

COMMITTEE ON EDUCATION AND LABOR

***CORRUPTION, CONFLICTS, AND CRISIS:***  
**THE NLRB'S ASSAULT ON**  
**WORKERS' RIGHTS UNDER THE**  
**TRUMP ADMINISTRATION**

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## Executive Summary

When President Trump reflected on his administration during this year's State of the Union, he claimed, "Our agenda is relentlessly pro-worker."<sup>1</sup> The reality, however, is far different. Over the past three and a half years, Trump's appointees to the National Labor Relations Board (NLRB) have waged a full-scale attack on workers' rights to organize unions and collectively bargain.

The NLRB is the federal agency charged with protecting most private sector workers' power to stand together and form a union, in order to bargain for higher wages, better benefits, and safer working conditions.<sup>2</sup> These rights are essential to growing a strong economy, because they allow workers to bargain for their fair share of the wealth they create. A worker in a union earns an average of 11.2 percent more than a peer in the same sector who has similar experience, education, and occupational classification in a non-union workplace.<sup>3</sup> Workers who are in a union are also 27 percent more likely to be offered health insurance through their employer,<sup>4</sup> and unions play a key role in improving workplace safety standards.<sup>5</sup> Union membership narrows the racial wealth gap, and union members of color have almost five times the median wealth of their non-union counterparts.<sup>6</sup>

The COVID-19 pandemic has revealed that far too many workers do not have access to basic workplace safety protections, health care, or paid leave.<sup>7</sup> Unions strengthen workers' power to bargain for these basic rights.<sup>8</sup> In response to this pandemic, workers are forming or joining unions at much higher rates than past years.<sup>9</sup> However, instead of protecting worker's rights to organize during the pandemic, the NLRB halted this momentum by suspending elections nationwide when over 100 elections were scheduled,<sup>10</sup> and continues to suspend elections that could be safely conducted with mail ballots.<sup>11</sup>

Although almost half of all non-union workers report that they would join a union if they could,<sup>12</sup> only roughly six percent of private sector workers are union members.<sup>13</sup> The reason — employers are exploiting the weaknesses in the National Labor Relations Act (NLRA), the law passed 85 years ago to protect workers' right to organize.<sup>14</sup> For example, when employers unlawfully fire union supporters, there are no fines or penalties to deter future violations.<sup>15</sup> The NLRA must be strengthened to deter employers from retaliating against workers who exercise their rights. The NLRB can and should do more to ensure union representation elections are fair, to prevent employers from evading their obligations, and to remedy violations of workers' rights. Nevertheless, the current NLRB has waged a multi-pronged attack on the right to organize since President Trump took office.

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## How Does the NLRB Function?

As the agency charged with enforcing the NLRA, the NLRB has two core functions: conduct union representation elections and remedy unfair labor practices committed by employers and unions. The agency consists of a Board of five Members who are Presidentially appointed and Senate confirmed, the General Counsel who is also Presidentially appointed and Senate confirmed, and career staff who serve in Washington, DC and in Regional Offices throughout the country.

The NLRB's five Members adjudicate and vote on representation cases and unfair labor practice cases. They may also conduct rulemaking. Each Member serves for a five-year term, and these terms are staggered so that one Member's term expires each year. Three Members are from the President's party, and two are from the opposite party. The current Members are:

- **Chairman John Ring**, who was previously a partner at Morgan, Lewis & Bockius, LLC, one of the largest law firms representing employers before the NLRB. His term expires on December 16, 2022.<sup>16</sup>
- **Member William Emanuel**, who was previously a partner at Littler Mendelson, PC, another of the largest law firms representing employers before the NLRB. His term expires on August 27, 2021.<sup>17</sup>
- **Member Marvin Kaplan**, who previously served as Chief Counsel to the Chairman of the Occupational Safety and Health Review Commission, and previously served as a Republican staffer drafting anti-union legislation in the House of Representatives. His term expires on August 27, 2025.<sup>18</sup>
- **Member Lauren McFerran**, who is the sole Democratic Member and previously served as a staffer in the Senate and as a union-side labor lawyer. Her term expires December 16, 2024.<sup>19</sup>

President Trump has refused to nominate a second Democratic Member, leaving the fifth seat vacant.

The NLRB has a General Counsel who serves for a four-year term. When an employee, a union, or an employer files a charge alleging an unfair labor practice, the General Counsel investigates that charge to determine if it has merit. If the General Counsel concludes it does, he or she can attempt to settle the case, or can prosecute the case before an Administrative Law Judge (ALJ). A party that loses before an ALJ can appeal the case to a panel consisting of the Board Members. However, if the General Counsel dismisses an unfair labor practice charge, the employee or entity filing the charge has no recourse. The current General Counsel, Peter Robb, spent most of his career at a private law firm representing employers in cases against unions, and represented the Reagan administration when it fired air traffic control workers in retaliation for striking.<sup>20</sup>

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## **I. The NLRB Has Conducted an Unprecedented Number of Rulemakings, All Designed to Eliminate Unions**

Although the NLRB has the power to issue regulations, it primarily formulates policy through opinions issued in cases litigated before the Board. During the Trump Administration, however, the agency has attempted to jam through five rulemakings, more than the agency has issued in the 30 years prior to the Trump Administration.<sup>21</sup> All of these rulemakings discourage workers from organizing unions and collective bargaining:

### **Making it Harder to Organize by Delaying Union Representation Elections**

On December 18, 2019, the NLRB overhauled its election procedures to delay the timing of representation elections.<sup>22</sup> This included delaying the scheduling of a pre-election hearing, delaying when employers must post a notice of the petition for election in the workplace, and permitting parties to create additional pre-election delay by filing post-hearing briefs. The effect of this rule is clear: establishing unnecessary procedural delays to provide employers more time to campaign against the union, through lawful or unlawful means.<sup>23</sup>

