Journal of Law and Policy

Volume 31 | Issue 2 Article 5

5-1-2023

Out of Captivity: Preventing Captive Audience Meetings in the Age of National Labor Relations Board Flip-Flopping

Rebecca Gans

OUT OF CAPTIVITY: PREVENTING CAPTIVE AUDIENCE MEETINGS IN THE AGE OF NATIONAL LABOR RELATIONS BOARD FLIP-FLOPPING

Rebecca Gans[*]

Captive audience meetings are one of the most effective tools available to companies fighting union campaigns. This tactic, despite being inherently coercive, is currently legal. In April 2022, the General Counsel of the National Labor Relations Board released a memorandum stating that the Board intends to consider these mandatory meetings illegal, arguing that the right to refrain embraced by the anti-labor Taft-Hartley Act should be applied here in a pro-labor context. While this ban would be a positive shift in policy for labor rights, due to frequent flip-flopping by the Board, it would almost certainly be undone by the next anti-union administration. This Note explores the futility of banning captive audience meetings through agency action in an era of frequent, politicized policy reversals. As these meetings post a direct threat to a worker's right to choose whether or not to unionize, a solution with more staying power is warranted. In lieu of action by the Board, this Note proposes a legislative ban on captive audience meetings that would not be easily reversed under an administration less friendly to labor.

---

[*] J.D. Candidate, Brooklyn Law School, 2024. B.A., Macalester College, 2014. I would like to thank my family for offering their wisdom and encouragement as I pursue a legal education, especially my parents, Sharman Propp and Richard Gans, and my brother, Ezra Gans. I would also like to thank my friend Elanna Conn for her unwavering support. Thank you to Professors William Araiza and David Leach for their invaluable advice as I developed this Note, and thank you to the Journal editors and staff who helped shape it for publication. Finally, and most importantly, this Note is dedicated to the union organizers and workers who fight tirelessly for workers' rights in the face of captive audience meetings and worse; we are all indebted to you.

INTRODUCTION

In December 2021, a Starbucks[1] location in Buffalo, New York became the first Starbucks in the United States to successfully unionize since the 1980s.[2] This union victory spurred an avalanche of highly-publicized union drives; by October 2022, 300 Starbucks locations had held union elections, with approximately 245 voting to unionize.[3] Amazon has faced similarly high-profile employee protests and union campaigns at a number of its facilities since 2021.[4] The two employers have responded to these union efforts with intense anti-union campaigns that have included both legal and illegal union-busting tactics.[5] One familiar, effective, and currently legal[6] tool has been a consistent feature in both companies' efforts:

---

[1] Starbucks Coffee Company is an international chain of coffee shops. *See About Us*, STARBUCKS, https://www.starbucks.com/about-us/ (last visited Mar. 13, 2023).

[2] Alina Selyukh, *Starbucks Workers Form Their 1st Union in the U.S. in a Big Win for Labor*, NPR (Dec. 9, 2021, 3:28 PM), https://www.npr.org/2021/12/09/1062150045/starbucks-first-union-buffalo-new-york.

[3] Andrea Hsu, *Starbucks Workers Have Unionized at Record Speed; Many Fear Retaliation Now*, NPR (Oct. 2, 2022), https://www.npr.org/2022/10/02/1124680518/starbucks-union-busting-howard-schultz-nlrb.

[4] *See* Sara Ashley O'Brien, *Amazon Workers Vote Against Union at Alabama Warehouse*, CNN BUSINESS (Apr. 9, 2021), https://www.cnn.com/2021/04/09/tech/amazon-bessemer-union-election/index.html; Noam Scheiber, *Mandatory Meetings Reveal Amazon's Approach to Resisting Unions*, N.Y. TIMES (Mar. 24, 2022), https://www.nytimes.com/2022/03/24/business/amazon-meetings-union-elections.html.

[5] *See e.g.*, Noam Scheiber, *Judge Finds Amazon Broke Labor Law in Anti-Union Effort*, N.Y. TIMES (Jan. 31, 2023), https://www.nytimes.com/2023/01/31/business/economy/amazon-union-staten-island-nlrb.html; Danielle Wiener-Bronner, *Starbucks Displayed 'Egregious and Widespread Misconduct" in Union Fight, Judge Says*, CNN BUSINESS (Mar. 1, 2023, 8:24 PM), https://www.cnn.com/2023/03/01/business/starbucks-union-ruling/index.html.

[6] *See generally* Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, ECON. POL'Y INST. 1 (May 20, 2009), https://www.epi.org/publication/bp235/.

the captive audience meeting.[7] Employers hold these often mandatory meetings during union campaigns to dissuade workers from voting to unionize.[8] Company representatives often use ideologically-charged anti-union rhetoric at these meetings, and under current labor law, employers can legally discipline or fire workers for disrupting them or for refusing to attend.[9]

Although the Amazon and Starbucks campaigns have attracted significant attention, these companies are not unique in their use of captive audience meetings. A 2009 study showed that eighty-nine percent of employers held these meetings when faced with a union election.[10] Many employers hire "union avoidance consultants" who specialize in anti-union messaging to run these meetings, creating an entire industry based on this practice.[11] Amazon, for example, spent over fourteen million dollars on union avoidance consultants in 2022.[12] Companies are willing to spend significant amounts of money—either on consultants directly or through lost work time—

---

[7] *See* Scheiber, *supra* note 4; Hannah Faris, *Starbucks Workers Are Facing Down One of the Most Intense Union-Busting Campaigns in Decades*, IN THESE TIMES (Mar. 21, 2022), https://inthesetimes.com/article/starbucks-organizing-union-labor-coffee-historic-campaign.

[8] *See* Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. L. 65, 65 (2010).

[9] Paul M. Secunda, *The Contemporary "Fist Inside the Velvet Glove": Employer Captive Audience Meetings Under the NLRA*, 5 FIU L. REV. 385, 386 (2010).

[10] *See* Bronfenbrenner, *supra* note 6, at 10.

[11] Celine McNicholas et al., *Unlawful: U.S. Employers are Charged with Violating Federal Law in 41.5% of Union Campaigns*, ECON. POL'Y INST. 1, 8 (Dec. 11, 2019), https://files.epi.org/pdf/179315.pdf.

[12] Dave Jamieson, *Amazon Spent $14 Million On Anti-Union Consultants In 2022*, HUFFPOST (Mar. 31, 2023, 8:03 PM), https://www.huffpost.com/entry/amazon-anti-union-spending-2022_n_6426fd1fe4b02a8d518e7010; *see also* Jules Roscoe, *Amazon's $3,200-Per-Day Union Busters Say This Is the Best Spot for Steak and Caviar in Albany*, VICE (Sept. 27, 2022, 11:26 AM), https://www.vice.com/en/article/y3p5pb/amazons-dollar3200-per-day-union-busters-say-this-is-the-best-spot-for-steak-and-caviar-in-albany (stating that Amazon paid $3,200 per day to individual consultants to fight a union campaign at its Albany facility).

because these meetings have proven to be effective.[13] The same study found a significant decline in union victories when captive audience meetings were held before elections.[14]

Captive audience meetings pose a significant threat to the labor movement; they decrease union win rates in elections and therefore lead to fewer unionized workplaces.[15] The problem with these meetings, however, is not simply a pro-labor concern. The National Labor Relations Act ("NLRA") was intended in part to make sure workers' choices were respected.[16] The National Labor Relations Board ("NLRB"), the agency that enforces the NLRA, views protecting this freedom to choose as a central part of its mission.[17] Captive audience meetings work against this core value by coercing workers into voting not how *they* want to, but how their *employers* want them to.[18] This should trouble those with both pro- and anti-union views, as coercion in either direction interferes with freedom of choice in the workplace.

In response to this problem, NLRB General Counsel Jennifer Abruzzo issued a memorandum stating that she will encourage the Board to consider captive audience meetings unlawful.[19] Although this is a positive step—and the change may help workers unionize in the short term—it is not a long-term solution. NLRB policy often evolves through Board adjudication,[20] and Board members are

---

[13] *See* Bronfenbrenner, *supra* note 6, at 10.

[14] *Id.*

[15] *See id.*

[16] *See* 29 U.S.C. § 157; General Shoe Corp., 77 N.L.R.B. 124, 126 (1948).

[17] *The NLRB Process*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/resources/nlrb-process (last visited Mar. 13, 2023) (explaining that "[t]he National Labor Relations Board is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative.").

