17] Proposed section 105(1)(A)(B) helps unions achieve these goals by providing a mechanism to easily set aside an election that they have lost. And proposed section 104(2)(A) and section 104(5) permit unions to expand a labor dispute beyond the disputing parties so as to apply economic pressure to employers to recognize unions without a secret ballot election.

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14. *See* The Developing Labor Law, *supra* note 11, ch. 2.II–III.

15. *See* 29 U.S.C. §§ 151, 153, 157, 158, 159; The Developing Labor Law, *supra* note 11, ch. 2.II–III.

16. H.R. Rep. No. 113-347, at 128.

17. *See id.* at 114. "This bill is a blatant attempt to legislate a radical, one-sided and undemocratic assault on workplace rights in order to bail out labor union special interests . . . [and] undermines the rights of employers and employees alike in order to increase the wealth and coercive power of labor unions and labor leaders." *Id.*

I. Selection of Exclusive Bargaining Representatives—Proposed Section 105(1)(A)(5)(B)

Enshrined as a core principle of the NLRA and, indeed, of our democracy itself is the selection of a representative through a secret ballot election. The idea of the secret ballot election is considered the "gold standard" method of selecting a representative that is vigorously protected within our own country and promoted by our country to others as a means of ensuring a fair and democratic election through the privacy of the voting booth. The PRO Act seeks to replace the secret ballot election as the principal method of selecting a collective bargaining representative with the card check.[18] Proposed Pro Act section 105(1)(A)(5)(B) allows the certification of a union that has lost an election, if the union files an unfair labor practice charge against the employer and has, at some point, collected a majority of authorization cards. Essentially, this provision gives unions the opportunity and means to overturn an election and be certified as the bargaining representative whenever they lose an election. These purposes are both anti-democratic and results-based in contravention of NLRA principles.

Under the NLRA, secret ballot elections have been the primary means of selecting a bargaining representative since 1935.[19] Such elections have been deemed the most accurate and preferred method of gauging employee preference free from improper influence, interference, and coercion.[20] Authorization cards have long been suspect as true indicators of employee preference because of the context in which they are frequently signed.[21] The United States Supreme Court, in the pivotal case of *NLRB v. Gissel Packing Co.*, acknowledged that the

18. *See The Labor Movement Has a Card to Play—And We Need to Play It*, IN THESE TIMES (Feb. 18, 2021), https://inthesetimes.com/article/card-check-unions-labor-pro-act [https://perma.cc/6WRY-YZXX] ("Card check, which makes forming a union faster and easier for workers, is the centerpiece of the PRO Act. It's an essential tool of the labor movement."); EMP. POL'Y DIV., U.S. CHAMBER OF COMM., LABOR'S LITANY OF DANGEROUS IDEAS: THE PRO ACT (2021), https://www.uschamber.com/assets/documents/024112_emp_pro_act_report_2021_update.pdf [https://perma.cc/F43D-SLH8]; TREY KOVACS, OLIVIA GRADY, RUSSELL A. HOLLRAH, PATRICK A. HOLLRAH, F. VINCENT VERNUCCIO, MORGAN SHIELDS, AUSTEN BANNAN & RUSS BROWN, COMPETITIVE ENTER. INST., THE CASE AGAINST THE PROTECTING THE RIGHT TO ORGANIZE ACT: UNION WISH LIST BILL WOULD HARM WORKERS AND THE ECONOMY 11 (2019), https://cei.org/sites/default/files/proact.pdf [https://perma.cc/EK7C-9JAZ] ("Card check takes away the right of employees to vote by secret ballet, in a free and fair election, to decide whether to be represented by a union. Collecting signatures on cards is not the same as winning an election through a secret ballot.").

19. THE DEVELOPING LABOR LAW, *supra* note 11, chs. 10, 12.

20. NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969); NLRB v. Flomatic Corp., 347 F.2d 74, 78 (2d Cir. 1965); *see also*, James Sherk, *Unions Know that Card Check Does Not Reveal Employees' Free Choice*, HERITAGE FOUND. (Mar. 6, 2009), https://www.heritage.org/jobs-and-labor/report/unions-know-card-check-does-not-reveal-employees-free-choice [https://perma.cc/837J-VY2Z]; Brief for Charging Parties and the AFL-CIO at 13, Levitz Furniture Company of the Pacific, Inc., 333 N.L.R.B. 717 (2001) (No. 20-CA-26596) ("A representation election is a solemn . . . occasion, conducted under safeguards to voluntary choice . . . [and] other means of decision making are not comparable to the privacy and independence of the voting booth.").

21. NLRB v. Village IX, Inc., 723 F.2d 1360, 1371 (7th Cir. 1983).

secret ballot election is the norm: "The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." [22]

Other courts have noted a preference for secret ballot elections, as well. In *NLRB v. Flomatic Corp.*, the Second Circuit wrote: "[I]t is beyond dispute that secret election is a more accurate reflection of the employees' true desires than a check of authorization cards collected at the behest of a union organizer."[23] Similarly, the Sixth Circuit noted in *United Services for the Handicapped v. NLRB* that "[a]n election is the preferred method of determining the choice by employees of a collective bargaining representative."[24]

Secret ballot elections are the bedrock of democracy and alleviate the concerns about coercion, duress, and outside pressure that can be placed on employees by unions and union supporters.[25] Authorization cards are not as reliable for gaining a true understanding of employee support, or lack thereof, of union representation.[26] As aptly put by the Seventh Circuit in *NLRB v. Village IX, Inc.*:

> Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election).[27]

The *Gissel* Court also recognized the problems with authorization cards as a true indicator of employee sentiment:

> We would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue.[28]

Accordingly, the *Gissel* Court held that a secret ballot election should not be set aside and supplanted by other means of selecting a bargaining representative, except in the most extraordinary and egregious circumstances.[29] Indeed, if an election were deemed to have been unfair, the proper remedy was to schedule a rerun election and not to impose a different result—i.e., the effective recognition of a union and

22. *Gissel Packing Co.*, 395 U.S. at 602.
23. *Flomatic Corp.*, 347 F.2d at 78.
24. United Servs. for the Handicapped v. NLRB, 678 F.2d 661, 664 (6th Cir. 1982).
25. *Village IX, Inc.*, 723 F.2d at 1371.
26. *Id.; see also Gissel Packing Corp.*, 395 U.S. at 604.
27. *Village IX, Inc.*, 723 F.2d at 1371.
28. *Gissel Packing Co.*, 395 U.S. at 604.
29. *Id.* at 615 (noting that "minor or less extensive unfair labor practices" because of their minimal impact on and election "will not sustain a bargaining order").

a bargaining order—unless the unlawful activity that occurred actually affected the results of the election.