### **Enabling Companies to Evade Their Duty to Bargain as Joint Employers**

On February 25, 2020, the NLRB issued a rule that permits companies to reserve control over subcontracted employees' terms and conditions of employment, or exercise control indirectly, without requiring them to bargain as a joint employer with a union representing those employees.<sup>24</sup> In defining the list of "essential terms and conditions of employment," the NLRB refused to include occupational safety and health.<sup>25</sup> This is especially dangerous for temp-agency workers during this pandemic when many workplaces have failed to timely and effectively implement safety protocols. For example, if a hospital controls the workplace safety standards, but refuses to bargain with the temporary agency workers, these workers will lack recourse against the party setting working conditions.<sup>26</sup>

### **Forcing Decertification Elections on Workers Who Want a Union**

On April 1, 2020, the NLRB announced that it would conduct elections even if the workers or unions file a charge alleging that the employer engaged in coercion that tainted the outcome of the election.<sup>27</sup> This means that an employer can intimidate the workers into opposing the union, the union can report the coercion to the NLRB, and the NLRB will still allow a decertification election to proceed. The NLRB can impound the ballots while it determines if the employer's pre-election conduct was unlawful, encouraging employers to roll the dice on a campaign of unlawful coercion.

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## **Stripping Student Workers of their Right to Organize – PENDING**

On September 23, 2019, the NLRB issued a proposed rule to strip private university students of their protections when they perform work for their university<sup>28</sup>—contradicting the plain text of the NLRA.<sup>29</sup> If the NLRB finalizes a regulation to strip student workers of their right to organize at private universities, it could eliminate the ability of these workers to collectively bargain for basic protections, which is particularly damaging where there have been large COVID-19 outbreaks at colleges and universities.

## **Depriving Employee Access to Information about the Union – PENDING**

On July 29, 2020, the NLRB proposed a new rule to limit union access to email addresses, home telephone numbers, and cell phone numbers of employees eligible to vote in an election, while leaving employers free to use this same contact information.<sup>30</sup> While claiming the goal is to protect individuals' privacy from a union's potential misuse of this information, the NLRB informed the Committee on Education and Labor on February 15, 2018, that no union has ever even been alleged to have abused such information.<sup>31</sup> As the pandemic makes employees more dependent on phones and email in order to organize safely, this rule will endanger workers and obstruct them from learning about the union.

## **II. The NLRB Consistently Sides with Employers over Employees and Unions, Rigging the Rules against Workers Who Organize**

When adjudicating disputes between workers and their employers, the Trump-appointed NLRB has demonstrated a bias in favor of employers over employees—this is especially evident given the vacant seat on the NLRB that could be held by a second Democrat. These decisions make it harder for workers to join a union, deny workers the protections of labor law, and let employers off the hook for retaliating against workers for joining a union.

### **Enabling Employers to Gerrymander Union Representation Elections**

In a series of decisions starting on December 15, 2017, the NLRB overturned a longstanding rule for determining which groups of workers at a worksite constitute an “appropriate” voting unit.<sup>32</sup> This change will frustrate workers' ability to form unions, because the new rule allows employers to determine who will be allowed to vote in an election. It does so by requiring the inclusion of employees in the voting unit who never previously expressed interest in joining the union. The effect of this decision is to make it less likely a vote to form a union will succeed.

### **Making it Easier for Employers to Oust Unions**

On July 3, 2019, the NLRB held that an employer may withdraw recognition from a union, without an election, regardless of whether the union has support of a majority of workers at the time of withdrawal.<sup>33</sup> Under this new standard, an employer may announce that it will withdraw recognition of a union within 90 days prior to the expiration of a collective bargaining agreement based on evidence

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that the union has lost majority support, such as signatures in a petition, and may suspend bargaining for the new agreement. Such an announcement would force the union to file for a new representation election within 45 days in order to regain recognition, and it would not prevent the employer from withdrawing recognition of the union at the expiration of the agreement if the election is not scheduled before then, even if the union has evidence of majority support at the close of the agreement.

## **Making it Easier to Misclassify Employees to Stop Union Organizing**

On January 25, 2019, the NLRB reimagined the traditional test for whether a worker is an employee, and thus protected by labor law, or an unprotected independent contractor, by focusing its analysis through the lens of “entrepreneurial opportunity.”<sup>34</sup> This decision makes it easier for employers to deny employees their labor rights by classifying them as independent contractors.

The NLRB went even further on August 29, 2019 and decided that employers do not even violate the NLRA when they misclassify their employees.<sup>35</sup>

## **Undermining the Right to Strike**

On July 25, 2019, the NLRB found that Walmart employees who participated in one-day and short-term strikes to protest low wages that were months apart were “intermittent” strikes and were not protected by labor law<sup>36</sup>—a novel interpretation of the law that varies from long-established precedent.<sup>37</sup> The consequence is that these employees can be fired for what otherwise would be lawful protected activity.

## **Allowing Employers to Circumvent Collective Bargaining**

On September 10, 2019, the Trump NLRB held that an employer can make unilateral changes to a collective bargaining agreement even if the union did not clearly and unmistakably waive its interest in bargaining over the subject—as long as the change is within the “scope” of a provision that permits the employer to act unilaterally.<sup>38</sup>

## **Preventing Employees from Organizing Safely with Technology**

On December 17, 2019, the Trump NLRB held that employers could retaliate against employees for organizing through employer-provided technology, like workplace email accounts, that would otherwise be protected if the employee conducted it in person.<sup>39</sup> This decision is out of touch with the modern workplace and imposes new burdens on teleworking employees’ right to organize free from retaliation.

## **Eliminating Protections for Secular Faculty at Religious Education Institutions**

On June 10, 2020, the NLRB issued divested itself of jurisdiction over faculty at religious educational institutions.<sup>40</sup> Now, secular staff and faculty at religious colleges and universities will no longer receive protection under federal labor law for exercising their right to organize and join a union. Already, some religious employers have attempted to withdraw recognition of unions in response to this decision.<sup>41</sup>

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## Permitting Retaliation Against Anti-Racist Speech

On July 21, 2020, the NLRB found that an employer did not violate the NLRA when it suspended an employee for referring to a manager as “master” to protest the manager’s allegedly racist behavior at a bargaining meeting.<sup>42</sup> In doing so, the decision made it easier for employers to retaliate against workers who protest discriminatory behavior in the workplace.<sup>43</sup>

## These Rules and Precedent-Setting Decisions Have Turned Labor Law Against Workers

The totality of new rulemakings, coupled with these and other decisions, amount to a brazen and deliberate campaign to allow employers to erect roadblocks to workers’ attempts to organize. When that is not enough, these decisions allow employers to frustrate bargaining and orchestrate decertification elections. In doing so, the Trump Administration has turned the NLRA into a weapon against workers and unions.

