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Big Labor Lies: Exposing Union Tactics to Undermine Free and Fair Elections

Before the House Committee on Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions

MACKINAC CENTER
FOR PUBLIC POLICY

Introduction

Chairman Good, Ranking Member DeSaulnier, and members of the subcommittee, good morning, and thank you for having me. My name is Stephen Delie, and I am the Director of Labor Policy for the Mackinac Center for Public Policy, as well as the legal and policy advisor for its Workers for Opportunity initiative. We are a 501(c)(3), nonprofit research and educational institute that advances the principles of free markets and limited government. Through our programs, we challenge government overreach and advance free-market approaches to public policy that free people to realize their potential and their dreams.

I am here today to support policies that will bring greater balance to labor law and enable workers to make a voluntary, clear, and knowing choice about unionization in their workplace. These policies are necessary because now, perhaps more than ever, federal law unfairly places a thumb on the scale in favor of unionization. Too often, government mandates and restrictions essentially force workers to accept a union, regardless of what workers actually want.

Workers, on the other hand, have made their preferences known by largely fleeing from union membership. While the media focuses on unionization campaigns at Starbucks and Amazon, or high-profile strikes like the one the UAW recently lead in my home state of Michigan, it often overlooks the evidence of what the typical American worker actually wants. The evidence on that point is clear, and it demonstrates that most workers do not want a union.

Union membership in the private sector hit an all-time low last year, down to only 6% of the workforce.[1] And while surveys suggests that the public is generally favorable to unions, very few workers actually want to join one, with one recent survey by Gallup revealing that a full 58% of non-union workers are "not interested at all" in joining a union.[2] In short, while unions have recently been enjoying renewed attention, that attention is not leading to growing membership.

But the goal of the National Labor Relations Act is not to grow union membership. Instead, the NLRA is designed to promote labor peace and "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives *of their own choosing*, for the purpose of negotiating the terms and conditions of employment."[3] Put plainly, the goal of the NLRA is to empower the American worker to determine what type of representation is best for them, whether union or non-union.

Unfortunately, neutrality is not the position of the current administration, the National Labor Relations Board under Chairman Lauren McFerran, or even the NLRA as currently applied.

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[1] U.S. Bureau of Labor Statistics. (2024, January 23). Union Members Summary. Bls.gov, available at: https://www.bls.gov/news.release/archives/union2_01232024.htm.

[2] McCarthy, J. (2022, August 30). U.S. approval of labor unions at highest point since 1965. Gallup, available at: https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx.

[3] 29 U.S.C. §151 (emphasis added).

Whether it be through the normalization of corporate pressure campaigns, the continual erosion of workers' right to a secret ballot vote on unionization, or encouraging the use of union insiders known as "salts" to stir dissent in a workplace, the current administration has made it increasingly difficult for workers to make a fully free and informed choice about union membership.

I intend to discuss these issues specifically today, as well as a number of bills currently before you that are designed to swing the pendulum of labor law back to an approach of government neutrality. Both the Employee Rights Act and the Start Applying Labor Transparency Act help to ensure that workers are able to make a fully informed choice about unionization, without being influenced by deceptive or coercive union tactics. The adoption of these bills would help labor policy adapt to the modern workplace.

1. Secret Ballot Elections and the Threat of Card Check

    a. Secret Ballot Elections are the Gold Standard for Fair Elections

For decades, unions have been aggressively pursuing an organizing strategy based on a process known as card check. This process is an alternative to the traditional approach to organizing, which allows employees to vote on whether a union is right for their workplace in a secret ballot election. While unions claim that card check reflects the will of a majority of employees, the card check process is rife with issues that render it unreliable.

Unions can be organized in one of two ways: through a secret ballot election, or through the card check process. A secret ballot election is self-explanatory: workers cast a secret vote on the question of whether a union should represent them. These elections are administered by the NLRB and are carefully controlled to ensure that the results are reliable.

Secret ballot elections are the gold standard for unionization determinations, as both the NLRB and Courts have recognized. The NLRB has also long held that card check is "admittedly inferior to the election process,"[4] and "notoriously unreliable."[5] It has similarly noted that card check is "susceptible to group pressure exerted at the moment of choice."[6] In describing some of the issues with card check, the Board has stated:

> There is good reason to question whether card signings in such circumstances accurately reflect employees' true choice concerning union representation. "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

[4] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969).

