Clean Slate for Worker Power:

Building a Just Economy and Democracy

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BUILDING A JUST ECONOMY AND DEMOCRACY

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EXECUTIVE SUMMARY

Since the founding of the country, concentration of power in the hands of a small minority has been recognized as a threat—perhaps the primary threat—to the viability of American democracy. Today, the struggle to preserve democracy in the face of extreme wealth concentration is acute because we live in a historical moment when vast disparities of economic power have been translated into equally shocking disparities in political power. With this *Clean Slate* report, we offer an intervention that promises to help stop the vicious, self-reinforcing cycle of economic and political inequality. By proposing a fundamental redesign of labor law, we aspire to enable working people to create the collective economic and political power necessary to build an equitable economy and politics.

Our goal is not restoring the labor movement—nor the economy and the politics—of yesterday. This cannot be our objective because although American democracy and the American economy were more balanced when the labor movement was at its historic peak, our society has always been profoundly exclusionary. Across our entire history, access to economic and political power has been unforgivably shaped by racial and gender discrimination, as well as by discrimination based on immigration status, by sexual orientation and gender identity discrimination, and by ableism. And, truth be told, the American labor movement has itself often failed to insist upon a genuinely inclusive and equitable America.

What we need, then, is a new labor law that is capable of empowering all workers to demand a truly equitable American democracy and a genuinely equitable American economy. This report contains many recommendations for how to construct such a labor law, but all of the recommendations are geared toward achieving this overarching goal. In fact, while the policy recommendations are detailed and at times complex, the theory of *Clean Slate* is simple: When labor law enables working people to build organizations of countervailing power, the people can demand for themselves a more equitable nation.

Process

The recommendations in this report are the product of a nearly two-year effort to elicit the best ideas from a broad array of participants. The project engaged more than 70 advocates, activists, union leaders, labor law professors, economists, sociologists, technologists, futurists, practitioners, workers, and students from around the world. Our thinking was facilitated by the amazing effort of eight working groups that engaged in deep research and learning and provided preliminary recommendations. These groups sought innovation, boldness, and comity but not consensus. Accordingly, they are due credit for making the project possible but are not responsible for the particular recommendations included.

Recommendations

Labor law reform must start with inclusion to ensure that all workers can build power and to address systemic racial and gender oppression. The first step in achieving the project's goals—the first step in the process of rebalancing power—is *inclusion*. Our nation's labor laws have long excluded too many workers. When Congress passed the Wagner Act, it carved large categories of workers out of the statute's coverage in order to secure the votes of Southern Democrats. The result was that labor law excluded huge swaths of Black workers, women, and immigrant workers, not to mention entire industries dominated by women and people of color. The legacy of these exclusions is with us today. More recently, the increasingly "fissured workplace" has exacerbated the longstanding impacts of excluding "independent contractors" from the reach of these protective laws. To build an inclusive economy and democracy, we recommend that the new labor law:

- Extend coverage to domestic, agricultural, and undocumented workers, workers who are incarcerated and workers with disabilities;
- Adopt the far more protective ABC test for defining independent contractor status; and
- Extend coverage to independent contractors.

Pathways to worker power must track corporate power and be universal. For all workers to have the potential to build effective countervailing power, labor law must create pathways to collective power everywhere that corporate power impacts their lives: in the workplace and across industries, in the boardroom, and in our political system. Our recommendations would fundamentally transform mechanisms of worker representation at all of these levels. Among other key features of the new labor law, our recommendations aspire to guarantee that every worker in the U.S. labor force will enjoy some form of voice and representation and that the vast majority of workers will enjoy multiple forms of voice and representation.

Democracy at work should be a right, not a fight. For too long, securing power and voice at work has required workers to fight herculean battles against nearly impossible odds. Workers have only had a binary choice for collective representation—either no representation or an exclusive representative collective bargaining union (and the option of exclusive representation is too often out of reach). To make democracy at work a right, and not a fight, we recommend that the new labor law provide for a range of representational structures made available to workers according to a system of graduated rights. These will include workplace monitors, works councils, non-exclusive collective bargaining representation, and exclusive collective bargaining representation. In sum, as more workers express support for collective representation, the more robust the structure of collective representation will be. Specifically, we recommend that the law:

- Provide graduated rights, starting with workplace monitors and disciplinary representation in every workplace;
- Provide a works council in any workplace where at least three workers request one;
- Give unions the discretion to decide which workers they want to organize—either within the worksite, across the worksite or throughout the enterprise;
- Allow non-exclusive bargaining rights; and
- Allow exclusive representation upon majority showing.

We need to enable collective bargaining between unions and industries, not just unions and firms, and to help take wages out of competition by applying resulting agreements to all employers in the sector. Our current system of decentralized bargaining—what is often referred to as "enterprise bargaining"—has resulted in important gains for workers but also has three profound shortcomings. First, it has left tens of millions of workers without the protection of collective bargaining, exacerbating racial and gender exclusion. Second, it creates an incentive for employers to fight unionization in order to avoid any competitive disadvantage with non-union competitors. Third, it is structurally incapable of addressing the problems posed by the fissured workplace. By empowering workers to bargain at the level of an industry or sector—rather than just at the level of an individual enterprise—we can address these shortcomings. Moreover, because sectoral bargaining results in higher levels of collective bargaining coverage, it is more effective than enterprise bargaining at reducing income inequality and notably more effective than enterprise bargaining at addressing racial and gender pay gaps.

Therefore, we recommend a system of sectoral bargaining. When a worker organization has a membership of 5000 workers in a sector or 10 percent of the workers in a sector (whichever number is lower), the Secretary of Labor will—upon request of the worker organization—establish a sectoral bargaining panel for the sector. At the panel, employers will be represented in proportion to their share of the sector. Sectoral bargaining agreements will become binding on all firms and all workers in the sector, subject to review and approval by the Secretary of Labor. We also recommend an optional, complementary model based on an expanded conception of prevailing wage law for sectors where workplace collective bargaining is prevalent.

Workers should be able to organize without interference from their employers. A new system for building worker power will depend on workers' ability to *organize.* Given the profound failures of the current law's protection for worker organizing activity, the new statute must provide far more robust insulation for worker organizing. Accordingly, all workers in the country must be protected by a just-cause dismissal standard. The new statute must also set out (1) new rules for union organizers that

facilitate contact between organizers and workers, (2) new rules for employer conduct that minimize employer interference with workers' organizational activity, and (3) new ways for workers to voice their support for collective representation so that their choices can be expressed freely and easily. These new rules must take into account mechanisms for organizing that will be effective in the modern workplace, including creating digital access. Specifically, to facilitate greater organizing, we recommend that the new labor law:

- Require employers to have a good cause for firing workers in order to better protect workers from retaliation for exercising their rights;
- Allow union organizers access to workplaces and email systems upon showing of 25 percent support;
- Greatly increase employer penalties for intervening in organizing campaigns, including making punitive damages available;
- Ban employers from requiring workers to listen to anti-union speeches;
- Give workers the right to bargain when employers interfere with the fairness of organizing efforts;
- Allow demonstration of support for worker organizations based on cards or petitions, either physical or digital; and
- Allow workers digital access to each other through access to email systems and creation of digital meeting spaces

Workers need more effective ways to act collectively in order to advance their interests, especially when they choose to strike or walk out. The law should protect workers' collective advocacy for workplace and broader social change, both free from employer interference and through means that are effective and accessible. Workers increasingly find that their working conditions are determined by an entity other than the one that signs their paychecks, but the law now precludes workers from exercising their power strategically to influence anyone other than their primary employer. Workers should be able to choose, as the object of their collective action, the entity that they believe is exercising real power over their lives. Moreover, the exercise of collective action rights should not end in financial ruin. All workers need protection for shorter strikes and from permanent replacements, and all workers need access to robust strike funds. Finally, the law needs to be updated to support digital organizing, including cyber picket lines. Accordingly, we recommend that the new labor law:

- Allow workers to strategically choose whom to strike based on which companies have power over their working conditions, not who signs their paychecks;

- Allow workers to choose what kinds of strikes that they think are best, including short-term and partial strikes;
- Require employers to disclose strategic business relationships;
- Ban employers from permanently replacing workers who go out on strike;
- Create more support for strikers, including establishing tax-deductible status for strike funds and extending unemployment insurance for strikers;
- Require employers to create digital meeting spaces; and
- Create digital picket lines.

Workers deserve a voice in the issues that are important to them and their communities. The collective bargaining obligation under current law is far too narrow. It places collective bargaining off-limits for many of the issues with the greatest and most direct impact on workers' lives—so-called entrepreneurial and managerial decisions. Current law also excises from the bargaining obligation the issues related to the ethics of employers' business practices; the consequences that their firms have on our shared environment; and the ways in which employers' decisions impact broader community conditions, such as the availability of affordable housing. To ensure that workers can bargain over the corporate decisions that impact their lives, *Clean Slate* recommends that the new labor law:

- Expand the range of collective bargaining subjects to include any subjects that are important to workers and over which employers have control, including decisions about the basic direction of the firm and employers' impact on communities and our shared environment;
- Empower workers to bring community groups to the bargaining table; and
- Bar employers from unilaterally imposing contract terms on workers and allow workers to opt for interest arbitration when bargaining is at an impasse.

Workers need a meaningful voice in the corporate boardroom. Because corporate decisions that shape workers' lives are often made at the corporate-board level, rebalancing power requires that workers have a meaningful voice in how corporations make decisions. Therefore, workers must have a sufficient number of seats on corporate boards so that they can actually influence corporate decision-making. Placing workers on boards is not enough, however, because corporate decision-making is handcuffed by a commitment to shareholder primacy. Thus, to empower corporate boards to heed worker voice, corporations should be required to attend to the interests of workers and not just the interests of shareholders. Thus, we recommend that the new labor law:

- Require 40 percent worker-chosen representatives on corporate boards;
- Require a supermajority board vote for decisions with the greatest impact on workers;
- Expand corporations' fiduciary duties to include a duty to workers; and
- Make managerial and entrepreneurial decisions mandatory subjects of bargaining.

Political equality and a robust democracy depend on workers' full participation in our political system. Rebalancing power requires that the law give workers a voice in our democracy. Therefore, we need to remove the barriers that would block even newly revitalized worker organizations and newly empowered workers from fully participating in our political system. Voting and other civic activities, for example, are too often off-limits for workers—especially low-wage workers, who are more likely to be women and people of color—who cannot get time off of work, cannot find or afford adequate childcare, and who lack access to public transportation. Changing voting and voter registration laws so as to eliminate structural barriers that keep workers from voting is thus central to the political empowerment of working people. So too are changes aimed at facilitating civic participation by workers. Finally, workers also deserve protection against employers who would impose their own political agendas on them. Thus, we recommend that the new labor law:

- Mandate same-day voter registration, early voting, and vote by mail;
- Mandate paid time off for workers to engage in civic activities, including voting; and
- Prohibit coercion of employees by employers in the political process.

Labor law needs mechanisms for innovation. We need to encourage innovation in organizing and bargaining by setting federal labor law as a floor and allowing states to adopt reforms that build up from it. Accordingly, we recommend that the new labor law:

- Make federal labor law a federal floor and allow experimentation at the state and local level, provided that such experimentation expands or better protects the right to engage in collective bargaining and concerted activity;
- Require the Secretary of Labor to certify that state or local laws meet the standard of expanding or enhancing collective rights; and
- Make presumptively compliant certain state or local laws that further collective bargaining or concerted activity.

Further Clean Slate Recommendations

Build Power Through New and Enhanced Mechanisms for Generating Revenue

- Extend the right to dues checkoff to all worker organizations;
- Give employers tax credits for providing paid time off for participation in collective bargaining, works councils, corporation board duties, and other collective representation activities;
- Ban right-to-work laws and allow fair share agreements; and
- Allow worker organizations to contract to provide workforce training programs.

Build Power Through Labor Standards Enforcement

- Give worker organizations greater standing in and access to various stages of government enforcement actions, including giving them full-party status in administrative proceedings;
- Give worker organizations a formal advisory role informing enforcement agencies' operations and strategic priorities;
- Create incentives and mandates for employers to participate in worker-driven standards-setting and enforcement programs through licensing and permitting authority;
- Establish a private right of action for labor rights; and
- Ban forced arbitration and class-action waiver agreements.

Set Conditions on Use of Taxpayer Money

- Require all federal contractors and recipients of federal funds and their subcontractors to comply with policies that support worker voice and create decent jobs; and
- Prohibit employers who have a record of noncompliance with labor laws from receiving federal funds.

Ensure Broader Inclusion in the Definition of Employee

- Only exclude supervisors and managers whose duties predominately involve exercising supervisory or managerial power; and

- Include graduate student teaching assistants (TAs) and research assistants (RAs), volunteers who are covered by the Fair Labor Standards Act (FLSA), and student athletes.

Utilize New and Enhanced Mechanisms for Organization-Building

- Create a Worker Organization Administration (WOA);
- Facilitate the growth of worker-controlled hiring halls;
- Give worker organizations a greater role in providing benefits to workers, such as by serving as health care navigators or administrators of portable benefits systems; and
- Require that the federal workforce training system involve worker organizations.

Topics for Further Consideration

Creation of Labor Courts

- Create specialized courts to adjudicate labor and employment cases, which could result in speedier and better enforcement.

Promotion of Competition in the Labor Market

- Ban noncompete, no-hire, and no-poach agreements; and
- Reform antitrust law to account for labor market consequences of firm coordination and mergers.

