

The Biden Administration: Politicizing National Labor Law to Help Their Union Bosses

Minority Staff Report



I. Introduction

During the 2020 presidential campaign, then-candidate Joe Biden vowed to be the “strongest labor president you’ve ever had,” promising to “empower workers” and support their efforts to organize.¹ To do this, he vowed to support proposed pro-union legislation such as the Protecting the Right to Organize (PRO) Act, to hold corporate executives “personally liable” for interfering in unionization efforts, and to “guarantee all workers have a right to collectively bargain” by repealing statutes that allegedly weakened unions.²

Once sworn in, President Biden took immediate, unprecedented action to begin implementing his “pro-union” agenda by terminating then-General Counsel of the National Labor Relations Board (NLRB or Board) Peter Robb and then-Deputy General Counsel Alice Stock on his first day in office.³ Since then, and in the face of continuing economic crises driven by rampant inflation, labor shortages, and historically high mortgage rates—otherwise known as “Bidenomics”—the Biden Administration and those he has appointed to carry out his pro-union policy agenda have remained focused on reversing the 40-year downward trend for union support by any means possible.⁴

President Biden and his administration have taken a whole-of-government approach to tip the scales in favor of labor unions and their union bosses—not to the benefit of the workers he claims to champion. For example, President Biden stacked the NLRB with Board members and legal counsel pulled directly from the ranks of labor unions,⁵ advocated for and provided nearly \$90 billion to bail out long-mismanaged union pension funds,⁶ and used his “bully pulpit” as the nation’s chief executive to take a pro-union, anti-business position by joining the United Auto Workers’ picket line—making him the first president in U.S. history to take such a dramatic step.⁷ Most significantly, however, President Biden and those he has appointed to execute federal labor

¹ Andrew Solendar, *Biden Vows To Be ‘Strongest Labor President You’ve Ever Had’ at Union Event*, FORBES (Sept. 7, 2020), <https://www.forbes.com/sites/andrewsolender/2020/09/07/biden-vows-to-be-strongest-labor-president-youve-ever-had-at-union-event/?sh=f01e16a5d5dd>.

² *Id.*

³ Rebecca Rainey, *Trump Officials at Labor Board Ousted by Biden After Resisting Removal*, POLITICO (Jan. 21, 2021), <https://www.politico.com/news/2021/01/20/trump-labor-board-460978>; Eli Rosenberg and Reis Thebault, *Biden Fires Trump-Appointed Labor Board General Counsel and Deputy Who Refused to Resign*, THE WASHINGTON POST (Jan. 21, 2021), <https://www.washingtonpost.com/business/2021/01/20/biden-fires-nlrp-peter-robb/>.

⁴ ICYMI: *President Biden: I’m ‘the Most Pro-Union President In American History. And I make no Apologies for It’*, AFL-CIO (June 29, 2023), <https://aflcio.org/statements/icymi-president-biden-im-most-pro-union-president-american-history-and-i-make-no>; Steven Greenhouse, *Biden Stakes Claim to Being America’s Most Pro-Union President Ever*, THE GUARDIAN (May 2, 2021), <https://www.theguardian.com/us-news/2021/may/02/joe-biden-unions>.

⁵ See, e.g., David M. Prouty, NLRB, <https://www.nlr.gov/bio/david-m-prouty> (last visited Oct. 19, 2023); Gwynne A. Wilcox, NLRB, <https://www.nlr.gov/bio/gwynne-a-wilcox> (last visited Oct. 19, 2023); *General Counsel*, NLRB, <https://www.nlr.gov/bio/general-counsel> (last visited Nov. 8, 2023).

⁶ Greg Iacurci, *Covid Relief Bill Gives \$86 Billion Bailout to Failing Union Pension Plans*, CNBC (Mar. 8, 2021), <https://www.cnbc.com/2021/03/08/covid-relief-bill-gives-86-billion-bailout-to-failing-union-pension-plans.html>.