In 2007, the sponsors of the ironically misnamed Employee Free Choice Act (EFCA) attempted directly to eliminate secret ballot elections by amending the NLRA to permit unions to organize a workplace merely by gathering signature cards from a majority of workers, rather than seeking a secret ballot election administered by the NLRB.[30] Learning from the outcry and opposition to EFCA's direct approach of eliminating the secret ballot election,[31] the PRO Act's proponents have proposed a more subtle approach, which effectively accomplishes the same thing.

Proposed section 105(1)(A)(5)(B) of the PRO Act provides as follows:

> *In any case in which a majority of the valid votes cast in a unit appropriate for purposes of collective bargaining have not been cast in favor of representation by the labor organization* and the Board determines that the election should be set aside because the employer has committed a violation of this Act or otherwise interfered with a fair election, and the employer has not demonstrated that the violation or other interference is unlikely to have affected the outcome of the election, *the Board shall, without ordering a new election, certify the labor organization as the representative of the employees in such unit and issue an order requiring the employer to bargain with the labor organization in accordance with section 8(d) if*, at any time during the period beginning one year preceding the date of the commencement of the election and ending on the date upon which the Board makes the determination of a violation or other interference, a majority of the employees in the bargaining unit have signed authorizations designating the labor organization as their collective bargaining representative.[32]

In essence, if a union loses an election and the employer is found to have committed an unfair labor practice or has otherwise interfered with a fair election, the Board *must* certify the union as the bargaining

30. The Employee Free Choice Act of 2009, H.R. 1409, § 2, 111th Cong., entitled, "Streamlining Union Certification," would have amended NLRA section 9(c) in pertinent part as follows:

> Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes. . . . If the Board finds that the majority of the employees has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative . . . , the Board shall not direct an election but shall certify the individual or labor organization as the representative . . . .

31. Eliminating a secret ballot election to determine unionization is highly unpopular. H. COMM. ON EDUC. & LAB., PROTECTING THE RIGHT TO ORGANIZE ACT OF 2019, H. REP. NO. 116-347, at 117 (2019) (noting that a 2015 poll by the Opinion Research Corporation showed that seventy-nine percent of union households, eighty-one percent of Democrats and eighty-one percent of independents "support the right to a secret-ballot election to determine unionization").

32. H.R. 842, § 105(1)(A)(5)(B), 117th Cong. (2021) (emphasis added).

representative and require the employer to bargain with the union, if a majority of the employees signed authorization cards during the time period from one year before the election to the date of any NLRB determination.

The PRO Act also shifts the burden of proof of causation from the NLRB General Counsel to the employer. Under the PRO Act, an unfair labor practice is presumed to have affected the election, unless the employer can prove otherwise.[33] The NLRB will overturn and reverse the results of an election, unless the employer can prove lack of causation—i.e., that its unfair labor practice or other interference with the election was unlikely to have affected the outcome of the election An employer will be unable to meet this burden of proof in virtually all cases because it cannot garner such proof without committing an unfair labor practice. It is an unfair labor practice for an employer to poll employees about their vote and the reasons for their vote. This shift in the burden of proof thus ensures the certification of a union that has not received a majority vote.

This provision essentially requires the certification of a union as an exclusive bargaining representative, where any type of unfair labor practice has occurred—even where the union has lost the vote by a large margin, and even where the employer's unfair labor practice had no effect on the outcome of the election. For instance, if employees were unaware of the existence of the employer's unfair labor practice or interference with the election, such employer action could not have had any effect on their vote and thus the election. Similarly, an unfair labor practice involving a minor or technical violation could be the basis for overturning an election. Under the PRO Act, given the likely inability of the employer to garner and proffer proof of causation (or lack thereof), the result would be an unwarranted reversal of the election and the imposition of an unelected union that lacks majority support. This result negates the principle of protecting employees' free choice in the selection of a bargaining representative—contrary to the foundational principles of the NLRA.

Under *Gissel*, before an election can be overturned, the NLRB General Counsel must prove that the union had majority support and that the employer's unfair labor practices eroded that majority support

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33. The PRO Act requires that "the NLRB shall presume that the employer's conduct affected the election outcome." H.R. Rep. No. 116-347, at 26:

> [The PRO Act requires] when a labor organization loses a representation election where it previously had majority support, and when the employer committed a violation of the NLRA, or otherwise interfered with the election, the NLRB shall presume that the employer's conduct affected the election outcome. Unless the employer rebuts that presumption, the NLRB must certify the union and order the employer to bargain.

such that the holding of a fair election or rerun election is unlikely.[34] Under this standard, before an election is overturned and a bargaining order issued, the General Counsel must prove that the unfair labor practices actually affected the prior election outcome "by undermining [union] majority strength" and that such unfair labor practices are likely to "impede the election process" of a new election.[35]

Gissel has been criticized by PRO Act proponents as not enough of a remedy for unlawful activity during an election because *Gissel* bargaining orders are so rarely issued.[36] *Gissel* bargaining orders are rare because setting aside an election or deciding not to run or rerun an election constitute extraordinary and serious remedies that should be based on causal evidence that the violations of the law are of the type that would affect the ability to hold a fair election and that the evidence demonstrates that they would cause such effect. Thus, the standard for setting aside an election requires a showing that the unfair labor practices affected the election sought to be set aside and are likely to adversely affect employees in a potential rerun election.[37]

Bargaining orders are not warranted where the unfair labor practices are not of the type, pervasiveness, or severity that would influence employees in their election decision or where the employees were unaware of them.[38] The burden of proof of causation is where it ought to be—on the party seeking to set aside the election. Moreover, as discussed below, only the NLRB General Counsel and the union can muster evidence relevant to causation—the employer cannot.[39]

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34. *Gissel Packing Co.*, 395 U.S. at 614 ("The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior.").