[5] *Sunbeam Corp.*, 99 NLRB 546, 550-51 (1952)

[6] *Dana Corp. and Metaldyne*, 351 NLRB 434, 438 (2007)

commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election)".[7]

These factors, among others, lead to a significant disparity between the level of employee support expressed in card check campaigns and employees' actual preferences. According to the NLRB, "unions with a 50- to 70-percent majority card showing won only 48 percent of elections. Even unions with more than a 70-percent card showing won only 74 percent of elections."[8] Thus, secret ballot elections are a significantly more accurate measurement of employee support.

b. Secret Ballot Elections are Preferred by the Courts, Congress, and the NLRB

Courts, including the Supreme Court, have also recognized the superiority of secret ballot elections. In *NLRB v. Gissel Packing Co.*, the Supreme Court stated: "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."[9] The vast majority of United States Courts of Appeals have similarly expressed a clear preference for secret ballot elections.[10]

Congress also prefers the secret ballot, as evidenced by its repeated rejection of attempts to require union recognition through card check. The Employee Free Choice Act, which would have mandated card check, was introduced in Congress five times between 2007 and 2016, but never became law. It joins the Labor Reform Act, Workplace Democracy Act, and the Clean Energy Worker Just Transition Act on the list of failed attempts to restructure labor law to favor or require card check.

But legislation that passed Congress has consistently upheld workers' rights to a secret ballot.[11] This can be most recently seen in the 2020 enactment of the United States-Mexico-Canada Agreement, which specifically requires Mexico to "provide in its labor laws that union representation challenges are carried out by the Labor Courts through a secret ballot vote."[12]

Even unions prefer a secret ballot election—under the right circumstances. The AFL-CIO has opposed card check procedures for union decertification proceedings, noting that card check

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[7] *Id.* at 439, citing *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983).

[8] *Id.*, citing McCulluoch, *A Tale of Two Cities: Or Law in Action*, Proceedings of ABA Section of Labor Relations Law 14, 17 (1962).

[9] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969).

[10] See, U.S. Chamber of Commerce, "*Beyond Belief: Does Current Law Require "Card-Check" Union Recognition?* USCHAMBER.COM, pp. 16-17 Retrieved May 15, 2024, available at: https://www.uschamber.com/assets/documents/Beyond-Belief-Report-Joy-Silk_04.26.2022.pdf.

[11] *Id.* at pp. 18-20

[12] *Id.*

procedures were "not comparable to the privacy and independence of the voting booth," and suggesting that the "election system provides the surest means of avoiding decisions which are 'the result of group pressures and not individual decisions.'"[13] The UAW also prefers secret ballot elections for internal elections—UAW President Shawn Fain was selected by secret ballot, as required by the 2022 UAW constitution.[14]

c. Secret Ballot Elections Reduce the Risk of Coercion and Deception

Secret ballots are more reliable, but also have the advantage of removing coercion and deception from organizing campaigns. Although not all organizing campaigns use such tactics, card check campaigns are uniquely susceptible to these unfair tactics.

Card check occurs in public, which itself puts undue pressure on employees. As the Seventh Circuit has noted:

> [A] card majority, by itself, has little significance. 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.[15]

Unions are aware of the pressure inherent to card check and use it to their advantage. In a 2007 hearing before this Subcommittee, Mike Ivey, a former UAW organizer, described how card check campaigns caused employees to sign cards, regardless of their feelings toward unionization:

> It wasn't enough that employees were being harassed at work, but now they are receiving phone calls at home. The union organizers refuse to take 'no' for an answer. Some employees have had five or more harassing visits from these union organizers. The only way, it seems, to stop badgering and pressure is to sign the card.[16]

While this pressure alone is a problem, a far more troubling issue is that card check campaigns open the door to deceptive or coercive practices. These tactics are extreme, and include:

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[13] Coalition for a Democratic Workplace, "*How Neutrality and Card Check Agreements Harm the American Worker*," p. 13. Retrieved May 14, 2024. Available at: https://myprivateballot.com/wp-content/uploads/2023/05/CDW-White-Paper_Neutrality-and-Card-Check-Agreements_May-2023-FINAL.pdf, citing Union Facts.com, "*Cards Are Not Votes*," available at https://www.unionfacts.com/article/the-problem/cardsare-not-votes/.

[14] *Id.*, citing UAW Constitution, Article 10, available at https://uaw.org/uaw-constitution-2/.

[15] *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983).

[16] "Strengthening America's Middle Class Through the Employee Free Choice Act" (U.S. Government Printing Office, Feb. 8, 2007), p. 29, available at: https://perma.cc/EH6M-GFVR.

