TESTIMONY OF EILEEN B. GOLDSMITH
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BEFORE THE
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Chairman Good, Ranking Member DeSaulnier, and members of the Subcommittee: Thank you for the opportunity to testify before you today concerning the National Labor Relations Board. My name is Eileen Goldsmith, and I am a partner at Altshuler Berzon LLP in San Francisco, where I have been a lawyer primarily representing labor unions for more than 20 years.

What I hope will be most valuable for you is for me to explain the critical but entirely ordinary operation of the Board, from the perspective of a lawyer whose clients regularly appear before the Board in both unfair labor practice and representation cases.

My law firm represents dozens of local unions in California and other states, as well as many international unions. Our clients represent workers in many industries, including construction, health care, education, transportation, hospitality, and others. I personally represent many local unions, primarily in the construction industry, who themselves represent thousands of California workers. I also represent apprenticeship programs that are jointly managed by unions and employer associations, and that provide outstanding job training to launch young people into rewarding careers in the skilled trades.

I have been doing this work for many years, and I consider it a privilege to support my union clients as they represent their members and seek to organize other workers. Over the years, I have appeared in NLRB proceedings dozens of times, primarily at the regional level, both bringing unfair labor practice charges or election proceedings on behalf of my union clients, and also sometimes defending my union clients against charges filed against them by employers or workers. My union clients depend on the Board's robust enforcement of the Act to protect their members' rights and to help other workers exercise their rights to self-organization.

The Board is the agency designed by Congress to enforce and administer the National Labor Relations Act ("Act"). Its central duty is to protect employees' right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" and employees' right to refrain from such activity. In upholding the Act against constitutional challenge, the Supreme Court in *Jones and Laughlin Steel* called that "a fundamental right."

The Board protects that fundamental right through two types of procedures: unfair labor practice and representation cases.

In unfair labor practice cases, the Board reviews decisions by Administrative Law Judges ("ALJs") issued after they have heard evidence concerning whether an employer or union has

violated the Act. Contrary to what may be the perception by some in Washington, D.C., the Board's decisions in such cases are often unanimous with members appointed by Republican Presidents joining with those appointed by Democrats.

I could give you many examples, but here is a typical one.[1] In the spring of 2022, workers employed by a company called HSA Cleaning to clean the three million square foot American Dream Mall in East Rutherford, New Jersey started talking to one another about how they were being treated and management's unwillingness to address their concerns. The workers sought a meeting with management where one worker served as their spokesperson. In mid-June, the workers started to speak with a union, Service Employees International Union, Local 32BJ, about representing them. The spokesperson and another worker both talked to union organizers. The spokesperson also talked openly with management about the union, saying he thought a union would be very good for the workers. On June 23, one of the workers started gathering signatures on a petition supporting union representation. Three days later, both workers were fired.

The Union filed charges with the NLRB alleging that the two workers had been fired in retaliation for their protected concerted activity, both before and after they started talking to the union. After an investigation, the Board's General Counsel found probable cause to believe the employer had violated the law. An evidentiary hearing was held before an ALJ, who found that the employer had fired the two workers in retaliation for the exercise of their rights. The employer sought review before the Board, and on April 19, 2024, a three-Member panel affirmed the judge's decision. Importantly, that panel consisted of two Democratic appointees, Chair McFerran and Member Wilcox, and one Republican appointee, Member Kaplan. That is how the NLRB typically functions.

Unfortunately, even though the fundamental right to join a union has been established for almost 90 years, employers have continued to violate the law by discharging, disciplining, and threating employees based on their exercise of their federally protected right to support a union. As the Education and Labor Committee heard from Professor Kate Bronfenbrenner in 2022, employer threats and intimidation remain extremely common. Professor Bronfenbrenner found that in the run-up to 30% of elections between 2016 and 2021, employers threatened workers with loss of wages and benefits, 40% with full or partial plant closing, and 23% with outsourcing. Some 16% of elections involve at least one retaliatory discharge.[2] In 2023, almost 20,000 unfair labor practice changes were filed with the NLRB, an increase of over 30% since 2021.[3] One of the critical roles of that Board is to remedy such unfair labor practices, and the Board's Members, as well as its staff at every level of the agency, carry out that role in a professional and nonpartisan manner. In Fiscal Year 2023 alone, the Board recovered almost $57 million in backpay for

[1] *HSA Cleaning, Inc.*, 373 NLRB No. 46 (2024).
[2] https://ecommons.cornell.edu/server/api/core/bitstreams/f5d57fd7-ad19-4368-a46d-71046137185f/content.
[3] https://www.nlrb.gov/reports/nlrb-case-activity-reports/unfair-labor-practice-cases/intake/unfair-labor-practice-charges.

employees whose right had been violated and almost 1,000 employees were offered reinstatement as a result of the Board's efforts.[4]

The second process through which the Board protects employees' fundamental rights is by conducting elections. The Act gives employees, unions, and employers the right to petition the Board to conduct an election to resolve a question of whether employees desire union representation. The current Board has experienced an unprecedented surge in such petitions. Between 2021 and 2023, there was a 66% increase in the number of petitions filed seeking an election in order to obtain union representation.[5] Last year 2,115 petitions were filed with the Board and 1,391 elections were supervised by the Board.