35. *Id.*

36. Brian J. Petruska, *Adding Joy Silk to Labor's Reform Agenda*, 57 SANTA CLARA L. REV. 97, 115 (2017) ("Another significant problem with *Gissel* is that the Second, Third, Fourth, Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits regard a *Gissel* bargaining order as an 'extraordinary remedy.'").

37. *Gissel Packing Co.*, 395 U.S. at 615 ("We emphasize that under the Board's remedial power there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order."); Aaron Bros. Co. of Cal., 158 N.L.R.B. 1077, 1079 (1966) (not "any employer conduct found violative of Section 8(a)(1) of the Act, regardless of its nature and gravity, will necessarily support a refusal-to-bargain finding . . . where an employer's unfair labor practices are not of such a character as to reflect a purpose to evade an obligation to bargain, the Board will not draw an inference of bad faith").

38. *Gissel Packing Co.*, 395 U.S. at 615; *Aaron Bros. Co. of Cal.*, 158 N.L.R.B. at 1079.

39. If an employer attempts to investigate and poll or interrogate employees about their vote and the reasons therefore, such interrogation would constitute an unfair labor practice in violation of section 8(a)(1). *See Gissel Packing Co.*, 395 U.S. at 609.

This PRO Act provision turns *Gissel* on its head and provides that *any* unfair labor practice and *any* interference (vague as that term is) in an election, regardless of its severity or type or number, would provide the pretext for setting aside an election.[40] The unfair labor practice is presumed to have interfered with the election, and the burden is on the employer to prove that the violation or interference "is unlikely to have affected the outcome of the election."[41] Placing this evidentiary burden on the employer is unwarranted and contrary to the strong presumption of the NLRA and the Supreme Court, as articulated in *Gissel*, that an election should not be set aside absent evidence that unlawful conduct affected or interfered with the election.[42]

Further, this burden of proof will be impossible for an employer to meet in virtually all elections. First, it is always difficult to prove a negative—that an action did not affect an outcome. Second, under the NLRA, an employer cannot lawfully poll employees about their decisions, their vote, or what may have influenced their vote: an employer asking employees such questions in and of itself is an unfair labor practice.[43]

Some PRO Act proponents also argue that this provision is necessary given the asserted increase in employer unlawful activity during elections since the *Gissel* decision.[44] The argument is specious because, since the 1980s, the number of unfair labor practice charges filed have not increased but have dramatically decreased.[45]

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40. The PRO Act requires that "the NLRB shall presume that the employer's conduct affected the election outcome." H. Comm. on Educ. & Lab., Protecting the Right to Organize Act of 2019, H. Rep. No. 116-347, at 26 (2019).

41. *Id.*

42. *Gissel Packing Co.*, 395 U.S. at 614–15.

43. In *Gissel*, the Supreme Court acknowledged some legitimacy in the employers' argument that they faced a "Hobson's Choice" if they bore the burden to proffer proof concerning union majority status because that involved polling or interrogating employees concerning union representation in violation of section 8(a)(1). *Id.* at 609.

44. They argue that there has been an increase in unlawful activity by employers during elections because the ratio of unfair labor practice charges filed to union election petitions filed has increased. Econ. Pol'y Inst., *supra* note 5, at 21–22. Petruska, *supra* note 36, at 122. However, there is no evidence that the asserted increased ratio of unfair labor practice charge filings to union representation petition filings means that employers are committing more unfair labor practice violations during organizing drives or that any changes in the law have had any effect on the filing ratio.

45. Since the 1980s, there has been an average annual decrease in filings of unfair labor practice charges of two to three percent. In FY1980, 31,281 unfair labor practice charges were filed against employers as compared to 14,344 in FY2022. *See infra* Appendix B: National Labor Relations Board Unfair Labor Practice and Union Representation Filings from 1936 to 2022. Further, to the extent unfair labor practice charges have increased in a given context, it should be noted that the number of workers in the U.S. workforce has dramatically increased in larger proportion to any increase in unfair labor practice charges. Further, since 2010, the NLRB has been changing well-established law such that employers that have followed existing law may nevertheless be considered later to have violated it.

In fact, unfair labor practice charges against employers and unions increased up until 1980. Since 1980, these filings have steadily declined, averaging an annual decrease in filings of unfair labor practice charges of two to three percent.[46] Further, the filing of a charge does not mean that unlawful activity occurred. In fact, the vast majority of unfair labor practice charges filed are found to be non-meritorious.[47]

Indeed, unfair labor practice charge filings have decreased since the 1980s at a greater rate than the decrease in union membership.[48] Thus, to the extent unfair labor practice filings are an indicator of the amount of unlawful conduct that has occurred, then there has been a significant decrease in unlawful activity both by employers and unions since the 1980s.[49] Given that the U.S. workforce has dramatically increased during the same period that unfair labor practice charge filings have decreased would seem to lead to the conclusion that less unlawful conduct, rather than more unlawful conduct, is occurring now than in the 1970s and early 1980s.

It is true that the number of representation petitions filed between the 1980s and the present have fallen even more dramatically than the number of unfair labor practices charges filed against employers during the same period.[50] But no evidence suggests that the asserted higher ratio of unfair labor practice charges filed to union representation petitions filed means that more unfair labor practices are being committed during union organizing drives or that the types of unfair labor practices that are being committed did or would affect the elections that occurred. There is thus no evidence or factual justification for the premises that unfair labor practice violations have increased, that there has been an increase in labor law violations during union organizing drives, that any alleged increase in NLRA violations during union organizing drives has affected union election outcomes, or that the *Gissel* remedy is inadequate in the relatively rare cases in which unfair labor practices have affected the outcome of the election or may do so. The facts thus do not support or warrant this anti-democratic PRO Act amendment that permits unions to overturn secret ballot elections, depriving workers of their own voice and choice by imposing a result contrary to the majority's vote.