- Threatening an employee by claiming a union would come for her children and slash her tires unless she signed a card;[17]

- Threatening to report migrant workers to immigration officials;[18]

- Deceiving employees by telling them a card signifies something other than an authorization for the union to represent them, such as the desire for an election to be held.[19]

Any of these tactics distort the will of employees. As Karen Mayhew, an employee who had experienced an SEIU campaign described, deceptive statements can cause employees to sign cards when they would otherwise decline. Ms. Mayhew described her experience of how, during a question-and-answer session, the SEIU told employees that the cards were a request to receive more information, only to later find that the union had used them to obtain recognition:

> It was made clear to all of us there in attendance that those authorization cards did NOT constitute a vote right there and then for exclusive representation by the SEIU. … When we were told that 50% plus one had signed the union's authorization cards, and that no election would be held, it did not take long for many employees to announce that they would not have signed the cards if they had known that there would be no election.[20]

Whether through deception, coercion or pressure, card check campaigns necessarily distort employees' true opinions about unionization. A secret ballot election largely eliminates these tactics, as it is impossible to know how a particular employee voted. This, in turn, allows employees to express their honest opinions, without fear of reprisal. To protect employee safety and well-being, secret ballot elections must be preserved.

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[17] *HCF, Inc. d/b/a Shawnee Manor*, 321 NLRB 1320 (1996).

[18] "Strengthening America's Middle Class Through the Employee Free Choice Act" (U.S. Government Printing Office, Feb. 8, 2007), p. 7, available at: https://perma.cc/EH6M-GFVR.

[19] A particularly egregious example of a deceptive card was uncovered by the National Right to Work Foundation. This card, titled "Request for Employees Representation Election Under the Railway Labor Act" contains the following statement: "I authorize the Airline Division of the International Brotherhood of Teamster to request the National Mediation Board to conduct an investigation and a representation election, *also to represent me in all negotiations of wages, hours and working conditions in accordance with the Railway Labor Act*." (sic). National Right to Work Foundation, *How Union Organizers Mislead Workers Into Signing Away Their Rights*, NRTW.ORG, Retrieved May 16, 2024 available at: https://www.nrtw.org/spotlight-on-card-check-deception/.

[20] "Strengthening America's Middle Class Through the Employee Free Choice Act" (U.S. Government Printing Office, Feb. 8, 2007), p. 7, available at: https://perma.cc/EH6M-GFVR.

2. Threats to Fair Union Elections

a. Neutrality Agreements

One technique unions use to avoid secret ballot elections is to convince (or coerce) employers to enter into so-called neutrality agreements. Although styled as an agreement by an employer to maintain neutrality throughout a unionization campaign, these agreements silence employers and deprive employees from hearing all the facts regarding unionization. The Coalition for a Democratic Workplace provides good description of these agreements:

> A neutrality agreement is a contract between an employer and a union wherein the employer agrees to remain neutral while the union attempts to organize the employer's workers. Typically, neutrality agreements require employers to remain silent during union organizing efforts and even prohibit employers from providing facts to workers to correct false or misleading statements made by the union. Essentially, an employer relinquishes its free speech rights to lawfully make its case as to why employees should not vote to be represented by the union. Often, these agreements not only require that the employer refrain from campaigning against the union but also require the employer to provide the union with personal information about the subject employees, such as phone numbers and home addresses, with no employee consent.
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> Usually, neutrality agreements also include an agreement to recognize the union as the exclusive bargaining representative of the employees by a 'card check' rather than by a secret ballot election. This means that rather than voting for or against union representation in a tightly monitored secret ballot election, a union can win representation if a majority of employees simply sign authorization cards—often presented to them with high-pressure tactics by union organizers.[21]

In truth, neutrality agreements are anything but neutral. These agreements leave employees with no information other than what the union provides. And while employees remain free to support or oppose unionization, employees have no say as to whether their employer enters into a neutrality agreement. Commonly, this means that employees also have no say in whether they get to select a union through a secret ballot election—an employer who agrees to a neutrality agreement requiring card check deprives employees of that opportunity in favor of recognition exclusively through card check.

b. Corporate Campaigns

To obtain neutrality agreements, unions often turn to a tool known as a corporate campaign. A corporate campaign occurs when a union attempts "to accomplish organizing or other labor relations objectives through its use of economic pressure tactics directed at a firm's business

[21] Coalition for a Democratic Workplace, "*How Neutrality and Card Check Agreements Harm the American Worker*," pp. 1-2. Retrieved May 14, 2024. Available at https://myprivateballot.com/wp-content/uploads/2023/05/CDW-White-Paper_Neutrality-and-Card-Check-Agreements_May-2023-FINAL.pdf

dealings outside the labor relations arena (such as consumer actions, lobbying a firm's creditors and lenders, or using public relations techniques to raise community awareness of a firm's positions)."[22] Put another way, unions attempt to inflict as much social pressure on an employer as possible, until that employer agrees to a neutrality agreement. Late AFL-CIO President Richard Trumka once described these campaigns as "inflicting upon the employer the death of a thousand cuts, rather than a single blow."[23]