⁷ Michael D. Shear, *Biden Defends Striking Autoworkers: They Deserve a ‘Fair Share’*, THE NEW YORK TIMES (Sept. 17, 2023), <https://www.nytimes.com/2023/09/15/us/politics/biden-uaw-strike.html>; Deepa Shivaram, *Autoworkers Get a Historic Visitor to the Picket Line: President Biden*, NPR (Sept. 26, 2023), <https://www.npr.org/2023/09/26/1201627330/biden-auto-workers-uaw-strike-michigan-detroit-trump>.

laws have taken the NLRB—which is statutorily mandated to be an impartial and unbiased arbiter between unions, employees, and employers—and used it for their political purposes to pad the membership rolls for labor unions, all at the expense of protecting workers’ freedom of choice and to the detriment of the American economy.⁸

Unfortunately, this impulsive chase for union approval is nothing new for a Democratic administration and its Board appointees. Throughout the course of the Obama Administration, the NLRB overturned a cumulative 4,559 years of Board precedent,⁹ all of which amended Board case law and rules in ways that favored unions’ preferred positions.¹⁰ On December 13, 2012, the U.S. House Committee on Oversight and Government Reform, now referred to as the Committee on Oversight and Accountability, further detailed the ways in which former President Barack Obama’s NLRB was little more than an advocate for union positions as opposed to a neutral regulator of federal labor law.¹¹

The Biden Board’s continuation of this lopsided preference for unions is unacceptable and further erodes the American people’s trust in the NLRB. The sampling of misbehavior at the Board detailed below shows just how far the Board has strayed from its mission to act as a neutral arbiter of federal labor laws in the interest of pushing the prerogatives of their union benefactors, and how ripe the Board has become for systemic change.

II. Background: Function and Purpose of the NLRB

The National Labor Relations Act (NLRA) of 1935 gives private sector workers the right to join or form a labor union and to bargain collectively over wages, hours, and other conditions of employment or to choose not to unionize.¹² The NLRB is an independent federal agency that administers and enforces the NLRA. As part of its statutory duties, the NLRB conducts secret ballot elections once a union files a representation petition. In conducting these elections, to preserve the integrity of the election process, the NLRB is statutorily obligated to act as a neutral arbiter, only showing favor for maximum voter participation in each election and without favoritism for either participating party.¹³

⁸ See 29 C.F.R. § 103 (2023) (finalizing a broad joint employer rule that expands who constitutes an “employer”); *Cemex Constr. Materials Pacific, LLC*, 372 NLRB No. 130 (2023) (establishing a mechanism for card check, allowing unions to avoid having to win representation elections); Memorandum GC 24-01 (NLRB GC Nov. 2, 2023) (expanding the Board’s *Cemex* decision to permit NLRB regions to circumvent representation elections when the employer commits even a minor unlawful labor practice before the election); Shivansh Tiwary and Raechel Thankam Job, *US Auto Strike’s Economic Fallout Starts to Hurt Global Businesses*, REUTERS (Oct. 20, 2023), <https://www.reuters.com/business/autos-transportation/us-auto-strikes-economic-fallout-starts-hurt-global-businesses-2023-10-20/> (setting the negative economic impact of strikes that President Biden vocally supported at more than \$7 Billion).

⁹ The Board also rejected an additional 454 collective years of case law through implementing new election rules.

¹⁰ Michael J. Lotito, Maurice Baskin, & Missy Parry, *Was the Obama NLRB the Most Partisan Board in History?*, COALITION FOR A DEMOCRATIC WORKPLACE & LITTLER MENDELSON, P.C. (Dec. 6, 2016), <https://www.litler.com/publication-press/press/was-obama-nlr-most-partisan-board-history>.

¹¹ STAFF OF HOUSE OF REP. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 112TH CONG., PRESIDENT OBAMA’S PRO-UNION BOARD: THE NLRB’S METAMORPHOSIS FROM INDEPENDENT REGULATOR TO DYSFUNCTIONAL UNION ADVOCATE (Comm. Print 2012).

¹² National Labor Relations Act, 29 USC §§ 151 et seq.

¹³ Memorandum from David Berry, NLRB Inspector General, to Jennifer Abruzzo, NLRB General Counsel, on the Report of Investigation – OIG-I-596, at 10 (July 8, 2023).