That uptick in employees' desire to be represented is not surprising given strong public support for unions. Gallup found in 2022 that public approval of union was at its highest level in over half a century, with 71% of Americans expressing approval of labor unions.[6] And that is all the more remarkable given the lack of public confidence in almost every other institution in American public life, from the Supreme Court to the press.

Again, I could give you many examples, but here is a typical one. In December 2023, nurses at the University Medical Center in New Orleans voted to be represented by National Nurses United.[7] The three-day vote was the largest union election in Louisiana in nearly 30 years. Over 90% of eligible voters cast a ballot, and 82% voted in favor of union representation. These are the heroes we all celebrated during the pandemic. But since the onset of the pandemic, nurses have been leaving the profession in record numbers, leading to critical shortages at many hospitals, especially non-unionized hospitals. In contrast, rather than exiting the profession, these nurses in New Orleans chose to gain a collective voice to address concerns about their working conditions. That choice was only possible because the NLRB procedures were available to them and the NLRB was able to conduct the election.

The vast majority of cases that the NLRB handles – both at the Board level and at the level of regional staff and ALJs – are bread-and-butter cases that are decided pursuant to well-established law. Indeed, very few unfair labor practice or election cases are ever appealed to the Board.[8] The overwhelming majority of unfair labor practice cases are investigated and decided by the hardworking staff of the regional offices or by ALJs, without ever reaching the Board. With respect to representation cases, most elections move forward by means of a stipulation negotiated with the assistance of regional staff, thereby avoiding costly pre-election litigation and allowing voting to proceed without unnecessary delay. Even when objections are raised against an election

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[4] https://www.nlrb.gov/sites/default/files/attachments/pages/node-130/nlrb-fy2023-par-508.pdf
[5] https://www.nlrb.gov/reports/nlrb-case-activity-reports/representation-cases/intake/representation-petitions-rc.
[6] Justin McCarthy, U.S. Approval of Labor Union at Highest Point Since 1965, GALLUP, https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx.
[7] *University Medical Center New Orleans*, Case No. 15-RC-327698.
[8] For example, in FY 2021 through FY 2023, the Board has issued, on average, 244 decisions per year. https://www.nlrb.gov/reports/agency-performance/board-decisions-issued. As the statistics discussed above reflect, the agency's overall caseloads are many multiples higher than that.

result, such cases rarely reach the Board, but instead are resolved at the regional level by the Regional Director or, where unfair labor practice charges are also at issue, by an ALJ.

While this day-to-day work of the agency may not grab headlines, it is a crucial function of the Board that workers and their representatives rely on, as do employers. I'd like to mention a few recent examples from my own practice and that of colleagues in my law firm that illustrate the typical work of the agency and, in several instances, also highlight the obstacles facing workers who attempt to exercise their rights under the Act.

In one typical case, several workers employed by a contractor in the construction industry were fired when they tried to organize a union.[9] In 2021, workers employed by J. Ginger Masonry, LP, in southern California became interested in joining Bricklayers & Allied Craftworkers Local 4. After a union organizer visited the jobsite and spoke to J. Ginger employees there, workers contacted the organizer to discuss their interest in unionizing. About eleven workers then attended a meeting with the organizer, where they discussed unionizing and signed union authorization cards. The very next day, a supervisor told one of the workers that he "[knew] what you guys did with the union yesterday" and directed one of the workers, Pedro Chan, to fire the others because "the company does not use those type of people." The supervisor also directed Chan to return his company truck and gas card. Later that day, the workers went to J. Ginger's Riverside office to ask why they were fired. Chan also asked why he had been directed to return his truck and gas card, and asked to confirm whether he and the others were being fired. A supervisor confirmed that all of the workers were being fired, although the employer later claimed that the workers had simply quit.

The union filed a charge alleging that the J. Ginger workers were fired for having attempted to unionize, and, like in the *HSA Cleaning* case discussed above, after an investigation by NLRB Region 21 staff, the Board's General Counsel found probable cause to believe the employer had violated the Act. The case proceeded to a hearing before an ALJ, who, applying well-established law dating back to the 1980 *Wright Line* decision,[10] found that the workers were indeed fired in retaliation for their union activity. The ALJ rejected the employer's defense as pretextual, finding that the weight of the evidence showed that the employer knew about the workers' organizing activity, was openly hostile to that activity, and had fired the workers immediately after they showed interest in organizing. The ALJ ordered the company to offer reinstatement to the workers together with make-whole relief. Currently, the *J. Ginger* case is pending on the employer's exceptions before the Board.