Unions admit that these tactics are coercive. The Service Employees International Union's 2011 "Contract Campaign Manual" specifically encourages pressuring employers through corporate campaigns.[24] The SEIU manual recognizes these campaigns are designed to "damage an employer's public image and ties with community leaders and organizations" by targeting "relationships between the employer and lenders, investors, stockholders, customers, clients, patients, tenants, politicians, or others on whom the employer depends for funds."[25]

Unions have not been shy about admitting the goals of a corporate campaign. In 2011, the SEIU attempted to organize the catering company Sodexo. Relying on the same corporate campaign manual cited above, the SEIU demanded a neutrality agreement. When Sodexo refused, a union representative informed the company's president that the union "enjoy[s] conversation but embrace[s] confrontation." The SEIU representative continued, "[I]f you do not execute this neutrality agreement, we will begin to target you, your employees, and your customers."[26]

This targeting includes weaponizing labor law to silence even neutral employer speech. During an interview, Amazon CEO Andy Jassy commented on the ongoing efforts to unionize Amazon. Jassy remarks were hardly inflammatory, including such statements as "of course, it's … employees'

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[22] James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819, 843 n.19 (2004-2005), available at: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1138&context=faculty_scholarship.

[23] Coalition for a Democratic Workplace, "*How Neutrality and Card Check Agreements Harm the American Worker*," p. 4, n. 11. Retrieved May 14, 2024. Available at https://myprivateballot.com/wp-content/uploads/2023/05/CDW-White-Paper_Neutrality-and-Card-Check-Agreements_May-2023-FINAL.pdf (citing Industrial Union Department, AFL-CIO, Developing New Tactics: Winning with Coordinated Corporate Campaigns (1985)).

[24] Vernuccio, F. V., "*Corporate Campaigns,"* MACKINAC CENTER, Retrieved May 13, 2024. Available at: https://www.mackinac.org/26960. The original document was Exhibit 8 of *Sodexo v. Service Employees International Union et. al.*, No. 1:11-cv-00276 (E.D. Vir. Filed Sep. 19, 2011).

[25] *Id.*

[26] "Corporate Campaigns and the NLRB: The Impact of Union Pressure on Job Creation" (U.S. Government Printing Office, May 26, 2011), pp. 9–11, available at: https://perma.cc/24J6-PBAH.

choice whether or not they want to join a union. We happen to think they're better off not doing so for a couple of reasons, at least."[27] Jassy continued by explaining those reasons:

> And what we tell our employees in our fulfillment centers is that we think they're better off without a union for a few reasons. One is we try to hire people who we empower, if they find ways that they can make the experience better for customers or their fellow teammates, they can just go fix it. You know, they, they don't have to go through a union. It's not bureaucratic, it's not slow…They can just go fix that. We think that that's pretty empowering and a great way to work. And I think it's nice to be able to have a direct relationship with your manager. We like to hear from all our employees as opposed to having it filtered through one or two voices.[28]

In response, the Amazon Labors Union filed an unfair labor practice charge with the National Labor Relations Board, alleging that Jassy's comments constituted an unfair restraint or coercion of employees' right to self-organize. An administrative law judge for the San Fransisco branch of the NLRB sided with the union, and ordered Amazon to publish a notice that it wouldn't "threaten" employees by claiming unions would slow the resolution of matters, were more bureaucratic, or by stating that employees would be better off without a union.[29]

Unions, meanwhile, are held to a different standard. In the recent *Lion Elastomers* case, NLRB Chairman McFerran voted to prohibit employers from taking action against racist, discriminatory, or disparaging language during an organizing campaign.[30] The ruling held that absent threats of violence, "profane, vulgar, racist, and otherwise insulting language" is protected.[31] The *Lion*

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[27] *Amazon Services LLC and Amazon Labor Union*, Case Nos. 19-CA-297441 and 29-CA-308092, NLRB, San Fransico Branch Office, May 1, 2024, available at: https://www.documentcloud.org/documents/24656009-administrative-law-judges-decision-amazoncom-services-llc.

[28] *Amazon Services LLC and Amazon Labor Union*, Case No. 19-CA-297441 and 29-CA-308092, NLRB, San Fransico Branch Office, May 1, 2024, available at: https://www.documentcloud.org/documents/24656009-administrative-law-judges-decision-amazoncom-services-llc.

