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PROTECTING THE EXERCISE BY WORKERS OF FULL FREEDOM OF ASSOCIATION: GIVING THE NLRB THE TOOLS IT NEEDS TO UPHOLD THE NLRA

❖ Note ❖

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I. INTRODUCTION

On April 9, 2021, Amazon defeated a unionization effort to unionize at their fulfillment center in Bessemer, Alabama after a hotly contested election featuring significant campaigning by both the company and the Union.¹ The Union immediately petitioned the National Labor Relations Board (“NLRB” or the “Board”) alleging several violations of the National Labor Relations Act (“NLRA” or the “Act”) by Amazon,² which resulted in the NLRB setting aside the original vote and ordering a new election.³ The NLRB also reached a settlement with Amazon over its general anti-labor practices in December 2021, forcing the company to issue communications to its over 1.5 million employees informing them of their rights under the NLRA.⁴

Amazon is not the only company to face a significant unionization push since the start of 2020. Two Starbucks stores in Buffalo, New York, successfully unionized in December 2021,⁵ and over 175 additional locations have filed for union votes with NLRB in the wake of that success.⁶ Like Amazon, Starbucks has been accused of numerous violations of the NLRA in its campaign

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¹ See Alina Selyukh, *Amazon Warehouse Workers get to Re-do Their Union Vote in Alabama*, NAT’L PUB. RADIO (Nov. 29, 2021), <https://www.npr.org/2021/11/29/1022384731/amazon-warehouse-workers-get-to-re-do-their-union-vote-in-alabama>.

² See *id.*

³ See *id.*

⁴ See *Amazon Unionization Efforts get a Boost Under a Settlement with U.S. Labor Board*, NAT’L PUB. RADIO (Dec. 23, 2021), <https://www.npr.org/2021/12/23/1067698799/amazon-nlr-union>.

⁵ See Alina Selyukh, *Starbucks Union Push Spreads to 54 Stores in 19 States*, NAT’L PUB. RADIO (Jan. 31, 2022), <https://www.npr.org/2022/01/31/1076978207/starbucks-union-push-spreads-to-54-stores-in-19-states>.

⁶ See Noam Scheiber, *Starbucks Union Campaign Pushes On, with at Least 16 Stores now Organized*, N.Y. TIMES (Apr. 8, 2022) <https://www.nytimes.com/2022/04/08/business/economy/starbucks-union-new-york-vote.html>.

against unionizers; and faces multiple NLRB investigations.⁷ Despite the best efforts of the NLRB, anti-labor practices which violate the NLRA remain widespread.⁸

This note will argue that the remedies currently available to the NLRB are inadequate to deter private sector management from violating workers' rights under the NLRA in their fight against those workers efforts to unionize. Part II discusses the background of the NLRA and NLRB, the current extent of its power, and how it has been limited by judicial intervention. Part III will analyze how these remedies compare to sanctions available to agencies enforcing other workplace protection statutes, how private sector companies react in the face of the NLRB's decisions, and how the proposed Protecting the Right to Organize Act ("PRO Act") would affect both. Part IV proposes changes to the PRO Act to better empower the NLRB to succeed in its mission of upholding and enforcing the NLRA.

II. BACKGROUND

Congress passed the NLRA in 1935 in response to growing tensions between company management and labor, and unfair practices on both sides of the disputes.⁹ In doing so, it declared as the policy of the United States "encouraging the practice and procedure of collective bargaining and [] protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."¹⁰ To this end, the act codified into law the right of workers to organize for the purpose of collective bargaining,¹¹ and created and empowered the NLRB to prevent any person from engaging in any unfair labor practice.¹² Accordingly, the board's role is to regulate and oversee union certification and decertification elections, adjudicate any related disputes, and use the tools at its disposal to prevent employers and unions from souring the process.¹³

Gaining union representation under the NLRA is a lengthy process. Employees interested in unionizing must first identify a potential union and obtain a showing of interest from thirty percent of the proposed bargaining unit.¹⁴ Next, the petition is served to the employer and provided to the NLRB to determine if the showing of interest is adequate and timely.¹⁵ Then the employer can either agree to an election by negotiating the terms thereof with the union or consent to oversight from the NLRB's regional director.¹⁶ Employers generally refuse consent,¹⁷ prolonging the process as there

⁷ See, e.g., Starbucks Corp., No. 28-CA-289622 (NAT'L LAB. RELS. BD. Jan. 26, 2022) (alleging retaliation, threats, surveillance, and more in Phoenix, AZ); see also Starbucks Corp., No. 15-CA-290336 (NAT'L LAB. RELS. BD. Feb. 8, 2022) (alleging improper discharge in Memphis, TN).