Reform of the Campaign Finance System

- Restructure the public campaign finance system in order to limit corporate influence and allow greater participation by workers and their organizations; and
- Create a federal democracy voucher program.

SECTION 1

INTRODUCTION

Since the founding of the country, concentration of power in the hands of a small minority has been recognized as a threat—perhaps the primary threat—to the viability of American democracy. This threat of concentrated power motivated the drafters of the U.S. Constitution to advocate for a system of checks and balances and a division of authority between state and federal governments. Concern over concentrated power explains the founders' desire to ensure that a "multiplicity of interests" would be represented in the decisions of the national government. This aspiration finds expression in core principles of our democratic system: in the idea that every person should have one vote, no more and no fewer; in the idea that we are to have a republican form of government, not an oligarchy or an aristocracy; in the idea that we are all equal before the law.

But, since the founding of the country, the struggle to uphold these constitutional principles against the threat of concentrated wealth has been a continual one. This struggle was central to the story of the New Deal. Thus, President Franklin Delano Roosevelt critiqued wealthy business and financial elites by naming them "economic royalists," thereby invoking the American revolutionary struggle against political royalism. As FDR put it in 1936: "For too many of us the political equality we once had won was meaningless in the face of economic inequality."[1] This democratic struggle against concentrated economic power has also been core to the highest aspirations of the labor movement. Dolores Huerta, leader of the United Farm Workers' historic organizing effort, put it this way: "Organized labor is a necessary part of democracy, [because o]rganized labor is the only way to have fair distribution of wealth."

This democratic struggle against concentrated economic power has also been core to the highest aspirations of the labor movement. Dolores Huerta, leader of the United Farm Workers' historic organizing effort, put it this way: 'Organized labor is a necessary part of democracy, [because o]rganized labor is the only way to have fair distribution of wealth.'

As with any complicated societal problem, there is no silver bullet policy solution to ensure that the economy works for everyone and that all Americans can live a good life. Solutions to problems as vast as the future of work are contingent on our understanding of what is causing economic insecurity in the first place. In this report, we suggest that each of the arguments mentioned above has some merit.

The struggle to preserve democracy in the face of extreme wealth concentration is a defining feature of our current historical moment because we live in a time of radical economic inequality. The point can be illustrated with any number of statistics, and it is worth reviewing a few of them:

- The average Amazon worker makes $29,000 per year[2], while Jeff Bezos, the CEO of Amazon, has a net worth of $110 billion.[3] This means it would take an Amazon worker *3.8 million years,* working full time, to earn what Bezos now possesses. It would take an Uber driver, driving full time, nearly *150,000 years* to earn what Uber co-founder Travis Kalanick made on the Uber IPO.[4]
- The country's wealthiest 20 people own more wealth than half of the nation combined—20 people with more wealth than 152 million others.[5]
- The wealthiest 100 U.S. households own approximately as much wealth as the country's entire Black population.[6]
- The wealthiest 186 people own as much wealth as the entire Latinx population of the country.[7]
- Income inequality in America, as measured by the Gini coefficient, is now the highest it's been since the Census Bureau began keeping track of the distribution of incomes.[8]
- You can work full time in America and still live in poverty; one in nine U.S. workers are paid wages that can leave them in poverty.[9]

As the founders, Roosevelt, and Huerta warned, this vast disparity in economic power has translated into an equally shocking disparity in political power. Recent political science reveals, for example, that "the views of constituents in the bottom third of the income distribution receive[ ] no weight at all in the voting decisions of their Senators";[10] that presidents respond to the "narrow political and economic interests" of the wealthy;[11] and that "when preferences between the well-off and the poor diverge, government policy bears absolutely no relationship to the degree of support or opposition among the poor."[12] Summarizing these findings, Martin Gilens and Benjamin Page conclude bluntly that in 21st century America, "the majority does *not* rule—at least not in the causal sense of actually determining policy outcomes."[13]

Accordingly, we face dual crises of inequality that reinforce and exacerbate each other in a vicious cycle: as economic wealth gets more and more concentrated, the wealthy build greater and greater political power that they, in turn, translate into favorable policies that lead to even more profound concentrations of wealth. And on and on.

The question is how to stop this downward spiral that threatens not only the economic survival of millions of American families but also the future of American democracy. There is, for better or worse, no silver bullet. But, with this report, we offer one intervention that promises to contribute to the effort: rewriting American labor law in a manner that is explicitly designed to enable workers to build collective economic and political power.[14]

> ***"We know from history that when workers come together and collectively build organizations that are capable of countervailing the power of the wealthy and the power of corporations, the outcomes are profound."***

We know from history that when workers come together and collectively build organizations that are capable of countervailing the power of the wealthy and the power of corporations, the outcomes are profound.[15] Indeed, a large part of the explanation for our current crisis of economic inequality is the decline of the labor movement. Unions redistribute wealth—from capital to labor, from rich to poor—and without unions, we have lacked for a check on economic concentration. The decline of the labor movement also explains much of the current crisis of political inequality. When unions were strong, they helped ensure that the government was responsive to the needs and desires of the poor and middle class; without unions, these millions of lower-income Americans have lost their most effective voice in our democracy. Huerta was right: Powerful organizations of working people are necessary for economic justice and political democracy.

The question, however, is not how to restore the economy and the politics of 70 years ago. Nor is it how to restore the labor movement of that era. These *cannot* be the questions because although American democracy and the American economy were more responsive and more inclusive then, they were still profoundly exclusionary. Across our entire history, access to economic and political power has been unforgivably shaped by racial and gender discrimination, by discrimination based on immigration status, by sexual orientation and gender identity discrimination, and by ableism. And, truth be told, the American labor movement has itself often failed to insist upon a genuinely inclusive and equitable America.

What we need, then, is a *new* labor law that is capable of empowering *all* workers to demand a truly equitable American democracy and a genuinely equitable American economy. There are many recommendations in this report for how to construct such a labor law, but all of them are geared toward achieving this overarching goal. As such, while the policy recommendations are detailed and at times complex, the theory of *Clean Slate* is simple: When labor law enables working people to build organizations of countervailing power, the people can demand for themselves a more equitable nation.

In order for labor law to succeed in this mission, it must do far more than it does today. In sum, and as we develop in detail below, this new labor law must enable workers to build collective organizations that can countervail corporate power wherever that power impacts workers' lives.

> ***As such, while the policy recommendations are detailed and at times complex, the theory of Clean Slate is simple: When labor law enables working people to build organizations of countervailing power, the people can demand for themselves a more equitable nation.***

This means that labor law must allow workers to build power in the workplace, across industries and markets, at the level of the corporate board, and in our political system. Our recommendations attempt to ensure that workers can build collective power at each of these levels.

Giving workers a voice at work has always been a core aspiration of labor law. This component of a labor law regime advances the goal of bringing democratic values into the workplace and counteracting what otherwise is a sphere defined by autocratic managerial rule.[16] The more we pay attention, moreover, the more we learn about the costs of autocratic workplace governance. Without the protections that come from a robust labor law and a strong collective organization of their peers, working people are simply too vulnerable to abusive employer authority. This vulnerability manifests in unsafe and unhealthy working conditions, wage theft, discrimination, and harassment. When workers fear that protesting such abuses will result in job loss, they are understandably hesitant to protest them—a lesson that has become painfully evident in recent years. With the backing of strong legal protections, including a just-cause dismissal standard, and the collective power of a workers' organization, workers are better positioned to resist these intolerable conditions.

But while voice at work has long been central to labor law, we have had too narrow a vision of the appropriate scope of this right. This is true in at least two major respects. First, labor law has limited workers to a stark, binary choice about collective representation: They can choose to be represented by an exclusive collective bargaining union, or they can have nothing. And because labor law has made it so difficult for workers to choose a union, most are left with nothing. We can address this set of problems by giving workers a menu of representational choices—workplace monitors, works councils, members-only unions, and exclusive representative collective bargaining unions—and by making it far easier for them to embrace all of these choices.

Second, the range of issues over which workers can claim a right to voice has also been far too narrow. In recent years, workers have made the narrowness of the traditional regime evident by demanding involvement in matters beyond what we have historically defined as "terms and conditions of employment." Thus, teachers are asking their school districts to address class sizes, affordable housing, and the lack of school nurses. Health-care workers are making demands about patient safety. Google employees protested the firm's creation of a censored search engine for the Chinese market, Accenture workers asked their employer to cancel a contract to help the Trump Administration recruit border patrol agents, and Wayfair employees wanted a say in their firm's decision to supply furniture to ICE. More and more workers want a role in addressing how their employers are contributing to—and how

they might stop contributing to—the climate crisis. The democratic principles that give workers a claim to voice over wages and hours similarly demand that workers have voice in these other decisions that their firms make and that have profound impacts on the workers and their communities.

The history of the past five decades teaches us, however, that—as critical as it is for workers to build countervailing power at work—limiting legal protection to collective organization at the employer level has come at an enormous cost. For one thing, as our labor market has evolved, as employment relationships have fissured, and as more and more employers have attempted to replace employment with independent contracting, it has become increasingly difficult for workers to organize in workplace units effectively. Put more simply, as the "employer" becomes less of a central organizing principle for work in America, employer-based organizing and bargaining are more difficult and less effective. Of equal importance, if worker representation occurs *only* at the workplace level, then every time an employer is organized, that employer may have the perception of being placed at a competitive disadvantage vis-à-vis the other employers in its sector of the economy. American labor law has, since its inception, privileged this kind of enterprise-level bargaining and, by doing so, has essentially baked an anti-union animus into American labor relations.

We address these issues by recommending that—in addition to far more robust protection for workplace representation and bargaining—American labor law provide for a system of sectoral collective bargaining. Among its many virtues, sectoral bargaining addresses the problems of fissuring: It matters not whether

someone is employed directly, is employed by a subcontractor or by a franchisee, or is an independent contractor; if they work in the sector, they are covered by the sectoral collective bargaining agreement. Sectoral bargaining is also important for disaggregated industries, such as domestic work. And sectoral bargaining helps solve the competitive problem inherent in a system that is limited to enterprise bargaining: Sectoral agreements can help take wages and working conditions out of competition for all the firms in the sector.

Powerful organizing and bargaining, at the workplace and across sectoral levels, are two core ways for workers to countervail the power of corporations, but these are not the only ways. Because key corporate decisions are made by corporate boards, workers should be positioned to exercise power at the level of the corporate board. To this end, we recommend giving workers significant representation on corporate boards and requiring that certain board decisions—those with the greatest impacts on the lives and communities of a firm's workers—be made according to supermajority voting rules. We also recommend allowing workers to bargain over corporate-level decisions with major impacts on workers—extending the bargaining right, that is, to decisions that have historically been deemed at the "core of entrepreneurial control."

Most broadly, labor law needs to empower workers to countervail corporate power in politics. In important ways, all of the reforms we recommend would facilitate the construction of political power for workers because, as we have already argued, economic power translates into political influence. So, as workers organize and rebalance the distribution of wealth, they would also be in a position to rebalance political inequality. However, we also recommend reforms targeted specifically at politics: changes to election rules that would make it easier for working people to participate in elections, including paid time off to vote and paid time off for other forms of civic activity.

Finally, one additional outcome of the project of rebuilding workplace democracy bears discussion, especially at this moment in our nation's history. The drafters of the Wagner Act understood that participation in workplace democracy gives working people the experience of a democratic process that can otherwise be remote in their political life. Indeed, democracy at work is not only a value in its own right, but it also facilitates the development of an active citizenry more likely to—and more empowered to—participate in democratic political life. In giving workers a venue to raise their voices together against abuse of authority, democracy in the workplace can make an authoritarian society less likely. At a time when the foundations of our democracy are being questioned, the project of creating a widespread system of workplace democracy takes on additional urgency.

> ***"In giving workers a venue to raise their voices together against abuse of authority, democracy in the workplace can make an authoritarian society less likely."***

Enabling working people to countervail the power of the wealthy and of corporations, wherever that power is exercised, is a critical endeavor. It is also a massively ambitious undertaking. As this brief introduction should suggest, we cannot realize these ambitions simply by amending the current federal labor statute. As important as such amendments could be, the project of addressing economic and political equality calls for much more than that. And so, animating our work has been the recognition that the scope of this project requires us to stop tinkering and to start fundamentally reimagining American labor law. The question we seek to answer is: What would labor law look like if, starting from a clean slate, it was designed to empower working people to build an equitable economy and politics?

SECTION 2

SYSTEMIC RACIAL AND GENDER OPPRESSION AND ITS RELATIONSHIP TO LABOR LAW

The Clean Slate project grows out of a recognition that our current labor law fails to enable workers to countervail corporate power. This failure is especially acute for the most vulnerable workers in our economy. Indeed, Black and Latinx Americans, women, and those with precarious immigration statuses predominantly constitute the sectors of the labor market with the fewest labor protections.[17]

The exclusion of the most vulnerable workers from key labor protections is inexcusable in its own right, but it also undermines the collective power of workers as a whole. This exclusion, moreover, is no accident but is the product of historical policy choices. Given that the American labor market is rooted in the institution of chattel slavery, it should come as no surprise that we have a tiered system of protections.[18] Slavery was a system of unimaginable cruelty and inhumanity, and more than a few traces live on today baked into and reinforced by our laws, norms, and institutions. Accordingly, as we design policies that empower workers in the contemporary economy, we must address the systems of oppression that have existed for so long that they sometimes feel invisible and unmovable. Contesting these systems of oppression requires centering those who have been historically marginalized.