[29] *Id.* The holding is rather remarkable in light of *FDRLST Media LLC v. NLRB*, 35 F. 4th 108 (3d Cir. 2022), in which an employer informed his employers via tweet that the first one of them who tried to unionize would be sent "back to the salt mine." The Third Circuit correctly determined that this language failed to satisfy the standard of a legal threat under the NLRA, which requires a statement tending to coerce an employee to not exercise his or her labor rights. *Id.* at 122, available at: https://www.nlrb.gov/case/02-CA-243109.

[30] *Lion Elastomers LLC*, 372 N.L.R.B. No. 83 (May 1, 2023).

[31] A recent unionization attempt by union employees calls into question whether unions follow even this permissive standard when acting as an employer. Employees of 1199SEIU-UHWE have recently claimed that union leaders have hired "a small group of non-employees who were recruited by the anti-union campaign" to discourage unionization. Employees describe these non-

Elastomers decision was later applied to excuse the conduct of Amazon Labor Union's co-founder, Gerald Bryson, who had used extremely offensive language to insult a co-worker during an organizing campaign.[32] The double standard is clear: Amazon is unable to discuss any of the downsides of unionization, while union organizers can resort to personal and profane attacks without fear of reprisal.

These tactics are nothing new, having been a core future of unionization campaigns since the 1990s. In a 1991 article, Joe Crump, the Secretary-Treasurer of a local United Food and Commercial Workers union based in Grand Rapids, Michigan, excitedly discussed the opportunity presented by corporate campaigns.

Crump highlights that, from 1987 to 1990, only 7.4% of the 417,085 workers organized by UFCW has been organized via a traditional secret ballot election. The remainer were organized through card check. While this is problematic for the reasons identified above, Crump's definition of a successful corporate campaign demonstrates precisely why they are so concerning. For Crump's union, successful organizing was defined "in one of two ways: either a ratified, signed collective bargaining agreement with a previously nonunion employer or a significant curtailment of a nonunion operator's business, *including shutting the business down*."[33] An example was offered to illustrate the point.

Crump highlights that, in 1988, UFCW attempted to organize a local supermarket chain in a six-month campaign that ultimately resulted in an election rejecting the union. After attempts to obtain another election, Crump explained that the union realized "the traditional method of organizing wasn't going to work," instead pivoting to a corporate campaign. Crump defined the campaign as successful, despite it putting the company out of business and leaving workers unemployed:

> After a three-year struggle, the battle with Family Foods is over. Do we represent the employees? No. The company went out of business. The good news is that some of the stores were purchased by companies already under a Local 951 contract. A couple of stores are empty, but I am sure that many of their former patrons are now

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employees having engaged in activity that, when compared to Jassy's statements, would appear to constitute an unfair labor practice. A flyer distributed to employees implores workers to "please don't start over", while promising to make "real changes." As LaborUnionNews notes: "As the flyer appears to contain veiled threats…as well as promises…both of which could be found to be objectionable by the NLRB, if the union staffers lose their election, under the NLRB's new *Cemex doctrine*, the NLRB could order 1199SEIU-UHWE management to bargain with the union. List, Peter, "*Union Accused of Using 'Union Busters' to Persuade Union Staff Against Unionizing*, LABORUNIONNEWS, May 7, 2024 (Last Retrieved May 16, 2024). Available at: https://laborunionnews.substack.com/p/union-accused-of-using-union-busters.

[32] *Amazon.com Services LLC v. Gerald Bryson*, No. 29-CA-261755 (2024). The NLRB remanded the case, originally decided in 2022, for reconsideration following the *Lion Elastomers* decision.

[33] Joe Crump, *The Pressure is On: Organizing without the NLRB*, 1 LAB. RES. REV. #18 (1991), available at http://digitalcommons.ilr.cornell.edu/lrr/vol1/iss18/8.

> shopping in unionized stores. Perhaps even more important is the message that has been sent to nonunion competitors: There is no 'free lunch' in our jurisdiction.[34]

Shutting down a business as a message to other nonunion businesses might be win for unions, but it does little to help the workers who end up unemployed by coercive union tactics. But it is consistent with how many unions view organizing with the support of a corporate campaign.

It might be argued that corporate campaigns targeting a company's regulatory compliance are warranted when the underlying allegations involve non-compliance with the law. Experience dictates, however, that these campaigns are less interested in addressing legal issues than they are with strong-arming an employer into accepting a neutrality agreement. Take, for instance, a recent example involving the Communications Workers of America and Microsoft's attempts to acquire Activision Blizzard.