In addition to conducting representation elections, the Board has the authority to engage in rulemaking to set out rules regarding labor law enforcement, and sits as a five-member judge and jury to adjudicate individual cases brought before it by the NLRB General Counsel.¹⁴ The General Counsel acts as the investigator and prosecutor before the Board, and is responsible for the general supervision of NLRB field offices (regions) throughout the country.¹⁵

III. NLRB General Counsel's Clear Preference for Unions and Unionization

President Biden unceremoniously terminated Presidentially-appointed, Senate-confirmed General Counsel Peter Robb on his first day in office, and later announced Jennifer Abruzzo as his nominee for the position.¹⁶ Much like President Biden's other Board nominees, Ms. Abruzzo came directly from a union, having served as Special Counsel to the Communications Workers of America, one of the largest unions in the United States.¹⁷ Ms. Abruzzo also served on the President's transition team, advocating that he fire former General Counsel Robb on day one.¹⁸ Shortly after taking office, Ms. Abruzzo released a 10-page memorandum detailing her priorities and the changes she wanted to make to federal labor law to tilt the scales toward unions winning elections and to grant unions greater rights against employers.¹⁹ Since releasing this memorandum, Ms. Abruzzo has taken steps to boost the success of unionization efforts such as convincing the Board to force employers to recognize and bargain with unions without the need for a secret-ballot representation election, despite elections being "the most satisfactory—indeed the preferred—method" to determine worker support for a union.²⁰ Eradicating secret ballot elections strips workers of their right to make an informed decision about whether they truly want to join a union, and creates an environment in which unions can pressure workers into expressing support for the union through exposure and intimidation in the workplace.²¹

In addition to her clear and documented preference for case outcomes and rule changes that uniquely benefit unions, General Counsel Abruzzo has overseen a multi-region effort to ensure certain unions win representation elections. On the ground, for example, the NLRB's regions appear to be singularly focused on unionizing Starbucks retail locations across the country and

¹⁴ *About*, NLRB, <https://www.nlr.gov/about-nlr/what-we-do/introduction-to-the-nlr> (last visited Oct. 20, 2023).

¹⁵ *General Counsel*, NLRB, <https://www.nlr.gov/bio/general-counsel> (last visited Nov. 8, 2023).

¹⁶ *President Biden Announces Key Nomination on Jobs Team*, THE WHITE HOUSE (Feb. 17, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/17/president-biden-announces-key-nomination-on-jobs-team/>.

¹⁷ *General Counsel*, NLRB, <https://www.nlr.gov/bio/general-counsel> (last visited Nov. 8, 2023); *About CWA*, COMMUNICATIONS WORKERS OF AMERICA, <https://cwa-union.org/about> (last visited Oct. 19, 2023).

¹⁸ *Nominations of Jennifer Abruzzo and Seema Nanda: Hearing of the Senate Committee on Health, Education, Labor, and Pensions*, 117th Cong., S. Hrg. 117-184 (Apr. 29, 2021) <https://www.govinfo.gov/content/pkg/CHRG-117shrg46764/pdf/CHRG-117shrg46764.pdf>.

¹⁹ Memorandum GC 21-04, at 4 (Aug. 12, 2021), <https://apps.nlr.gov/link/document.aspx/09031d4583506e0c>.

²⁰ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969) ("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.")

²¹ See *Cemex Constr. Materials Pacific, LLC*, 372 NLRB No. 130 (2023); Allen Smith, *NLRB General Counsel Calls for Union Organization Through 'Card Check'*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Apr. 20, 2022), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/nlr-general-counsel-card-check-brief.aspx> (noting that in the majority of secret ballot elections, "the number of votes for unions is almost always vastly less than those who signed authorization cards.").

keeping them unionized—as evidenced by the examples detailed below, an onslaught of over 550 ULPs and over 100 NLRB complaints being issued against Starbucks since 2021, and the NLRB’s continued efforts to block Starbucks employees from removing the union in more than fifteen Starbucks locations.²²

As a result of these efforts in 2022 and 2023, a whistleblower complaint filed by an NLRB employee and Louisiana constituent exposed numerous instances of various NLRB regions using their power over representation elections to benefit unions. A subsequent 2023 report from the NLRB’s Office of Inspector General (OIG) detailed the ways in which the NLRB’s St. Louis Region “gross[ly] mismanage[d]” and unduly influenced an election, demonstrating the Board is not constrained by its own protocols and procedures to maintain neutrality.²³

a. Case Study: The NLRB’s “Gross Mismanagement” of the Overland Park, Kansas Starbucks Election

In 2022, Starbucks Workers United (SWU) filed a petition to represent all workers employed at Starbucks’ Overland Park, Kansas store, which prompted the NLRB to schedule a mail-ballot election between March 16 and April 8, 2022.²⁴ During the election period, contrary to explicit and longstanding NLRB rules, SWU and Regional staff improperly communicated about the logistics of the election—unbeknownst to Starbucks—including information about specific employees who had not received their mail ballot and how best to ensure those employees received their ballots and voted in the election.²⁵ Under Board rules, if a voter does not receive their ballot, the Board is only permitted to communicate with that voter and cannot send a new ballot at the request of anyone except the voter.²⁶ From the outset, the Region’s staff chose to ignore this rule.