⁸ See Celine McNicholas et al., *Unlawful: U.S. Employers are Charged with Violating Federal Law in 41.5% of all Union Election Campaigns*, ECON. POL'Y INST. (Dec. 11, 2019), <https://files.epi.org/pdf/179315.pdf>.

⁹ See 29 U.S.C. § 151.

¹⁰ *Id.*

¹¹ See *id.* § 157

¹² See *id.* §§ 153, 160.

¹³ See generally *id.* §§ 151-169.

¹⁴ See 29 C.F.R. §§ 102.60-61 (2020); see also *Representation Law and Procedures*, AM. BAR ASS'N 1, https://www.americanbar.org/content/dam/aba/events/labor_law/basics_papers/nlra/representation_procedures.aut_hcheckdam.pdf [hereinafter ABA].

¹⁵ See 29 C.F.R. § 102.60 (2020); see also *The NLRB Process*, NAT'L LAB. RELS. Bd., <https://www.nlr.gov/resources/nlr-process> (last visited Mar. 22, 2022) (showing basic flowchart of unionization petition steps).

¹⁶ See 29 C.F.R. § 102.62 (2020); see also ABA, *supra* note 14, at 4-5.

¹⁷ See McNicholas et al., *supra* note 8.

must be a pre-election hearing with the regional director to resolve the parties' disagreements.¹⁸ Once the terms have been set, the election occurs, the board tallies the results, and each party submits any objections they have, if any.¹⁹ For the nearly 6,000 Amazon workers in Bessemer, Alabama, 150 days passed between the initial filing of their petition with the NLRB and the tallying of the votes in their first election.²⁰

In its role as administrator and protector of this process, the NLRB strives to maintain "laboratory conditions" to allow employees to express their desires uninhibited.²¹ Either side in the election can taint these conditions through their conduct leading up to and throughout the election.²² Such conduct is not limited to unfair labor practices described in the act, but rather encompasses any actions which "create[] an atmosphere calculated to prevent a free and untrammelled choice by the employees."²³ Ways in which employers can create such an atmosphere include, but are not limited to: promising benefits,²⁴ threatening reprisal,²⁵ misrepresenting facts in campaign materials,²⁶ interrogation,²⁷ and disciplining or discharging employees based on union affiliation.²⁸

When the NLRB finds that one side has engaged in conduct which taints the laboratory conditions it requires for union certification elections, its options for remedies are limited.²⁹ The text of the act provides that it may "serve[] on such person an order requiring such person to cease and desist from such unfair labor practice, and to take *such affirmative action . . . as will effectuate* the policies of this subchapter."³⁰ The Supreme Court has not read provision this broadly, holding that the board is limited to remedial, rather than punitive, measures.³¹ This decision, made in the Board's infancy, leaves it with three options: first, order a new election;³² second, force the violator to take an action which attempts to undo any damage they caused and no more;³³ or third, issue a *Gissel* order, declaring majority support for the union and bypassing the need for additional election.³⁴

The first of these measures is straightforward – the laboratory conditions required for a fair election were tainted so a new election is necessary to reestablish them.³⁵ It is often coupled with the

¹⁸ See 29 C.F.R. § 102.63 (2019); See also ABA, *supra* note 14, at 5-12.

¹⁹ See 29 C.F.R. § 102.69 (2020); See ABA, *supra* note 14, at 17-24.

²⁰ See *Amazon.com Services LLC, No. 10-RC-269250*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/case/10-RC-269250> (last accessed Mar. 23, 2022).

²¹ See *Gen. Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948).

²² See *id.*

²³ *Id.*

²⁴ See *Coca-Cola Bottling Co.*, 132 N.L.R.B. 481, 483-84 (1961) ("the giving of things of value to individual employees . . . in circumstances which reasonably would lead the donees to believe that it was given to influence their vote, is . . . a ground for setting aside the election.").