There, the CWA was pursuing a neutrality agreement with Microsoft. When Microsoft refused, CWA sent a letter to the Federal Trade Commission claiming that Microsoft's attempted merger with Activision Blizzard raised anti-trust concerns. Microsoft reversed course, eventually agreeing to the neutrality agreement CWA demanded. The CWA withdrew its complaint, thereby demonstrating their real concern was obtaining a neutrality agreement, not thwarting anti-competitive activity.

Further, corporate campaigns themselves can go beyond economic coercion and venture into illegality. As the Mackinac Center noted in a 2019 study:

> In 2016, a jury awarded Professional Janitorial Services of Houston $5.3 million dollars in damages as the result of a corporate campaign. The damages were awarded by a jury in response to a defamation suit filed by PJS against the SEIU for their aggressive corporate campaign, which included:
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> > [P]ublishing defamatory statements about PJS to its customers, tenants of building cleaned by PJS, and other third parties. The union published its statements about PJS on the union's website and in flyers, handbills, letters, reports, emails, newsletters, and speeches. Most of the union's statements accused PJS of violating wage-and-hour and other labor laws. The union's admitted goal in publishing these accusations to PJS's customers and others was to cause PJS to lose business to union contractors. According to PJS, it lost more than one dozen accounts due to the union's publications.[35]

Whether conducted legally or illegally, corporate campaigns are squarely aimed at causing employers economic and reputational damage, most frequently to secure a neutrality agreement. These campaigns do not benefit employees, who, at best, are deprived of hearing from a multitude

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[34] *Id.* at p. 35.

[35] Vernuccio, F. V. (2019.). *Protecting the Secret Ballot: The Dangers of Union Card Check*, p. 9. MACKINAC CENTER. Retrieved May 14, 2024. Available at: https://www.mackinac.org/archives/2019/s2019-09.pdf.

of perspectives on unionization, and, at worse, face unemployment due to their employer's bankruptcy.

But the solution to this problem is not to ban corporate campaigns, as doing so would arguably infringe on First Amendment rights. A far better solution is to remove the incentive that drives corporate campaigns, namely, card check.

c. Lack of Transparency

Another example of the unfair playing field in labor law is a practice known as "salting." Salting is when unions hire workers with the intent of having them get hired by the employers unions are hoping to unionize. These salts foment discontent among employees while encouraging unionization. Salts do not usually disclose their union affiliation, meaning their fellow workers rarely have any idea that their co-worker is being paid to promote unionization. One salt even failed to disclose her union employment when testifying before Congress - to this Committee - in 2022.[36]

This is in stark contrast to the requirements that employers must follow when they hire consultants to discuss the impacts of unionization with workers. When an employer hires a labor persuader, they are required to disclose those consultants' identities within 30 days, as well as provide details about their compensation and the activities they performed. The consultant has similar filing requirements.[37]

That disparity is important and calls into question some of the most high-profile organizing campaigns. Although the media has been quick to tout supposed union successes at organizing Starbucks, a closer look calls into question whether those elections reflect a genuine desire for unionization, or whether it was manufactured manipulation. Workers United, the union responsible for unionizing multiple Starbucks locations, sent at least 10 salts into various New York franchises, including the first Starbucks to ever unionize.[38] In total, Workers United paid 41 individuals, including salts, almost $2.5 million as part of its unionization campaign.[39]

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[36] Christenson, Josh. *Starbucks Union Organizer Testified Before Congress Without Disclosing She was Pad Nearly $50k*, N.Y. POST (May 22, 2023). Retrieved May 15, 2024. Available at: https://nypost.com/2023/05/22/starbucks-union-organizer-kept-her-affiliation-from-congress/.

[37] F. Vincent Vernuccio, *Unions' Deceptive 'Salting' Loophole Leaves a Bad Taste*, N.Y. POST, Nov. 2, 2023. Last retrieved May 15, 2024. Available at: https://nypost.com/2023/11/02/opinion/unions-deceptive-salting-loophole-leaves-a-bad-taste/.

[38] Christenson, Josh. *Starbucks Union Organizer Testified Before Congress Without Disclosing She was Pad Nearly $50k*, N.Y. POST (May 22, 2023). Retrieved May 15, 2024. Available at: https://nypost.com/2023/05/22/starbucks-union-organizer-kept-her-affiliation-from-congress/.

[39] Labor Union News, *Analysis: Workers United Paid Nearly $2.5 Million to Organizers, 'Salts' and Activists at Starbucks.* LABORUNIONNEWS.COM, April 25, 2023. Last retrieved May 15, 2024. Available at: https://laborunionnews.substack.com/p/analysis-workers-united-paid-nearly.