[18] *See generally* Bronfenbrenner, *supra* note 6 (providing data regarding the effects of captive audience meetings).

[19] Memorandum from Jennifer Abruzzo, Nat'l Lab. Rels. Bd., Off. Of the Gen. Couns., GC 22-04 to All Regional Directors, Officers-in-Charge, and Resident Officers, The Right to Refrain from Captive Audience and other Mandatory Meetings (Apr. 7, 2022).

[20] *See* Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. PA. J. LAB. & EMP. L. 707, 714 (2006).

partisan appointees.[21] As a result, Board policy is unstable, shifting frequently and significantly based on the political leanings of each presidential administration.[22] Workers' free choice in exercising their rights is a significant enough concern to warrant a solution that cannot easily be revoked due to a partisan shift in the next administration.

This Note argues that captive audience meetings are a danger to labor rights and should be considered unlawful, but a shift in NLRB policy is not the most effective way to create lasting change. Part I provides an overview of the NLRA and the Taft-Hartley Act. Part II describes what captive audience meetings are and outlines the history of NLRB doctrine regarding these meetings. Part III explains why captive audience meetings are detrimental to workers. Part IV discusses attempts to ban these meetings at the state level. Part V examines General Counsel Jennifer Abruzzo's 2022 memorandum proposing new NLRB policy regarding captive audience meetings and explains why her solution is not ideal. Finally, Part VI provides an alternative solution, arguing that Congress should repeal the Taft-Hartley Act and amend the NLRA to deem captive audience meetings unlawful.

I. BACKGROUND

Modern American labor law is governed largely by the NLRA.[23] While there are some notable exceptions, including agricultural and domestic workers, railroad workers, airline workers, and public

---

[21] *Who We Are*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are (last visited Mar. 13, 2023).

[22] *See* Bernard D. Meltzer, *Organizational Picketing and the NLRB: Five on A Seesaw*, 30 U. CHI. L. REV. 78, 78 (1962) (describing a "striking degree of instability in the Board's decisions").

[23] *See* 29 U.S.C. §§ 151–169; *Frequently Asked Questions – NLRB*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/resources/faq/nlrb (last visited Mar. 13, 2023). The original NLRA is also referred to as the Wagner Act, after its main architect, Senator Richard Wagner. *See 1935 Passage of the Wagner Act*, NAT'L. LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1935-passage-of-the-wagner-act (last visited Mar. 13, 2023).

employees, the NLRA covers most private-sector employees and employers.[24]

a. The National Labor Relations Act

Congress passed the NLRA in 1935[25] as part of the New Deal Era efforts to protect the working class and bolster the American economy.[26] It was largely focused on encouraging collective bargaining,[27] the method by which employers and unionized employees create and modify contracts determining conditions of employment.[28] This process was considered essential to the future of democracy, as collective bargaining was seen as the most effective way to remedy the inherent "inequality of bargaining power" between employers and employees,[29] avoid strikes, and

---

[24] 29 U.S.C. §§ 151–169; NAT'L LAB. RELS. BD., *supra* note 23 (explaining that "[t]he NLRA applies to most private sector employers, including manufacturers, retailers, private universities, and health care facilities. The NLRA does *not* apply to federal, state, or local governments; employers who employ only agricultural workers; and employers subject to the Railway Labor Act (interstate railroads and airlines).").

[25] 29 U.S.C. §§ 151–169.

[26] 29 U.S.C. § 151; ELLEN DANNIN, TAKING BACK THE WORKERS' LAW 24 (2006) (stating that "Congress enacted the NLRA because it had concluded that allowing large imbalances of power between employers and employees created harms that were not confined to the single workplace. They injured the foundations of our society."). The New Deal was a Great Depression recovery program led by President Franklin D. Roosevelt consisting of a wide array of social and economic reforms. *See President Franklin Delano Roosevelt and the New Deal*, LIBRARY OF CONGRESS, https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/franklin-delano-roosevelt-and-the-new-deal/ (last visited Mar. 13, 2023).

[27] *See* 29 U.S.C. § 151.

[28] *Glossary*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/bls/glossary.htm (last visited Mar. 13, 2023).

[29] 29 U.S.C. § 151; HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 3 (1950). Senator Robert Wagner, the architect of the Act, wrote that "collective bargaining is at the heart of the struggle for the preservation of political as well as economic democracy in America." Robert F. Wagner, *The Ideal Industrial State–As Wagner Sees It*, N.Y. TIMES MAG., at 9 (May 9, 1937).

protect the American economy.[30] Section 7, the "heart" of the NLRA, clearly expressed a focus on collective bargaining.[31] Section 7, as originally passed, stated that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."[32]

For the most part, the rest of the NLRA can be viewed as a legal and administrative framework for protecting these Section 7 rights. For instance, Section 3 created the NLRB, a federal agency responsible for enforcing the Act and protecting Section 7 rights.[33] Section 8 established and defined "unfair labor practices," conduct that violates the Act and, in particular, conduct that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 7."[34] In the original NLRA, Section 8 solely addressed employer misconduct; only employers, not unions, were considered capable of committing unfair labor practices.[35]

---

[30] 29 U.S.C. § 151.

[31] National Labor Relations Act, ch. 372, §7, 49 Stat. 449–457, 452 (1935) (current version at 29 U.S.C. § 157); *Protecting Employee Rights*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/nlrb_brochure.pdf (last visited Mar. 13, 2023) (stating that "[t]he heart of the National Labor Relations Act is captured in one paragraph, known as Section 7, which spells out the rights guaranteed to private sector workers.").

[32] 49 Stat. 449–457, 452.

[33] *Id.* at 449–457, 451; NAT'L. LAB. RELS. BD., *supra* note 21 (stating that "[t]he National Labor Relations Board (NLRB) is an independent federal agency created in 1935 and vested with the power to safeguard employees' rights to organize, engage with one another to seek better working conditions, choose whether or not to have a collective bargaining representative negotiate on their behalf with their employer, or refrain from doing so. The NLRB also acts to prevent and remedy unfair labor practices committed by private sector employers and unions, as well as conducts secret-ballot elections regarding union representation.").

[34] 49 Stat. 449–457, 452.

[35] *Id.*

b. The Taft-Hartley Act

As the Great Depression subsided and the public began to feel the impacts of the NLRA, union membership in the United States grew substantially, with an approximately twelve million member increase from 1935 to 1947.[36] During this time, anti-union sentiment began to grow as well.[37] The public worried that organized labor had gained too much economic and political power.[38] Concerns arose that organized labor lacked a sense of responsibility commensurate with that power, as well as a perceived inequity between the regulation of employers and the regulation of unions.[39] Organized labor also lost favor with the public during World War II due to a number of strikes that were seen as disloyal to the war effort.[40] Although these concerns were not fully supported by evidence and were often blown out of proportion, business-backed groups were still able to launch an effective propaganda campaign calling for anti-labor amendments to the NLRA.[41]

After a long effort by a more right-leaning legislature, the Taft-Hartley Act[42] was passed in 1947 when the Senate overrode President Truman's veto.[43] The anti-union slant of the Act was not obscured.[44] It began with introductory statements that "were designed to stand in contrast to . . . the Wagner Act,"[45] and the Taft-Hartley Act's substantive amendments clearly bolstered managerial interests at the expense of labor concerns and to the detriment of the NLRB itself.[46] Commentary on the Taft-Hartley Act often centers around its provisions attacking labor, but it is equally important to

---

[36] MILLIS & BROWN, *supra* note 29, at 271.

[37] *Id.* at 314–15.

[38] *Id.* at 272.

[39] *Id.*

[40] *Id.* at 311, 314–15.

[41] *Id.* at 290–91.

[42] Labor-Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947).

[43] *See* MILLIS & BROWN, *supra* note 29, at 363–92 for a more detailed discussion of this legislative process.

[44] *Id.* at 396.