In sum, there is no justification for this PRO Act provision. The proponents of the PRO Act are attempting to do indirectly what they

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46. *See infra* Appendix B.

47. Since the 1960s, the merit factor—i.e., the percentage of unfair labor practice charges that the NLRB regional offices have found to have merit—has ranged from 29.1% to 41.2%, with an average annual average merit finding of 35% to 37% of unfair labor practice charges filed. Of the unfair labor practices charges found to have merit by Regional Directors, a smaller number are found by the Board to be unlawful.

48. *Compare infra* Appendix A, *with infra* Appendix B.

49. *See infra* Appendix B.

50. *See infra* Appendix B.

could not succeed in doing directly with EFCA—the certification of unions without achieving a majority vote through a secret ballot election. EFCA required recognition of a union solely based on a majority of authorization cards. The PRO Act provision, on the other hand, imposes a representative contrary to election results without an evidence-based reason for doing so. For a union that loses an election, it is a classic "Heads I win, tails you lose" situation. Lost in all of this is the effectuation of employees' wishes and desires—which is what the NLRA protects: "It is . . . the policy of the United States . . . to protect[] the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing . . . ."[51] This PRO Act provision does not protect employees; it protects only unions.

On August 25, 2023, the Democrat-appointed majority of the NLRB issued a decision in *Cemex Construction Materials Pacific, LLC*, holding that (1) whenever a union requests recognition based on asserted majority bargaining unit support, the employer must either bargain with the union or file an election petition within two weeks of the union's bargaining demand (assuming the union has not already filed an election petition); (2) if the employer refuses to accede to a demand for recognition and no election petition is filed, the employer will be found to have refused to bargain and a bargaining order will be issued without an election; and (3) if the employer commits any unfair labor practice, the election petition (whether filed by the employer or the union) will be dismissed and the employer will be ordered to recognize and bargain with the union without any election.[52] Because a single unfair labor practice can result in dismissal of an election petition, the *Cemex* decision will effectively obliterate the opportunity for large numbers of employees to cast votes in secret ballot elections. Like proposed PRO Act section 105(1)(A)(5)(B), the *Cemex* decision is anti-democratic, inconsistent with *Gissel*, and contravenes the principles of the NLRA, which guarantee employee free choice in the selection of a bargaining representative. While *Gissel* requires a high threshold of employer misconduct and a showing that the misconduct has affected or will affect the election as a prerequisite for the dire remedies of not running an election and issuing a bargaining order, the threshold for issuing a bargaining order in *Cemex* is minimal to infinitesimal. *Cemex* therefore goes even further than the PRO Act in depriving employees of

51. 29 U.S.C. § 151.

52. Cemex Construction Materials Pacific, LLC, 372 N.L.R.B. No. 130, at 25 (Aug. 25, 2023) ("Under the standard we adopt today, an employer violates Section 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files a petition pursuant to Section 9(c)(1)(B) of the Act (an RM petition) to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed a petition pursuant to Section 9(c)(1)(A)") (citations omitted).

their section 7 right to choose whether or not to unionize and in imposing on them an unelected (and, likely, minority-supported) bargaining representative.

Given the critical importance and drastic consequences of the *Cemex* decision, the issues raised in it are likely to be litigated at the highest federal court levels. *Cemex* is a flawed decision for many reasons and should be reversed. Many of those reasons and arguments for reversal are the same as those articulated here about the PRO Act. Like the PRO Act, *Cemex* protects and supports unions, not employees.

II. Secondary Boycotts—Proposed Section 104(2)(A) and Section 104(5)

The PRO Act seeks to repeal NLRA sections 8(b)(4) and 8(b)(7), which prohibit secondary boycotts in which a union tries to influence an employer with which it has a dispute by exerting economic or social pressure against persons or businesses with whom the employer deals.[53] The goal of a secondary boycott is to put pressure on the neutral employer to cease doing business with the primary target or to convince the primary target to accede to the union's demands in order to stop the harm imposed on the neutral business.[54] Although the NLRA does not define secondary boycott, it has been defined variously as "a combination to influence *A* by exerting economic or social pressure against persons with whom *A* deals"[55] and "a combination to harm one person by coercing others to harm him."[56]

Notwithstanding (or, perhaps, because of) the passage of the NLRA in 1935, waves of strikes and boycotts occurred during the 1930s and 1940s.[57] In response, Congress enacted sections 8(b)(4) and 8(b)(7) in the Taft-Hartley Act amendments to limit such strikes and boycotts, whose purpose was to threaten or injure those not party to the primary dispute, thereby reducing the number of strikes and boycotts that

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53. The PRO Act also seeks to repeal section 8(e), which prohibits unions and employers from entering into agreements to cease doing business with another entity. Section 8(e) was added to the NLRA by the Landrum-Griffin Act amendments in 1959 to close loopholes in section 8(b)(4), which prohibits strikes and other coercive, threatening or restraining activities for an unlawful secondary purpose. *See* Pub. L. No. 86-257, § 704(b), 73 Stat. 519, 543. Section 8(e) prohibits unlawful boycotts through voluntary agreement. 29 U.S.C. § 158(e).

54. Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(b) of the National Labor Relations Act*, 7 UNIV. PA. J. LAB. & EMP. L. 905, 908 (2005).

55. FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 43 (1930).

56. RALPH M. DERESHINSKY, ALAN D. BERKOWITZ & PHILIP A. MISCIMARRA, THE NLRB AND SECONDARY BOYCOTTS 1 (rev. ed. 1981) (referencing the Frankfurter and Greene definition).