There is strong public support for Congress to level the playing field. A recent poll on salting found that 75 percent of Americans agree that unions should be required to disclose salts, just as employers are required to disclose persuaders.[40] Fifty-nine percent favor throwing out union elections where salting was a factor.[41] Sixty-two percent agree that employers should be able to ask applicants if they are a union salt.[42]

Fair elections require a level playing field. Just as employers are required to disclose the consultants they hire to represent their views, so should unions be required to disclose the workers they pay to promote unionization.

d. Legislative and Administrative Threats

Workers' right to a fair election is under threat, both from proposed legislation and from Chairman McFerran's NLRB.

The most significant legislative threat to the secret ballot is the Protecting the Right to Organize Act, or the PRO Act. Under the PRO Act, unions who lose a secret ballot election can more easily dispute election results by claiming employer interference. If a union raises such a challenge, the burden is placed on the employer to prove a negative—that it did not interfere. If the employer fails to do so, a union could be recognized via card check. Put another way, the PRO Act finds an employer guilty until proven innocent.

While problematic on its own, this arrangement is particularly dangerous thanks to the NLRB's recent decision in *Cemex*, which expands the right to recognition via card check to include any instance of even minor misconduct by an employer, regardless of whether that misconduct has any impact on the fairness of an election.

In *Cemex*, Chairman McFerran and her fellow members of the Board re-adopted a variant of the *Joy Silk* doctrine, which has been disfavored since the 1940s. Under *Cemex*, employers facing a unionization attempt through card check must file a petition for a secret ballot election within a narrow, 45-day window. More problematically, *Cemex* now allows the NLRB to set aside an election whenever it determines an employer has committed an unfair labor practice, and instead of ordering a new election, order an employer to recognize the union via card check.[43] Prior to the

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[40] I4AW, "*Polling Results on Union Salting and Union Elections*," I4AW.ORG, retrieved May 18, 2024. Available at: https://i4aw.org/resources/polling-results-on-union-salting-and-union-elections/. The survey had a sample size of 1,010 adults, and was conducted from July 24-26, 2024.

[41] *Id.*

[42] *Id.*

[43] *Cemex Construction Materials Pacific LLC and International Brotherhood of Teamsters*, Case No. 28-CA-230115. Aug. 25, 2023, retrieved May 16, 2023. Available at: https://www.nlrb.gov/news-outreach/news-story/board-issues-decision-announcing-new-framework-for-union-representation.

Board's decision in *Cemex*, such an extreme remedy would be reserved for when an employer "committed egregious, or 'hallmark' violations, that made a free and fair election impossible."[44]

3. State and Federal Efforts to Protect Workers' Rights

The ongoing attacks against workers' right to a free and fair election have not gone unnoticed. Solutions at both the federal and state level have been proposed, and in some cases implemented, to ensure that workers have the chance to make a knowing, voluntary, and free choice about whether union representation is in their best interest.

At the federal level, three bills are uniquely focused on the issues I have discussed with you today. Those bills are the Employee Rights Act, the Worker's Choice Act, and the Start Apply Labor Transparency Act. We urge you to adopt all three measures.

a. The Employee Rights Act

The ERA advances several policies which would further worker freedom. Most relevant to my testimony today is the ERA's guarantee of workers' right to a secret ballot election. This step will eliminate the concerns regarding card check election, corporate campaigns, and neutrality agreements described above.

The ERA also contains other protections designed to ensure that workers are able to make a truly voluntary choice about unionization, including:

- Allowing employees to limit the amount of personal information their employer provides to a union;

- Protecting employees' right to a secret ballot in unionization elections;

- Requiring workers to opt in to any political spending, ensuring workers must affirmatively consent to paying for a union's political activity;

- Clearly defining an independent contractor standard, which prevents independent contractors from being erroneously classified as employees and improperly unionized; and

- Codifying the traditional understanding of when two entities can be considered joint employers, ensuring that unionization efforts target individual businesses, rather than basing that determination on entire franchisors.

[44] Lotito, Michael J., et. al, "*NLRB's Cemex Decision—Not Exactly Card Check, but Awfully Close*," LITTLER, Aug. 28, 2023. Last retrieved May 14, 2024, available at: https://www.littler.com/publication-press/publication/nlrbs-cemex-decision-not-exactly-card-check-awfully-close.

Each of these changes are common sense and ensure that workers have the maximum say over the representatives in their workplace. Congress should enact this bill and protect the voices of individual workers.

b. The Worker's Choice Act

The Worker's Choice Act is another significant step toward worker freedom. Currently, workers in a unionized workplace have no ability to speak on their own behalf. Unions act as the exclusive representative of employees, who have no ability to negotiate for themselves to secure better terms and conditions of employment. This is true even for those workers who opt-out of union membership.