## III. The NLRB’s Anti-Worker Decisions Are Tainted with Its Members’ Conflicts of Interest

In its rush to execute the Trump Administration’s anti-worker agenda, the NLRB has repeatedly run afoul of federal ethics laws.<sup>44</sup> In March 2018, the agency was forced to vacate a decision that narrowed the standard for holding companies liable as joint employers, because Member William Emanuel participated in that matter in violation of his ethics pledge.<sup>45</sup> On September 13, 2018, the Board proposed a rule on the joint employer standard that was identical to the decision it was ethically barred from issuing.<sup>46</sup> The NLRB then issued a report on November 19, 2019, that permits Members to “insist on participating” in a matter where the Designated Agency Ethics Official (DAEO) concludes they have a conflict of interest.<sup>47</sup> This sham ethics report directly contradicts federal ethics regulations, which explicitly states that, if the DAEO “determines that the employee’s participation should not be authorized, the employee will be disqualified from participation in the matter.”<sup>48</sup>

The NLRB again raised ethics concerns when Member Emanuel cast the deciding vote to let a company (McDonald’s) off the hook as a joint employer for retaliating against employees who organized for the Fight for \$15.<sup>49</sup> Member Emanuel’s former law firm, Littler Mendelson, established a legal hotline for franchisees on how to handle the same labor law issues that were pending before the NLRB.<sup>50</sup> At the time of this report’s publication, Littler Mendelson’s legal hotline for McDonald’s franchisees (855-MCD-LAWS, or 855-623-5297) is *still* operational—and was operational the entire time the case was before Member Emanuel. Nonetheless, Member Emanuel insisted on participating in the *McDonald’s* case over the objections of parties and at least one ethics expert.<sup>51</sup>

After over a year of the NLRB refusing to provide transparency about Members’ conflicts of interest, the Committee served a subpoena on September 15, 2020 to compel the NLRB to produce the DAEO determinations regarding participation in the joint employer rulemaking and the *McDonald’s* litigation.<sup>52</sup> After the issuance of the subpoena, the NLRB began permitting Committee staff to view some of the



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documents in a closed setting. The information uncovered by the Committee, to date, points to the need for far more transparency regarding ethics evaluations to better evaluate whether conflicts of interest are being papered over through a sham process.

## IV. The NLRB's General Counsel Has Dismantled the Agency with His Mismanagement

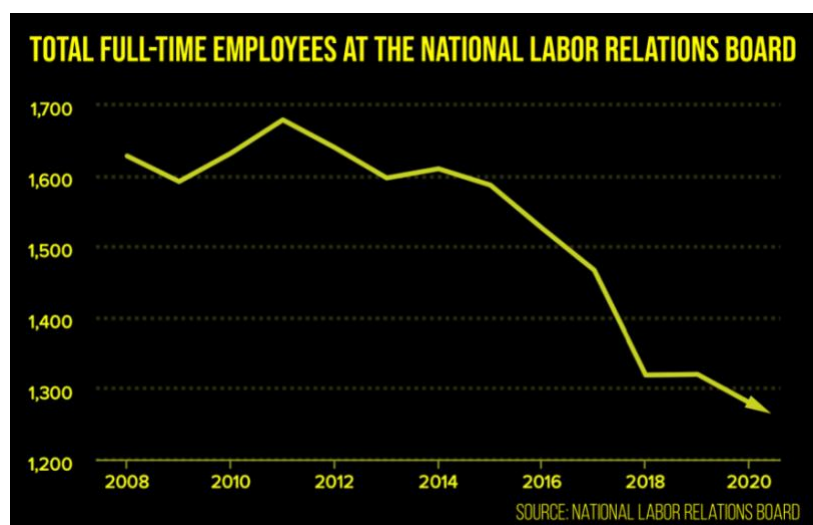
The NLRB's General Counsel, Peter Robb, has made a series of policy changes that have undermined the prosecutorial powers granted to his office to protect workers from unfair labor practices. Instead of carrying out his statutory duty to act as the agency's top prosecutor,<sup>53</sup> Robb has acted more akin to a defense counsel for employers, the most frequent violators of federal labor law.<sup>54</sup> By refusing to fill vacant agency positions, interfering in union representation elections, and imposing unlawful procedures for processing cases, Robb's actions have left already vulnerable workers in a precarious situation as they navigate their workplaces during the global pandemic.

### "Destroying the Agency from the Inside"<sup>55</sup>

Robb has weakened the agency's prosecutorial and administrative powers by exacerbating regional staffing shortages. As noted in *Bloomberg Law*, "The NLRB [has always been] a decentralized agency" with Regional Offices located "close to the communities where the cases originate."<sup>56</sup> The Regional Directors who run these offices "supervise a staff of attorneys and field examiners in the processing of representation, unfair labor practice, and jurisdictional dispute cases."<sup>57</sup> The Regional Offices handle the vast majority of NLRB cases, and the hardworking staff of these offices are essential to fulfilling the agency's statutory mandates.<sup>58</sup>

However, under Robb's watch, the agency has faced a staffing crisis aggravated by his refusal to spend appropriated funds as directed by Congress.<sup>59</sup> Since 2017, the number of full-time NLRB employees declined by over 10%, from 1,467 employees in 2017 to 1,280 in 2020.<sup>60</sup> Moreover, 15 of the NLRB's 26 regional offices have at least one vacancy or temporary appointment in a key leadership position.<sup>61</sup> Instead of spending the agency's appropriated funds to fill these vacancies, the General Counsel has allowed funds to lapse.<sup>62</sup>

Of the \$274 million that the NLRB has been appropriated in each of the past six fiscal years, the agency left over \$3 million unspent at the close of FY18 and over \$5 million unspent at the close of FY19.<sup>63</sup> As a former NLRB Member who now represents employers noted, the lack of appropriate staffing "has the potential to have a real adverse impact[.]