²⁵ See *Wesselman's Enters.*, 248 N.L.R.B. 1017, 1022 (1980).

²⁶ See *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 131 (1982) ("we will set an election aside . . . because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is.").

²⁷ See *V&S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 280 (6th Cir. 1999) ("It is well-settled that an employer violates the Act by interrogating its employees about their union activities.").

²⁸ See ABA, *supra* note 14, at 14-16.

²⁹ See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11 (1940) ("this authority to order affirmative action does not go so far as to confer a punitive jurisdiction . . . even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.").

³⁰ 29 U.S.C. § 160(c).

³¹ See *Republic Steel Corp.*, 311 U.S. at 12.

³² See *Gen. Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948).

³³ See *Republic Steel Corp.*, 311 U.S. at 12.

³⁴ See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610-615 (1969).

³⁵ See *Republic Steel Corp.*, 311 U.S. at 12.

second, non-punitive remedial orders.³⁶ For example, if an employer is found to have improperly surveilled employees, they could be ordered to refrain from doing so again.³⁷ If an employee is improperly discharged, they can be reinstated, possibly with backpay (but no more),³⁸ and misrepresentations in campaign materials can result in orders to distribute corrections and notices of employees' rights.³⁹ Neither imposes a burden that goes beyond the harm caused, and presumptively benefit gained, by the guilty employer.⁴⁰

The final remedy – *Gissel* bargaining orders – arise when the steps taken by employers to subvert the union certification election process go so far as to make a return to “laboratory conditions” impossible.⁴¹ When such conditions exist and the Union can prove majority support some other way, whether by showing majority support in the initial petition or subsequent increase in signatures, the Board will certify the union representative and order the company to move onto negotiations, essentially circumventing the election altogether.⁴² The Supreme Court upheld this process in 1969, noting that “[i]f the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer”⁴³ The requirements it laid out are: (1) a showing of majority support, (2) the possibility of return to a fair election is slight, and (3) that the employee is better protected by a bargaining order.⁴⁴ A combination of these strict requirements and shifting policy between administrations has made *Gissel* bargaining orders a rare and extraordinary remedy.⁴⁵

Considering the current remedies available to the Board, how this compares to other regulatory bodies, and how corporations, the central issue this paper seeks to resolve is whether either current remedies or those proposed in the Protecting the Right to Organize Act are adequate to advance the United States' policy of encouraging the practice and procedure of collective bargaining.

III. ANALYSIS

Given the NLRB's charter to effectuate the United States' policy of “encouraging the practice and procedure of collective bargaining,”⁴⁶ the remedies available to it are woefully inadequate. Of the three options it possesses, only *Gissel* bargaining orders truly cause employers to suffer the consequences of violating the NLRA by directly enforcing the result they were hoping to avoid: union representation of their workforce. The actions of both Starbucks and Amazon taken in the face of burgeoning unionization movements show that the potential burdens they face from NLRB remedies completely fail to outweigh the benefits they gain by illegally tainting the laboratory conditions required for a fair election. That other regulatory bodies are regularly given discretion to

³⁶ See, e.g., *id.*

³⁷ See *id.* (“he may be ordered to cease particular methods of interference, intimidation or coercion”); See also Amazon.com Services LLC, 13-CA-275270 (N.L.R.B. Dec. 22, 2021) (settlement agreement).

³⁸ See 29 U.S.C. S 160(c).

³⁹ See *Republic Steel Corp.*, 311 U.S. at 12 (“to give appropriate notice of his compliance with the Board's order, and otherwise to take such action as will assure to his employees the rights which the statute undertakes to safeguard.”); See also Amazon.com Services LLC, 13-CA-275270 (N.L.R.B. Dec. 22, 2021) (settlement agreement).

⁴⁰ See *Republic Steel Corp.*, 311 U.S. at 12-13 (1940).

⁴¹ See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969).

⁴² See *id.*

⁴³ *Id.* at 610.

⁴⁴ See *id.* at 614-15.

⁴⁵ See ABA, *supra* note 14, at 19.