[45] *Id.*

[46] *Id.*

consider its employer-protective measures. The most relevant additions were to Section 7 and Section 8 of the NLRA.[47] As amended by the Taft-Hartley Act, Section 7 now includes the phrase: "and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment. . . ."[48] This provision introduced into the Act the so-called right to refrain.[49] The right to "remain aloof from a union connection" was not a new idea.[50] The Taft-Hartley Act "only made explicit what had been implicit and always so regarded by the NLRB"—that in most circumstances, workers have the right to join or not to join a union.[51] The amended Section 7 is less of a creation of a right and more of a signal that, not only are workers able to refrain, but it is a valid option to refrain.[52]

Today, anti-union groups use the language in the Taft-Hartley Amendments to encourage the proliferation of right-to-work laws.[53] Workplaces in which it is mandatory to be a union member to be hired, known as "closed shops," are already prohibited under federal law.[54] Right-to-work laws go beyond this prohibition, permitting employees to refuse to pay union dues, but still allowing them to

---

[47] 29 U.S.C. §§ 157–58. Other anti-labor provisions in the Taft-Hartley Act not discussed in this Note include a prohibition of secondary boycotts, the exclusion of supervisors from union bargaining units, and the introduction of elections through which represented employees could vote to leave their incumbent unions. *1947 Taft-Hartley Substantive Provisions*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-substantive-provisions (last visited Mar. 29, 2023).

[48] 29 U.S.C. § 157.

[49] *Id.*

[50] MILLIS & BROWN, *supra* note 29, at 421.

[51] *Id.*

[52] *Id.* (stating that "the insertion served to advertise [the right to refrain] and to ease the conscience of individual workers who did not respond to appeals that they should join a common cause, or assist in paying the bills incidental to the work of a union, ordinarily serving all those in the same group.").

[53] *See* Elise Gould & Will Kimball, *"Right-to-Work" States Still Have Lower Wages*, ECON. POL'Y INST. 1, 2 (Apr. 22, 2015), https://files.epi.org/pdf/82934.pdf.

[54] MILLIS & BROWN, *supra* note 29, at 428.

receive the full benefits of union membership.[55] These laws, in effect in twenty-six states,[56] "seek to hamstring unions' ability to help employees bargain with their employers for better wages, benefits, and working conditions" by reducing their numbers and therefore reducing their bargaining power.[57] This leads to lower wages for all workers, not just union workers, in right-to-work states.[58] Right-to-work laws are an indirect expression of right to refrain doctrine, and their detrimental effects show the harm the right to refrain has done to workers.

The Taft-Hartley Act also added Section 8(c), known as the "free speech amendment."[59] This new subsection stated:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.[60]

Unlike the right to refrain provision, which codified an existing practice, the free speech amendment was a significant departure from existing law and procedure.[61] This amendment not only precluded the NLRB from deeming any employer speech an unfair labor practice itself, but also prohibited the consideration of employer speech as *evidence* of an unfair labor practice.[62] The

---

[55] Gould & Kimball, *supra* note 53, at 2.

[56] Joey Cappelletti, *Michigan Becomes 1st State in Decades to Repeal 'Right-to-Work' Law*, PBS NEWS HOUR (Mar. 24, 2023, 4:51 PM), https://www.pbs.org/newshour/politics/michigan-becomes-1st-state-in-decades-to-repeal-right-to-work-law. In March 2023, the Michigan state legislature passed a law repealing its right-to-work law. *Id.* For examples of right-to-work statutes, see, e.g., IND. CODE §§ 22-6-6-1–22-6-6-13; ALA. CODE §§ 25-7-30–25-7-36.

[57] Gould & Kimball, *supra* note 53, at 2.

[58] *Id.*

[59] 29 U.S.C. § 158(c); *see also* MILLIS & BROWN, *supra* note 29, at 422.

[60] 29 U.S.C. § 158(c).

[61] MILLIS & BROWN, *supra* note 29, at 422.

[62] 29 U.S.C. § 158(c); MILLIS & BROWN, *supra* note 29, at 422–25. This near-total limitation on use of speech as evidence distinguishes NLRB cases from most other types of litigation; even in a criminal case, speech may often be used

amendment "went far beyond the constitutional protection of free speech," giving employers unique protections when opposing union drives.[63] This language also contradicted an earlier Supreme Court decision in which the Court found Board consideration of employer speech constitutional, emphasizing the Taft-Hartley Act's departure from previously established labor law.[64]

II. CAPTIVE AUDIENCE MEETINGS

These robust employer speech protections in the Taft-Hartley Act paved the way for employer use of a tactic that was previously considered unlawful coercion—captive audience meetings.[65]

a. What Are Captive Audience Meetings?

During a union election campaign, employers often hold what are known as captive audience meetings.[66] Definitions of the term vary. Roger Hartley, a labor law scholar whose work is critical of these meetings, defined them as "assemblies of employees during paid work time in which employers compel employees to listen to

---

as evidence under common law rules. MILLIS & BROWN, *supra* note 29, at 424–25.

[63] MILLIS & BROWN, *supra* note 29, at 422.

[64] *See* N.L.R.B. v. Virginia Electric & Power Co., 314 U.S. 469, 478 (1941), in which the Court found that "the Board has a right to look at what the Company has said as well as at what it has done." Later Supreme Court decisions determined that the prohibition applies even in situations where unfair labor practices are taking place. In other areas of labor law, conduct that is acceptable on its own becomes unacceptable if the employer is also committing unfair labor practices; no such rule applies to employer speech protections. MILLIS & BROWN, *supra* note 29, at 424 (referring to the Court's holding in Babcock and Wilcox that "[e]ven in a context of other unfair labor practices, employers' extensive campaigns of statements or letters were held to be privileged").

[65] 29 U.S.C. § 158(c); Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948); *see also* Allie Robbins, *Captive Audience Meetings: Employer Speech vs. Employee Choice*, 36 OHIO N.U. L. REV. 591, 594 (2010).

[66] *See* Charles J. Morris, *Freeing the Captives: How Captive-Audience Meetings under the NLRB Can Be Controlled*, 69 ADMIN. L. REV. 869, 869–70 (2017).

anti-union and other types of proselytizing."[67] Charles Morris, another scholar concerned about the negative effects of this practice, described a captive audience meeting as a "mandatory meeting on company time and property . . . where an anti-union message is communicated and where the company maintains a rule prohibiting union organizing on company time while denying the union similar access to those employees."[68] Business advocates have described captive audience meetings more positively as when employers hold "mandatory meetings with their employees to explain the company's view on unions and union organization efforts."[69]

Essentially, captive audience meetings are mandated gatherings where an employer shares opinions about the upcoming election or about unions in general.[70] These meetings can be led either by management or by union avoidance consultants, consultants and lawyers who specialize in convincing workers not to unionize.[71] The employees at anti-union meetings are considered a captive audience because their attendance is mandatory.[72] While they cannot legally be physically restrained, they may be subject to discipline or discharge if they refuse to attend or if they leave before the meetings are finished.[73]

---

[67] Hartley, *supra* note 8, at 65.

[68] Morris, *supra* note 66, at 870.

[69] John W. Hargrove & Anne R. Yuengert, *Recent Developments in Federal Union Organizing Law*, NAT'L L. REV. (Apr. 19, 2022), https://www.natlawreview.com/article/recent-developments-federal-union-organizing-law.

[70] *See* Morris, *supra* note 66, at 870; Hartley, *supra* note 8, at 65.

[71] Morris, *supra* note 66, at 870. It is estimated that employers spend $340 million on union avoidance consulting services every year. Gordon Lafer & Lola Loustaunau, *Fear at work: An inside account of how employers threaten, intimidate, and harass workers to stop them from exercising their right to collective bargaining*, ECON. POL'Y INST. 1, 5 (July 23, 2020), https://files.epi.org/pdf/202305.pdf.

[72] Hartley, *supra* note 8, at 65.

[73] *Id.*

b. Timeline of NLRB Doctrine Regarding Captive Audience Meetings

A timeline of Board cases since the initial passage of the NLRA reveals evolving doctrine regarding employer neutrality, employee choice, and the more recent concept of employer speech. All of these policies factor into the Board's stance on captive audience meetings.

In its early years, the Board had a strict stance on employer neutrality during union organizing and elections.[74] This is reflected in pre-Taft-Hartley Act Board decisions such as *Virginia Electric & Power Co.*[75] and *Clark Bros. Co., Inc*.[76] In *Virginia Electric*, the Board considered the legality of an employer, the Virginia Electric & Power Company, holding meetings in which company officials discouraged employees from joining a national union.[77] The employer wanted workers instead to join a company union; they held a series of meetings at which company representatives discussed the supposed dangers of joining a larger union as opposed to a union under company control.[78] The Board ruled that this form of employer speech was an unlawful interference with Section 7 rights.[79] The following year, however, the Supreme Court reversed and remanded the Board's decision in *NLRB v. Virginia Electric & Power Co*.[80] The Court established that speech alleged to be coercive must be evaluated in the context of the totality of the employer's behavior—speech alone is insufficient evidence of

---

[74] Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 356 (1995).