Regional personnel not only worked directly with the union to send duplicate and triplicate ballots to those voters favoring the union,²⁷ but also offered—through SWU and without Starbucks’ knowledge—for those voters to vote in person at the Region’s office.²⁸ This was done in violation of the parties’ joint agreement that the election would take place via mail ballots.²⁹

²² Justin Wise and Robert Iafolla, *Littler Cashes In On Starbucks’ Sprawling Anti-Union Campaign*, BLOOMBERG LAW (June 28, 2023), <https://news.bloomberglaw.com/daily-labor-report/littler-cashes-in-on-starbucks-sprawling-anti-union-campaign>; Parker Purifoy, *Starbucks Workers Face ‘Uphill Battle’ With bids to Remove Union*, BLOOMBERG LAW (July 12, 2023), <https://news.bloomberglaw.com/daily-labor-report/starbucks-workers-face-uphill-battle-with-bids-to-remove-union>.

²³ Berry, *supra* n. 13, at 2.

²⁴ *Starbucks Corporation & Workers United*, Case 14-CA-289926 (Feb. 25, 2022) (Notice of Election), at 1-2; Berry, *supra* n. 13, at 2.

²⁵ Berry, *supra* n. 13, at 11; *see also* Berry, *supra* n. 13, at 41-45 (March 23, 2022 email from union attorney to NLRB Region 14 Field Examiner identifying individuals who had not received ballots).

²⁶ NLRB Casehandling Manual § 11336.4.

²⁷ Berry, *supra* n. 13, at 3, 41-52, 63 (emails between the union’s attorneys and Regional staff arranging for ballots to be provided to specific voters).

²⁸ *See* Berry, *supra* n. 13, at 12; *see also* Berry, *supra* n. 13, at 52 (April 1, 2022 email from NLRB Region 14 Field Examiner to union attorney: “Just to confirm with you, please have the individuals that have not yet received ballots call me directly . . . and I will assist them in scheduling a time to visit the Overland Park office to pick up a ballot.”).

²⁹ *See* Berry, *supra* n. 13, at 12.

Starbucks was not aware of any irregularities in the election or any of the Region’s behind-the-scenes conduct until April 1, 2022, when Regional personnel emailed Starbucks and SWU to alert them that the wrong voter list was used when sending out the initial ballots.³⁰

On April 4, 2022, after the Region alerted the parties of voter list irregularities, Starbucks asked “when additional ballots were mailed,” and the Board informed Starbucks for the first time that they were sent on April 1, 2022.³¹ Even then, however, the Region failed to tell Starbucks that that a subset of voters were also permitted to pick up ballots and vote in person at the Region’s office.³²

After the union won the election in a 6-1 vote, Starbucks filed numerous objections, including allegations that the Regional Director and Regional personnel improperly intervened to give SWU an electoral advantage.³³ Specifically, Starbucks alleged that the Board failed to mail ballots to eligible voters—including one voter known not to be supporting the union—improperly coordinated with SWU during the election to make special arrangements for a subset of voters to cast their ballots in person, and maintained a substantial disparity between the communications it shared with SWU and those shared with Starbucks.³⁴

Due to the nature of Starbucks’ objections, a different regional director was tasked with hearing the parties’ positions. Following the investigation, the second regional director found (1) the Region “misrepresented to [Starbucks] the steps it was taking to provide” voting accommodations to specific voters, (2) the Region gave SWU more insight and transparency into the processing of the ballots than it gave to Starbucks, and, (3) there were “inequities resulting from the Region’s communications with the parties that cast doubt on [the] validity [and] the fairness of this election.”³⁵ Ultimately, the regional director found the Board’s conduct placed in doubt “the fairness of the conduct of [the] election,” and ordered that Region 14 hold a new election.³⁶

The NLRB’s conduct also triggered a full investigation by the NLRB’s Office of Inspector General (OIG), which came to a similar conclusion.³⁷ In a report sent to General Counsel Abruzzo on July 8, 2023, the OIG found that Region 14:

- engaged in “gross mismanagement” that “called into question the Region’s neutrality in the [election] process,”³⁸
- directly contravened the NLRB’s statutory mandate to conduct impartial representation elections and “created the risk of great reputational harm that could negatively impact the ability of the [NLRB] to carry out that mission,”³⁹

³⁰ *Id.* at 59 (April 1, 2022 email from Region 14 staff to union and Starbucks lawyers alerting them that the Region used the wrong voter list to send out initial ballots).