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on case handling, which is not good for the employers, unions, and individual employee who come before the agency[.]”<sup>64</sup>

## **Prosecuting Unions for Exercising Free Speech while Incentivizing Employers to Flout the Law**

When a person files a charge with the NLRB, the General Counsel has the sole discretion whether to prosecute that case. If the General Counsel refuses to prosecute, that person has no other opportunities for legal recourse. Mr. Robb has used this to his advantage by shielding employers from liability and wasting time prosecuting unions for noncoercive activities. For example, Mr. Robb has chosen to prosecute frivolous cases against unions for erecting “Scabby the Rat,” a giant inflatable balloon employed during labor disputes, contending that placing the balloon outside of an employer’s business where there is a dispute is unlawful coercion.<sup>65</sup>

Mr. Robb has also made it more challenging for NLRB staff to investigate employers’ violations of law by discouraging the use of investigative subpoenas, the only tool available to the agency to compel the production of vital information, and thus undermining his own agency’s authority.<sup>66</sup> Instead, Mr. Robb is encouraging NLRB staff to merely “urge” full cooperation with their investigations, which employers can freely ignore.<sup>67</sup> Moreover, Mr. Robb has undermined the agency’s duty to protect employees from retaliation<sup>68</sup> by requiring agency staff to turn over key witness testimony and recorded evidence over to parties charged with violating the law before trial.<sup>69</sup> Mr. Robb’s policy changes give alleged violators more time to intimidate workers and to mount defenses against their unfair labor practice charges.<sup>70</sup>

## **V. When the Pandemic Began, the NLRB Suspended All Elections—And Prioritized Efforts to Slow Down Elections Once the Suspension Lifted**

As workers attempt to organize unions in order to respond to the COVID-19 pandemic’s toll on their workplace, the NLRB has served as an obstacle. On March 16, 2020, Mr. Robb issued a directive, in violation of his lawful authority, instructing the Regional Directors to suspend all union representation elections.<sup>71</sup> The Members of the Board then voted to suspend all representation elections on March 19 through April 3, an action that was also unlawful under the NLRA.<sup>72</sup> Under these circumstances, the NLRB could have prioritized conducting safe, efficient elections through the use of mail ballots, instead of requiring employees to vote at the worksite.

As a result, over 100 representation elections throughout the country were paused—even elections where the union, the employer, and the Regional Office were all prepared to proceed with a mail ballot election.<sup>73</sup> In 2020, more workers petitioned for a union representation election between January 1 and March 14 than they had between those dates during any year since 2016.<sup>74</sup> The NLRB’s suspension of elections halted that momentum.<sup>75</sup> Since lifting the suspension, the NLRB has continued to suspend individual elections in order to consider limiting the use of mail ballots, jeopardizing the safety of voting employees and the NLRB’s own staff.<sup>76</sup>

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This raises an important question: what was the NLRB doing when it was not conducting the elections it suspended? An NLRB document reveals that, in order to implement its December 2019 regulation to delay the conduct of union elections, the NLRB conducted 15 trainings for staff throughout the country. Contrary to the NLRB's stated need to suspend all representation elections due to COVID-19 for safety reasons, 11 out of those 15 trainings occurred during the suspension when the NLRB was refusing to conduct safe, timely elections.<sup>77</sup> The time and resources the NLRB spent training agency staff on how to slow down elections could have been spent on continuing core agency operations with safe mail ballot elections.

The NLRB's weak response to the pandemic continues to harm workers. The number of union representation elections for the first half of 2020 dropped 26% from the first half of 2019, from 583 elections in the first half of 2019 to only 432 during the same time period in 2020.<sup>78</sup> Intent on preventing employees from voting safely in mail ballot elections, the NLRB has begun suspending mail-ballot elections in order to consider whether to force the election to happen in person, which would endanger voting employees and the NLRB's own staff.<sup>79</sup>

## **VII. Congress and the Next Administration Must Restore the NLRB's Ability to Protect Workers**

### **Congress Must Pass the Protecting the Right to Organize (PRO) Act**

On February 6, 2020, the House of Representatives passed the *Protecting the Right to Organize (PRO) Act*, H.R. 2474, by a vote of 224-194 that even gathered some Republican support. However, the Republican-controlled Senate has refused to consider this legislation. This bill would strengthen the NLRA to better safeguard workers' right to join a union and remedy longstanding weaknesses in the law that allow employers to retaliate against workers when they attempt to organize and collectively bargain. For example, the NLRB cannot issue civil monetary penalties for companies that violate workers' right to organize, no matter how egregious or willful the violation. Even when workers win a union after an election, the NLRA allows employers to engage in dilatory tactics rather than conclude a first contract in a timely manner. As detailed throughout this report, the Trump Administration has seized on the NLRA's weaknesses to slow down elections, to enable employers to evade liability under the NLRA, and to shield employers who retaliate against workers who exercise their rights. The *PRO Act* would revitalize labor law and end the Trump-appointed NLRB's attack on workers' rights.

### **The Next Administration Must Restore the NLRB's Commitment to Protecting Workers**

The next administration, if Democrats control the White House, will play a critical role in appointing Members and a General Counsel who can restore the NLRB's commitment to its mission, stated in the text of the NLRA, of "encouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association."<sup>80</sup> The next administration can fill the vacant Member seat swiftly, and it must appoint Members who have devoted their careers to advocating on

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behalf of workers, and thus promoting the NLRB's mission.<sup>81</sup> This new NLRB majority must act swiftly to reverse the dangerous rulemakings and anti-worker precedents issued by the Trump NLRB.

Unfortunately, a Democratic administration will not be able to alter the partisan balance on the Board and in the Office of General Counsel on day one. Member Emanuel's term does not expire until August 27, 2021, meaning that Democrats cannot gain a majority on the Board until seven months into the next administration. General Counsel Robb's term does not expire until November 1, 2021.