[75] Virginia Elec. & Power Co., 20 N.L.R.B. 911 (1940), *enforcement denied*, 115 F.2d 414 (4th Cir. 1940), *rev'd* 314 U.S. 469 (1941).

[76] Clark Bros. Co., Inc., 70 N.L.R.B. 802 (1946); *see also* Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1 (1935), *enforced as modified*, 91 F.2d 178 (3rd Cir. 1937), *rev'd*, *on other grounds*, 303 U.S. 261 (1938).

[77] *Virginia Elec. & Power Co.*, 20 N.L.R.B. at 924.

[78] *Id.* These company-controlled unions are now prohibited under Section 8(a)(2) of the NLRA. 29 U.S.C. § 158; *see also Interfering With or Dominating a Union*, NAT'L. LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-or-dominating-a-union-section-8a2 (last visited Feb. 22, 2023).

[79] *Virginia Elec. & Power Co.*, 20 N.L.R.B. at 924.

[80] N.L.R.B. v. Virginia Elec. & Power Co., 314 U.S. 469 (1941).

coercion.[81] The opinion stopped short of establishing an affirmative employer right to speech and specified that Board protections against coercion were not a free speech violation.[82]

In *Clark Bros.*, the Board took advantage of the door the Supreme Court left open to regulating coercive employer speech.[83] An employer, Clark Bros., led an aggressive anti-union campaign, including the use of mailings, paid anti-union advertisements, and captive audience meetings.[84] The effort culminated in anti-union speeches at meetings in the hour before the polls opened for a run-off election.[85] The Board found that these meetings were inherently mandatory, as "the respondent controlled the manner in which the employees were to occupy their time."[86] By examining "the totality of [the employer's] acts and statements,"[87] the Board found that "the conduct of the [employer] in compelling its employees to listen to a speech on self-organization . . . independently constitute[d] interference, restraint, and coercion within the meaning of the [NLRA]."[88] The order emphasized the importance of employee choice and, in a prescient nod to the future of this discourse, specified that employees have the freedom to choose *not* to receive information, just as they are free to choose to receive it.[89] The Board

---

[81] *Id.* at 477.

[82] *Id.*

[83] *Clark Bros.*, 70 N.L.R.B. at 803; *Virginia Elec.*, 314 U.S. at 469.

[84] *Clark Bros.*, 70 N.L.R.B. at 803 (stating that the employer "mailed anti-CIO leaflets to its employees, inserted paid advertisements hostile to the CIO in the local newspaper, made anti-CIO speeches which included suggestions of the possibility of job insecurity through its officials at the plant during working hours and required its employees to hear these speeches, and distributed anti-CIO statements to the employees on company premises during working hours").

[85] *Id.*

[86] *Id.* at 804 (explaining that "the employees were required to listen to these speeches because the respondent controlled the manner in which the employees were to occupy their time. The only way the employees could have avoided hearing the speeches would have been for them to leave the premises, which they were not at liberty to do during working hours").

[87] *Id.*

[88] *Id.*

[89] *Id.* at 805 (stating that "[t]he Board has long recognized that 'the rights guaranteed to employees by the Act include the full freedom to receive aid, advice, and information from others, concerning those rights and their

acknowledged the concept of protected speech and then disposed of the argument in a single sentence, finding it irrelevant that "the speech itself may be privileged under the Constitution."[90] The issue of exclusive access, where an employer has access to employees but the union does not, was also raised.[91] The Board found it problematic that the employer utilized its exclusive access to employees "in a manner relating to [employees'] organizational activities."[92]

Just one year after the Taft-Hartley Act was passed, the impact of the amendments on Board doctrine was clear, and policy began to shift in an anti-labor direction. In *Babcock & Wilcox Co.*, the Board considered a case at a factory involving what it called compulsory audience speeches[93] given by the factory Superintendent as well as coercive polling.[94] The Board found that in light of the Taft-Hartley Act, the *Clark Bros.* doctrine no longer applied, writing that "the language of Section 8(c) of the amended Act, and its legislative history, make it clear that the doctrine of the *Clark Bros.* case no longer exists as a basis for finding unfair labor practices in circumstances such as [these]."[95] Under *Clark Bros.*, the polling and other surrounding circumstances would have factored into the Board's determination of whether the speeches were

---

enjoyment.' Such freedom is meaningless, however, unless the employees are also free to determine whether or not to receive such aid, advice, and information. To force employees to receive such aid, advice, and information impairs that freedom; it is calculated to, and does, interfere with the selection of a representative of the *employee's* choice." (quoting Matter of Harlan Fuel Company, 8 N.L.R.B. 25, 32 (1938))).

[90] *Id.*

[91] *Id.* at 804.

[92] *Id.*

[93] Babcock & Wilcox Co., 77 N.L.R.B. 577, 578 (1948).

[94] *Id.* at 582. The Superintendent's speeches at the compulsory meetings included anti-union rhetoric such as, "We believe / that the reason the union is after you / is to collect money from you / for something that you already have; / for something that you can get anyway-- / without any union. / . . . We know, / and you know, / that in trying to use force, / unions have shut plants down. / We don't want to see that happen here, / because of some men / who dont [*sic*] even work here / and who would not lose anything / while you were out on strike." *Id.* at 591–92.

[95] *Id.* at 578.

coercive, even if the speech alone was not.[96] The *Babcock & Wilcox* opinion, however, discarded the idea that other factors at the workplace could "establish the coercive character of the otherwise unobjectionable conduct."[97] This was a rejection of the totality of the circumstances standard in *Clark Bros.* that allowed inferences of coercion from the greater context of employer practices.[98]

A number of cases that followed *Babcock & Wilcox*[99] involved the issue of union access to employees, taking a new look at the exclusive access concept addressed in *Clark Bros.*[100] In *Bonwit Teller* in 1951, the Board ruled that an employer with a no-solicitation rule prohibiting solicitation on company property cannot violate that rule to make anti-union speeches and then deny the union similar access to employees.[101] Employer speech against unions was not prohibited, but the Board at this time was unwilling to give employers opportunities to influence workers' views without giving unions those same opportunities.[102]

Merely two years after *Bonwit Teller*, under a new Republican administration, the Board reversed course. In *Livingston Shirt Corp.*, the Board was no longer concerned with equal access for unions.[103] The Board found that Section 8(c) did not allow it to find an unfair labor practice solely from employer speech and that an employer's exercising its right to speak does not create an obligation to allow union speech to avoid an unfair labor practice.[104] Therefore, according to this Board, the doctrine established in *Bonwit Teller* is

---

[96] Clark Bros. Co., Inc., 70 N.L.R.B. 802, 803 (1946).

[97] *Babcock & Wilcox*, 77 N.L.R.B. at 578.

[98] *Clark Bros.*, 70 N.L.R.B. at 804, 825.

[99] Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948).

[100] *Clark Bros.*, 70 N.L.R.B. at 804.

[101] Bonwit Teller, Inc., 96 N.L.R.B. 608, 611 (1951).

[102] *Id.*

[103] Livingston Shirt Corp., 107 N.L.R.B. 400, 409 (1953).

[104] *Id.* at 405–06 ("Section 8 (c) of the Act specifically prohibits us from finding that an uncoercive speech, whenever delivered by the employer, constitutes an unfair labor practice . . . to say that conduct which is privileged gives rise to an obligation on the part of the employer to accord an equal opportunity for the union to reply under like circumstances, on pain of being found guilty of unlawful conduct, seems to us an untenable basis for a finding of unfair labor practices.").

incompatible with the Act, and employers holding captive audience meetings while denying equal access for unions is not an unfair labor practice.[105]

The same Board that established *Livingston Shirt* doctrine also created a new rule in *Peerless Plywood*.[106] Despite its ruling in *Livingston Shirt*, the Board in *Peerless* acknowledged the potent effect of captive audience meetings on decision-making, particularly when they are held shortly before elections.[107] The Board stated that when speeches are made on company time too close to elections by either side, they "have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect."[108] This concern led to the *Peerless Plywood* rule, which prohibits employers and unions alike from "making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election."[109]

Babcock & Wilcox,[110] *Livingston Shirt*,[111] and *Peerless Plywood*[112] remain the governing Board rulings regarding captive audience meetings. They established that captive audience meetings are not unfair labor practices,[113] equal access to employees is not a required consequence of holding captive audience meetings,[114] and these meetings may not be held on company time within twenty-four hours of an election.[115]

---

[105] *Id.* at 406.
[106] Peerless Plywood Co., 107 N.L.R.B. 427, 430–31 (1953).
[107] *Id.* at 429.
[108] *Id.*
[109] *See id.*
[110] *See* Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948).
[111] *See* Livingston Shirt Corp., 107 N.L.R.B. 400 (1953).
[112] *See* Peerless Plywood Co., 107 N.L.R.B. 427 (1953).
[113] *Babcock & Wilcox Co.*, 77 N.L.R.B. at 578.
[114] *Livingston Shirt Corp.*, 107 N.L.R.B. at 406.
[115] *Peerless Plywood Co.*, 107 N.L.R.B. at 429.