⁴⁶ 29 U.S.C. § 151.

devise punitive schemes, as seen with both the Equal Employment Opportunity Commission⁴⁷ and the Department of Labor’s Wage and Hour Division⁴⁸, shows that it is a necessary power for agencies to uphold the laws they are charged with enforcing.

Like the NLRA, the Fair Labor Standards Act (“FLSA”)⁴⁹ and Family and Medical Leave Act (“FMLA”)⁵⁰ both create specific workers’ rights and establish protections against abuses by employers for those rights. Similarly, Title VII of the 1964 Civil Rights Act prohibits workplace discrimination for a variety of protected classes.⁵¹ None of these three employment laws limits the agencies charged with enforcing them as much as the NLRA currently limits the NLRB.⁵² Under all three, violations can be punished through punitive damages, with both companies and individuals within them potentially liable.⁵³

Violations of the FMLA, FLSA, and Title VII are relatively rare.⁵⁴ By contrast, when facing an attempt by employees to establish collective bargaining—the primary right guaranteed under the NLRA—it is standard practice for companies to contravene worker’s rights.⁵⁵ Employers are charged with violating the NLRA in 41.5% of union election campaigns.⁵⁶ Perhaps unsurprisingly, in the face of severe and often illegal management opposition, unionization has been on the decline in recent decades, with the proportion of workers who are members of unions falling from 20.1 percent in 1983 to just 10.8 percent in 2021.⁵⁷ That rate stands at just 6.1 percent in the private sector.⁵⁸ Despite this, two major American corporations have been facing major, high-profile unionization efforts since the start of the new decade: Amazon⁵⁹ and Starbucks.⁶⁰ These examples demonstrate that the NLRB currently lacks the power to prevent them from merely treating violating the NLRA as part of the cost of doing business.

The most notable effort Amazon faces is at their fulfillment center in Bessemer, Alabama.⁶¹ Workers there filed a petition seeking representation in November 2020⁶² and had an election by

⁴⁷ See 42 U.S.C. § 2000e (barring employment discrimination on the basis of various protected classes, establishing the EEOC to aid in enforcement, and allowing for punitive damages against violators).

⁴⁸ See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219.

⁴⁹ See *id.*

⁵⁰ See Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654.

⁵¹ See 42 U.S.C. §§ 2000e-2(a)-(c) (barring discrimination by employers, employment agencies, and labor organizations “on the basis of his race, color, religion, sex, or national origin.”).

⁵² Compare 29 U.S.C. § 216 (providing financial and criminal penalties under the FLSA) and 29 U.S.C. § 2617(a) (providing for punitive financial damage awards under the FMLA) and 42 U.S.C. § 2000e-5 (providing financial and criminal penalties under Title VII) with *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940) (barring any punitive remedies under the NLRA).

⁵³ See 29 U.S.C. § 216 (FLSA); see also 29 U.S.C. § 2617(a) (FMLA); See also 42 U.S.C. § 2000e-5 (Title VII).

⁵⁴ See *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020> (last visited Mar 23, 2022); See also *BLS Reports: Characteristics of Minimum Wage Workers, 2020*, U.S. BUREAU OF LAB. STAT. (Feb. 2021), <https://www.bls.gov/opub/reports/minimum-wage/2020/home.htm>.

⁵⁵ See generally McNicholas et al., *supra* note 8.

⁵⁶ *Id.*

⁵⁷ BUREAU OF LAB. STAT., USDL-22-0079, UNION MEMBERS – 2021 (2022), <https://www.bls.gov/news.release/pdf/union2.pdf>.

⁵⁸ *Id.*

⁵⁹ See generally Alina Selyukh, *Amazon Labor Push Escalates as Workers at New York Warehouse Win a Union Vote*, NAT’L PUB. RADIO (Feb 17, 2022), <https://www.npr.org/2022/02/17/1080689396/amazon-labor-push-escalates-as-workers-at-new-york-warehouse-win-a-union-vote>.

⁶⁰ See generally Scheiber, *supra* note 6.

⁶¹ See Selyukh, *supra* note 1.