³¹ *Id.* at 64-65.

³² *Id.* at 4.

³³ *Starbucks Corporation & Workers United*, Case 14-CA-290968 (Sept. 13, 2023) (Decision and Direction of Second Election), at 1-2.

³⁴ *Id.* at 3-14.

³⁵ *Id.*

³⁶ *Id.* at 10.

³⁷ Letter from David Berry, NLRB Inspector General, to Senator Bill Cassidy, M.D., Ranking Member, Senate Committee on Health, Education, Labor, and Pensions (Mar. 6, 2023) (on file with the Senate Committee on Health, Education, Labor, and Pensions).

³⁸ *Id.*

³⁹ *Id.*

- showed lack of candor by failing to notify all workers on the voter list and Starbucks that anyone needing a ballot could pick one up at the Regional office and provided “deceptive and incomplete” responses to Starbucks’ requests,⁴⁰ and
- refused to cooperate fully with the OIG’s investigation by giving piecemeal answers that could not be backed up by documentation and not providing first-hand accounts of the process despite their obvious recollection of the events.⁴¹

b. The Board’s Broader Election Mismanagement

The NLRB whistleblower also brought forward allegations of broader mismanagement and lopsided election-monitoring by the NLRB. In fact, the whistleblower produced over 500 pages of internal NLRB documents detailing “questionable conduct” and “improper actions” by Board officials in 33 separate elections across 15 different regions. These documents showed instances of:

- a Starbucks/SWU election being overturned and rescheduled in Buffalo, New York because the Board conducted that election in such a manner as to “cast doubt on whether all ballots were counted,” and which “undermine[d] the integrity of the election and the parties’ confidence in the election results”;
- the NLRB’s Buffalo office permitting employees to vote in violation of the election agreement between the parties, and in a manner in which the Board did not have any control over the ballots (i.e., sliding the ballot under the Region’s interior door if the office was not open);
- the Pittsburgh Region directly contravening the parties agreed-to mail-ballot election rules by having a Board agent personally retrieve a ballot from a voter;
- the Atlanta Region permitting eligible employees to vote in person despite the stipulated rules of the election calling for ballots to be returned via U.S. Mail;
- the Seattle Region communicating directly with union representatives instead of individual voters about sending duplicate ballots to voters who did not receive their original ballot, which the union attorney admitted was not permitted; and,
- the San Francisco Region communicating directly with union representatives regarding individual voters’ needs for new ballots and encouraging employees to return their ballots in person, all of which was contrary to the stipulated rules of the election that called for individual voters to request new ballots and for all ballots to be returned to the Region via U.S. mail.⁴²

Under General Counsel Abruzzo’s leadership, the NLRB appears to strategically tip the proverbial scales in favor of unions when the proposed unit is small and can be more easily swayed toward a

⁴⁰ See Berry, *supra* n. 13, at 12.

⁴¹ *Id.* at 16.

⁴² Letter from Chairwoman Virginia Foxx, Chairwoman of the House Committee on Education and the Workforce to Lauren McFerran, Chairwoman of the National Labor Relations Board, and Jennifer Abruzzo, General Counsel of the National Labor Relations Board, (Aug. 14, 2023), <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=409475>.

union victory. For example, in Buffalo in 2022, Region 3 failed to present seven ballots during the ballot counting procedure in an election where SWU won by a single vote: eight votes for the union, seven against the union.⁴³ This election had to be set aside and re-run after Starbucks raised objections, after which the employees voted against being represented by SWU.⁴⁴

IV. NLRB's Election Rules and Decisions Have Uniformly Benefited Unions

In addition to the on-the-ground mismanagement at the regional level that is systematically benefiting unions, the Board is also making fundamental changes to tip the scales for future elections toward unions. With private sector unionization at an historic low point,⁴⁵ unions have been left searching for ways to systematically short-circuit the typical election rules, weaken the mechanisms by which employers can inform employees of potential downsides of unionizing, and stymie employee attempts to remove the union even when they win elections.