III. THE CASE AGAINST CAPTIVE AUDIENCE MEETINGS

a. Captive Audience Meetings Are Coercive

While employers and their advocates may attempt to characterize captive audience meetings as neutral, they are inherently coercive. Given the imbalance of power between workers and employers, enhanced by employers' ability to legally fire employees for not attending or disrupting these meetings,[116] captive audience meetings are more accurately described as employers holding an "economic gun" to their employees' heads.[117]

The coercive nature of captive audience meetings puts the practice directly at odds with employees' Section 7 right to organize.[118] An essential requirement for exercising this right is the worker's ability to make decisions free from outside influence.[119] This is expressed in the NLRB's central value of maintaining "laboratory conditions" for union elections.[120] The laboratory conditions standard was established in *General Shoe Corp.*, when the Board stated that, "[i]n election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees."[121] An employee with an "economic gun" to their head[122] is certainly not "uninhibited."[123] Captive audience meetings, which coerce employees to vote against

---

[116] Secunda, *supra* note 9, at 386 (explaining that "[w]hile employees are free to leave these meetings in the formal sense, they may only do so at the peril of losing their jobs. Employees may be terminated for refusing to attend anti-union assemblies. Indeed, employees can be lawfully terminated for merely asking questions of their employers during such a meeting, or for leaving such meetings without permission.").

[117] *Id.* at 386–87.

[118] *See* 29 U.S.C. § 157.

[119] *See* General Shoe Corp., 77 N.L.R.B. 124, 126 (1948).

[120] *Id.* at 127.

[121] *Id.*

[122] Secunda, *supra* note 9, at 387.

[123] *General Shoe Corp.*, 77 N.L.R.B. at 126.

unionizing, work in direct opposition to laboratory conditions and therefore present a significant threat to Section 7 rights.[124]

Even longstanding NLRB policy forbidding captive audience meetings within twenty-four hours of an election also supports the assertion that these meetings are coercive.[125] When the Board created the *Peerless Plywood* rule in 1953, it drew a distinction between last-minute captive audience meetings and speech further away from an election.[126] The decision emphasized the danger of last-minute meetings,[127] but their concerns logically extend to all captive audience meetings. It is unreasonable to find that a meeting twenty-three hours before an election is coercive but an identical meeting twenty-five or twenty-six hours before an election does not disturb laboratory conditions.[128]

b. Captive Audience Meetings Have A Proven Negative Effect on Union Elections and Lead to Unfair Labor Practices

Captive audience meetings are not only problematic in theory. Quantitative evidence shows that these coercive meetings have a profound negative effect on union elections.[129] A study of over 1,000 NLRB elections found that eighty-nine percent of employers facing union drives held captive audience meetings.[130] When employers did not hold captive audience meetings, the union win rate for elections was seventy-three percent; when they did, the union win rate was only forty-seven percent.[131] This significant difference between how workers vote when they have or have not

---

[124] *See* 29 U.S.C. § 157; *see also General Shoe Corp.*, 77 N.L.R.B. at 127.

[125] Peerless Plywood Co., 107 N.L.R.B. 427, 429–30 (1953).

[126] *Id.* at 429.

[127] *Id.*

[128] *See* Peerless Plywood Co., 107 N.L.R.B. at 429–30; *see also General Shoe Corp.*, 77 N.L.R.B. at 127.

[129] Bronfenbrenner, *supra* note 6, at 10.

[130] *Id.* at 6, 10.

[131] *Id.* at 10.

been exposed to anti-union rhetoric shows the potent effect of these meetings.[132]

In addition to the dangerous coercive effect of employer speech itself, captive audience meetings create a wealth of opportunities for other unfair labor practices to occur,[133] and there are many legal and practical roadblocks preventing unions from holding employers accountable.[134] The fact that it is legal to fire or discipline a worker for disrupting, leaving, or refusing to attend a captive audience meeting means that it is difficult—for workers and employers, as well as the courts—to distinguish legal and illegal employer actions. When a pro-union worker is fired after asking questions at a meeting, for example, it seems likely that it would be immensely challenging for a union to prove the firing was illegal retaliation for the worker's views and not a legal disciplinary response to the alleged disruption. This challenge is compounded by the stringent restrictions on introducing employer speech as evidence of an unfair labor practice.[135]

A lack of proof of employer misconduct is not the only obstacle in the way of holding employers accountable for illegal actions. Unions are sometimes hesitant to pursue unfair labor practice claims stemming from captive audience meetings for practical reasons.[136] Pursuing a claim with the NLRB at this stage in a union drive can significantly delay a union election, sometimes for as long as a year or more.[137] Election delays, paradoxically, create more opportunities for employers to engage in illegal activity.[138] Additionally, the relief

---

[132] Of all the employer actions evaluated in this study, referring workers to the Immigration and Naturalization Service (INS) was the only tactic to have a more significant chilling effect than captive audience meetings. *Id.* at 10–11.

[133] *See* Noam Scheiber, *Labor Regulators Find Merit in Accusations by Unions at Amazon and Starbucks*, N.Y. TIMES (May 6, 2022), https://www.nytimes.com/2022/05/06/business/economy/nlrb-amazon-starbucks.html; *see generally* Bronfenbrenner, *supra* note 6; Lafer & Loustaunau, *supra* note 71.

[134] *See generally* Bronfenbrenner, *supra* note 6.

[135] 29 U.S.C. § 158(c).

[136] Bronfenbrenner, *supra* note 6, at 13–20.

[137] *Id.* at 17 (stating that "filing charges can hold up the election for many months if not a year or more.").

[138] John Logan et al., *New Data: NLRB Process Fails to Ensure a Fair Vote*, UNIV. CAL., BERKELEY CTR. FOR LAB. RSCH. & EDUC. 1, 2–4 (June 2011),

available to workers for successful or settled claims is minimal, even for serious charges.[139] These high costs and low benefits mean unions are sparing in filing claims, often only pursuing the most serious allegations.[140] To avoid delays, less egregious claims are more often filed after the election has concluded, if at all.[141] Notwithstanding this tendency not to report misconduct, claims are still filed in forty-one and a half percent of all union elections supervised by the NLRB.[142] When claims are still filed in close to half of elections despite unions' reluctance to report, it is probable that unfair labor practices are committed by employers in a majority of union campaigns; because a large majority of employers utilize captive audience meetings, there is undoubtedly overlap.[143]

IV. STATE LAWS BANNING CAPTIVE AUDIENCE MEETINGS

Instead of waiting for the federal government to prevent captive audience meetings, some states have taken legislative action, with

---

https://laborcenter.berkeley.edu/pdf/2011/NLRB_Process_June2011.pdf; *see also* Kate Bronfenbrenner & Dorian Warren, *The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence*, INST. FOR SOC. & ECON. RSCH. POL'Y (June 2011), https://academiccommons.columbia.edu/doi/10.7916/D8W38452.

[139] Bronfenbrenner, *supra* note 6, at 8 (stating that "[g]iven the long time that it takes to litigate a ULP case to conclusion, and the relatively weak relief available even for employees who ultimately win their cases, the statutory scheme does not provide strong incentives for workers to pursue such charges.").

[140] *Id.* at 17 (explaining that "except in the case of the most egregious violations (e.g., serious harassment, threats of referral to ICE, multiple discharges, or violence), unions typically wait until after the election to file charges.").

[141] *Id.*

[142] McNicholas et al., *supra* note 11, at 2.