> ***"Accordingly, as we design policies that empower workers in the contemporary economy, we must address the systems of oppression that have existed for so long that they sometimes feel invisible and unmovable. Contesting these systems of oppression requires centering those who have been historically marginalized."***

The History of Labor Law

This effort requires that we look beyond the text of statutes and identify the deeper sources of exclusion. Just because the text of a law is race or gender neutral does not mean that it is so in practice. In fact, a "universalistic" approach can facilitate or justify exclusion. [19] A color-blind, gender-blind approach can mask a belief that the interests of those at the margins are disconnected from society's shared concerns and aspirations. [20]

Take, for example, the New Deal's landmark law safeguarding the right to organize and bargain collectively, the National Labor Relations Act (NLRA, or "the Act"). On its face, the NLRA is silent as

to race and gender, but it ultimately reinforced the "racialized and gendered hierarchy of the 1930's labor market."[21] It did this by, among other things, excluding domestic workers and agricultural laborers—two low-wage sectors dominated by women and people of color—from the Act's coverage.[22]

At the time that the NLRA was enacted, nearly half of Black men and a significant number of Mexican American and Native American men and Asian American men and women worked in agricultural and domestic work.[23] Notably, domestic work had the highest concentration of women of color. For Black women, the intersection of identities ensured that they were especially impacted by these carveouts: 90 percent of Black women worked either as a domestic worker or in agriculture in the 1930s.[24]

The geographic concentration of excluded occupations influenced support for the exclusions. In his book, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America*, Ira Katznelson argues that Southern politicians were willing to support New Deal legislation "provided [that] these statutes did not threaten Jim Crow," so they "traded their votes for the exclusion of farmworkers and maids, the most widespread [B]lack categories of employment, from the protection offered by [New Deal] statutes."[25] These carveouts were written into the law to ensure that white, male plantation owners could maintain power over Black workers.[26] President Roosevelt could only be confident of the support of the Southern bloc "so long as the New Deal did not disturb southern agricultural, industrial, or racial patterns."[27] Ultimately, it was Southern senators who developed the definition of "employee" for the NLRA,[28] which made these exclusions a condition for passage of the legislation.[29]

More than 80 years later, demographics continue to act as destiny. These exclusions continue to have a disproportionate effect on workers of color.[30] While over the last eight decades, the demographic composition of agricultural and domestic work has shifted somewhat from being mostly Black to being primarily foreign-born immigrants, women and people of color continue to make up almost 100 percent of workers in those categories. For instance, 95 percent of U.S. domestic workers are women, foreign-born, or women of color.[31] Among agricultural workers, 73 percent are foreign-born immigrants.[32] Then and now, race, gender, national origin, and immigration status matter when it comes to determining whose work is considered worthy of rights, dignity, and protection under the law.

For the Clean Slate project, there are three clear takeaways:

- **The identity of a worker affects how society values different types of work.** Labor historically performed by women and people of color—and women of color and Black women in particular under the institution of slavery—such as caregiving, has long been undervalued. In many cases, statutorily and in common parlance, caregiving labor is not even considered "work."
- **Labor law exclusions have always been about power.** Exclusions from labor law have been motivated by the desire of the dominant group to maintain power over a subjugated group. Because Southern whites held power in policymaking institutions, they were able to build their interests into labor law. It is not an accident that labor performed by the most marginalized in our society is also the labor that is least protected under the law. Codifying power dynamics into our laws is a deliberate way of maintaining racial and gendered hierarchies, just as maintaining racial and gender hierarchies is a way of establishing divisions among workers.
- **Ignoring the power dynamics at the root of labor law exclusions means that we will perpetuate those exclusions by default.** Because so many of the exclusions we see in our law are facially race and gender neutral, we are in danger of perpetuating them if we limit our project to rooting out only facial discrimination. It is easy to ignore the racist and sexist roots of labor law exclusions, but without directly confronting the power dynamics that enabled these exclusions in the first place, a new set of labor laws risks repeating the mistakes of the past.

The Potential of Labor Law

At its core, labor law determines the rules by which power is allocated in the labor market. By shaping fundamental aspects of the labor market, labor law inevitably also shapes some of the opportunities and pathways to power in the broader economic and societal context.

Therefore, by keeping an eye on the equitable nature of labor law, we can begin to rectify other forms of racial and gender inequities. In this section, we offer, by way of example, the racial wealth gap, norms around deservingness, and the imbalance of political leadership. Though making labor law more inclusive will not *solve* these problems, addressing specific issues in labor law has the potential to weaken the structures of power that underlie all of these issues.

Wealth: Consider, for example, the racial wealth gap. Black households in the United States hold approximately 7 percent of the wealth held by white households, and these gaps persist across various income levels.[33] Latinx workers also experience a sizable wealth gap.[34] Wealth statistics for Native Americans are hard to find, but it is likely that they hold even less wealth than other groups because of widespread land theft.[35] Wealth is a deeply important factor in economic security and intergenerational mobility, and workers' exclusion from labor law's protection creates challenges to accumulating wealth. Without a union, workers are more vulnerable to wage theft and low pay.[36] Moreover, workers in low-wage sectors are much less likely to have access to wealth-building vehicles, such as retirement plans.[37] Workers not represented by a union are less likely to have health insurance and, therefore, are more likely to face the financial ruin occasioned by unexpected medical bills.[38] The lack of power at work, therefore, affects workers' ability to maintain their financial well-being in the moment and to build a financially secure future.

Deservingness: Making labor law more inclusive also has the potential to chip away at core myths about success and deservingness in American society. The law serves as a powerful signal of what society values, and current labor law signals that we do not value much of the work done by women and people of color. In addition, the idea that if someone works hard, they will have access to economic security, mobility, and wealth is deeply embedded in the American ethos.[39] This concept of the American dream—that you can pull yourself up by your bootstraps—may have been true in the 20th century for a small group of people, but it was never true for the most historically marginalized.[40] In part, it has not been true for them because our nation's labor laws have denied them the bootstraps on which to pull. In denying women and workers of color a fair path to success, our labor laws put in motion the narrative that they do not deserve success. Making labor law more inclusive can change this narrative of deservingness.

Leadership: Perhaps most importantly, a new labor law regime that expands collective bargaining would bring workers from sectors that the labor movement has been unable to organize to the forefront of the labor movement. These sectors, including agricultural and domestic work, fast food, and retail, are dominated by women and people of color.[41] By facilitating the growth of powerful labor organizations in these sectors, the law would open up new leadership opportunities for those who have historically been on the margins of power. Though the labor movement, much like almost all American institutions, has much progress to make in dealing with racism and sexism, much progress has been made. Today, several of the largest unions in the country are led by women and people of color, and many of the most vibrant worker organizations are being led by a new generation of diverse leaders. As more women and workers of color come into the labor movement through labor law reform, they would have new opportunities to impact our political system, making our democracy more representative of our polity and thereby stronger.

The Future of Labor Law

The Clean Slate project is laying out a course for a new and more inclusive approach to labor law. To do so, it must confront age-old structures of power, particularly around race and gender, but also take a more inclusive eye towards power-building. This means a real recognition of the myriad aspects of identity that affect any given worker and the ways in which intersectionality interacts with the result of our policy choices.[42] After all, while some workers are statutorily prohibited from unionizing, others face challenges that make participation in organizing activities more difficult, such as unpredictable scheduling, lack of affordable childcare and eldercare, or the lack of access to resources available in a language that they understand. These are all aspects of privilege that need to be considered as we develop a better set of laws to empower workers.

The stakes are high. Research has shown us that participation in civic associations, such as unions, results in greater political participation.[43] Leveraging the power of workers to fight for more inclusive policies writ large is a moral imperative, especially in this political moment. However, simply increasing political participation is not enough. Equally important is that the vehicles that facilitate such political participation—including the worker organizations that we focus on here—reflect the interests of those who have been historically disenfranchised.

We need a clean slate approach to labor law. These laws, however, do not exist in a vacuum; they sit upon centuries of exploitative practices, policy choices, and webs of norms that are so deeply calcified that they often seem too hard to change. A clean slate approach would not only wipe the ledger of labor law clean—it would also directly contest existing patterns of oppression and use an inclusive lens to ensure that we are not replicating the power dynamics that got us to where we are today.

TERRENCE WISE

I'm a second-generation fast-food worker in Kansas City, Missouri. I'm 40 years old, I work at McDonald's, and I'm a leader in the Fight for $15 and a Union movement. My fiancée and I have three teenage girls. Despite 20 years of experience in fast food, I'm paid less than $15 an hour, have no paid sick days, employer healthcare or vacation and have to rely on public assistance to support my family.

When my coworkers and I join together to fight for better pay and working conditions, McDonald's hides behind its franchisees and says it can't do anything to change things. But we all know corporate McDonald's is the boss. When I go to work, I put on a McDonald's uniform. I serve food from McDonald's menu, according to McDonald's protocol.

Yet McDonald's says when workers are harassed on the job at a franchise store, it's not the corporation's problem. When workers are paid so little we need public assistance to survive, it's not the corporation's problem. When we experience violence on the job, again, not the corporation's problem. And when we join together and demand the right to a union, Corporate McDonald's fights us every step of the way.

Six years ago, even with me working two full-time fast-food jobs, my family lost our first home. My daughters have memories of getting ready for school and watching their parents put on work uniforms in our idling purple minivan in sub-zero temperatures.

Instead of using its billions in profits to treat us workers with respect, McDonald's has used its corporate power in every way possible to avoid responsibility for me and my coworkers. Through my organizing, I've met people who work for other fast food companies, retail stores, hospitals and airports and they all want the same thing – to have a voice that matters and that their bosses have to listen to.

This Clean Slate framework to build worker power would give workers like me a fighting chance to come together in a new way to improve our lives, families and communities and make sure companies like McDonald's don't wield all the power in our economy.

SECTION 3

CLEAN SLATE RECOMMENDATIONS FOR BUILDING WORKER POWER

3A. Foster Inclusion

Recommendations:

- Extend coverage to domestic, agricultural, and undocumented workers, workers who are incarcerated, and workers with disabilities;
- Adopt the far more protective ABC test for defining independent contractor status; and
- Extend coverage to independent contractors.

The overarching goal of the *Clean Slate* recommendations is to build economic and political power for workers. Together, these recommendations describe a new legal regime that would enable workers to countervail the economic and political power of corporations. The first step in achieving these goals—the first step in the process of rebalancing power—is *inclusion*.

As discussed above, our nation's labor laws have long excluded too many workers. The core of these exclusions remains in place under the NLRA today, with continuing impacts on Black and brown workers, immigrants, and women. More recently, the increasingly "fissured workplace" has exacerbated the longstanding impacts of excluding "independent contractors" from the reach of these protective laws.[44] Today, more and more business models are structured to erode the very nature of employment—cutting labor costs, evading social insurance systems, and shifting risks onto workers who lack bargaining power, many of whom are Black workers, immigrant workers, and/or women.[45]

Below, we propose several reforms that would reshape the landscape of who bargains. We put these reforms at the forefront of our recommendation both because they are essential to building power and because they are essential to creating an equitable society. By starting from a "clean slate," we can rethink the historical racist and sexist forces that shaped the current, limited landscape.

In addition, we note that while the proposals in this section and throughout the report would extend collective bargaining rights to many workers who have been historically excluded from the labor

movement—and thereby create the potential for greater opportunities for leadership for these workers within the labor movement—these reforms alone would not necessarily result in a more diverse set of leaders. It is beyond the scope of this report to make recommendations regarding governance and leadership development within worker organizations, although we regard this work as equally critical to the future of worker power as we regard the recommendations we make here. We also note that the expansion of the right to join worker organizations creates an imperative for those organizations to adopt processes that ensure that their leadership and accountability structures align with what will be a more inclusive membership.