The COVID-19 pandemic will continue to endanger the health and safety of American workers well after January 20, 2021, and the need to protect workers' rights to organize will be as urgent then as it is now. For this reason, the next administration must be mindful that "[a]ny member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office[.]"<sup>82</sup> Malfeasance and neglect of duty are evident in Member Emmanuel's participation in matters where there were conflicts of interest and the agency's unlawful suspension of elections during the pandemic. The next administration must prioritize restoring the NLRB's commitment to protecting workers and their right to organize.

## VIII. Conclusion

In recognizing the importance of the National Labor Relations Act, Justice Ruth Bader Ginsburg wrote:

*Forced to face their employers without company, employees ordinarily are no match for the enterprise that hires them. Employees gain strength, however, if they can deal with their employers in numbers. That is the very reason why the NLRA secures against employer interference employees' right to act in concert for their "mutual aid or protection."<sup>83</sup>*

Congress declared that the purpose of the NLRA is to promote the right to join a union and collectively bargain,<sup>84</sup> but—as workers around the country are organizing, protesting, and going on strike for issues as basic as safety protections from COVID-19—the NLRB is negligent, and at times openly hostile to these rights, during a crisis where they are especially needed. The Committee will continue to conduct vigorous oversight of the Trump NLRB and require the NLRB to face the public accountability it has worked so hard to avoid.

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<sup>1</sup> Donald J. Trump, *Remarks by President Trump in State of the Union Address*, The White House (Feb. 4, 2020) <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-state-union-address-3/>.

<sup>2</sup> 29 U.S.C. § 151, 157.

<sup>3</sup> Celine McNicholas et al., *Econ. Policy Inst., Why Unions are Good for Workers—Especially in a Crisis like COVID-19* 1 (2020) <https://files.epi.org/pdf/204014.pdf>.

<sup>4</sup> Bureau of Labor Statistics, *Medical Care Benefits: Access, Participation, and Take-Up* [Rates, Employee Benefits Survey (Sept. 24, 2020) <https://www.bls.gov/news.release/ebs2.t02.htm>.

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<sup>5</sup> Josh Bivens et al., Econ. Policy Inst., *How Today's Unions Help Working People* (2017)

<https://www.epi.org/files/pdf/133275.pdf>.

<sup>6</sup> Christian E. Weller and David Madland, *Union Membership Narrows the Racial Wealth Gap for Families of Color*, Center for American Progress (Sept. 4, 2018, 8:00 AM),

<https://www.americanprogress.org/issues/economy/reports/2018/09/04/454781/union-membership-narrows-racial-wealth-gap-families-color>.

<sup>7</sup> Steven Greenhouse, *COVID-19 Puts Workers in Danger. It's Another Reason We Need Unions*, *The Guardian* (Jul. 24, 2020)

<https://www.theguardian.com/commentisfree/2020/jul/24/covid-19-workers-dangers-unions>.

<sup>8</sup> Charlotte Garden, Century Foundation, *Workers' Collective Power in the Pandemic*, (June 10, 2020)

<https://tcf.org/content/commentary/workers-collective-power-pandemic?session=1>.

<sup>9</sup> Alina Selyukh and Shannon Boyd, *More Essential Than Ever, Low-Wage Workers Demand More*, National Public Radio (Apr. 28, 2020) <https://www.npr.org/2020/04/27/843849435/hometown-heroes-or-whatever-low-wage-workers-want-more-than-praise>;

Shia Kapos, *Unions Tap Into Burst of Worker Angst Over Coronavirus*, *Politico* (June 15, 2020)

<https://www.politico.com/news/2020/06/15/unions-workers-coronavirus-304650>; see also Robert Combs, *ANALYSIS: Unions Had Momentum at NLRB—Then Came Coronavirus*, *Bloomberg Law* (Mar. 24, 2020) (describing how the number of workers filing representation petitions to the NLRB was higher at the beginning of 2020 than it was at the beginning of previous years, before the NLRB's suspension of elections halted that momentum)

<https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-unions-had-momentum-at-nlr-then-came-coronavirus>.

<sup>10</sup> Robert Combs, *ANALYSIS: Unions Had Momentum at NLRB—Then Came Coronavirus*, *Bloomberg Law* (Mar. 24, 2020)

<https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-unions-had-momentum-at-nlr-then-came-coronavirus>;

see also National Labor Relations Board, *Elections Postponed due to COVID-19 as of April 27, 2020* (on file with Education and Labor Committee).

<sup>11</sup> Robert Iafolla, *Union Elections Hang in the Balance as NLRB Ponders Vote by Mail*, *Bloomberg Law* (Oct. 7, 2020)

<https://news.bloomberglaw.com/daily-labor-report/union-elections-hang-in-the-balance-as-nlr-ponders-vote-by-mail>.

<sup>12</sup> Thomas Kochan et al., *Who Wants to Join a Union? A Growing Number of Americans*, MIT Mgmt. Blog (Sept. 2, 2018),

<https://gcmj.mit.edu/whats-new/blog/who-wants-join-union-growing-number-americans>.

<sup>13</sup> Bureau of Labor Statistics, *Union Membership (Annual)*, News Release (Jan. 22, 2020),

<https://www.bls.gov/news.release/union2.nr0.htm>.

<sup>14</sup> H. Comm. on Educ. and Labor, *Protecting Workers' Right to Organize: The Need for Labor Law Reform*, YouTube (July 25, 2019), <https://www.youtube.com/watch?v=T9FPVr5-umY> (reprinted as Serial 116–11).

<sup>15</sup> *Id.*

<sup>16</sup> National Labor Relations Board, *Members of the NLRB since 1935* <https://www.nlr.gov/about-nlr/who-we-are/the-board/members-of-the-nlr-since-1935> (last accessed Sept. 28, 2020).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Professional Air Traffic Controllers Organization*, 7 FLRA No. 10 (1981) <https://www.flra.gov/decisions/v07/07-010.html>;

see also Noam Scheiber, *Trump Appointee is Trying to Squelch Us, Labor Board Staff Says*, *New York Times* (Jan. 25, 2018) (“Most labor historians say the government’s hard line in firing the controllers contributed to organized labor’s decline in subsequent decades, said Joseph A. McCartin, a history professor at Georgetown University.”),

<https://www.nytimes.com/2018/01/25/business/economy/labor-board.html>.