[143] Bronfenbrenner, *supra* note 6, at 10. Recent high-profile union elections involving captive audience meetings at Amazon and Starbucks have resulted in a number of unfair labor practice claims, many of which have been found valid by the Board. *See* Jeffrey Dastin, *Amazon's Captive Staff Meetings on Unions Illegal, Labor Board Official Finds*, REUTERS (May 6, 2022, 8:22 PM) https://www.reuters.com/business/retail-consumer/amazons-captive-staff-meetings-unions-illegal-us-labor-director-finds-2022-05-06/; Scheiber, *supra* note 5; Scheiber, *supra* note 133.

mixed results.[144] In the past few decades, a number of states have passed or attempted to pass legislation targeting captive audience meetings.[145] These statutes do not target labor speech specifically, but instead usually ban speech relating to political and religious matters.[146] New Jersey came close to enacting a ban in 2006, but later backtracked and removed union-related speech from the law.[147] Wisconsin enacted a statute in 2010 that "prohibited employers from disciplining employees who refused to attend captive audience meetings," allowing anti-union employer speech itself but removing the "captivity" component of captive audience meetings.[148] This law did not survive a challenge in federal court, where it was overturned on preemption grounds, as it was contrary to the NLRA.[149] Oregon and Connecticut are the only states with active statutes banning or limiting captive audience meetings in a labor context.[150]

a. Oregon Law

Oregon enacted a captive audience law known as the Worker Freedom Act in 2009.[151] The law does not prevent employers from holding anti-union meetings—it explicitly allows for "meetings, forums or other communications about religious or political matters for which attendance or participation is strictly voluntary."[152] Instead, it prohibits employers from making these meetings

---

[144] Matthew W. Finkin, *Captive Audition, Human Dignity, and Federalism: Ruminations on an Oregon Law*, 15 EMP. RTS. & EMP. POL'Y J. 355, 355 n.2 (2011).

[145] *Id.* (listing a number of state-level attempts to limit captive audience meetings as of 2011).

[146] *Id.* at 355.

[147] Aaron Nicodemus, *Employers' Forced Worker Meetings Face Legislative Challenge*, BLOOMBERG L.: DAILY LAB. REP. (Apr. 8, 2019, 6:00 AM), https://news.bloomberglaw.com/daily-labor-report/employers-forced-worker-meetings-face-legislative-challenge; *see also* Finkin, *supra* note 144, at 355 n.2.

[148] Nicodemus, *supra* note 147.

[149] *Id.*; Finkin, *supra* note 144, at 355–56 n.2.

[150] CONN. GEN. STAT. § 31-51q (2022); OR. REV. STAT. ANN. § 659.785 (2009).

[151] OR. REV. STAT. ANN. § 659.785 (2009).

[152] *Id.* § 659.785(4)(h).

mandatory or retaliating against employees who do not attend.[153] Shortly after it was passed, the Oregon law was challenged by a pro-business group and the United States Chamber of Commerce, who disputed the law on preemption grounds and claimed that it was in conflict with the NLRA.[154] The Oregon District Court found that the plaintiffs lacked standing to sue because they had not been harmed, so the Court awarded summary judgment to the defendants and the law was never adjudicated on its merits.[155] This law remains in effect today.[156]

b. Connecticut Law

Connecticut legislators first proposed captive audience legislation in 2005, but the bill was never passed.[157] A 2018 effort was defeated due to opposition from the state's Attorney General, who believed the law would be invalid due to preemption concerns;[158] a 2019 attempt did not survive a Republican filibuster.[159] The next Attorney General supported the legislation and believed a revised version could be defended against

---

[153] *Id.* § 659.785(1).

[154] Associated Or. Indus. v. Avakian, No. CV 09-1494-MO, 2010 U.S. Dist. LEXIS 44263, at *3–4 (D. Or. May 6, 2010).

[155] *Id.* at *9.

[156] OR. REV. STAT. ANN. § 659.785 (2009).

[157] *Starbucks Baristas Unionize After Connecticut Bans Bosses' Anti-Union 'Captive Audience' Meetings*, SPECIAL TO PEOPLE'S WORLD (July 15, 2022, 11:14 AM) https://www.peoplesworld.org/article/starbucks-baristas-unionize-after-connecticut-bans-bosses-anti-union-captive-audience-meetings/ (stating that "Connecticut labor leaders had fought to ban 'captive audience' meetings for more than a decade. A bill was first introduced in 2005, but each year management groups lobbied against it.").

[158] Mark Pazniokas, *Connecticut 'Captive Audience' Law Challenged in Federal Lawsuit*, HARTFORD COURANT (Nov. 2, 2022, 6:00 AM), https://www.courant.com/news/connecticut/hc-news-captive-audience-law-connecticut-challenge-court-20221102-jyvkrt47kjepxjocdrv6t2vtbq-story.html (explaining that "Attorney General George Jepsen, a Democrat who once worked for a union, advised the General Assembly that the state has police powers to regulate worker safety and provide a minimum wage but warned that a captive audience bill filed that year likely would be deemed by a court as preempted by the NLRA. Jepsen's opinion effectively killed a captive audience bill in 2018.").

[159] *Id.*

preemption challenges.[160] This change in state leadership helped the legislature pass a law banning captive audience meetings in 2022, seventeen years after a ban was first introduced.[161] The law prohibits employers from mandating employee attendance at any "meetings where the employer is sharing its views on religious or political matters, including unionization" and also establishes that employees can sue for damages if the law is violated.[162]

In November 2022, the United States Chamber of Commerce and a number of pro-business organizations filed a challenge to the Connecticut law in district court, alleging that the law is preempted by the NLRA and also "violate[s] the First and Fourteenth Amendments to the United States Constitution by discriminating against employers' viewpoints on political matters, by regulating the content of employers' communications with their employees, and by chilling and prohibiting employer speech."[163] As of the writing of this Note, the lawsuit is still in progress and the law is currently valid.[164]

V. THE ABRUZZO MEMORANDUM IS NOT THE SOLUTION

On April 7, 2022, NLRB General Counsel Jennifer Abruzzo released a memorandum entitled "The Right to Refrain from Captive Audience Meetings and other Mandatory Meetings."[165] This memorandum announced that, despite NLRB precedent treating captive audience meetings as lawful, Abruzzo believes the Board should "reconsider such precedent and find mandatory meetings of this sort unlawful."[166] Abruzzo specified that this

---

[160] CONN. GEN. STAT. § 31-51q (2022); Pazniokas, *supra* note 158 (stating that "successor Tong . . . did not disavow Jepsen's opinion but instead concluded a case could be made to defend a revised version . . . Tong said the 2022 legislation was written to stand outside the reach of the NLRA preemption").

[161] CONN. GEN. STAT. § 31-51q (2022); *see also* Pazniokas, *supra* note 158.

[162] CONN. GEN. STAT. § 31-51q (2022); *see also* Pazniokas, *supra* note 158.

[163] Complaint at 2, Chamber of Commerce v. Bartolomeo, No. 3:22-cv-1373 (D. Conn. Nov. 1, 2022).

[164] CONN. GEN. STAT. § 31-51q (2022); Complaint at 2, *Bartolomeo*, No. 3:22-cv-1373 (D. Conn. Nov. 1, 2022).

[165] ABRUZZO, *supra* note 19.

[166] *Id.* at 1.

proposed policy change applies to any time employees are required to listen to employer speech about their Section 7 rights while either "forced to convene on paid time or . . . cornered by management while performing their job duties."[167] This memorandum signals a significant change in policy, as no general counsel before Abruzzo has attempted to challenge the lawfulness of captive audience meetings.[168]

Abruzzo's memorandum emphasized the coercive nature of captive audience meetings.[169] She acknowledged the power imbalances at play and wrote that "the Board must keep in mind the basic 'inequality of bargaining power' between individual employees and their employers, as well as employees' economic dependence on their employers."[170] An employer-mandated meeting has an inherent threat of discipline for non-compliance, and the law currently allows employers to discipline employees who refuse to attend captive audience meetings.[171] Abruzzo characterized current Board law as a "license to coerce" and stated that this "is an anomaly in labor law, inconsistent with the Act's protection of employees' free choice and based on a fundamental misunderstanding of employers' speech rights."[172] This acknowledgement of captive audience meetings as employer coercion marks a return to agency policy in the era before the Taft-Hartley Act.[173]

As a legal basis for finding captive audience meetings unlawful, Abruzzo focused on the "right to refrain," which "bars employers from interfering with employees' choice of whether and how to

---

[167] *Id.* at 2.

[168] *See* Steven M. Swirsky & Daniel J. Green, *NLRB General Counsel Urges Labor Board to Expand Prohibition on "Captive Audience" Meetings and Employers' Right to Present Their Views on Unionization*, EPSTEIN BECKER GREEN (Apr. 19, 2022), https://www.managementmemo.com/2022/04/19/nlrb-general-counsel-urges-labor-board-to-expand-prohibition-on-captive-audience-meetings-and-employers-right-to-present-their-views-on-unionization/ (characterizing Abruzzo's position as "a radical break with precedent").