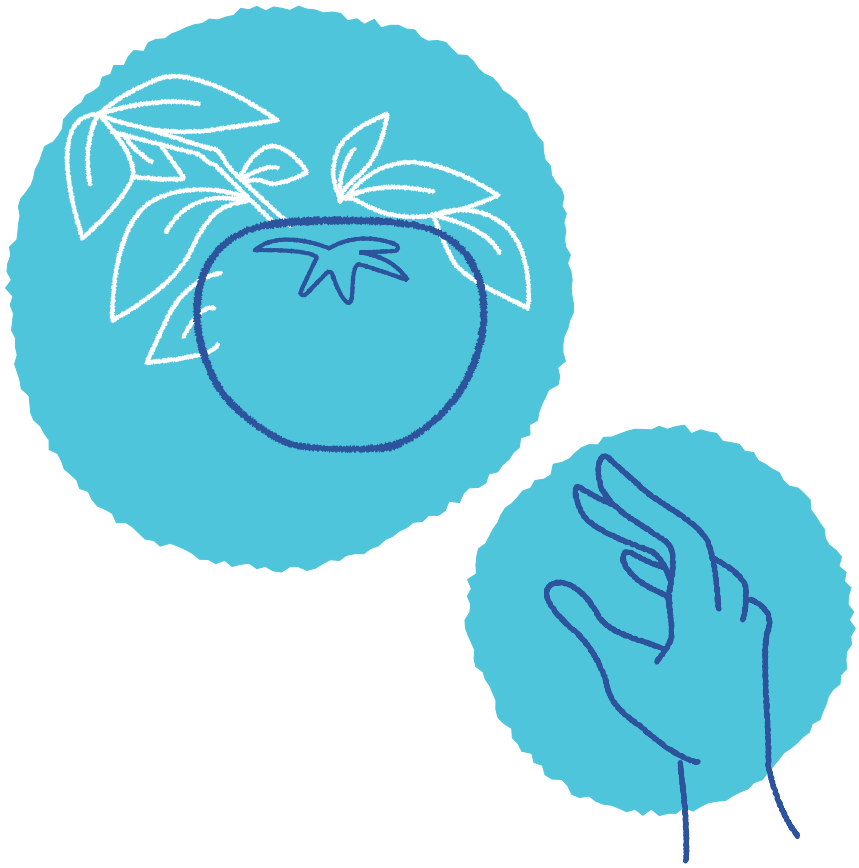
Overall, we recommend making labor law more inclusive through two principles means. First, we propose extending workplace democracy in some form to all workers by bringing representation and collective action rights to workers in sectors, industries, and workplaces that the labor movement has historically been unwilling or, more frequently, unable to organize. This construction of a new system of workplace democracy is the focus of the later sections of our report. The second principle, which is the focus of this first section, is expanding the definition of who has the legally protected right to engage in concerted activity and collective bargaining. We recommend that the new labor statute explicitly encompass those who, historically, have been excluded because of who they are and not because of any rational analysis of whether they need the protection of the law.[46]

AGRICULTURAL AND DOMESTIC WORKERS

A new labor law should define coverage to include agricultural and domestic workers in the same manner and to the same extent as all other workers covered by the law.[47] No distinction should be made based on these historically unjust exclusions. To be sure, we are not recommending the removal of the occupational exclusions from the NLRA to bring these workers within the protection of that statute. This is because agricultural workers and domestic workers likely would be more successful at organizing and exercising collective power in ways precluded by the NLRA.

A new labor law should define coverage to include agricultural and domestic workers in the same manner and to the same extent as all other workers covered by the law.

For example, agricultural workers have often relied on so-called secondary tactics against "lead companies" that benefit from their labor but do not directly employ them.[48] Unions covered by the NLRA face very significant restrictions on secondary tactics.[49] However, because we recommend allowing *all* workers to utilize secondary tactics, there is no reason to create a separate system for agricultural workers in the new labor law we propose. Attention would have to be paid, however, to how to transition workers currently covered by state collective bargaining laws for agricultural workers to the broad system created by a newly enacted federal law.



Similarly, the NLRA's enterprise-level bargaining would not be the best model for organizing domestic workers. Because such workers are often the sole employees of their employers, a sectoral approach would be more effective. We note that several state laws and the recently introduced Domestic Workers Bill of Rights would enable a form of sectoral bargaining.[50] Again, because we recommend sectoral bargaining for all workers, no special provisions for domestic workers would be necessary under our proposed labor law. Again, attention would need to be paid to how to transition from these new state systems to the new federal system.

UNDOCUMENTED WORKERS

Approximately 8 million undocumented immigrants in the U.S. are employed, which is roughly 5 percent of the total workforce.[51] These immigrants work in almost every industry and often alongside documented colleagues in the same jobs. Many of these workers, out of fear of discovery of their immigration status, work in the lowest-paid and most-dangerous jobs.[52] Moreover, they are vulnerable to exploitation by employers who are complicit in or learn of their undocumented status.[53]

In *Sure-Tan v. National Labor Relations Board (NLRB)*, the Supreme Court held that undocumented workers are employees covered by the NLRA.[54] Although *Sure-Tan* has not been expressly overruled, the impact of it for undocumented workers was greatly diminished by the Court's decision in *Hoffman Plastic Compounds v. NLRB*, in which the Court held that undocumented workers could not have access to the NLRA's backpay remedy.[55] The continuing viability of even these second-class rights under the Act are in question. In *Agri Processor Co. v. NLRB*, the D.C. Circuit upheld the NLRB's determination that an employer illegally refused to bargain with a union because of the employer's belief that the bargaining unit included some undocumented workers.[56] Now Associate Supreme Court Justice Kavanaugh, in dissent, would have excluded undocumented employees from the protection of the statute, despite decades of precedent that held them to be protected as employees: "Applying *Sure-Tan* and *Hoffman* in the wake of [the Immigration Reform and Control Act (IRCA)], I would hold that an illegal immigrant worker is not an 'employee' under the NLRA."[57]

The effect of this subjugation of undocumented workers to second-class status under the NLRA is threefold. First, it denies these already-vulnerable workers meaningful protection over the right to engage in collective bargaining or concerted activity. Second, the exclusion operates as a green light and incentive for employers to exploit this group of workers and impede union organizing. Third, the exclusion of undocumented workers from the Act's protection also diminishes the power of their documented colleagues; the exclusion creates a disincentive for undocumented workers to join organizing campaigns or collective actions, making it even more difficult for documented workers to gain majority support.

We recommend that the new labor law expressly cover workers regardless of their immigration status, as was the Board's position in *Hoffman Plastic Compounds*. Further, all remedies should be available to all workers regardless of immigration status. Moreover, we recommend that the new labor law make it an unfair labor practice for an employer to inquire about a worker's immigration status during an organizing campaign.[58] We note that the Protecting the Right to Organize (PRO) Act precludes an employee from being denied backpay because of their immigration status.[59]

INDEPENDENT CONTRACTORS

In early cases, the NLRB and the Supreme Court held that the Act's protections extended to workers who were common law independent contractors, but who, in reality, were subservient to the companies for which they worked.[60] Employers objected, and Congress denied protection to common law independent contractors in the Taft–Hartley Act.[61]

The Board then developed a multi-factor test to determine who is an employee and who is an independent contractor in close cases.[62] Unfortunately, that test has proven quite confusing and difficult to apply for several reasons. The precise factors that the Board emphasizes have varied over time, and the Board and courts tend to weigh those factors differently in each case.[63] These ambiguities can undermine workers' rights by making it more difficult and expensive for them to prove misclassification. Employers have exploited this exemption. A recent study estimated that as many as 30 percent of employers misclassify some employees as independent contractors, especially in the in-home care, residential construction, housekeeping, delivery, and janitorial industries—all sectors that depend on large numbers of Black and Latinx women.[64]

A new labor law should not include an explicit exclusion for independent contractors. Ensuring coverage for workers who are treated as independent contractors, however, will take more than just not excluding them. As long as coverage of the Act is still defined by the term "employee," employers will be able to argue that workers who meet the definition of an independent contractor are excluded and thereby denied the right to collective bargaining. We recommend two solutions to this problem.

First, we recommend adopting a broad definition of employee to minimize the number of workers who are misclassified as independent contractors. Specifically, we recommend that the new labor

law include the ABC test: that is, establish a presumption that all workers are employees unless the employer can rebut that presumption by proving each of the following three factors: (1) that it does not exert control over the workers; (2) that the work performed is outside the usual scope of the employer's business; and (3) that the worker is engaged in an independent trade, occupation, or business.[65] We note that the PRO Act includes adoption of the ABC test.[66]

ABC TEST

All workers are employees unless the employer can prove:

1. **that it does not exert control over the workers**
2. **that the work performed is outside the usual scope of the employer's business; and**
3. **that the worker is engaged in an independent trade, occupation, or business.**

Although adoption of the ABC test would minimize misclassification, it would not address the problem of workers who still meet the definition of independent contractor but who also lack sufficient power or leverage on their own to establish decent working conditions when their client is a firm. In order to enable these workers to leverage countervailing collective power, the new labor law would also have to expressly include them in the coverage of the Act.

Second, we also recommend that the new labor law expressly protect the right to collectively bargain among any independent contractors who: (1) do not employ any employees; (2) who make little capital investment—roughly defined as investment that is limited to the needs of the independent contractor personally (e.g., one car, one set of tools, one computer, etc.)—in their "businesses"; and (3) who share the same economic relationship with a single company. In addition, antitrust law should be amended to exclude any workers who meet this definition to ensure that they do not incur liability under that law when they act collectively in a manner that might otherwise meet the definition of an anticompetitive practice.

Our intent in covering a subset of independent contractors is twofold. First, it reduces the incentive to continue misclassification under the ABC test. As we have seen in the wake of the passage of AB5 in California, there are companies that intend to force litigation over the exact parameters of even that clearer, easier-to-apply test for employee status.[67] With the expressed inclusion of some independent contractors under the collective bargaining law, there would be less scope for litigation under the ABC test. Second, we believe that there are "true" independent contractors who lack sufficient bargaining power to negotiate decent working conditions, especially when they are engaged by a corporation and not individual consumers or clients.

WORKERS WHO ARE INCARCERATED

Many individuals who are incarcerated and detained work for far less than minimum wage. While the Board and the federal courts have not yet addressed whether prisoners and/or detainees are employees under the NLRA,[68] courts in Fair Labor Standards Act (FLSA) and Title VII cases have generally refused to protect workers who are incarcerated on the grounds that their relationship with the prison is primarily penological in nature.[69] Notably, Black and Latinx individuals are vastly overrepresented in the incarcerated population.[70]

We recommend that, with respect to work supervised by a non-prison entity, regardless of location, the new labor law cover inmates or detained workers with regard to their work tasks.[71] A collective bargaining regime for prisoners would need to take account of security concerns in the penological context; this may, in turn, require a different set of bargaining topics than under standard practice and perhaps distinct regulations surrounding strikes and concerted action. With respect to work done inside the prison and under prison supervision, one possible approach would be providing workers who are incarcerated a set of meet-and-confer rights.

WORKERS WITH DISABILITIES IN "SHELTERED WORK" OR "REHABILITATIVE" PROGRAMS

In its 2004 *Brevard Achievement Center* decision, the NLRB held that workers with disabilities who are in a "primarily rehabilitative" relationship with their employer are not statutory employees. Even though the custodial workers with disabilities at Brevard worked 40-hour workweeks performing the same tasks as employees with no disabilities, the Board explained that because the workers with disabilities performed this work as part of a rehabilitative program, they were not employees entitled to the Act's protection.[72]

As NLRB members Wilma B. Liebman and Dennis P. Walsh explained in their dissent, the Board's "primary purpose" test for employee status unfairly deprives workers of labor rights simply because they have another, allegedly more important, relationship with their employer. The majority's decision also discriminates against workers with disabilities in sheltered work programs, making such workers second-class citizens at work, and contributes to inequities in society at large.[73]

We recommend that the new labor law expressly cover workers in sheltered work or rehabilitative programs if they otherwise meet the definition of employee, regardless of whether they have another purpose to their relationship with their employer.

3B. Transform Representation Rights

The guiding principle of the *Clean Slate* reforms is that the law should equip all workers to build collective power everywhere corporate power impacts their lives. In this section, we make recommendations for legal reforms that would create new structures of worker voice and power at work, across enterprises, and at the level of industry (or "sector"). As the discussion will reveal, our recommendations would fundamentally transform mechanisms of worker representation at each level. Among other key features, our recommendations aspire to guarantee that *every worker in the U.S. labor force will enjoy some form of voice and representation and that the vast majority of workers will enjoy multiple forms of voice and representation. Moreover, for the first time, workers would gain the legal right to a powerful voice in shaping conditions across whole sectors of the economy.*

> ***"...our recommendations aspire to guarantee that every worker in the U.S. labor force will enjoy some form of voice and representation and that the vast majority of workers will enjoy multiple forms of voice and representation. Moreover, for the first time, workers would gain the legal right to a powerful voice in shaping conditions across whole sectors of the economy."***

Some of these mechanisms would be automatic and universal by definition. Thus, at the level of the workplace, every worker in the United States would be entitled to recourse to a workplace monitor. Access to other forms of representation would be nearly universal and are designed with only minimal thresholds in place; for example, so long as three workers request it, workplaces in the United States would be required to establish works councils. With respect to sectoral voice and power, our recommendation is that the support of 10 percent of a sector's workforce or 5000 workers (whichever is fewer) would lead to the institution of sectoral bargaining. Just as crucially, we propose, later in the report, reforms to the law of organizing designed to ensure that workers have a clear path to achieving the requisite levels of support necessary to access all forms of representation available under the new law.

Table 1: Forms of Worker Representation

Form of Representation	Threshold Demonstration of Support
Workplace monitor	Automatic
Disciplinary representation	Upon request
Works Councils	3 workers
Members only union	25% of workers
Exclusive representative	50% +1 workers
Sectoral bargaining	10% or 5000 members

WORKPLACE REPRESENTATION

Recommendations:

- Provide graduated rights, starting with workplace monitors and disciplinary representation, in every workplace;
- Provide a works council in any workplace where at least three workers request one;
- Give unions the discretion to decide which workers they want to organize—either within the worksite, across the worksite, or throughout the enterprise;
- Allow non-exclusive bargaining rights; and
- Allow exclusive representation upon majority showing.

We start with the workplace. The workplace is a critical sphere for building worker power for two basic reasons. First, and most obviously, without power in the workplace, working people will lack a meaningful voice in shaping some of the most critical aspects of their lives. Second, as we have learned

from the history of organizing, worker power is often most effectively built at the local, workplace level. Thus, in order to have a successful voice in sectoral bargaining, firm governance, and politics, we need to begin at the grassroots level of the workplace. Hence, the law must do much more to facilitate workplace organizing.