57. H. COMM. ON EDUC. & LAB., PROTECTING THE RIGHT TO ORGANIZE ACT OF 2019, H. REP. NO. 116-347, at 34, 129 (2019). "In 1937, there were nearly 5,000 strikes nationwide . . . . [E]conomic disruption of this magnitude undoubtedly harmed American workers by reducing overall productivity . . . ." *Id*. at 129.

were "obstructing the free flow of commerce."[58] The purpose of sections 8(b)(4) and 8(b)(7) is to shield neutral parties from controversies not their own. Under current law, secondary boycotts are prohibited when their objective is to compel (1) membership in an employer or labor organization, (2) recognition of an uncertified union, (3) recognition of a union if another union has been certified, or (4) assignment of certain work to certain employees.[59] A union's use of a secondary boycott can have potentially devasting effects upon parties neutral to the dispute between the union and its more direct target.[60]

The principal argument in support of repeal of these provisions is that they impinge on labor unions' First Amendment rights.[61] The claim is that prohibiting restrictions on strikes and boycotts "'is in tension with . . . First Amendment cases in which the Supreme Court has made clear that speaker- and content-based restrictions on speech are presumptively invalid.'"[62]

This is a very weak argument that is easily refuted in multiple ways. First, the Supreme Court permits Congress to regulate economic activity even if it interferes with free speech rights, distinguishing between "commercial" speech, which can be more extensively regulated, and "political speech," which receives greater First Amendment protections from regulation.[63] PRO Act proponents argue that secondary boycotts should receive the same First Amendment protection as "political" speech and political boycotts, even though unions possess a "commercial" object in their speech—namely, either obtaining recognition or some other valuable concession.[64]

The Supreme Court has ruled that while Congress has broad power to regulate economic activity, there is no comparable right to regulate or prohibit peaceful political activity.[65] The Court "recognized the strong governmental interest in certain forms of economic regulation,

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58. 29 U.S.C. § 151; H.R. Rep. No. 116-347, at 34, 129.

59. *See* 29 U.S.C. § 158(b)(4).

60. See, for example, the 2019 jury award of $93.6 million to ICTSI Oregon, the former operator of the Port of Portland's Terminal 6, due to ongoing unlawful work stoppages and slowdowns by the ILWU that caused customers to cease doing business with the operator and ultimately the closure of its operations. Maxine Bernstein, *Jury Awards $93.6 Million to Former Operator of Ports Terminal 6 for Losses Due to Dock Workers Unlawful Labor Practices*, Oregonian (Nov. 6, 2019, 5:07 PM), https://www.oregonlive.com/business/2019/11/jury-awards-936-million-to-former-operator-of-ports-terminal-6-for-losses-due-to-dock-workers-unlawful-labor-practices.html [https://perma.cc/MXP8-6FX5]; *see also* Bock, *supra* note 54, at 908.

61. The House Report to the PRO Act states: "[Section 8(b)(4)] restrictions pose serious problems under the First Amendment to the Constitution of the United States. . . . The PRO Act protects workers First Amendment rights by repealing prohibitions on unions' picketing and secondary activities." H.R. Rep. No. 116-347, at 34–35.

62. *Id.* at 34.

63. NAACP v. Claiborne Hardware, 458 U.S. 886, 912 (1982).

64. *Id.* (citing NLRB v. Retail Store Emps. Local 1001 (Safeco), 447 U.S. 607 (1980)).

65. *Id.*

even though such regulation may have an incidental effect on rights of speech and association."[66] Thus, in *NLRB v. Retail Store Employees Local 1001 (Safeco)*, the Court held that "[s]econdary boycotts and picketing by labor unions may be prohibited as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'"[67] Unions, when engaging in such speech and conduct to achieve the ends prohibited by section 8(b)(4), are acting as businesses to achieve their own commercial interests.[68] This type of speech and activity is not political speech or motivated for a public good and can be regulated.[69]

Second, the U.S. Supreme Court makes a distinction between activity that constitutes "pure speech" and activity that is speech plus other conduct, particularly if that other conduct is coercive, threatening, or intimidating, or injures or has the object of injuring others. This is the implicit rationale behind its holding in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*.[70] The U.S. Supreme Court decision in *DeBartolo* creates a carve out from the prohibitions of section 8(b)(4) for conduct that is deemed to be speech or "publicity."[71] Specifically, in *DeBartolo*, the Court declined to find a violation of section 8(b)(4)(ii)(B) in the union's distribution of handbills that truthfully advised the public that a product or products were produced by an employer with whom the labor organization had a primary dispute and were being distributed by another employer,[72] The Court found this conduct lawful, even though there was a secondary motive, because the conduct was pure speech aimed only at consumers and did not involve other confrontational, intimidating, or coercive activities such as picketing or striking.[73]

Interestingly, proponents of the First Amendment rationale for repeal of these secondary boycott prohibitions do not mention the existence of the *DeBartolo* decision, which protects informational speech—as opposed to coercive conduct.[74] Given the existence of the *DeBartolo*

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66. *Id.* (citing *Retail Store Employees Local 1001 (Safeco)*, 447 U.S. 607).

67. *Id.*

68. The Supreme Court held that even peaceful picketing violates the NLRA's prohibition on secondary boycotts and "carries no unconstitutional abridgment of free speech." Int'l Bhd. of Elec. Workers (IBEW) v. NLRB, 341 U.S. 694, 699–700 (1951) ("It was the objective of the unions' secondary activities and not the quality of the means employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision.").

69. *Id.*

70. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council 485 U.S. 568 (1988).

71. *Id.* at 584.

72. *Id.* at 575.

73. *Id.* at 578–84.

74. *Id.* at 584.

decision, there is no basis for unions to seek repeal of these sections of the NLRA on First Amendment grounds. *DeBartolo* already protects distribution of the message and supports the dissemination of speech.[75] If proponents of the PRO Act really only want to protect the right of unions to disseminate a message for the "public good," that protection already exists.

The real reason for PRO Act proponents' desire to repeal these provisions is to give unions the freedom to engage in the confrontational, intimidating, and coercive conduct normally associated with secondary activity—such as picketing, striking, and boycotting other businesses. These activities involve more than informational speech.