[169] *See* ABRUZZO, *supra* note 19.

[170] *Id.* at 1 (citing NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969)).

[171] *See id.* at 1 –2.

[172] *Id.* at 2.

[173] *Id.*

exercise [their Section 7] rights."[174] While the right to refrain has anti-worker roots, Abruzzo indicated that she believes this concept can also be used to protect workers.[175] Abruzzo believes that "[f]orcing employees to listen to . . . employer speech under threat of discipline—directly leveraging the employees' dependence on their jobs—plainly chills employees' protected right to refrain from listening to this speech in violation of Section 8(a)(1)."[176]

Although Abruzzo's proposed policy change would be a step in the right direction, it is not the best way to create meaningful progress given the unavoidably anti-labor roots of her proposal's guiding policy and the NLRB's tendency toward flip-flopping, which makes it difficult, if not impossible, to make lasting changes from within the agency.

a. The Right to Refrain Is Contrary to the NLRB's Mission and Should Not Be Expanded

Repurposing an anti-labor concept for a pro-labor goal is a satisfyingly subversive idea, but it is not in the best interest of the labor movement. Emphasizing the right to refrain in one context inevitably legitimizes it in others; the concept has already done too much harm to the labor movement to take this risk.[177] Federal law already adequately protects those who do not want to join unions.[178] The addition of the right to refrain to the statutory language of Section 7 was a partisan action intended to dissuade more workers from exercising their right to organize.[179] To rebalance the scales,

---

[174] ABRUZZO, *supra* note 19.

[175] *Id.* at 3.

[176] *Id.* at 2.

[177] MILLIS & BROWN, *supra* note 29, at 421.

[178] *See, e.g.*, *Right to Refrain*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/right-to-refrain (last visited Mar. 13, 2023) ("Federal law protects your right to decline to participate in union organizing or concerted activity, and to campaign against a union during an organizing campaign."); Communications Workers of Am. v. Beck, 487 U.S. 735, 738 (1988).

[179] MILLIS & BROWN, *supra* note 29, at 421 (stating that "the insertion served to advertise [the right to refrain] and to ease the conscience of individual workers who did not respond to appeals that they should join a common cause, or assist in

this toxic doctrine should be rejected entirely, rather than adopted by both sides.

b. Frequent NLRB Flip-Flopping Will Prevent Abruzzo's Plan from Having A Lasting Impact

The structure of the NLRB lends itself to partisanship and policy instability.[180] The agency has a bifurcated structure, with the Board on one side and the General Counsel on the other.[181] The Board is composed of five seats, one of which opens up each year for a new presidential appointment.[182] Custom dictates that three seats on the Board are allotted to one party and two to the other, with the majority going to the administration's party.[183] The General Counsel is also appointed by the president.[184]

Generally, administrative agencies have two options for creating policy: rulemaking and adjudication.[185] Rulemaking is a slower process, usually requiring a notice and comment period, which is an opportunity for the public to weigh in on proposed changes.[186] Adjudication does not involve input from the public; in the NLRB's case, adjudication is done through Board decisions.[187] This allows change to happen more rapidly and without a notice and comment

---

paying the bills incidental to the work of a union, ordinarily serving all those in the same group.").

[180] *See, e.g.*, Meltzer, *supra* note 22, at 78; Turner, *supra* note 20, at 708–11.

[181] 29 U.S.C. § 153; NAT'L LAB. RELS. BD., *supra* note 21.

[182] NAT'L LAB. RELS. BD., *supra* note 21.

[183] *Members of the NLRB since 1935*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/who-we-are/the-board/members-of-the-nlrb-since-1935 (last visited Mar. 13, 2023) (showing a pattern since 1947 of three members belonging to the administration's party and two members belonging to the minority party).

[184] *General Counsel*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/bio/general-counsel (last visited Mar. 13, 2023).

[185] George W. Chesrow, *NLRB Policymaking: The Rulemaking - Adjudication Dilemma Revisited in NLRB v. Bell Aerospace Co.*, 29 UNIV. MIAMI L. REV. 559, 559–60 (1975).

[186] CONG. RSCH. SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW, 2–3 (2013), https://sgp.fas.org/crs/misc/RL32240.pdf.

[187] *See* Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L. J. 729, 729 (Apr. 1961).

period; by utilizing adjudication in favor of rulemaking, the Board has created a significant body of law with little oversight.[188]

This tendency toward making rules through adjudication has led to a flip-flopping problem in the NLRB.[189] A pro-union rule created by a Democratic Board can quickly be reversed by the following Republican Board, and vice versa. These reversals have been common throughout the NLRB's history,[190] particularly in the last few decades.[191] Flip-flopping leads to confusion among labor practitioners and makes it difficult for the Board to make lasting change.[192]

The NLRB's persistent flip-flopping problem means that even if Abruzzo's plan does become official Board policy, the change would likely only last until the next Republican administration.[193]

---

[188] *Id.* at 730.

[189] *See* Turner, *supra* note 20, at 720.

[190] *See, e.g., supra* text accompanying notes 101–105 for one relevant example, the change in policy from *Bonwit Teller* to *Livingston Shirt*.

[191] *See, e.g.*, Paul Galligan & Jade M. Gilstrap, *Flip-Flops, Not Just For the Beach or Boardwalk: NLRB (Again) Buries Consent Requirement for Bargaining Units with Temps*, SEYFARTH SHAW LLP (July 14, 2016), https://www.employerlaborrelations.com/2016/07/14/flip-flops-not-just-for-the-beach-or-boardwalk-nlrb-again-buries-consent-requirement-for-bargaining-units-with-temps/; Mark S. Filipini et al., *Key Takeaways from the NLRB's Flip-Flop on Joint Employment Standards*, NAT'L L. REV. (Mar. 29, 2018), https://www.natlawreview.com/article/key-takeaways-nlrb-s-flip-flop-joint-employment-standards; Susan Lessack, *NLRB Flip Flops on Browning Ferris Standard for Joint Employment (Again)*, HIRING TO FIRING L. BLOG (Feb. 28, 2018), https://www.hiringtofiring.law/2018/02/28/nlrb-flip-flops-on-browning-ferris-standard-for-joint-employment-again/; Mark S. Spring, *NLRB Reverses Position on Obligation of Employers to Continue Deducting Union Dues After Expiration of CBA*, CAL. LAB. & EMP. L. BLOG (Oct. 17, 2022), https://www.callaborlaw.com/entry/nlrb-reverses-position-on-obligation-of-employers-to-continue-deducting-union-dues-after-expiration-of-cba; George J. Miller, *The NLRB "Flip-Flops" Again*, WYATT (Sept. 17, 2011), https://wyattfirm.com/the-nlrb-flip-flops-again/; Jon Hyman, *NLRB Flip-Flops on Key Independent Contractor Test*, OHIO EMP. L. BLOG (Jan. 28, 2019), https://www.ohioemployerlawblog.com/2019/01/nlrb-flip-flops-on-key-independent.html?m=0&hl=en.

[192] *See* David Kern, *NLRB Flip-Flops Confuse Unions, Employers*, MILWAUKEE BUS. J. (Jan. 2, 2005), https://www.bizjournals.com/milwaukee/stories/2005/01/03/editorial5.html.

[193] *See* Turner, *supra* note 20; ABRUZZO, *supra* note 19.

The next Board would only have to wait to hear its first captive audience case and then create a new rule through adjudication reversing Abruzzo's desired rule. Abruzzo's plan may not have a negative impact on unions, but the precedent outlined earlier in this Note shows that any action taken by the Board to prevent captive audience meetings would not have longevity.[194] The Board has already flip-flopped on captive audience policy from a Democratic to Republican administration, and that would most likely happen again.[195]

VI. PROPOSED LEGISLATIVE SOLUTION

Due to the NLRB's frequent flip-flopping between administrations, meaningful change cannot come from the Board itself. The lasting negative effect of the Taft-Hartley Act proved that the best way to change labor policy without risk of reversal is to change the statute itself through legislative action. This Note proposes that to stop captive audience meetings, Congress should repeal the Taft-Hartley Act and amend the NLRA to include an explicit ban on the practice.