Our approach to building worker power and voice at work is captured by the idea that democracy at work should be a right, not a fight. For too long, securing power and voice at work has required workers to fight herculean battles against nearly impossible odds.

Our approach to building worker power and voice at work is captured by the idea that democracy at work should be *a right, not a fight*. For too long, securing power and voice at work has required workers to fight herculean battles against nearly impossible odds. This is the fault of our labor law and results from two interrelated features of that law. First, our labor law has presented workers with a binary choice: either have *no* collective representation in the workplace or have an exclusive bargaining agent in the form of a labor union.[74] If workers do not, or are unable to, elect an exclusive bargaining agent, the law leaves them with no representation at all.[75] Second, the law's weakness has made it exceedingly difficult for workers to exercise their choice in favor of union representation in the face of extreme employer opposition.[76] In combination, this means that workers only have one option for collective representation—an option that is most often out of reach.

Writing on a clean slate, we must address both of these shortcomings in labor law. First, we must move beyond the binary set of choices and ensure that all workers have access to a menu of forms of voice at work. Second, we must ensure that workers are fully free to exercise their rights to choose any of the options made available to them. In this section of our recommendations, we describe the new menu of representational structures that would be made available to all workers through the new labor law statute we envision. To make democracy at work a right, and not a fight, the statute should provide for a range of representational structures made available to workers according to a system of graduated rights. In sum, as more workers in a given bargaining unit or workplace express support for collective representation, the more robust the structure of collective representation would be. In subsections C, D, and E below, we detail legal protections for organizing, collective action, and bargaining that would ensure workers' ability to take advantage of all these forms of representation.

Two notes of detail at the outset:

First, some of the following forms of representation would be truly workplace-based. For example, workplace monitors and works councils would be organized at the level of complete workplaces. But with respect to other forms of representation, the choice of who to represent would be at the discretion of the worker organization involved. Both non-exclusive bargaining unions and exclusive bargaining unions would have the right to organize at the level of a workplace or at the sub-workplace level (e.g.,

among a bargaining unit of workers within a single workplace and defined by similar job duties). Exclusive bargaining representative unions would have the right to organize at these two levels and at the "enterprise" level (i.e., into a bargaining unit that encompasses multiple workplaces).

Indeed, because decisions that impact workers' lives are quite often made at the enterprise level rather than the individual workplace, the law ought to enable workers to engage in true enterprise-level bargaining. Therefore, we recommend that when a worker organization secures exclusive representation status at two or more workplaces (or bargaining units) within the same enterprise, the worker organization should be able to elect to demand bargaining with the enterprise on behalf of all the represented workplaces or units in the enterprise.[77]

Second, throughout this section and those to follow, we use the term "worker organization" to describe organizations that represent and bargain on behalf of workers. We chose "worker organization" rather than "union" to signal a broader range of institutions than the one included in the current statute's definition of "labor organization." Unions are thus a central form of "worker organization," but the term is also meant to encompass other forms of collective worker organizations. Our goal is to define the term in a way that allows workers the greatest freedom to both maintain existing unions and create new organizations with minimal government interference. Thus, we recommend defining "worker organizations" as unions *and* other collective organizations of workers that:

- Have a mission dedicated to building worker power, with worker organizing as one central strategy;
- Engage in workplace organizing (not legal strategies or governmental lobbying alone) to address violations and raise standards;
- Are not dominated, or interfered with, by employers
- Have a membership comprising workers; and
- Have officers elected by this membership pursuant to democratic processes.

Given that "unions" are a core form of "worker organization," we at times use the terms interchangeably in the discussion that follows.

We recommend the following structures of representation and graduated rights in the workplace:

Step 1: Workplace monitors and disciplinary representation

In every workplace covered by the statute we envision, workers would elect—on an annual basis—a workplace monitor. In workplaces with 500 or fewer workers, there would be a single workplace monitor; in workplaces with more than 500 workers, the workers would elect 1 workplace monitor for every 500 workers.[78] The monitors would be nominated and elected by the workers, and employer interference in the nomination and election of monitors would be prohibited. Monitors can, but need not, be employed in the workplace where they are elected. Workers might, for example, nominate monitors employed by worker organizations, community organizations, or other nonprofit groups—so long as those groups are not dominated by the employer.

The monitors would be empowered to help ensure the workplace's compliance with all state, federal, and local employment and labor laws. To facilitate the successful functioning of the monitors' role, the monitors would get paid time off for their monitoring work. They would be entitled to attend, with pay, trainings regarding their work as monitors and trainings regarding the substance of state, federal, and local employment and labor law. They would also be entitled to inspect all areas of the workplace and all relevant company records, and they would have the authority to interview all relevant parties when necessary. Should there be a government inspection of the workplace regarding compliance with any employment or labor law matter, the monitor would have the right to consult with the inspector and to accompany the inspector during her visit to the workplace.

Additionally, in every workplace covered by the statute, every worker would have the right to bring a coworker or other representative to any meeting with a manager or supervisor that might lead to adverse employment consequences. The choice of the representative would be the workers' own to make and could include another worker from the workplace or someone affiliated with a worker organization, a community organization, or another nonprofit group. The employer would be prohibited from interfering with the worker's choice of representative. Should a coworker be chosen as representative, that coworker would be given paid time off to attend the disciplinary hearing and would be protected against retaliation for her participation.

> ***"Thus, all workers would have, as a right, access to both a workplace monitor and a representative at disciplinary meetings."***

Thus, all workers would have, as a right, access to both a workplace monitor and a representative at disciplinary meetings. Moreover, in order to facilitate the success of more robust forms of workplace representation, the statute would also provide additional rights in every workplace covered by the statute. First, employers would be required to distribute a written notice to every worker on an annual basis describing the workers' rights under this new statute, including a description of how to exercise their rights under this new system of graduated rights. Second, all workers would have the right to

become a member of a worker organization and to require the employer to check-off membership dues from her paycheck to the worker organization. This would be true irrespective of the degree of support for the worker organization in the workplace. Third, any worker organization with an interest in representing workers at the workplace would have the right to receive contact information for all non-supervisory employees. Contact information would include a worker's name, mailing address, job title, email address, and phone number. The statute would restrict the worker organization's use of this information to communicating with employees about representation.

Step 2: Works councils[79]

In every workplace covered by the statute, where three or more workers request it, a works council would be established.

In every workplace covered by the statute, where three or more workers request it, a works council would be established. The council would exclusively consist of representatives nominated and elected by workers. Managerial involvement of any kind in representational elections would be prohibited. Non-supervisory workers with the support of at least 50 coworkers or 10 percent of their coworkers (whichever number is lower) may run for the council. In addition, if a worker organization has members in the workplace, the worker organization may nominate workers for seats on the council, and the worker organization may participate in council elections. Once elected to the council, representatives would serve for two-year terms. They would be entitled to paid time off for all council work and to receive training necessary to carry out their work on the council. Reimbursement for childcare and eldercare necessary to attend trainings and participate in council activities would also be made available.[80] Training could be offered by any worker organization certified by the Department of Labor (DOL) to provide it.[81]

The council would meet and confer with management on the following topics, among others that the council deems appropriate:

- Equity issues, including discrimination and how to foster inclusiveness in a diverse workforce;
- Work scheduling;
- Job structures and definitions;
- Safety and health;
- New technology and its impact on the workforce;

- Compliance with labor and employment standards (in consultation with workplace monitors);
- Community needs, including housing, childcare and eldercare, transportation, and environmental concerns; and
- Entrepreneurial decisions that impact the workforce.

For every topic on which the council has a right to meet and confer with management, it also would have the right to request and obtain from management all information relevant to a full discussion of these topics. Information would be made available in the languages spoken by all members of the works council. Further, if a worker organization has members in the workplace, the council could share this information with the worker organization and could consult with the worker organization on questions relevant to its work.

Works councils could establish subcommittees as they see fit in order to carry out their work. However, all works councils would be required to establish a subcommittee for equity and inclusion. This subcommittee would have primary jurisdiction over all equity issues dealt with by the council, including discrimination issues. Representatives for the subcommittee should include workers from historically marginalized communities, such workers of color, workers with disabilities, and women, immigrant, and LGBTQ workers.

Step 3: Non-exclusive bargaining rights

When a worker organization's membership reaches 25 percent of a workplace, or, at the organization's discretion, 25 percent of a bargaining unit within a workplace, that organization would be entitled to act as the bargaining agent for its membership. Concomitantly, the employer would be obligated to bargain with the worker organization in good faith to reach a collective agreement covering the worker organization's membership. Bargaining would take place on the subjects of bargaining discussed in Section 3E below. The organization would establish its membership through a showing of membership cards or petitions, signed by workers in the unit or workplace, which indicate the worker's interest in being a member of the organization. Membership cards or petitions could be physical or electronic forms signed digitally, so long as they indicate the worker's desire to become a member of the worker organization. All cards or petitions would have to be produced for verification by a neutral factfinder, with certification results required within 48 hours.

Collective agreements reached between management and such non-exclusive worker organizations would apply only to the organization's members. The fact that management, through such agreements,

may be obligated to offer different terms and conditions of employment to organization members than to non-organization members would not constitute discrimination under the new statute. Moreover, should management decide to extend the terms of a collective bargaining agreement reached with a non-exclusive worker organization to workers who are not members of the non-exclusive organization, that would not constitute discrimination either (namely, that would not constitute an attempt to encourage or discourage membership in the organization). On the other hand, if management offers different terms and conditions of employment to members of a non-exclusive worker organization with the intent of discriminating between organization and non-organization workers (i.e., with the intent of encouraging or discouraging membership in an organization), that would constitute an unfair labor practice under the new statute. Moreover, if an employer offers more favorable terms to workers who are not members of a non-exclusive worker organization (but who are otherwise similarly situated to the workers in the organization), there should be a presumption that the employer has done so with the intent of discouraging membership in the worker organization.

Along with bargaining rights, worker organizations that reach the 25-percent-membership threshold (whether of a workplace or of a bargaining unit within a workplace) would also be entitled to expanded access to the workplace. Organizations at this level of membership density would have the right to access non-work areas for the purpose of meeting with employees to discuss worker organization matters, including further organizing plans. The specific locations in which such meetings take place would be negotiated by the worker organization and the employer. If no agreement is reached regarding the location for such meetings, a location would be designated by a government neutral. If a workplace does not have a physical location for such meetings, alternative locations would be approved. Similarly, worker organizations with 25 percent membership would be granted access to the company's email system for the limited purpose of communicating with workers regarding the worker organization.

Worker organizations that have 25 percent membership would also have the right to send a representative to meet with all new employees hired into the workplace or bargaining unit for the purpose of discussing organization matters. If the employer holds new-employee orientations, representatives from all worker organizations with 25 percent membership must be invited to attend and make presentations at those orientations.

In addition, worker organizations with 25 percent membership would have the right to appoint a representative, chosen from its membership, to the works council. This representative would not replace an existing member of the council, but, instead, an additional seat would be created on the council to accommodate this representative.

Step 4: Exclusive bargaining

When a worker organization's membership exceeds 50 percent of a workplace, or, at the organization's discretion, 50 percent of a bargaining unit within a workplace, that organization would become the exclusive bargaining representative for all the workers in the workplace or the bargaining unit. The employer would be required to bargain in good faith with that organization over the subjects set out in Section 3E below. Collective bargaining agreements reached between exclusive bargaining agents and employers would apply to all workers in the workplace or unit. If an impasse is reached during the bargaining for a first collective bargaining agreement, the dispute would be submitted to mediation. If mediation is not successful, the dispute would be submitted to final and binding interest arbitration. In addition, when a worker organization becomes the exclusive bargaining agent, it would replace any other non-exclusive representatives for that workplace or unit. Although works councils would continue to operate even when there is an exclusive representative, in such cases, the works council would not meet and confer with management over any mandatory subjects of bargaining or other topics addressed in the collective bargaining agreement negotiated by the exclusive representative.

For exclusive bargaining relationships, the new statute would need to determine who sits at the bargaining table on the "employer side." This question is relevant given the distinction between the entities that currently meet the definition of "employer" for collective bargaining purposes and the entities that actually have the power to shape working conditions at the workplace level. The force of the problem should be significantly mitigated in a sectoral bargaining system because even firms that disclaim "employer status" would be required to comply with sectoral standards. Nonetheless, workplace bargaining will only be meaningful if the bargaining obligation extends to the parties with the power to shape conditions at the workplace level. To ensure that this is the case, the statute should impose bargaining responsibility not just on the employer with whom the workers have established an exclusive bargaining relationship but also on those economic actors that have the power to shape and address worker concerns at the workplace level regardless of those actors' status as "employers." In determining which entities should be within the definition of "employer," the realities of how the business functions, not formalistic distinctions, should be considered. This means, among other things, adopting a broad definition of "joint employer." Because this dynamic is most pronounced in precarious sectors of the labor market where workers of color and women dominate the workforce, it is a dynamic with acute equity implications.

One promising approach to this issue is offered by state laws that make general contractors liable for the employment actions of subcontractors—all the way down the chain of supply or production—regardless of whether the general contractor qualifies as the "employer" of the "employee" whose rights

are in issue. For example, California defines contracting companies (called "client employers") and their labor contractors in order to make these actors jointly liable for wage payments and workers' compensation, irrespective of whether an employment relationship exists between the client employer and the affected workers. Idaho has adopted a similar approach to its workers' compensation law.[85] The new labor law could attach a bargaining obligation according to similar principles: where one entity contracts with another and receives labor or services that are part of the regular business of the contracting entity, both the contracting entity and the contractor are subject to the duty to bargain.