Since obtaining a Democrat-appointed majority under the Biden Administration, the Board has been focused on following the extreme agenda General Counsel Abruzzo published in 2021 to increase unions' power throughout the union representation lifecycle. Indeed, the Board's changes are not merely designed to help unions win initial representation elections, but are aimed at eliminating employee choice altogether to avoid any chance of union defeat. For example, the Board recently decided a case that will allow unions to force employers to recognize and bargain with them without the hassle of a representation election. This will force employees to cede their voice—and money—to unions without the chance to cast a vote. The Board is simultaneously seeking public comments to a rule that will allow unions to perpetually block any employee effort to rid itself of a union it no longer wants, even if the union's claims against that effort are completely frivolous.

In light of the Board's actions, it is abundantly clear that the Biden Board operates with a single-minded goal: to benefit their union bosses at the expense of workers.

a. Aggressively Shortening the Time Employers Have to Campaign Against—and That Employees Have to Learn About—Unionization

The first step to ensuring that unions win more elections requires the union to have a procedural advantage against an employer, and to ensure few opportunities for employer rebuttal. On August 24, 2023, the NLRB took a major step in this direction, finalizing what has become known as the “quickie” or “ambush” election rule. After the election is set, the Board's goal is to hold an election within eight days—down from 20 days under prior practice.⁴⁶ This rule significantly compresses the timeline on which an employer can work to educate employees about the impact of a union on working conditions.⁴⁷ This new rule not only expedites the timeline on which representation elections will be held, but also systematically weakens an employer's opportunity to argue that the union's requested unit is improper and to make its case to its employees that unionizing may be

⁴³ *Starbucks Corp. & Workers United*, Case 03-RC-285929 (report on objections, order setting aside election and order directing rerun election) (May 18, 2022).

⁴⁴ *Case Search Results, Starbucks Corporation*, NLRB, <https://www.nlr.gov/case/03-RC-285929> (last viewed Oct. 20, 2023).

⁴⁵ *Union Members – 2022*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LAB. (Jan. 19, 2023), <https://www.bls.gov/news.release/pdf/union2.pdf>.

⁴⁶ *Id.* at 58090, 58095 (Kaplan dissenting).

⁴⁷ 88 Fed. Reg. 58076 (Aug. 25, 2023) (to be codified at 29 C.F.R. § 102, *et seq.*).

against their economic interests. In fact, an employer cannot even make an argument that the union’s proposed unit of employees is inappropriate until after the election takes place.⁴⁸

The rule also hamstring employees, who will have to absorb information in a limited period of time to make an informed choice about whether they want to maintain their existing relationship with their employer or cede their authority to the union. As first noted by NLRB Member Marvin E. Kaplan in dissent to this rule, it remains to be seen “how much the voters will actually benefit from the requirements that elections be held as quickly as possible when they find themselves exercising this right without fully understanding the arguments concerning representation and the ways in which their vote may affect them.”⁴⁹ These questions, unfortunately, do not seem to concern the Board when compared to the benefit to unions.

b. Silencing Employees’ Voices by Eliminating the Need for Representation Elections

After guaranteeing unions a leg up during the election process, Abruzzo’s next step is to find ways to eliminate elections where possible. In furtherance of this goal, the Board released its *Cemex Construction Materials Pacific, LLC* decision in which the Board lowered the threshold for forcing an employer to recognize and bargain with a union without conducting an election.⁵⁰ Under the new *Cemex* rule—which overturned 52 years of Supreme Court precedent⁵¹—when a union presents an employer with evidence of majority support for unionizing, the employer must either (1) recognize the union voluntarily, (2) actively file a petition with the Board to challenge the union’s claims within two weeks, or (3) do nothing and risk the union filing an unfair labor practice (ULP) that will likely result in a bargaining order.⁵²

Even if the union initially fails to obtain a bargaining order and has to go through an election (which would now take place on the new fast-tracked schedule), the union can still deny workers the right to a secret ballot election if the Board determines that the employer committed even a single, minor ULP before the election.⁵³

The Board has yet again taken substantial action that tramples on employees’ freedom of choice by making it more likely that unions can achieve recognition without all employees having the chance to voice their opinion. Again, Member Kaplan brought these objections before the Board: “[U]nder the majority’s purported standard, employees’ right to a secret-ballot election hinges on whether or not an employer successfully anticipates and avoids all actions that could be viewed as violations of the Act. An employee’s right to a secret-ballot election should not be conditioned on employer perfection.”⁵⁴

c. Preventing Employees from Choosing to Oust Their Union

Finally, after clearing the path for unions to more easily win representation elections, the last step is to ensure unions never have to face an employee-driven union decertification effort to oust them. Again, the Board has come to the aid of unions to accomplish this goal. On November 4, 2022, the Board released a notice of proposed rulemaking—curiously called the “Fair Choice and Employee

⁴⁸ *Id.* at 58080.