⁶² See Amazon.com Services LLC, 10-RC-269250 (N.L.R.B. Nov. 20, 2020) (RC Petition).

mail ballot in March of 2021.⁶³ Following a contested campaign by both sides, Amazon prevailed, but not fairly.⁶⁴ The NLRB found that they engaged in several unfair practices which tainted the “laboratory conditions” required for union certification election.⁶⁵ These include inquiries into how employees would vote, installation of a tent and campaign materials by the ballot box, installation of a ballot box in the facility that employees believed Amazon could access, creating the impression that Amazon was surveilling how employees voted, and improper threats of retaliation and promises of benefits.⁶⁶ Given the severity and quantity of Amazon’s transgressions, the board ordered a new election (which concluded on March 28, 2022 with disputed results)⁶⁷ and also ordered Amazon to cease the unfair practices listed above, and to provide the union equal access to the means of communication Amazon used for its own campaign.⁶⁸ Perhaps unsurprisingly, the company has been accused of further unfair interference in this new election by removing pro-union messaging and restricting employees’ activities outside of working hours.⁶⁹ Following the second election, the union filed another twenty-three objections with the NLRB, alleging Amazon continued to engage in much of the same behavior that resulted in the Board setting aside the first election.⁷⁰

Starbucks also faces a union push, though rather than the large, centralized efforts Amazon is combatting, efforts by employees for the café corporation are remarkable for their breadth.⁷¹ It started in late 2021 with three individual stores in the Buffalo, New York area, each consisting of fewer than twenty employees.⁷² Two of the three succeeded in December of that year, with the third following closely in early 2022 after disputes over the ballots.⁷³ These successes launched an avalanche of similar filings throughout the nation, with over 175 stores seeking votes in the first three months of 2022 alone.⁷⁴ Much like Amazon, Starbucks has engaged in numerous illegal acts to combat the unionization efforts of its employees.⁷⁵ The NLRB’s findings against it include illegal surveillance and retaliation in multiple locations in the southwest.⁷⁶ Starbucks has also been accused of violating the law when it recently fired seven union organizers in Memphis, Tennessee.⁷⁷

From a purely cost-benefit perspective, it is inevitable that companies like Amazon and Starbucks continue to violate the NLRA⁷⁸ given the complete lack of punitive remedies available to

⁶³ See *Amazon.com Services LLC*, 10-RC-269250 (N.L.R.B. Jan. 19, 2021) (Notice of Election).

⁶⁴ See *Amazon.com Services LLC*, No. 10-RC-369250, 2021 N.L.R.B. Reg. Dir. Dec. LEXIS 182, at *29-*30 (N.L.R.B. Nov. 29, 2021).

⁶⁵ See *id.* at *38.

⁶⁶ See *id.*

⁶⁷ See Andrea Hsu, *Do-over Union Election at Amazon's Bessemer Warehouse is too Close to Call*, NAT’L PUB. RADIO (Mar. 31, 2022), <https://www.npr.org/2022/03/31/1090123017/do-over-union-election-at-amazons-bessemer-warehouse-is-too-close-to-call>.

⁶⁸ See *Amazon.com Services LLC*, 2021 N.L.R.B. Reg. Dir. Dec. LEXIS 182, at *38.

⁶⁹ See Daniel Wiessner, *Union Says Amazon Continues to Interfere with Election at Alabama Warehouse*, REUTERS (Feb. 22, 2022), <https://www.reuters.com/business/retail-consumer/union-says-amazon-continues-interfere-with-election-alabama-warehouse-2022-02-22/>.

⁷⁰ Compare *Amazon.com Services, LLC*, 10-RC-269250 (N.L.R.B. Apr. 7, 2022) (petitioner’s objections) with *Amazon.com Services LLC*, 2021 N.L.R.B. Reg. Dir. Dec. LEXIS 182, at *38.

⁷¹ See generally Scheiber, *supra* note 6.

⁷² See Selyukh, *supra* note 5.

⁷³ See *id.*

⁷⁴ See Scheiber, *supra* note 6.

⁷⁵ See Josh Eidelson, *Starbucks Retaliated Against Pro-Union Staff, NLRB Alleges*, BLOOMBERG (Mar. 15, 2022), <https://www.bloomberg.com/news/articles/2022-03-15/starbucks-retaliated-against-pro-union-staff-nlr-alleges>.