<sup>21</sup> Representation-Case Procedures, 79 Fed. Reg. 74307 (Dec. 15, 2014) (to be codified at 29 C.F.R. pts. 101-03); Collective Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16,336 (Apr. 21, 1989) (to be codified at 29 C.F.R. pt. 103).

<sup>22</sup> Representation-Case Procedures, 84 Fed. Reg. 69,524 (Dec. 18, 2019) (to be codified at 29 C.F.R. pt. 102).

<sup>23</sup> Kate Bronfenbrenner, Econ. Policy Inst., *No Holds Barred: The Intensification of Employer Opposition to Organizing* 12 (2009), <https://www.epi.org/files/page/-/pdf/bp235.pdf>.

<sup>24</sup> See *The Standard for Determining Joint Employer Status*, 85 Fed. Reg. 11,184, 11,190 (Feb. 26, 2020) (to be codified at 29 C.F.R. pt. 103) (narrowing the standard for joint employer status to when companies exercise “substantial direct and immediate control over one or more essential terms or conditions of their employment”).

<sup>25</sup> 29 C.F.R. § 103.40(b).

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<sup>26</sup> Letter from Craig Becker, AFL-CIO, and Nicole Berner, SEIU, to Chairman John Ring, National Labor Relations Board (Apr. 20, 2020) <https://www.law360.com/articles/1265546/attachments/0>.

<sup>27</sup> Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 Fed. Reg. 18,366 (Apr. 1, 2020) (codified at 29 C.F.R. Part 103).

<sup>28</sup> Jurisdiction—Nonemployee Status of University and College Students Working in Connection With Their Studies, 84 Fed. Reg. 49,691 (to be codified at 29 C.F.R. Part 103) (Sept. 23, 2019).

<sup>29</sup> The National Labor Relations Act excludes certain categories of workers, but not students who perform work for the universities where they attend. See 29 U.S.C. § 152(3).

<sup>30</sup> Representation-Case Procedures: Voter List Contact Information; Absentee Ballots for Employees on Military Leave, 85 Fed. Reg. 45,553 (July 29, 2020) (to be codified at 29 C.F.R. Part 102).

<sup>31</sup> Letter from Marvin Kaplan, Chairman, NLRB, and Peter Robb, General Counsel, NLRB to Senator Patty Murray, Congressman Robert C. “Bobby” Scott, Congressman Kilili Sablan, and Congressman Donald Norcross (Feb. 15, 2018) <https://edlabor.house.gov/imo/media/doc/2.15.2018%20-%20NLRB%20Response%20to%20Congress%20-%202014%20Election%20Rule%20Data.pdf>.

<sup>32</sup> *Boeing Co.*, 368 NLRB No. 67 (2019); *PCC Structural, Inc.*, 365 NLRB No. 160 (2017).

<sup>33</sup> *Johnson Controls, Inc.*, 368 NLRB No. 20 (2019).

<sup>34</sup> *SuperShuttle*, 367 NLRB No. 75 (2019). In this decision, the NLRB held that SuperShuttle drivers had sufficient entrepreneurial opportunity to be independent contractors—even though the drivers were subject to non-compete clauses that prohibited them from driving for any of SuperShuttle’s competitors.

<sup>35</sup> *Velox Express, Inc.*, 368 NLRB No. 61 (2019).

<sup>36</sup> *Walmart Stores, Inc.*, 368 NLRB No. 24 (July 25, 2019).

<sup>37</sup> The NLRA protects the right to strike. 29 U.S.C. § 163. However, the NLRB has long permitted employers to retaliate against “intermittent” strikes. See, e.g., *Pacific Telephone & Telegraph Co.*, 107 NLRB 1547 (1954); *Honolulu Rapid Transit Co.*, 110 NLRB 1806 (1954).

<sup>38</sup> *MV Transportation, Inc.* 368 NLRB No. 66 (2019). This decision overturned over 70 years of precedent holding that employers could not unilaterally change employees’ terms and conditions of employment unless it demonstrated that the union clearly and unmistakably waived its interest in bargaining over the subject. *Provena St. Joseph Medical Center*, 350 NLRB 808, 811-12 (2007) (citing *Tide Water Associated Oil Co.*, 85 NLRB 1096 (1949)). Another decision from the Trump NLRB permits employers to unilaterally change terms and conditions of employment once the collective bargaining agreement expires, if the employer has a past practice of making similar changes. *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017).

<sup>39</sup> *Caesars Entertainment*, 368 NLRB No. 143 (2019).

<sup>40</sup> *Bethany College*, 369 NLRB No. 98. The NLRB is required to balance its mission to protect the right to form a union with religious freedom, but this tilted the scale to strip the rights of workers who had no religious function. *Bethany College* overturned a previous decision where the NLRB would protect the labor rights of faculty at religious educational institutions who did not perform a specific role in maintaining the institution’s religious environment. *Pacific Lutheran University*, 361 NLRB 1404 (2014).

<sup>41</sup> See Jazmine Hughes, *A Quaker School Promoted Liberal Values. Then Its Teachers Unionized*, New York Times (Sept. 3, 2020) <https://www.nytimes.com/2020/09/03/nyregion/brooklyn-friends-quaker-union.html>. After the *Bethany College* decision, the Brooklyn Friends School, a private Quaker school, attempted to decertify the union representing secular faculty. The school announced it would withdraw the petition after a successful strike from the union where parents, students, and community members came out to support the union. Caroline Lewis, *Brooklyn Friends School Drops Effort to Disband Union Following Teachers’ Strike*, Gothamist (Oct. 8, 2020) <https://gothamist.com/news/brooklyn-friends-school-drops-effort-disband-union-following-teachers-strike>.

<sup>42</sup> *General Motors*, 369 NLRB No. 127 (2020).