⁴⁹ *Id.* at 58093 (Kaplan dissenting).

⁵⁰ *Cemex Constr. Materials Pacific, LLC*, 372 NLRB No. 130 (2023).

⁵¹ *Id.* at *25.

⁵² *Id.* at *25-29.

⁵³ Memorandum GC 24-01, at 4-5.

⁵⁴ *Cemex*, 372 NLRB No. 130, at *41 n. 4.

Voice” rule—that would permit unions to block employee-filed petitions to strip the union of its right to represent them.⁵⁵ Unions have historically utilized these “blocking charges” as a weapon to delay or prevent a decertification election from ever coming to fruition by filing repeated unsubstantiated ULP charges.⁵⁶ In fact, several federal appellate courts have observed the potential for union abuse, dating back decades.⁵⁷

Under the Trump Administration, the Board sought to eliminate the bad incentives surrounding blocking charges in 2020, when it implemented a rule that permitted unions to file ULPs during the decertification process, but allowed the employees’ decertification vote to continue.⁵⁸ Under that rule, to ensure a fair election, the Board would simply hold the results of the election until the ULP at issue was resolved.⁵⁹

Clearly, this 2020 rule did not work for unions’ purposes, as they could no longer simply hold on to their power by filing frivolous ULPs to deny employees their right to choose whether to associate with the union. As a result, the Board proposed a new rule to restore the pre-2020 imbalance of power that incentivizes frivolous claims to the Board and strips employees of their freedom of choice.

V. Conclusion and Next Steps

The NLRB was statutorily devised to act as a neutral arbiter to balance the interests of workers, unions, and employers. Since 2021, the Biden Administration and its NLRB appointees have demonstrated a radical, systematic, and fundamental determination to upend this balance and shift federal labor law enforcement to benefit labor unions, even if it means violating all semblance of objectivity or expending with an employees’ freedom of choice. The NLRA, however, was meant to give employees a voice—to protect “workers’ full freedom of association.”⁶⁰

To hold the Board accountable to its statutory mission, the minority staff for the HELP Committee will continue to investigate the NLRB’s politicized conduct to ensure that the Board, General Counsel Abruzzo, and all regions make every reasonable effort to maintain neutrality and carry out their statutory mission of promoting all employee choice, and not just a choice for unions.

⁵⁵ 87 Fed. Reg. 66890 (Nov. 2, 2022).

⁵⁶ *Id.* at 66916 (Kaplan and Ring dissenting).

⁵⁷ See *NLRB v. Hart Beverage Co.*, 445 F.2d 415, 420 (8th Cir. 1971) (“[I]t appears clearly inferable to us that one of the purposes of the [u]nion in filing the unfair practices charge was to abort [r]espondent's petition for an election, if indeed, that was not its only purpose.”); *Templeton v. Dixie Color Printing Co.*, 444 F.2d 1064, 1069 (5th Cir. 1971) (criticizing the Board for holding a decertification petition in abeyance for 3 years while fielding blocking charges from the union); *NLRB v. Midtown Service Co.*, 425 F.2d 665, 672 (2d Cir. 1970) (“If . . . the charges were filed by the union, adherence to the [blocking-charge] policy in the present case would permit the union . . . merely by filing charges to achieve an indefinite stalemate designed to perpetuate the union in power.”); *NLRB v. Minute Maid Corp.*, 283 F.2d 705, 710 (5th Cir. 1960) (to delay a decertification petition because of blocking charges “would put the union in a position where it could effectively thwart the statutory provisions permitting a decertification when a majority is no longer represented.”); *Pacemaker Corp v. NLRB*, 260 F.2d 880, 882 (7th Cir. 1958) (“The practice adopted by the Board is subject to abuse. . . [by filing blocking charges] the [u]nion was able to and did stall and postpone indefinitely the representation hearing.”).

⁵⁸ 85 Fed. Reg. 18369-18370, 18399.

⁵⁹ *Id.*

⁶⁰ *The Law*, NLRB, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law> (last viewed Nov. 15, 2023).