Other possible approaches are worth considering, as well. One would involve the law attaching a bargaining obligation to entities that own or control the property where certain employees work. Take, for example, airports and medical centers. Under this approach, these entities would be obligated to bargain when janitors, food service, or maintenance workers gained non-exclusive or exclusive bargaining status at their workplaces within the airport or medical center. Such a "premises approach" to bargaining responsibility has roots in common law tort doctrines—just as one can be presumed to know about, and have the ability to correct, unsafe conditions on one's own property, one might be given the responsibility to engage in collective bargaining about conditions on that property.[86]

SECTORAL REPRESENTATION

Recommendations:

- Create an administrative system of "sectoral bargaining panels;"
- Make sectoral collective bargaining agreements binding on all firms in the sector through administrative extension; and
- Expand prevailing wage as a sectoral option.

As discussed in the Introduction, collective bargaining in the United States has historically—with some important but limited exceptions—been a highly decentralized system: Unions generally negotiate on behalf of the workers at an individual firm or, even more commonly, on behalf of a subset of the workers at an individual firm. Decentralized bargaining of this sort has produced significant results for workers covered by collective bargaining agreements: There is a consistent union wage premium, for example, and unionized workers enjoy more extensive benefits and greater job security than non-unionized workers.

However, decentralized bargaining—what is often referred to as "enterprise bargaining" in the United States but which actually refers to bargaining at the level of the workplace or subunits of a workplace—also has three profound shortcomings. First, and consistent with our emphasis on inclusion, decentralized bargaining has left tens of millions of workers without the protection of a collective

bargaining agreement.[87] This form of exclusion exacerbates the forms of gender and racial exclusion addressed above. Second, because unions produce a wage and benefits premium for unionized workers, enterprise bargaining therefore creates a perception among employers that unionization implies a competitive disadvantage vis á vis non-union firms in the market. Enterprise bargaining accordingly leads employers to fight unions. Indeed, the decentralized nature of collective bargaining is a significant cause of employer opposition to unionization in the U.S. Third, enterprise bargaining is structurally incapable of addressing the problems posed by the fissured workplace. If unions only negotiate with individual firms, then subcontracting, franchising, and systems of independent contracting can readily defeat the efficacy of unionization.[88]

> ***"[D]ecentralized bargaining has left tens of millions of workers without the protection of a collective bargaining agreement."***

To address exclusion, employer opposition, and the problems that flow from fissuring, the U.S. needs to enable collective bargaining not just at the firm level but also at the sectoral level—that is, we need to enable collective bargaining between unions and industries, not just unions and firms. Take, for example, the fast food industry and compare an enterprise system in which collective bargaining takes place between a union and a single firm with that of a sectoral system in which collective bargaining takes place between many unions and all of the employers in the industry. The first thing to note is the effect of franchising: Because each franchise (e.g., each individual McDonald's or Burger King franchisee) may, under current law, be considered a separate employer—a separate "enterprise"—bargaining in an enterprise system would likely occur between unions and individual franchisees. What would collective bargaining between a union and an individual McDonald's franchise look like? Among other things, management would likely want to pass any wage gains secured by the union onto the customers in the form of higher prices. In the competitive fast food market, however, such price increases could result in customers switching to a different restaurant (e.g., either to another McDonald's or to a different fast food chain entirely). This dynamic means that the franchise would perceive itself as having an incentive to prevent unionization at all costs. The situation is modestly, but not fundamentally, improved if collective bargaining were to take place between unions and complete fast food chains. In this scenario, McDonald's, for example, would vigorously resist unionization out of concern over being placed at a competitive disadvantage relative to Burger King.

...the U.S. needs to enable collective bargaining not just at the firm level but also at the sectoral level—that is, we need to enable collective bargaining between unions and industries, not just unions and firms.

In a sectoral system, on the other hand, unions representing fast food workers nationally could secure wage and benefits gains across the entire fast food industry. This form of wage increase could not place any restaurant chain at a competitive disadvantage vis-à-vis any other restaurant chain, and thus, this form of wage increase would not incentivize employer opposition to unionization. Ultimately, a system of sectoral bargaining would predictably result not only in more effective collective bargaining but also in much greater collective bargaining coverage, addressing the problem of exclusion that has plagued industries such as fast food.

The predictions of this hypothetical example are borne from real-world evidence. Countries with sectoral bargaining systems—which include nearly all countries in Europe as well as Argentina and South Africa—have far greater collective bargaining coverage than countries with enterprise-level bargaining.[89] Moreover, sectoral bargaining is particularly effective in ensuring collective bargaining coverage in highly fissured industries and industries with high numbers of independent contractors—industries in which women, people of color, and immigrants are disproportionately represented.[90] Because sectoral bargaining results in higher levels of collective bargaining coverage, it is also more effective than enterprise bargaining at reducing income inequality across countries.[91] Here, sectoral bargaining is notably more effective than enterprise bargaining at addressing racial and gender pay gaps.[92]

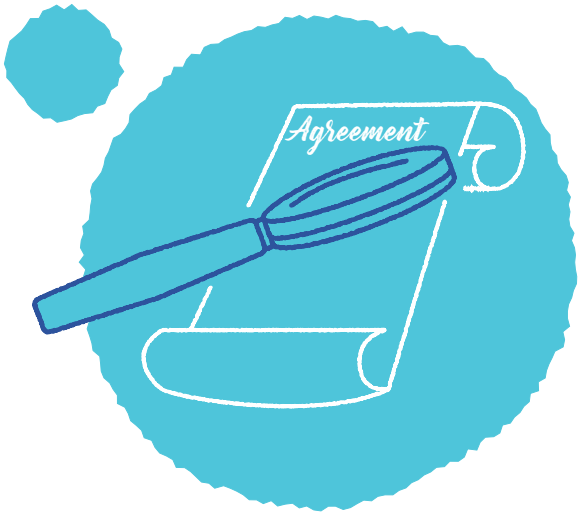
> ***"Because sectoral bargaining results in higher levels of collective bargaining coverage, it is also more effective than enterprise bargaining at reducing income inequality across countries. Here, sectoral bargaining is notably more effective than enterprise bargaining at addressing racial and gender pay gaps."***

It is also worth saying that sectoral bargaining can contribute significantly to economic productivity and efficiency. Because firms in a sectoral bargaining system do not—and indeed, generally cannot—secure a competitive advantage by lowering wages, they are forced to compete based on the quality of the products that they produce or the services that they provide.

Sectoral systems also encourage increased investment in worker training. In a sectoral system, wages and benefits are generally equivalent across firms in an industry, so employers can invest in training without fear of losing workers to higher-paying competitors. And because sectoral systems concentrate much of the bargaining at the centralized level of the sector, individual firms are left with lower transaction costs when it comes to negotiating their own employment agreements.

For the foregoing reasons, we recommend that the new labor law provide for the establishment of a system of sectoral bargaining for all firms and workers in the United States. The new labor statute would create an administrative system of "sectoral bargaining panels" in which unions, on a proportional basis, would bargain—on behalf of all workers in a sector—with employer associations—which

would represent employers in the sector on a proportional basis. The agreements reached by the sectoral unions and the sectoral employer associations would become binding on all firms, and for all workers, in the sector, subject to the following critical conditions. First, the statute establishing this system of sectoral bargaining would also provide meaningful standards that any sectoral agreement would be required to meet before that agreement could become binding on the sector. And, consistent with this feature of the new law, the statute would also provide for review and approval of sectoral agreements by the Secretary of Labor. Thus, for example, the statute could require that the Secretary of Labor reject any agreements that do not improve the standard of living for a majority of workers in the sector and that do not provide all workers in the sector with a living wage; an adequate amount of paid sick, family, and vacation time; and a safe, secure, and healthy workplace.[93] Crucially, the statute must require that the Secretary of Labor reject any agreements that do not advance gender and racial equity—including, but not limited to, pay equity.



Creating a sectoral bargaining system in practice will require the resolution of several complex questions that cannot all be adequately addressed without further exploration. What follows is a discussion of many of those questions with preliminary suggestions about the resolution of each of them.

Sector definitions

A first step toward the establishment of sectoral bargaining in the U.S. is the definition of sectors. The statute should empower the Secretary of Labor to define sectors pursuant to statutory guidelines and after meaningful consultation with affected constituencies—including worker organizations and employers. The statutory guidelines themselves should be developed after a consultation process with labor economists, worker organizations, employers, and other stakeholders. In carrying out this definitional work, an important consideration comes from historical experience with sectoral bargaining—namely, that defining sectors more broadly would generally contribute to the goal of raising standards for as many workers as possible.

More narrowly defined sectors would enable a finer tuning of standards for particular groupings within an industry. Given that our proposal contains robust protection for workplace bargaining—bargaining that will be sensitive to the need for local variation—defining sectors broadly and capturing the

benefits of those broad definitions may make the best sense. One possibility would be to rely on the existing North American Industry Classification System (NAICS) definitions.[94]

Sectoral bargaining panels

After defining sectors, the new statute must then specify when and how sectoral bargaining panels should be established. Because there are many sectors today—however defined—in which workers have no meaningful representation, it would be difficult, in practice, to require the creation of sectoral bargaining panels in all sectors immediately. Accordingly, we recommend the following approach. The statute should state that a sectoral bargaining panel will be established by the Secretary of Labor upon the request of a worker organization when that worker organization has a membership of at least 5,000 workers in the sector or 10 percent of the workers in the sector, whichever number is lower. For these purposes, membership in a worker organization can be shown by a membership card or petition, either physical or online, which states that the worker wishes to be a member of the worker organization. Membership for sectoral bargaining panels can also be established by showing that the worker is a member of the worker organization for purposes of workplace collective bargaining.

Designation of representatives for the sectoral bargaining panels

Once a sectoral bargaining panel is established by the Secretary of Labor, the statute would need to provide a process through which workers and employers designate their representatives for the purpose of sectoral bargaining. Although some systems deploy a "most representative union" and "most representative employer association" approach—a kind of winner-take-all approach—we recommend a system based on proportional representation. Thus, the Secretary would recognize a sectoral workers' bargaining council and a sectoral employers' bargaining council. On the worker side, any worker organization that meets the statutory threshold of 5,000 members or 10 percent of the sector (again, whichever is lower), would be entitled to its proportional share of seats and votes on the council. Consider, for example, if there are 100,000 workers in a sector: If Worker Organization 1 represents 15,000 workers, Worker Organization 2 represents 10,000 workers, and Worker Organization 3 represents 5,000 workers, then a workers' bargaining council of Worker Organization 1, Worker Organization 2, and Worker Organization 3 would be created. Worker Organization 1 would have 50 percent of the seats and votes (15/30), Worker Organization 2 would have 33 percent of the seats and votes (10/30), and Worker Organization 3 would have 17 percent of the seats and votes (5/30). Proportional representation would continue even in the event that one union represented a majority in the sector.

Acceptance of any sectoral agreement would require 50 percent +1 vote of the workers' bargaining council. Ratification of sectoral agreements by the members themselves should also be required, and it should be assessed through a democratic process.

Representation on the employer side would operate according to similar principles. Any employer or employers' association in the sector that represents employers with 5,000 workers in the sector or 10 percent of the workers in the sector, whichever is lower, would be entitled to proportional representation on the employers' bargaining council. Acceptance of any sectoral agreement would require 50 percent +1 votes of the employers' bargaining council.

The statute must also ensure that the process of bargaining is inclusive of the broadest possible range of worker voices. This goal can be furthered by ensuring that all workers have the ability to provide input to their representatives and to attend meetings regarding bargaining demands. This, in turn, requires that provision be made for education and training regarding the bargaining process to workers who wish to receive it. Additionally, paid time off from work should be provided to workers who wish to receive such training and to attend meetings regarding bargaining. Moreover, bargaining council representatives must be obligated to act on behalf of the workers in the sector as a whole and not just on behalf of already represented members.

Scope of bargaining and impasse

The statute must establish not only who bargains but also what subjects must be bargained at the sectoral level. Here, some variation is called for depending on the level of union density in the sector. The basic principle is that the scope of bargaining should be broader and more comprehensive in higher-density sectors than it is in lower-density sectors. This implies that the statute must define sectors according to density levels. Low-density sectors would include those that meet the minimum threshold (of 5,000 workers or 10 percent of the sector) and would range up to some higher threshold. We recommend that labor economists, worker organizations, and other stakeholders be engaged in a process to determine what this higher threshold ought to be. Wherever it is set—at, for example, 20 or 30 percent union density—this threshold would trigger an expanded scope of bargaining.

In lower-density sectors, bargaining at the sectoral level would establish minimum workplace standards for wages, benefits, scheduling (including flexible working arrangements), leave time, and workplace health and safety. The sectoral bargaining panels in low-density sectors would also be required to address gender and racial equity—including, but not limited to, pay equity. In higher-density sectors, bargaining could address a broader range of subjects and could potentially reach the full range of mandatory subjects defined below, including a more comprehensive system of wage scales, benefits, and other terms and

conditions of employment, as well as provisions for grappling with climate change. As in lower-density sectors, high-density sectoral bargaining would be required to address gender and racial equity.[95]

In both low- and high-density sectors, the question of regional variation must also be addressed: Should regional variations with respect to the subjects determined by sectoral bargaining be required, permitted, or prohibited? Should, for example, minimum wage rates be uniform across the country or should they be regional? If regional, by state, city, or market? In low-density sectors, the first question should likely be resolved by the statute itself. Here, one promising possibility would be to permit regional variation only to the extent that the Secretary of Labor determines that such a variation will not lead to capital flight from one region to another. In higher-density sectors, the statute should likely leave resolution of the regional variation question to the parties themselves (i.e., the question of variation of sectoral standards should itself be subject to the sectoral bargaining obligation).