<sup>43</sup> After the NLRB let the employer off the hook, Chairman Ring wrote an opinion piece in the Wall Street Journal claiming that the decision ended the NLRB’s practice of “excusing workplace harassment.” See John F. Ring, *NLRB Stops Excusing Workplace Harassment*, Wall Street Journal (July 21, 2020) <https://www.wsj.com/articles/nlr-stops-excusing-workplace-harassment-11595358659>. By obscuring what actually happened in the case, this Orwellian framing ignores that the *General Motors* decision will permit employers to characterize antiracist speech as offensive in order to crack down on organizing activity.

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<sup>44</sup> Exec. Order No. 13,770 (Jan. 28, 2017) (requiring appointees to attest that they will not “participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts”).

<sup>45</sup> See *Hy-Brand Industrial Contractors*, 366 NLRB No. 26 (2018); see also OIG Report Regarding *Hy-Brand* Deliberations; Report of Investigation – OIG-I-541, National Labor Relations Board Inspector General (Mar. 20, 2018) [https://drive.google.com/file/d/1CiNGB3\\_cvcMOTI3wLUJMLu66OOMiK\\_i3/view](https://drive.google.com/file/d/1CiNGB3_cvcMOTI3wLUJMLu66OOMiK_i3/view); Recommended Action Plan Respecting the Board’s Adjudication of *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017), National Labor Relations Board Designated Agency Ethics Official (Feb. 21, 2018) <http://src.bna.com/ykl>.

<sup>46</sup> The Standard for Determining Joint Employer Status, 83 Fed. Reg. 46681 (Sept. 14, 2018). Board Members “must be disqualified” from participating in a rulemaking “when they act with an ‘unalterably closed mind’ and are ‘unwilling or unable’ to rationally consider arguments.” *Air Trsnp. Ass’n of Am., Inc. v. NMB*, 663 F.3d 476, 487 (D.C. Cir. 2011) (citing *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170, 1174 (D.C. Cir. 1979)). By initiating a rulemaking to reach the same result that the NLRB was foreclosed from obtaining in adjudication due to a conflict of interest, the NLRB’s rulemaking appeared designed to circumvent federal ethics standards that forced the agency to vacate *Hy-Brand*. See 5 C.F.R. § 2635.101(b)(14) (Executive branch “[e]mployees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.”). The NLRB permitted Committee staff to view the ethics memo permitting Member Emanuel to participate in the rulemaking, but the memo failed to conduct any analysis applying the recusal standard to the rulemaking’s suspect procedural history. The Committee raised this concern in its public comment, but the NLRB only responded, without explanation, that it “does not undermine the DAEO’s determination.” Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. at 11190. The NLRB refuses to make this memorandum publicly available.

<sup>47</sup> National Labor Relations Board, National Labor Relations Board’s Ethics Recusal Report (2019) <https://www.nlr.gov/sites/default/files/attachments/pages/node-6353/nlrbs-ethics-recusal-report-november-19-2019.pdf>.

<sup>48</sup> 5 C.F.R. § 2635.502(c) (stating that the Designated Agency Ethics Official has authority to issue “an independent determination” that can “disqualify” a Member from participating).

<sup>49</sup> 368 NLRB No. 134 (2019).

<sup>50</sup> Hassan A. Kanu, *McDonald’s Versus ‘Fight for \$15: Documents Reveal Strategy*, Bloomberg Law (Sept. 11, 2018 12:27PM), <https://news.bloomberglaw.com/daily-labor-report/mcdonalds-versus-fight-for-15-documents-reveal-strategy>.

<sup>51</sup> Letter from Richard W. Painter, S. Walter Richey Professor of Corporate Law, University of Minnesota Law School, to Office of Executive Secretary, National Labor Relations Board (Oct. 1, 2018) (supporting charging parties’ motion seeking recusal of Chairman Ring and Member Emanuel in the *McDonald’s* case); Charging Parties’ Motion for Recusal of Chairman Ring and Member Emanuel, *McDonald’s*, 02-CA-093893 et al. (Aug. 14, 2018).

<sup>52</sup> Letter from Robert C. “Bobby” Scott, Chairman, House of Representatives Committee on Education and Labor, to John Ring, Chairman, National Labor Relations Board (Sept. 15, 2020), <https://edlabor.house.gov/imo/media/doc/NLRB%20Subpoena.pdf>.

<sup>53</sup> 29 U.S.C. § 153(d) (detailing the responsibilities of the General Counsel).

<sup>54</sup> Hassan A. Kanu, *NLRB Revises Procedures for Evidence Collection, Disclosure (1)*, Bloomberg Law (June 17, 2020, 11:41 AM), <https://news.bloomberglaw.com/daily-labor-report/nlr-revises-procedures-for-evidence-collection-disclosure> (“The agency issued 1,010 complaints against employers in fiscal year 2010 and 77 against unions . . . [i]n 2019, it issued 789 complaints against businesses and 132 against unions.”).

<sup>55</sup> Hassan A. Kanu, *Labor Board Moves Spark Internal Discord*, Bloomberg Law (Mar. 2, 2018, 6:13 AM), <https://news.bloomberglaw.com/daily-labor-report/labor-board-moves-spark-internal-discord> (quoting “[o]ne of the NLRB unions”).

<sup>56</sup> Robert Iafolla, *More Than Half of NLRB Regional Offices Have Top-Level Vacancies*, Bloomberg Law (Mar. 4, 2020, 5:45 AM), <https://news.bloomberglaw.com/daily-labor-report/more-than-half-of-nlr-regional-offices-have-top-level-vacancies>.

<sup>57</sup> National Labor Relations Board, Organization and Functions 208, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/organdfunctions.pdf>; see also 29 U.S.C. § 153 (b) (“delegation of powers to members and regional directors”).

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<sup>58</sup> Robert Iafolla, *More Than Half of NLRB Regional Offices Have Top-Level Vacancies*, Bloomberg Law (Mar. 4, 2020, 5:45 AM), <https://news.bloomberglaw.com/daily-labor-report/more-than-half-of-nlrb-regional-offices-have-top-level-vacancies>.