Picketing, as the Supreme Court explained, is qualitatively "'different from other modes of communication.'"[76] When a message is conveyed through handbilling, publication in a newspaper or distribution of circulars, its effect will "'depend entirely on the persuasive force of the idea'" communicated in the message.[77] Conveying a message in this manner is "pure" communication or speech. However, conveying a message through picketing is "'a mixture of conduct and communication.'"[78] The conduct—the picket line—is intended to, and does, intimidate.[79] In this situation, it is often the conduct that persuades, rather than the content of the message.[80] The First Amendment protects the content of such an informational message and the neutral distribution of such message, but it does not protect the delivery of the message through intimidation and coercion.

Secondary actions—such as picketing and boycotts—aimed at those who are not parties to the dispute can be intimidating and are inherently coercive. They embroil other neutral businesses in disputes not their own and over which they have no control, with the consequence of substantial potential loss to these innocent parties.[81] Their purpose is to cause economic pain and disruption.

This is exactly the type of activity that can and does have unwanted ripple effects on neutral businesses and employees and can destabilize the livelihood of many other workers. Secondary boycotts can and do cause financial ruin for multiple businesses and workers. A very

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75. *DeBartolo* held that peaceful handbilling of consumers, even for a purpose prohibited by section 8(b)(4), does not rise to the level of prohibited section 8(b)(4)(ii) conduct, because it was speech unaccompanied by threatening, coercive or restraining conduct such as picketing or strikes. *Id*. at 583–84.

76. *Id.* at 580 (quoting Babbitt v. Farm Workers, 443 U.S. 289, 311, n.17 (1979) (quoting Hughes v. Super. Ct., 339 U.S. 460, 465 (1950))).

77. *Id.*

78. NLRB v. Retail Store Emps. Local 1001 (Safeco), 447 U.S. 607, 619 (1980).

79. *DeBartolo*, 485 U.S. at 580; *Safeco*, 447 U.S. at 619.

80. *DeBartolo*, 485 U.S. at 580; *Safeco*, 447 U.S. at 619.

81. *Safeco,* 447 U.S. at 614 (holding peaceful picketing of a secondary employer unlawful where the picketing "reasonably can be expected to threaten [the secondary business] with ruin or substantial loss").

notorious relatively recent example occurred at the Port of Oregon, resulting in losses of over $100 million, a huge loss of jobs, and disruption of the local economy.[82] In 2012, the International Longshore and Warehouse Union (ILWU) threatened International Container Terminal Services, Inc. (ICTSI), the company that operated Terminal 6 at the Port of Oregon, that if "reefer work" was not assigned to its members, the ILWU would run every container out of Portland.[83] ICTSI could do nothing about the ILWU's demands because the Port of Oregon, not ICTSI, controlled the assignment of reefer work.[84] Nevertheless, over the next several years, ILWU engaged in work slowdowns, stoppages and other activities, resulting in delays in the loading and unloading of ships, causing ICTSI to lose its shipping customers and forcing it to close its business and pay $11 million to get out of its twenty-five-year lease.[85] The NLRB and the courts found that ILWU had engaged in illegal work slowdowns and work stoppages in violation of NLRA section 8(b)(4), causing the shutdown in 2017 of Terminal 6 at the Port of Oregon, Oregon's only container terminal.[86] Closure of the terminal resulted in the loss of numerous union jobs, increased costs for farmers and other exporters who were forced to truck or rail their goods to Puget Sound ports, and a loss of revenue to the community.[87]

Thus, a business could be faced with the choice of capitulating to a union's demand for recognition, notwithstanding the desires of its employees for such representation, or possible financial ruin because of a loss of business from customers or other business partners that have been pressured to terminate their business relationship. The legalization of these types of strike activities would increase labor conflict, economic injury, and disruption, and would have a devastating effect on the economy to the detriment of American business and workers.[88] According to the House Minority Report concerning Secondary Boycotts,

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82. *See* Bernstein, *supra* note 60 (noting that the terminal operator claimed up to $135 million in damages).

83. ICTSI Or., Inc. v. Int'l Longshore & Warehouse Union, 442 F. Supp. 3d 1329, 1337–39 (D. Or. 2020).

84. *Id.* at 1338.

85. *See id.* at 1363–64.

86. Bernstein, *supra* note 60; *see also* Int'l Longshore & Warehouse Union, 363 N.L.R.B. 460 (2015); *ICTSI Or., Inc.*, 442 F. Supp. 3d at 1363–66.

87. ICTSI sued the ILWU for damages of between $97 million and $135 million in operating losses. In 2019, a jury ultimately awarded ICTSI $93 million in damages. Bernstein, *supra* note 60. On the union's motion for new trial, the district court ordered a new trial on the amount of damages, *ICTSI Or., Inc.*, 442 F. Supp. 3d at 1366, and those proceedings are ongoing, *see* ICTSI Or. Inc. v. Int'l Longshore & Warehouse Union, No. 3:12-cv-1058-SI, 2022 WL 16924139 (D. Or. Nov. 14, 2022) (framing the issues on retrial of damages).

88. *See Protecting the Right to Organize Act: Deterring Unfair Labor Practices: Hearing Before the Subcomm. on Health, Emp., Lab. & Pensions of the H. Comm. on Educ.*

> Secondary activity extends the pain of striking and picketing by allowing unions to target the business partners of a company they are seeking to organize. As such, businesses with no direct connection to the employer being targeted by the union will be subject to union harassment. Given the interdependent nature of companies in the 21st century economy, allowing secondary boycotts could subject nearly any employer, employee, or consumer in the country to union harassment. . . . [L]egalizing secondary activity would target and destroy countless small businesses.[89]

These are the weapons that the proponents of the PRO Act want unions to have in their arsenal, even if their use of such weapons hurts neutral businesses and employees and even if employee choice in the selection of bargaining representative is trampled. Repeal of these NLRA sections expands labor disputes beyond the disputants—contrary to the purpose and policy of the NLRA to "proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."[90] The NLRA was enacted to reduce industrial strife and economic disruptions due to labor disputes, not to increase them. A repeal of the secondary boycott prohibitions would do just that.