⁷⁶ See *id.*

⁷⁷ See Allison Morrow, *Starbucks Fires 7 Employees Involved in Memphis Union Effort*, CNN BUSINESS (Feb. 8, 2022), <https://www.cnn.com/2022/02/08/economy/starbucks-fires-workers-memphis-union/index.html>.

⁷⁸ See McNicholas et al., *supra* note 8.

the NLRB when it finds employers violate the law. Excepting *Gissel* bargaining orders, the most the Board can currently order is a new election, the employer to cease and desist, or to undo the damage done by their actions.⁷⁹ In essence, the “cost” of being found guilty of an NLRA violation is merely to be put into the same position they would have occupied as if they had not perpetrated the violation in the first place. If they taint a union election, the punishment is a union election.⁸⁰ If an employee is improperly fired, the punishment is to reinstate with *potential* back pay.⁸¹ If they make improper threats or promises or engage in any of the other various acts that constitute improper campaigning, they simply have to stop doing so and potentially issue a notice of employees’ rights.⁸² Even for *Gissel* orders, the union must already have a showing of majority support,⁸³ so the certification of the union absent another election is simply the most likely result absent abuses by the employer. In sum, even the highest “cost” of violating the NLRA is minimal, merely the incidental costs involved in perpetrating those violations in the first place.

On the other side of the equation, unions represent a potentially significant increase in costs through wages, benefits, and restrictions on employer freedom to and hire and fire employees at will.⁸⁴ Even for a bargaining unit of relatively few employees, these costs could easily run into the hundreds of thousands per year, let alone the tens of millions Amazon could face in major facilities like their fulfillment center in Bessemer.⁸⁵ Given corporations’ fiduciary duty to their shareholders,⁸⁶ the only logical choice when facing a unionization movement is to take on the minimal costs of violating the NLRA to avoid hundreds of thousands, if not millions, in increased costs. It should not be surprising that companies like Starbucks and Amazon routinely and repeatedly flout the NLRA – given the current enforcement regime, it is simply the most logical choice.

This stands in stark contrast with the FLSA, where the potential punishments for violations are much more severe.⁸⁷ It includes similar compensatory remedies as the NLRA, financial penalties, and even criminal sentences for repeat offenders.⁸⁸ These measures prove effective. According to Bureau of Labor Statistics estimates, of the over seventy-three million hourly workers in the United States, 1.2 percent earn less than the federal minimum wage established by the FLSA.⁸⁹ In 2021, the Department of Labor found fewer than 8,000 cases with violations of the federal minimum wage and overtime laws each, involving a total of just over 180,000 employees.⁹⁰ This represents less than

⁷⁹ See *supra* Part II.

⁸⁰ See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 615 (1969).

⁸¹ See 29 U.S.C. § 160(c).

⁸² See *Amazon.com Services LLC*, 13-CA-275270 (N.L.R.B. 22 Dec. 2021) (settlement agreement).

⁸³ See *Gissel Packing Co.*, 395 U.S. at 614.

⁸⁴ See generally Mathew Walters & Lawrence Mishel, *How Unions Help All Workers*, ECON. POL’Y INST. (Aug. 26, 2003), <https://files.epi.org/page/-/old/briefingpapers/143/bp143.pdf>.

⁸⁵ See generally *id.* (finding unions raise the wages of unionized workers by about 20%). Given Amazon’s average wage of eighteen dollars per hour and assuming a working year of 2,000 hours, this would represent an annual increase of about thirty-six million in labor costs at the Bessemer facility in wages alone.

⁸⁶ See Mary Siegel, *Fiduciary Duty Myths in Close Corporate Law*, 29 DEL. J. CORP. L. 377, 377 (2004).

⁸⁷ See 29 U.S.C. § 216 (allowing for fines of up to \$10,000 and prison terms of up to six months for individual violators, liability for up to double the damages caused, and an additional penalty for child labor violations that scales with the number of employees affected).

⁸⁸ See 29 U.S.C. § 216.

⁸⁹ U.S. BUREAU OF LAB. STAT., *supra* note 54. As the report notes, not all the 865,000 workers below the federal minimum wage are covered by the FLSA.