<sup>59</sup> Eric Katz, *Trump Administration Plans to Slash Labor Relations Board, Consolidate Power*, Government Executive (Mar. 5, 2018), <https://www.govexec.com/management/2018/03/trump-administration-plans-slash-labor-relations-board-consolidate-power/146412/>.

<sup>60</sup> Celine McNicholas et al., *Econ. Pol'y Inst., Unprecedented: The Trump NLRB's Attack on Worker's Rights 20* (2020), <https://files.epi.org/pdf/177387.pdf>.

<sup>61</sup> Robert Iafolla, *More than Half of NLRB Regional Offices Have Top-Level Vacancies*, Bloomberg Law (Mar. 4, 2020, 5:45 AM), <https://news.bloomberglaw.com/daily-labor-report/more-than-half-of-nlrb-regional-offices-have-top-level-vacancies>.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Hassan A. Kanu, *Death to Scabby: Trump Labor Counsel Wants Protest Icon Deflated*, Bloomberg Law (Jan. 22, 2019, 5:54 AM), <https://news.bloomberglaw.com/daily-labor-report/death-to-scabby-trump-labor-counsel-wants-protest-icon-deflated>. Despite the General Counsel's fixation on inflatable animals, a U.S. district court rejected his request for an injunction to stop a union's "peaceful, nonthreatening, noncoercive" use of an inflatable rat. *NLRB v. Construction & General Building Laborers' Local 79*, 19-CV-3496 (E.D.N.Y. July 1, 2019). After having his pet project rejected in court, Robb argued in a different case that "the lawfulness of inflatable rats . . . is a matter of national interest," and his office continues to waste time and resources on this failed attempt to attack free speech. *Int'l Bhd. Of Elec. Workers, Local Union 98*, Case No. 4-CC-223346 (July 16, 2019), <https://src.bna.com/JZH>.

<sup>66</sup> 29 U.S.C. § 161 (directing the agency to subpoena "the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested").

<sup>67</sup> Memorandum OM 19-05 from Beth Tursell, Associate to the General Counsel, to All Regional Directors et al., at 1 (March 13, 2019), <https://apps.nlr.gov/link/document.aspx/09031d4582b39def>.

<sup>68</sup> *Offshore Mariners United*, 338 NLRB 745, 746–47 (2002) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978)) ("[T]he Board's policy is grounded in 'the peculiar character of labor litigation,' where 'witnesses are especially likely to be inhibited by fear of the employer's or—in some cases—the union's capacity for reprisal and harassment.'"). *NLRB v. Washington Heights*, 897 F.2d 1238, 1245 (2d Cir. 1990) ("Pretrial discovery in Board proceedings is neither constitutionally nor statutorily required.").

<sup>69</sup> Memorandum GC 20-08 from Peter B. Robb, General Counsel, to All Regional Directors et al. (June 17, 2020), <https://apps.nlr.gov/link/document.aspx/09031d458311d38b>.

<sup>70</sup> See National Labor Relations Board, *Bench Book: An NLRB Trial Manual § 7-200* (2019), [https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/alj\\_bench\\_book\\_2019.pdf](https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/alj_bench_book_2019.pdf) ("The Board, with court approval, has historically [avoided pretrial discovery] to protect employees and other potential witnesses from reprisal or harassment and to avoid the delay and collateral disputes that often accompany discovery.").

<sup>71</sup> Plan of Action, Office of the General Counsel (Mar. 16, 2020) (on file with the Education and Labor Committee). The General Counsel did not have any legal authority to issue this decision, as only the Board, not the General Counsel, can regulate representation elections. See 29 U.S.C. § 153 (governing the delegation of the Board's powers to the Regional Directors regarding the direction of an election); 29 C.F.R. § 102.69 (placing with Regional Directors the discretion to supervise elections "[u]nless otherwise directed by the Board").

<sup>72</sup> National Labor Relations Board, *National Labor Relations Board Suspends Representation Elections Through April 3, 2020* (Mar. 19, 2020), <https://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-suspends-representation-elections-through>. The NLRA does not provide the NLRB with authority to issue a nationwide suspension of elections outside of a rulemaking or adjudication.

<sup>73</sup> National Labor Relations Board, *Elections Postponed due to COVID-19 as of April 27, 2020* (on file with Education and Labor Committee).

<sup>74</sup> Robert Combs, *ANALYSIS: Unions Had Momentum at NLRB—Then Came Coronavirus*, Bloomberg Law (Mar. 24, 2020), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-unions-had-momentum-at-nlr-then-came-coronavirus>.

<sup>75</sup> *Id.*



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<sup>76</sup> See, e.g., *Ecolab Production LLC*, 16-RC-264667 (Oct. 1, 2020); *Airgas USA, LLC*, 16-RC-262896 (Sept. 24, 2020); *Clarkwestern Dietrich Building Systems, LLC*, 01-RC-264014 (Sept. 16, 2020); *Perdue Foods LLC*, 270 NLRB No. 20 (2020); *Aspirus Keweenaw*, 370 NLRB No. 13 (2020).

<sup>77</sup> National Labor Relations Board, *Election Rule Training Conducted in March and April, 2020* (on file with Education and Labor Committee).

<sup>78</sup> Robert Combs, *ANALYSIS: NLRB Stats Show Union Elections still in Slowdown Mode*, Bloomberg Law (Aug. 17, 2020) <https://news.bloomberglaw.com/daily-labor-report/analysis-nlr-stats-show-union-elections-still-in-slowdown-mode>.

<sup>79</sup> Robert Iafolla, *Union Elections Hang in the Balance as NLRB Ponders Vote by Mail*, Bloomberg Law (Oct. 7, 2020), <https://news.bloomberglaw.com/daily-labor-report/union-elections-hang-in-the-balance-as-nlr-ponders-vote-by-mail>.

<sup>80</sup> 29 U.S.C. § 151.

<sup>81</sup> *Id.*

<sup>82</sup> 29 U.S.C. § 153(a).

<sup>83</sup> *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1640 (citing 29 U.S.C. §§ 151, 157, 158).

<sup>84</sup> 29 U.S.C. § 151