Conclusion

The NLRA has been successful in stabilizing labor relations in this country since the 1940s, and that stability has fostered this country's economic growth and expansion. The PRO Act's proposed bargaining order and secondary boycott amendments are not simple "policy choices," but drastic changes to the NLRA, inconsistent with its fundamental aims and principles and having great potential detrimental repercussive effects on workers and businesses throughout the United States. Workers will be stuck with bargaining representatives who were imposed on them, who do not enjoy majority support, and who will be ineffective. Workers and businesses will be subject to more

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& Lab., 116th Cong. (2019) (statement of Philip A. Miscimarra, Partner, Morgan Lewis & Bockius LLP and former Chairman of the NLRB):

> [T]he biggest problem with the PRO act is the expansion of economic weapons and economic injury, which have been the engine driving collective bargaining under the NLRA. Increasing the scope of these economic weapons, and making them more destructive, will have a destabilizing impact on U.S. employees, employers, the general public and unions. . . . Inevitably, the PRO Act's expansion of employment related costs and conflict will magnify increased investments of every business in new technology rather than people.

H. Comm. on Educ. & Lab., Protecting the Right to Organize Act of 2019, H. Rep. No. 116-347, at 129–30 (2019).

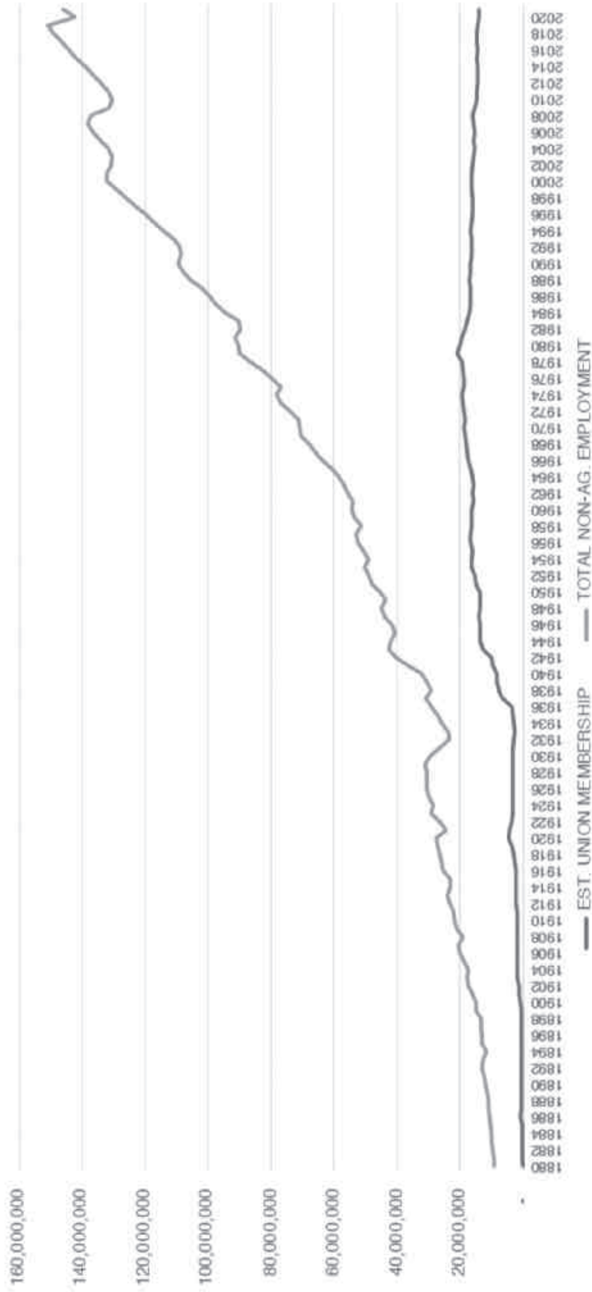
89. H.R. Rep. No. 116-347, at 129.

90. 29 U.S.C. § 151; *see* H.R. Rep. No. 116-347, at 129–30.

labor conflict and strife that will likely cause economic disruptions that could well result in the loss of jobs.

These proposed amendments place the goals and wishes of labor unions above the desires, welfare, and rights of workers. And, most importantly, they betray the core democratic values and processes of the NLRA and of our nation—the ability to exercise freedom of choice in the selection of a representative through a secret ballot election. Both of these provisions have the goal of eliminating or avoiding the conduct of a secret ballot election and thus the exercise of employee free choice. Lacking the persuasiveness in the arena of the free exchange of ideas to achieve victory in the voting booth, unions now seek the ability to employ intimidating, coercive, and undemocratic tactics to achieve bargaining representative status.