Related to the question of bargaining scope is the issue of impasse: What happens if the parties at a sectoral bargaining panel are unable to reach agreement? During the bargaining for a first sectoral agreement, workers should have the right to strike across the sector, consistent with the protections for strike activity laid out below. In addition, if impasse is reached during the bargaining of a first agreement, either party can trigger mediation. If mediation is not successful, the workers' bargaining council can request that the dispute be submitted to final and binding interest arbitration before a tripartite panel of arbitrators, which would be selected pursuant to the procedures discussed in the bargaining section below. Any agreement that emerges from the interest arbitration process would be subject to the same type of review by the Secretary of Labor that ordinary sectoral agreements would require. Thus, for example, the Secretary would need to ensure that the arbitrator's recommended resolution advances gender and racial equity; improves the standard of living for a majority of workers in the sector; and provides all workers in the sector with a living wage, an adequate amount of paid sick, family, and vacation time, access to a secure retirement program, and a safe, secure, and healthy workplace.

If the parties on a sectoral bargaining panel cannot conclude a second or subsequent sectoral agreement, the previously negotiated sectoral agreement would continue in effect until a new agreement is reached. This is the approach used in Argentina, and it has proven effective.[96] If impasse on a second or subsequent agreements occurs, workers also would have the right to strike across the sector and would enjoy the protections for strike activity laid out in Section 3D.

Prevailing wage option

As discussed above, density for sectoral bargaining purposes would be assessed based on membership levels of worker organizations in each sector. If in any sector, however, a set percentage of the sector's workers are covered by workplace collective bargaining agreements, that sector would be eligible for a prevailing wage option. Under this option, the law would require that the Department of Labor set basic economic terms for the sector—including, but not limited to, wages and benefits—based on the terms

contained in the workplace collective bargaining agreements in the sector. The model for this option is existing prevailing wage laws, such as Davis-Bacon[97] and the Service Contract Act,[98] but the new statute would mark an expansion of these laws in several ways. First, the prevailing conditions would be generally applicable to all work in the sector and not be limited to conditions on public works or other publicly funded projects. Second, the new law would cover basic economic terms and not just wages.

Invocation of the prevailing wage option would be at the discretion of the worker organizations who are party to the workplace collective bargaining agreements in the sector. A majority of those worker organizations would be sufficient to invoke the option. (For example, if the option requires that 20 percent of the sector be covered by collective bargaining agreements, worker organizations with collective bargaining agreements covering 10 percent +1 of the sector could invoke the option.) In sectors where the prevailing wage option is invoked, a sectoral bargaining panel could still be constituted. That panel would have jurisdiction to bargain all subjects not covered by the prevailing wage order.

Determining the appropriate level of collective bargaining coverage necessary to trigger the prevailing wage option will require further work, and it should involve labor economists, worker organizations, employers, and other stakeholders. Moreover, the provisions for the prevailing wage option—similar to the provisions for sectoral bargaining more broadly—must be designed to comply with the non-delegation doctrine by stating an intelligible principle, cabining the discretion of the executive officials involved, making clear that the executive is playing an implementation and enforcement role, and ensuring that the executive—not a private party—makes the ultimate decision about whether the prevailing economic terms fulfill the mandate of the statute.

Interaction between sectoral bargaining and workplace bargaining

As described above, we recommend a robust system of workplace collective bargaining backed by significant protections for worker organizing and involvement at the workplace level. This means that the statute must resolve the question of the relationship between sectoral bargaining agreements and agreements reached between worker organizations and firms within those sectors. We are guided in this recommendation by the extensive experience of multiple countries where sectoral bargaining and workplace bargaining exist together. Here, the basic principle guiding the statute should be that, with respect to the topics that they cover, sectoral agreements set floors above which workplace agreements may go but below which workplace agreements may not fall. This principle would apply equally in low- and high-density sectors. For example, if a sectoral agreement established that wage rates for a given occupation in the sector must be at least $25 per hour, a workplace agreement covering a firm in that sector could specify that wages should equal $25 per hour or exceed $25 per hour, but it could not specify that wages should fall below $25 per hour (irrespective of what may have been bargained in exchange for that lower wage rate). Similarly, if a sectoral agreement provides that workers must receive seven days of paid vacation time per year, a workplace agreement in the sector could specify a minimum of seven or more days of paid vacation time but not less than seven paid days.

Several other points bear brief elaboration. In low-density sectors, many aspects of the working relationship would likely not be addressed by the sectoral bargaining agreement. Even in high-density sectors where the scope of bargaining subjects would be broader, sectoral agreements would be silent on many subjects that workers would care about at the local level. Where a sectoral bargaining agreement is silent on an issue—even if that issue is subject to the sectoral bargaining obligation—workplace agreements may resolve the issue in whatever manner makes sense to the parties to the workplace agreement, consistent with any relevant law. Relatedly, the statute should make clear that state and local governments remain free to set workplace standards that are higher than those contained in sectoral bargaining agreements.

3C. Fortify Organizing Rights

Recommendations:

- Require employers to have a good cause for firing workers in order to better protect workers from retaliation for exercising their rights;
- Allow union organizers access to workplaces and email systems upon showing of 25 percent support;
- Greatly increase employer penalties for intervening in organizing campaigns, including

making punitive damages available;

- Ban employers from forcing workers to listen to anti-union speeches;
- Give workers the right to bargain when employers interfere with the fairness of organizing efforts;
- Allow demonstrations of support for worker organizations based on cards or petitions, either physical or digital; and
- Allow workers digital access to each other through access to email systems and creation of digital meeting spaces.

Although the new statute would call for a fundamental expansion of the ways that workers can exercise collective power, the new system—like any such system—will depend on workers' ability to *organize*. Given the profound failures of the current law's protection for worker organizing activity, the new statute must provide far more robust insulation for worker organizing. In particular, the new statute must set out: (1) just-cause protection for all workers, (2) new rules for union organizers that facilitate contact between organizers and workers, (3) new rules for employer conduct that minimize employer interference with workers' organizational activity, and (4) new ways for workers to voice their support for collective representation so that their choices can be expressed freely and easily.

JUST-CAUSE PROTECTION FROM RETALIATION

The first—and in many respects, most powerful—way to protect worker organizing is to end the at-will rule of employment and adopt just-cause protections for all workers. As we will explain immediately below, providing such protection will go a long way toward insulating workers' organizing efforts from employer interference.

The first—and in many respects, most powerful—way to protect worker organizing is to end the at-will rule of employment and adopt just-cause protections for all workers...providing such protection will go a long way toward insulating workers' organizing efforts from employer interference.

The default rule regarding employment security in U.S. workplaces is "employment at will." Although it is older than this, the rule is often associated with a case called *Payne v. Western & Atlantic Railroad*. There, the court summed up the rule as follows: "Men [sic] must be left, without interference, to discharge employees at will for good cause or for no cause, or even for bad cause, without thereby being guilty of an unlawful act."[99] Of course, a host of laws proscribe specific reasons for firing. Most relevant, the NLRA makes it illegal to fire employees for engaging in union organizing activity.[100] Formally, then, the at-will rule grants employers the right to fire an employee for any reason other than a reason proscribed by law.

Although the NLRA makes it unlawful to fire workers for concerted action, the at-will rule nonetheless has a profoundly corrosive effect on workers' ability to engage in organizing activity protected by law. This is true for two sets of reasons. First, and most basically, at-will employment contributes to a massive power disparity between employees and employers. When employees know that they can be discharged at will—for nearly any reason at all—they rightly come to fear displeasing their employer. Indeed, in an at-will regime, workers learn that displeasing their employer can mean the end of their ability to support themselves and their families. The consequences of this dynamic should not be underestimated. It helps explain, for example, why workers too often acquiesce to abusive work environments, including those that are defined by harassment. It explains a lot about why workers—and women workers, in particular—hesitate to ask for better wages and working conditions. And, of course, it helps explains why workers are afraid to organize unions. Jay Feinman thus concludes, in recognition of this dynamic, that employment at will is "the ultimate guarantor of the [employer's] authority over the worker."[101]

More particularly, the at-will rule of employment operates to undermine the effectiveness of the NLRA's statutory prohibition on firing workers who engage in concerted activity. Although the statute explicitly bans such firings, the at-will rule makes it far too easy for employers to come up with pretextual reasons to discharge workers. Take, for example, a worker who is soliciting membership cards in an organizing campaign—activity clearly protected by the NLRA. The employer may not fire the worker for soliciting cards, but, under the at-will rule, the employer may fire the worker for nearly any other reason. Thus, the at-will rule enables the employer to rely upon—or manufacture—a huge range of other explanations for the discharge, including that the employee was late too often, that the employee had a bad attitude at work, or that the employee did not dress appropriately for work. To be sure, such an employer—if faced with an allegation that she fired the worker for engaging in union activity—would have to prove that its asserted explanation was not pretextual. However, the at-will rules give the employer great latitude to put forward a wide range of ostensibly non-pretextual reasons for the discharge: Indeed, the range of ostensibly non-pretextual reasons for discharge in an at-will world includes any reason for discharge other than a reason explicitly prohibited by law. Thus, workers and unions are forced to expend great resources litigating whether a proffered justification was pretextual or not.

Replacing at-will employment with a just-cause dismissal rule would help correct both of these problems. If employers are required to show a good cause in order to justify a discharge, employees would know that simply displeasing the employer cannot result in job loss. They would know that the employer has to have a good-faith, objective, and job-related reason for firing them. Thus, this protection can help rebalance the power dynamic in the employment relationship and thereby empower employees to oppose discriminatory workplace practices and to engage in concerted activities. Moreover, under a just-cause regime, the anti-retaliation guarantees of statutes like the NLRA are likely to be more effective. This is true because employers would be less likely able to rely upon—or

manufacture—ostensibly non-pretextual reasons for discharge. Put simply, it is much more difficult for an employer to justify a discriminatory discharge in a just-cause regime than it is in an at-will regime.

> ***"Workers who are not worried each day about their job security are more likely to be productive and creative contributors at work. They are more likely to have the motivation and the capacity to respond nimbly and creatively to necessary changes in the work environment."***

Moreover, moving from an at-will to a just-cause employment regime is likely to have significant economic benefits—for workers and for firms. Research on high-commitment management practices, for example, reveals that higher levels of employment security are associated with greater organizational performance.[102] This should not be surprising. Workers who are not worried each day about their job security are more likely to be productive and creative contributors at work. They are more likely to have the motivation and the capacity to respond nimbly and creatively to necessary changes in the work environment. Even more basically, workers with greater job security are likely to be *happier*. And labor economists find a strong link between worker happiness and productivity.[103]

Accordingly, we recommend a statutory requirement that employers must demonstrate just cause in order to discharge a non-probationary employee. The new statute should set out both substantive and procedural standards related to the new rule. In developing these standards, drafters of the new statute should learn from the extensive experience with just-cause policies that is reflected in collective bargaining agreements. For example, Roger Abrams and Dennis Nolan offer a synthesis of some of the principles contained in collectively bargained just-cause clauses:[104]

A. Just cause for discipline exists only when an employee has failed to meet his obligations under the fundamental understanding of the employment relationship. The employee's general obligation is to provide satisfactory work. Satisfactory work has four components:

    1. Regular attendance.
    2. [Adherence] to reasonable work rules.
    3. A reasonable quality and quantity of work.
    4. Avoidance of conduct, either at or away from work, which would interfere with the employer's ability to carry on the business effectively.

B. For there to be just cause, the discipline must further one or more of management's three legitimate interests:

1. Rehabilitation of a potentially satisfactory employee.
2. Deterrence of similar conduct, either by the disciplined employee or by other employees.
3. Protection of the employer's ability to operate the business successfully.

C. The concept of just cause includes certain employee protections that reflect the union's interest in guaranteeing "fairness" in disciplinary situations.

1. The employee is entitled to industrial due process. This includes:
   a. Actual or constructive notice of expected standards of conduct and penalties for wrongful conduct;
   b. A decision based on facts, determined after an investigation that provides the employee an opportunity to state his case, with union assistance if he desires it;
   c. The imposition of discipline in gradually increasing degrees, except in cases involving the most extreme breaches of the fundamental understanding. In particular, discharge may be imposed only when less severe penalties will not protect legitimate management interests, for one of the following reasons: (1) the employee's past record shows that the unsatisfactory conduct will continue, (2) the most stringent form of discipline is needed to protect the system of work rules, or (3) continued employment would inevitably interfere with the successful operation of the business; and
   d. Proof by management that just cause exists.
2. The employee is entitled to industrial equal protection, which requires like treatment of like cases.
3. The employee is entitled to individualized treatment. Distinctive facts in the employee's record or regarding the reason for discipline must be given appropriate weight.