In states without right to work protections, these dissenting workers can be forced to financially support a union, even if they disagree with the union's political spending or believe it is failing to adequately represent employees. Workers in a right to work state cannot be forced to pay a union, but still have no ability to speak for themselves.

The Worker's Choice Act remedies these problems by allowing workers who opt of out union membership to negotiate their own terms and conditions of employment. Unions, meanwhile, are relieved of the obligation to represent those who refuse union membership. This common-sense solution is long overdue, and should be adopted.

c. The SALT Act

The SALT Act directly tackles the inherent unfairness of current federal law by requiring unions to disclose and report organizers' identities and activities in the same manner as employers. This levels the playing field by allowing employees to assess the motivations of everyone communicating with them during a unionization campaign—not just the employer's representatives. It also allows workers to assess whether a coworker pushing for unionization is doing so due to a genuine dispute over terms and conditions of employment, or for some ulterior motive like personal gain. Passing the SALT Act would bring greater balance to union elections and lead to better-informed workers.

d. State Efforts

The states have also recognized the importance of ensuring workers can make a fully informed choice about unionization, free from coercion or deception. In 2023, Tennessee became the first state in the nation to adopt a law conditioning the award of economic development funding on a requirement that the company receiving the award require secret ballot union elections. Thus, states are using their legal ability to control the expenditure of state tax dollars to protect workers' rights.

Tennessee is not alone in defending the secret ballot. Within the past few months, both Georgia and Alabama have passed similar legislation. These states are at the forefront of pushing back against the ongoing federal efforts to prevent employees from learning about the full scope of their labor law rights, and in ensuring workers can make a fully informed decision about unionization.

Opponents to this legislation have argued that these efforts are preempted by the NLRA. These arguments are flawed. States enjoy broad authority to regulate the industries they choose to subsidize, as recognized by the United States Supreme Court in *Building & Construction Trades Council v. Associated Builders and Contractors of Massachusetts*.[45] Were this not the case, states could not regulate private sector activity through the use of project labor agreements, prevailing wage requirements, and similar regulations.[46] For years, traditionally pro-labor states have been eroding the neutrality upon which labor law is premised; now, states like Tennessee, Georgia, and Alabama are leading the charge to protect workers to the fullest extent permitted by law.

Congress should heed the growing chorus of state voices and strengthen secret ballot protections, so that workers across the country can enjoy the right to vote their conscience on union issues.

Conclusion

The NLRA recognizes that workers have the right to select the best representative for them in the workplace. This is consistent with the traditional understanding of labor law, including how it was originally understood by unions. Samuel Gompers, the first and longest-serving president of the American Federation of Labor once stated:

> There may be here and there a worker who for certain reasons unexplainable to us does not join a union of labor. That is his right and no one can dare question his exercise of that legal right.

That remains the case today. Government, whether through legislation or administrative fiat, should not be placing a thumb on the scale to favor either unions or employers. Instead, government should ensure that every worker has the ability to make a free, knowing, and voluntary choice about unionization.

Sadly, that is not the current state of the law. Card check procedures subject workers to harassment, coercion, and deception. Neutrality agreements deprive workers of the information needed to make a fully informed decision. Corporate campaigns force employers to surrender their First Amendment rights and risk the jobs of the very workers unions are attempting to organize.

Congress should strive to amend labor law so that these coercive tactics are no longer countenanced. The Employee Rights Act, Worker's Choice Act, and SALT Act are all significant steps in the right direction and should be adopted. But Congress can, and should, go further, and ensure that labor law as a whole is premised on the principle of voluntary association. Doing so would be a return to the original intent of labor laws. To once again quote Gompers:

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[45] *Building & Constr. Trades Council v. Associated Builders and Contractors of Massachusetts*, 507 U.S. 218 (1993).

[46] See, e.g., *Mich. Bldg. & Constr. Trades Council v. Snyder*, 729 F.3d 572 (6th Cir. 2013) (upholding legislation prohibiting state agencies from requiring project labor agreements on state projects).

> I want to urge devotion to the fundamental of human liberty – to the principles of voluntarism. No lasting gain has ever come from compulsion … the workers of America adhere to voluntary institutions in preference to compulsory systems which are held to be not only impractical, but a menace to their rights, their welfare, and their liberty.[47]

Thank you for the opportunity to testify before you today.

[47] Fr. Edward A. Keller, *The Case for Right to Work Laws: A Defense of Voluntary Unionism,* p. 90 (The Hertiage Foundation, Inc., 1956).