⁹⁰ *Fair Labor Standards Act*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/data/charts/fair-labor-standards-act> (last visited Mar. 3, 2022) (showing table of annual FLSA violations).

a quarter of a percent of hourly workers in the United States.⁹¹ The contrast with the 41.5% of union elections in which employees are charged with NLRA violations⁹² could not be clearer.

To help remedy the NLRB's current lack of power to enforce the NLRA, the 117th Congress proposed the Protecting the Right to Organize Act ("PRO Act") which passed the House⁹³ but lingers in committee in the Senate.⁹⁴ It provides, among several other important provisions, the Board with the ability to impose limited financial sanctions of varying degrees for violations of the election "laboratory conditions" generally and unfair labor practices more specifically.⁹⁵ The limited nature of these sanctions means they are not severe enough to deter large companies from engaging in practices of the NLRA.

The financial penalties within the PRO Act are not severe enough to tip the cost-benefit analysis large corporations engage in when violating the NLRA to prevent union formation. There are four financial penalties in the proposed legislation: (1) up to a \$10,000 fine for each violation, (2) up to \$10,000 per day for continuing to violate the NLRA following a Board order to cease and desist, (3) up to \$50,000 per unfair labor practice, which can be doubled for any employer with a similar violation in the prior three years, and (4) corporate and individual liability under a new private right of action up to double the compensatory amount (backpay).⁹⁶ The first of these covers the majority of actions taken by companies like Starbucks and Amazon to combat unionization efforts.⁹⁷ For example, none of the various violations Amazon perpetrated in Bessemer rose to the level of an unfair labor practice as defined by the Act, but rather together created an atmosphere which tainted the laboratory conditions required for a fair election.⁹⁸

This first penalty does not go far enough to prevent companies from continuing their illegal strategies in combatting large union efforts. Amazon's fulfillment center in Bessemer is an example: the proposed bargaining unit there consists of just over 6,000 employees.⁹⁹ Under the currently proposed legislation, Amazon would be subject to \$70,000 in fines for the conduct which resulted in the second election,¹⁰⁰ and none of the supervisors responsible for those actions could be held individually liable.¹⁰¹ While such fines would be inconvenient for the internet commerce giant, they pale in comparison to the additional costs it would face as a result of the earlier implementation of collective bargaining at the Bessemer facility.¹⁰² From the company's perspective, violating the NLRA to scare employees out of unionizing is still the most logical business decision. Since the corporation bears the costs of such misconduct, the individuals making and carrying out the

⁹¹ See U.S. BUREAU OF LAB. STAT., *supra* note 54; *See also id.*

⁹² McNicholas et al., *supra* note 8.

⁹³ See Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (as passed by House of Representatives, Mar. 9, 2021).

⁹⁴ *See id.*

⁹⁵ *See id.* §§ 106, 109.

⁹⁶ *See id.*

⁹⁷ *See generally* Amazon.com Services LLC, No. 10-RC-369250, 2021 N.L.R.B. Reg. Dir. Dec. LEXIS 182 (N.L.R.B. Nov. 29, 2021) (sustaining seven charges against Amazon, all of which fall in the first category of violations and not unfair labor practices).

⁹⁸ *See generally id.*

⁹⁹ *See* Selyukh, *supra* note 1.

¹⁰⁰ *See generally* Amazon.com Services LLC, 2021 N.L.R.B. Reg. Dir. Dec. LEXIS 182; *See also* Protecting the Right to Organize Act of 2021, H.R. 842 § 109, 117th Cong. (as passed by House of Representatives, Mar. 9, 2021). Each of the seven violations by Amazon would result in a \$10,000 fine, totaling \$70,000.

¹⁰¹ *See* H.R. 842 § 109. The individual liability proposed in the PRO Act only extends to unfair labor practices, of which none of Amazon's violations constitute.

¹⁰² *See* Walters & Mitchell, *supra* note 84.

decisions are shielded from the repercussions of their bad behavior and will continue to act in the corporation's best interests, which continues to be to violate the law.