The Taft-Hartley Act, which works in direct opposition to the goals of the NLRA as a whole, should be repealed. Congress enacted the NLRA to ensure that American workers could exercise their right to choose whether or not to organize.[196] This right to free choice was eroded by Taft-Hartley provisions prioritizing employer speech and normalizing anti-union sentiment. The effects of the Taft-Hartley Act on Board policy are clear specifically within captive audience doctrine. The most effective way to undo the damage of the Taft-Hartley Act is to repeal it. Repealing the Taft-Hartley Act would remove the right to refrain from the NLRA entirely. Because the right to refrain clause did not add any concrete "right," as federal law provides the ability to not join a union in most cases, this would have a conceptual effect without directly taking

---

[194] *See* ABRUZZO, *supra* note 19.

[195] *See* Bonwit Teller, Inc., 96 N.L.R.B. 608 (1951); Livingston Shirt Corp., 107 N.L.R.B. 400 (1953).

[196] 29 U.S.C. § 157; *The Law*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law (last visited Mar. 13, 2023).

away rights from workers.[197] Removal of this language from the statute will instead delegitimize the idea of refraining as a "right" in the field of labor law.

More significant than the removal of the right to refrain clause would be the repeal of Section 8(c), the employer free speech amendment.[198] This amendment exempts employer speech from being considered an unfair labor practice or evidence of an unfair labor practice. Section 8(c) was used to justify the Board's decision in *Babcock & Wilcox*, which first allowed captive audience meetings and is still the law today.[199] Section 8(c) has greatly harmed workers by protecting employers who engage in coercive misconduct; it should be repealed to correct this mistake.[200]

To effectively prevent harmful changes in doctrine on captive audience meetings, Congress should amend the NLRA to ban them explicitly. Before the Taft-Hartley Act was passed, the Board acknowledged the unlawful coercive effect of these meetings in decisions such as *Clark Bros*.[201] This decision was written without relying on specific statutory language banning captive audience meetings, and it is possible that a post-Taft-Hartley Board would revert to this doctrine based on the original NLRA. However, a statute that does not address captive audience meetings or that is vague on the issue would invite further flip-flopping. An amendment to the NLRA explicitly declaring these meetings unlawful would protect the statute from anti-labor interpretations by the Board and the courts. There may always be politically motivated Board members and judges willing to creatively interpret the statute, but a specific and well-crafted amendment would be the best protection against this.[202]

Currently, much of the conversation about a federal legislative solution to captive audience meetings is centered on the Protecting the Right to Organize Act ("PRO Act"), first proposed in 2019 and

---

[197] *See* NAT'L LAB. RELS. BD., *supra* note 178.

[198] 29 U.S.C. § 158(c).

[199] *See* Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948).

[200] 29 U.S.C. § 158(c).

[201] Clark Bros. Co., Inc., 70 N.L.R.B. 802, 804–5 (1946).

[202] *See* Turner, *supra* note 20.

most recently introduced in early 2023.[203] The PRO Act would amend the NLRA and Taft-Hartley Act to include a number of labor protective measures, including a captive audience ban.[204] The Act has passed the House of Representatives twice, but the Senate has never voted on it.[205] While this legislative action would not be vulnerable to agency reversal, making it preferable to Abruzzo's proposal, it foregoes repealing the Taft-Hartley Act in its entirety. This means that it does not address the right to refrain. Federal legislation that explicitly rejects this doctrine would be a powerful statement and would be step toward a more comprehensive pro-worker overhaul of American labor laws.

a. Possible Challenges to This Proposal

To assess the potential challenges this solution would face, it is helpful to consider the attempts at invalidating the Oregon and Connecticut captive audience bans.[206] These state laws were largely challenged on preemption and First Amendment grounds.[207] Although preemption concerns are not relevant to a federal law, a free speech challenge is possible. However, these state statutes banned captive audience meetings by employers related to any political or religious speech, not just anti-union speech.[208] This

---

[203] *See generally* Allen Smith, *Labor-Friendly PRO Act Reintroduced in Congress*, SOC. FOR HUM. RES. MGMT. (Mar. 1, 2023), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/pro-act-reintroduced-2023.aspx; Alexia Fernández Campbell, *Democrats Have an Ambitious Plan to Save American Labor Unions*, VOX (May 14, 2019, 6:00 PM), https://www.vox.com/policy-and-politics/2019/5/14/18536789/right-to-work-unions-protecting-the-right-to-organize-act-bill; Nicholas Fandos, *House Passes Labor Rights Expansion, But Senate Chances Are Slim*, N.Y. TIMES (Mar. 9, 2021), https://www.nytimes.com/2021/03/09/us/politics/house-labor-rights-bill.html.

[204] Richard L. Trumka, Protecting the Right to Organize Act of 2023, H.R. 20, 118th Cong. § 104 (2023).

[205] Smith, *supra* note 203.

[206] *See* Nicodemus*, supra* note 147.

[207] *See id.*; Associated Or. Indus. v. Avakian, No. CV 09-1494-MO, 2010 U.S. Dist. 44263, at *1 (D. Or. 2010).

[208] CONN. GEN. STAT. § 31-51q (2022); OR. REV. STAT. ANN. § 659.785 (2009).

broader scope left them more vulnerable to challenges than a more tailored, labor-specific ban would be, especially on free speech grounds. A labor-specific captive audience ban would fall more clearly under the NLRA, where there is precedent for limiting speech to support free choice and fair elections.[209] Even in the post-Taft-Hartley era, *Peerless Plywood* remains the law and is an example of a limit on speech that has been upheld.[210] When discussing potential free speech challenges, it is also important to emphasize that this ban would not prohibit employers from speaking about labor issues in general; it would merely prohibit the mandatory listening component that is central to the captive audience meeting. This ban does not target speech, but coercion.

The plausibility of this solution largely depends on the makeup of the legislature and the Supreme Court. Changing this statute would require a Democratic majority in Congress, possibly two-thirds, as reactions to state-level bans show that a ban is unpopular with pro-business constituencies.[211] Not all Board interpretations of the NLRA survive challenges in the Supreme Court, so a liberal majority on the Court would also likely be needed, as state-level history shows this law would most likely be challenged in the courts.[212] However, the clearer the amended statute is, the less room there is to misconstrue the Act.

Even though Taft-Hartley was an amendment to the original NLRA, it has now been in effect for seventy-five years, and there may be resistance to disturbing it.[213] There may also be a sense of complacency during Abruzzo's tenure or under a Democratic administration in general, as the issue could feel less urgent under a Board that may attempt to disallow captive audience meetings on its own. However, policy can begin to change as soon as an opposing party's administration begins. While it may not seem urgent now, legislation is crucial to ensure the longevity of pro-labor policy if and when a labor-hostile administration comes into office.

---

[209] *See* Peerless Plywood Co., 107 N.L.R.B. 427 (1953).

[210] *Id.*

[211] *See* Nicodemus*, supra* note 147.

[212] *Id.*

[213] Labor-Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947).

Although a legislative solution is a more radical step than agency action, trends indicate that the labor movement is gaining momentum.[214] Even if this solution is not an immediate option, it would be short-sighted for the labor movement to not be considering it, planning for it, and beginning to lobby for it. Federal legislation is slow, and labor advocates should be prepared to take advantage of an opportunity if it arises.

CONCLUSION

When Congress passed the NLRA in 1935, they affirmed that workers have the right to organize and to choose whether or not to join a union. Captive audience meetings pose a threat to these essential rights, and a solution with longevity is necessary to ensure these rights are protected. The best course of action is to repeal the Taft-Hartley Act and to amend the NLRA to include a ban on captive audience meetings. Data shows that American approval of unions is growing,[215] yet the percentage of American workers who are union members is at an all-time low.[216] This disconnect suggests that outside pressures and coercion continue to influence workers. As long as captive audience meetings remain legal, employer coercion remains legal. A captive audience ban that will stand the test of time is essential to ensure that when American workers decide to exercise their rights and hold union elections in their workplaces, their voices are heard.

---

[214] Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022) https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx; Pazniokas, *supra* note 158 (stating that "unions won more than 600 elections for the right to represent workers in the first half of 2022, the most in nearly two decades.").

[215] McCarthy, *supra* note 214 (stating that "[s]eventy-one percent of Americans now approve of labor unions . . . up from [sixty-four percent] before the pandemic and [this] is the highest Gallup has recorded on this measure since 1965.").

[216] *Economic News Release: Union Members Summary*, U.S. BUREAU OF LAB. STAT. (Jan. 19, 2023, 10:00 AM), https://www.bls.gov/news.release/union2.nr0.htm#.