The *J. Ginger* case is a great example of the day-to-day work of the Board, applying and enforcing well-established law. Troublingly, the case is also emblematic of the challenges that are faced by workers who express interest in exercising their right to be represented by a union. The employer openly terminated these workers in retaliation for their organizing activity even though it was obviously unlawful for the employer to do so. As the ALJ observed, "the motive

[9] *J. Ginger Masonry, LP*, Case No. 21-CA-289777.
[10] *Wright Line*, 251 NLRB 1083 (1980), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

for [the workers'] firings best supported by the record is that J. Ginger hoped that by terminating a handful of employees – including some relatively senior and influential ones – it could quell interest in a nascent union campaign." As Professor Bronfenbrenner's analysis shows, what happened at J. Ginger is hardly an isolated incident.

In another case, we filed an unfair labor practice charge against a fast food employer, alleging that a worker was fired for coordinating with a labor organization to raise concerns about safety risks at her workplace, including criminal activity in the restaurant's parking lot that directly threatened the safety of the restaurant's employees. In that case, the NLRB regional staff conducted an investigation and, again applying well-established law to the facts, agreed that the worker's efforts to elevate safety concerns on behalf of herself and her co-workers was protected under the Act and that her termination was unlawful. With the help of the NLRB Region 20 staff, we secured an early settlement on behalf of that worker before a complaint was issued. This is just another example of an employer attempting to retaliate against a worker for exercising her legal rights, and it underscores the importance of the availability of NLRB remedies that facilitate prompt voluntary settlements.

I have also defended several unfair labor practice charges brought against my union clients in recent years involving allegations by union members that the union had violated its duty of fair representation in some way. In each of these cases, the regional staff has dismissed the charges because, after thorough investigation, they concluded that the evidence did not establish a violation of the Act. While I am pleased to say that each of these charges was dismissed, the NLRB's prompt and thorough handling of these kinds of cases is important to ensure that workers' rights are fully protected in those instances where a union is found to have treated a member in a manner that is arbitrary or discriminatory, or that reflects bad faith.

Our firm's election-related work provides another window into the day to day operations of the Board at the ground level. For example, my colleagues have worked with the regional staff on a series of mail ballot elections over the past few years in which employees of Lucile Packard Children's Hospital and Stanford Health Care sought to be represented by the Committee for Recognition of Nursing Achievement. In each case, the union and the employer stipulated to the proposed bargaining units and the terms by which the elections would proceed. Each of the elections was conducted by mail ballot and proceeded smoothly, with no post-election objections. We are grateful to the NLRB Region 32 staff for handling these matters with great efficiency and professionalism.

In each case, the ballots were mailed within four to five weeks after election petitions were filed. The affected employees cast ballots in very high numbers, ranging from 79%-100% in these bargaining units. Employees voted for union representation at rates from 65%-100% in the affected bargaining units, and the union was certified in each case. The high level of interest in unionizing among these Stanford and Lucile Packard employees is consistent with the statistics discussed above reflecting a surge of interest in union representation among American workers.

Despite the important work the NLRB is doing to protect American workers' rights from the regional staff level up to the Board itself, a critical problem confronting both labor and

management lawyers across the country right now is the severe understaffing of the Board. The Board's budget was flat-lined for almost a decade prior to a small increase for FY 2023, causing a substantial decline in real dollar terms. The consequence was a 30% reduction in staffing in a decade, at the same time that private sector employment grew by almost 16%.[11] The Board is starved of resources, particularly at the regional level, significantly impairing the ability of the hard-working staff at the Regions to make prompt decisions in processing unfair labor practice cases in particular, and also affecting the capacity of Regional staff to conduct elections and resolve disputes that arise both pre- and post-election.

Workers should not have to confront lengthy delays when trying to vindicate their rights, whether they are asserting claims against their employer or their union. Moreover, long delays in case processing do not serve the interests of workers, unions, or employers. Just as much as workers deserve prompt resolutions of their claims, so too does an employer accused of unlawfully retaliating against an employee for protected activity deserve a prompt decision, especially when the employer has a compelling defense. While the Board staff are working valiantly to process cases despite the agency's limited resources, understaffing and delays undermine the efficacy of the Act. From my vantage point as a regular practitioner before the Board, I would encourage the Subcommittee to take up the issue of the mismatch between the Board's caseload and its resources.

Thank you again for the opportunity to appear before you today. I would be happy to answer any questions.

[11] https://www.americanprogress.org/article/the-nlrb-protects-workers-right-to-organize-yet-remains-underfunded/.