Changes are needed in the PRO Act to truly shift the incentives for large corporations away from violating the law and towards following it. Currently, while the proposed financial sanctions can dissuade employers from violating the rights of small bargaining units, they lack the ability to meaningfully shift the cost-benefit analysis of employers where large units are involved. Absent further changes, there is little reason to believe that large employers like Amazon will desist from their current practices of regularly violation the NLRA, and the Board will be unable to properly "protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."¹⁰³

IV. RECOMMENDATION

For the NLRB to fulfill its mission of furthering the United States' policy of encouraging the practice and procedure of collective bargaining, it needs tools far beyond the scope of what are currently available to it. Fundamentally, it must possess the ability to shift the cost-benefit analysis companies face such that adhering to the law is less costly than breaking it. The PRO Act is a good start but does not go far enough, particularly where large employers are concerned. To fully empower the NLRB, Congress should alter the financial penalties within the PRO Act to scale proportionally with the number of employees affected and extend individual liability to violations of the laboratory conditions.

The first solution to this problem is simple: scale the penalty for violating laboratory conditions with the number of employees affected by the violation. If the fine were a maximum of \$10,000 per employee rather than per violation it would serve to Similarly, the FLSA treats each individual employee as a separate violation for its child labor provisions.¹⁰⁴ Treating each employee affected deter not just small employers, but large ones too. The PRO Act already takes a similar approach for violations which continue after a cease and desist order by the board, treating each day as a new violation which incurs an additional fine.¹⁰⁵ Treating each employee affected as an additional violation would give the board the ability to adequately shift the cost-benefit analysis undertaken by employers opposing large bargaining units which could potentially increase costs by orders of magnitudes more than the current proposed financial penalties.¹⁰⁶

The second solution brings changes to the cost-benefit calculation for individuals acting on behalf of these employers by imposing individual liability for violations which stain the laboratory conditions required for a fair election. The PRO Act already establishes this for unfair labor practices through the private right of action.¹⁰⁷ However, as discussed above employers can violate the laboratory conditions required for a fair election without engaging in unfair labor practices.¹⁰⁸ The logic behind making individuals liable for unfair labor practices they engage in on behalf of their employers is simple: make it in their best self-interest to adhere to the law even if it is not in their employer's best interest. The same logic should apply to violations of the laboratory conditions for

¹⁰³ 29 U.S.C. § 151.

¹⁰⁴ See 29 U.S.C. § 216(e)(1)(A).

¹⁰⁵ See H.R. 842 § 106.

¹⁰⁶ For example, if the fine were up to \$10,000 per employee, Amazon could be potentially liable for up to \$60,000,000 for its actions in Bessemer, which may prove enough to outweigh the potential increases in expenditure from unionization discussed *supra* note 85.

¹⁰⁷ See H.R. 842 § 109.

¹⁰⁸ See *supra* Part II.

union elections. These individual sanctions need not scale in the same fashion as they do for the corporation overall – even a relatively modest penalty can be enough to shift the finances, and thinking, of individual supervisors. A corporation cannot violate their employee’s rights under the NLRA law without individuals doing so on its behalf. Holding those individuals liable helps dissuade them violating the law, even if it might benefit their employer.

These two changes – scaling the punitive damages along with the number of employees affected and allowing for individual liability when the laboratory conditions are violated – would alter incentives for both large corporations and the individuals acting on their behalf in dealings with unionization efforts by their employees. For the corporation, the potential costs of their illegal anti-union activities would appropriately scale with the costs of not doing so. For those individuals acting on behalf of the corporation, individual liability creates a personal incentive to adhere to the law as a counterbalance to pressure from their employer to violate it. Both are necessary to truly shift the cost-benefit calculation for employers and individuals away from subverting employee rights under the NLRA towards acknowledging and respecting the right to unionize.

V. CONCLUSION

Time has shown that the National Labor Relations Board desperately lacks the power it needs to properly enforce the National Labor Relations Act and advance the United States’ policy of promoting the practice and procedure of collective bargaining. The proposed Protecting the Right to Organize Act contains many important provisions, but the penalties contained within still fail to adequately empower the NLRB to disincentive employers from continuing to illegally meddle in union certification elections. Congress should adjust these penalties to scale with the number of number of employees affected by violations and extend individual liability to corporate officers who direct such actions and pass these changes, along with the remainder of the PRO Act, to enable the Board to fulfill its duty to enforce and uphold the NLRA.