Appendix A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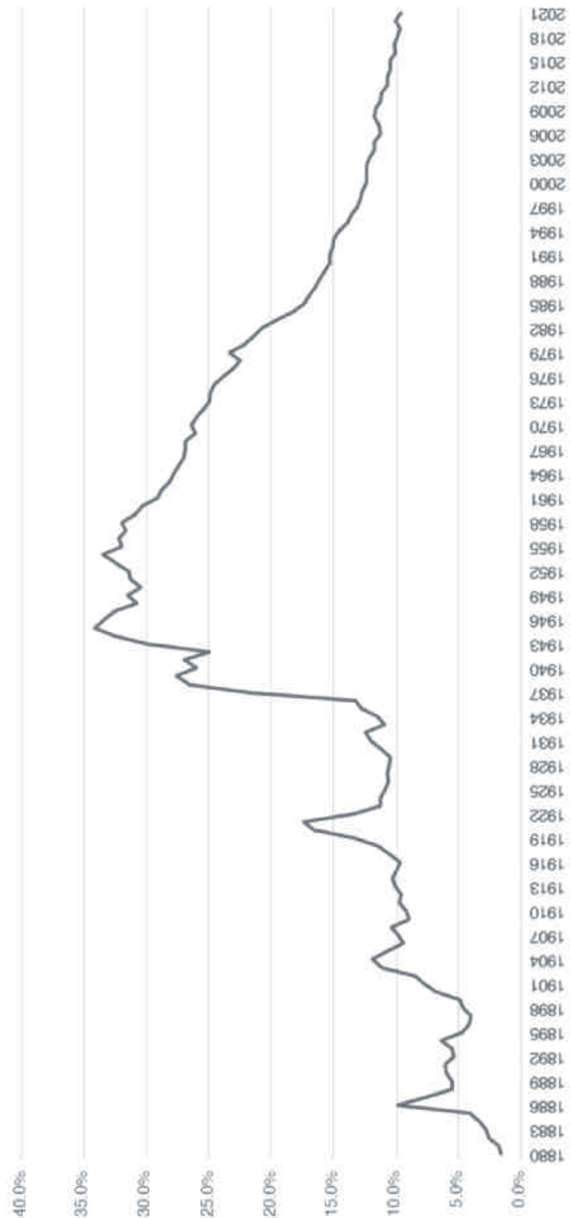
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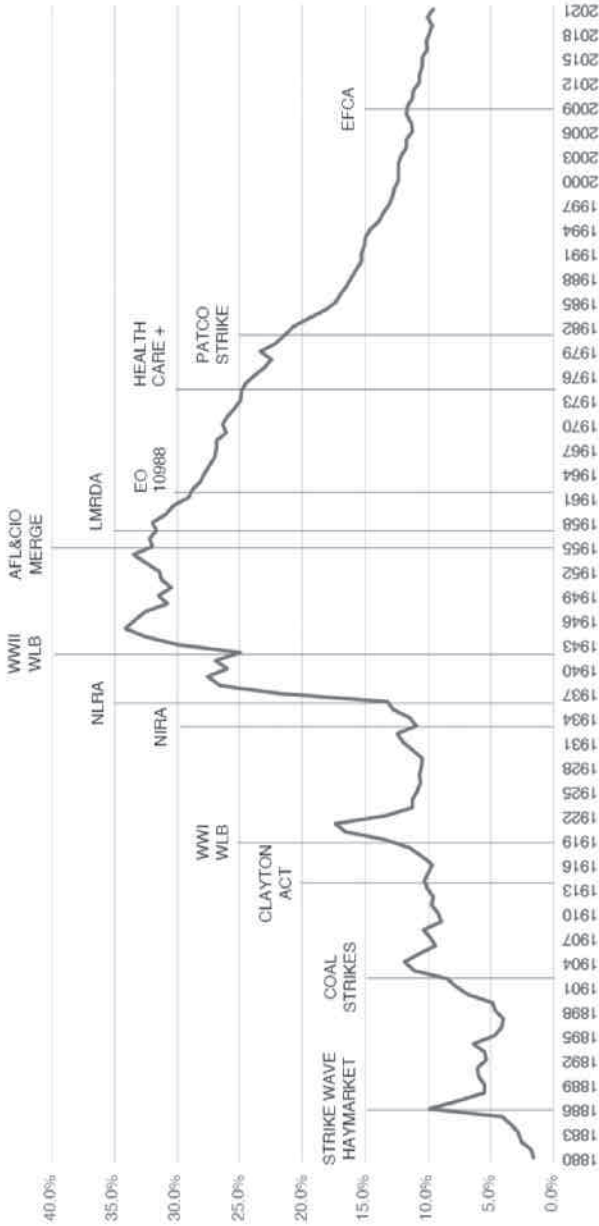
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Appendix B

National Labor Relations Board Unfair Labor Practice and Union Representation Filings
1936 to 2022

Fiscal Year	Total Unfair Labor Practice Charges Filed	Merit Factor* (%)	CA (Employer)	CB (Union)	Total Representation Cases Filed***	Total Case Intake
2022	17,998	41.2	14,344	3,536	2,511	20,509
2021	15,081	37.9	11,715	3,277	1,638	16,719
2020	15,869	35.2	12,277	3,550	1,764	17,633
2019	18,552	36.0	13,925	4,435	2,095	20,647
2018	18,871	37.6	14,566	4,146	2,090	20,961
2017	19,280	38.6	15,040	4,108	2,357	21,637
2016	21,326	37.1	16,764	4,410	2,537	23,863
2015	20,199	37.8	15,719	4,323	2,822	23,021
2014	20,424	35.2	15,843	4,431	2,677	23,101
2013	21,394	35.2	15,915	5,226	2,652	24,046
2010**	23,516	35.6	17,145	6,039	3,206	26,722
2005**	24,720	38.5	18,300	5,812	5,138	29,858
2000**	29,188	39.9	22,094	6,166	6,061	35,249
1995**	34,040	37.5	26,244	6,989	5,895	39,935
1990**	33,833	40.7	24,075	8,157	7,674	41,507
1985**	32,685	32.8	22,245	8,382	8,490	41,175
1980**	44,063	35.7	31,281	8,976	13,318	57,381
1975**	31,253	30.2	20,311	7,575	13,670	44,923
1970**	21,038	34.2	13,601	4,631	12,543	33,581
1965**	15,500	35.5	10,931	2,793	12,225	27,725
1960**	11,357	29.1	7,723	2,505	10,170	21,527
1955**	6,171	N/A	4,362	1,382	7,220	13,391
1950**	5,809	N/A	4,472	996	15,823	21,632
1945**	2,427	N/A	2,427	0	7,310	9,737
1940**	3,934	N/A	3,934	0	2,243	6,177
1936**	865	N/A	865	0	203	1,068

*Merit Factor for Fiscal Years 2010 through 2022 from NLRB Performance and Accountability Reports found at *Performance and Accountability*, NLRB, https://www.nlrb.gov/reports/agency-performance/performance-and-accountability [https://perma.cc/WJ3H-48W8].
**All Information for Fiscal Years 1945 through 2000 obtained from NLRB Annual Reports found at *Annual Reports*, NLRB, https://www.nlrb.gov/reports/agency-performance-reports/historical-reports/annual-reports [https://perma.cc/WFD7-6NK6].
***Representation filings include union certification and decertification case filings.