Drafters might also take note of (although not necessarily adopt) Montana law—the one state in the nation that does not have an at-will regime. Under Montana law, an employer's decision to discharge an employee is unlawful where "the discharge was not for good cause and the employee had completed

the employer's probationary period of employment."[105] The law goes on to define "good cause" as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason."[106]

ORGANIZER ACCESS

As the Supreme Court has long recognized, the process of organizing a union often involves workers learning "the advantages of self-organization from others."[107] Especially in low-density sectors and at a historical moment where the vast majority of workers have never had personal experience with a union, the successful formation of worker organizations will depend on the active participation of organizers. Current rules, however, fail to enable organizers to access workers for the purpose of discussing organization.[108] Accordingly, the new statute must provide union organizers with expanded access rights to workers. Critically, these rights must include the ability to meet with workers at work. The workplace provides a unique, central location for organizers to meet with and discuss organization with workers—and thus helps organizers overcome what otherwise amounts to a significant coordination problem. Requiring access to the workplace also addresses a long-standing symbolic problem inherent in the current law: If organizers are *excluded* from the workplace, this contributes to the sense that worker organizations are "outsiders" to the work relationship; bringing organizers into the workplace has the opposite symbolic effect, contributing to the understanding that worker organizations are an integral part of the work world.

Much of what must be done to ensure access has been detailed above in the discussion of workplace representation. Again, worker organizations must have access to the names and contact information of all workers in a workplace. Without knowing who the workers are, it would be impossible for worker organizations to contact them for the purpose of discussing organization. Next, worker organizations must have the right to access workers on company property. Thus, when support for an organization reaches 25 percent, the organization would have the right to access non-work areas of the workplace for the purpose of meeting with employees to discuss union matters, including further organizing plans.[109]

EMPLOYER CONDUCT

As is well documented, employers routinely engage in coercive acts meant to discourage employees from building collective power and exercising collective voice.

The limitations on organizer access contained in current law have been matched by an equally pernicious *lack* of regulation of employer conduct that is aimed at interfering with employees' organizational activity. As is well documented, employers routinely engage in coercive acts meant to discourage employees from building collective power and exercising collective voice.[110] To address this problem and better facilitate worker organizing, the new statute should follow the lead of the PRO Act and ban so-called captive audience meetings.[111] This part of the new law would prohibit

employers from requiring workers to attend meetings at which the employer attempts to persuade the workers not to engage in organizational activity. Moreover, the prohibition would extend across all types of organizational activity encompassed by the new law. For example, employers could not require employees to hear anti-works council messages, anti-workplace organizing messages, or anti-sectoral bargaining messages. The prohibition would also apply to group meetings and to one-on-one meetings between workers and supervisors. An employer would not be permitted, in any case, to require a worker to listen to an anti-organizational message.[112]

In addition to their efforts to discourage *genuine* forms of worker organizing, employers also interfere with employee efforts to build collective power by encouraging *sham* forms of organization. Historically, these efforts found their home in the development of company unions: employee organizations that were supported and dominated by employers and which often served employer rather than worker interests.[113] Because it makes multiple forms of worker representation available to workers, the new statute would have to police against multiple forms of employer interference and domination. Indeed, the requirement of majority support serves as a structural—if not a foolproof—safeguard against employer domination. Because multiple forms of worker representation in the new system would not require majority support, the law would need to do even more to protect against employer interference. For example, with respect to works councils, employers would be prohibited from nominating members and from interfering in the selection process. Employers would also be strictly barred from supporting the creation or development of workplace representative organizations—both exclusive and non-exclusive—and sectoral bargaining representatives, and they would be subject to meaningful penalties—including civil penalties—should they do so.

It is also the case that employers discourage collective worker activity in ways that are already prohibited by law.[114] For example, workers who take a lead role in union organizing campaigns are often fired for doing so.[115] And employers facing a union campaign frequently threaten to close all or part of the business if the workers choose to unionize.[116] The problem here is not that we lack appropriate prohibitions—all of this conduct is illegal—but the problem is that the remedies for violating these prohibitions are so weak that employers often find it economically rational to violate the law.[117]

As such, the new labor law must significantly increase penalties when employers violate workers' rights to engage in collective activity, as proposed in the PRO Act. For example, consistent with the provisions of the PRO Act, if an employee is discharged or suffers other serious economic harm in violation of the substantive rights provided by the new labor law, the new statute should require the NLRB to award the employee backpay (without any reduction for interim earnings) and an additional award of double that amount as liquidated damages.[118] In such cases, the employer also should be subject to a civil penalty not to exceed $50,000, unless the NLRB determines that the employer is a repeat violator, in which case the penalty may be larger. Additionally, the NLRB would be empowered to order reinstatement or to seek temporary injunctive relief from a court whenever there is reasonable

cause to believe that a worker has been unlawfully terminated for engaging in activity protected by the law. Given the importance of deterring employer interference with the multiple forms of worker representation made available in the new law, punitive damages would be available in cases involving employer support, interference, and domination of worker organization—whether at the workplace or sectoral level.[119]

Where the employer's illegal actions interfere with workers' ability to freely choose to be represented by an exclusive bargaining agent, the NLRB should require the employer to bargain with that worker organization as the workers' exclusive agent if, prior to the employer's interference, the organization enjoyed support from a majority of the workplace or bargaining unit, or in cases where the employer's misconduct prevented the union from ever enjoying majority support. And, as discussed in greater detail below and consistent with the PRO Act, a private right of action should be made available to workers seeking to enforce their rights under the statute in any case that the NLRB does not act to vindicate those rights. Finally, all these remedial tools should be available irrespective of a worker's immigration status.[120]

MECHANISMS OF CHOICE

> ***"Under the new statute, workers would be able to choose the mechanism that best enables them to express their choices of collective representation."***

The current law also impedes workers' ability to build collective power by requiring workers to register their desire to unionize through the cumbersome machinery of the NLRB election process—a process that has been manipulated by employers into a tool for delay.[121] And delay, in turn, has been used as an opportunity to undermine worker organizing efforts.[122] Under the new statute, workers would be able to choose the mechanism that best enables them to express their choices of collective representation. With respect to workplace-level representation—whether for non-exclusive or exclusive bargaining representatives—workers can express their desire for representation by signing a card or petition that states their wish to be represented. As noted above, cards or petitions can be physical or they can be digital and signed online; the only requirement is that the card or petition provides a clear statement that the worker wishes to be represented by the worker organization in question.

An employer would have standing to challenge the validity of cards or petitions in an NLRB proceeding but must have a good-faith basis for any such challenge, which ordinarily would be limited to an allegation of forgery (or its electronic equivalent). Moreover, cards or petitions would be presumed valid and would trigger bargaining obligations until they are actually declared invalid by the NLRB. Any challenges to the validity of the cards or petitions must be resolved expeditiously by the NLRB. Should a worker organization wish to determine worker support through an election, that worker organization would have the right to petition the NLRB for an election. Such elections would take

place within five to seven days of the petition and would be held at offsite and neutral locations (e.g., a public school) with internet and phone voting made available upon the request of the worker organization. Workers would receive paid time off to vote.

With respect to sectoral bargaining representatives, workers would have a right to signal their affiliation with and support for the worker organization of their choice by signing a membership card or petition, either physical or digital. Workers who are represented for workplace bargaining—whether by an exclusive or non-exclusive representative—would be presumed to support that same worker organization for sectoral bargaining purposes. However, if the workplace organization does not meet the threshold for inclusion in a sectoral bargaining panel (i.e., has fewer than 5000 members), the workers would maintain the right to affiliate with a different worker organization for sectoral bargaining purposes. Employers' associations that are members of sectoral bargaining panels, along with worker organization members of such panels, would have the right to challenge the validity of membership cards or petitions signed for sectoral bargaining purposes in their sectors, subject to the same limitations discussed above.

DIGITAL ACCESS

With more and more workers not sharing a physical workspace with their coworkers, a right to physical access to the workplace is insufficient to meet the modern challenges to engaging in meaningful union organizing. Instead, any effective reforms must provide both physical and digital access to the collective. Under current law, however, such access is far from assured. The NLRB has oscillated about whether employees can use their work-issued email addresses and computers to discuss working conditions and engage in concerted activity.[123] The ban, or even the uncertainty about access, deprives workers of an important means of engaging in collective activity in the workplace.

> ***We recommend that the new labor law protect workers' access to use the full panoply of employer technology—Slack, Google docs, online chat, or other means—to be in contact with coworkers during non-working time.***

We recommend that the new labor law protect workers' access to use the full panoply of employer technology—Slack, Google Docs, online chat, or other means—to be in contact with coworkers during non-working time. The value of this intervention is illustrated by the Google strike,

which was organized almost entirely using Google's own technology.[124] Any employer resource that employees routinely use in the course of their work, and for which there are no more than de minimis costs associated with increased usage, should be available to employees.

We note that these recommendations about the use of employers' technology for workers' communications rely on access to an employer-provided email address. However, most low-wage workers do not have an employer-provided email address, and some do not have an email address at all.[125] To the extent that these workers communicate mainly by private cell phone,[126] one solution might be for employers to turn over these phone numbers, if they have them.

In addition to the access rights outlined above, we recommend that labor law require employers to facilitate workers' communication by providing workers (and/or worker organizations) with a way to contact their coworkers. This obligation could run either to everyone in the organization, a default that many companies currently use (e.g., because their internal email address books include everyone in the organization); to all of the workers in an organization who are covered by labor law; or to subsets of workers who do similar jobs.

This requirement could be as straightforward as requiring employers to provide workers with a list of company email addresses or other contact information. Notably, a communications-facilitation requirement could be more effective if workers had a private forum for online communication—essentially, a digital meeting space. Such a digital meeting space could be created by calling on employers to load employee email addresses into a forum maintained by employees' union representative or another worker organization. The use of a third-party facilitator is important because the union or worker organization could then monitor communications on the forum to watch for online harassment and also offer technical assistance with organizing.

In making the recommendation to establish digital meeting spaces, we acknowledge that it has proven difficult to protect these kinds of online forums from ugly and harassing behavior, including behavior that targets groups based on race, sex, national origin, religion, sexual orientation, or gender identity. Thus, we recommend consideration of allowing sub-groups or affinity groups of workers the ability to set up their own private sub-forums. In addition, the creation of these digital meeting spaces would create an obligation for unions and worker organizations to recruit and train forum moderators who do not have other supervisory authority over the workers in order to ensure that digital meeting space discussions are respectful.

Finally, we recommend that the new labor law impose limits on employers' surveillance of and interference with ad-hoc and informal online forums and spaces, whether or not they are maintained by the employer. Self-organized and maintained by workers, these spaces are important convening points for workers in addition to whatever private forums employers or unions provide for workers.

3D. Reimagine Collective Action Rights

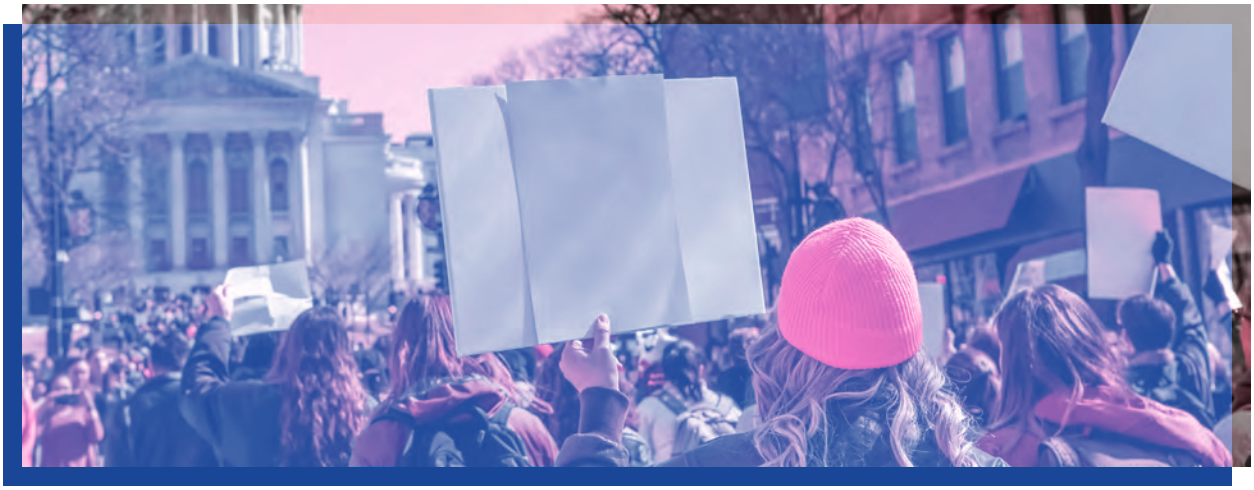
Recommendations:

- Allow workers to strategically choose whom to strike based on which companies have power over their working conditions, not who signs their paychecks;
- Allow workers to choose what kind of strikes that they think are best, including short-term or partial strikes;
- Require employers to disclose strategic business relationships;
- Ban employers from permanently replacing workers who go out on strike;
- Create more support for strikers, including establishing tax-deductible status for strike funds and extending unemployment insurance for strikers;
- Require employers to create digital meeting spaces; and
- Create digital picket lines.

> ***"Our vision is that the law should protect workers' collective advocacy for both workplace and broader social change, free from employer interference and through means that are effective and accessible."***

To make a new labor law successful, we also need to reimagine legal protection for a broader range of workers' collective actions. In this section, we focus on the law's relationship to workers' freedom to fight for change in their workplaces and beyond. Our vision is that the law should protect workers' collective advocacy for both workplace and broader social change, free from employer interference and through means that are effective and accessible. We focus on three areas for reform:

- Provide a meaningful right to strike, walk out, picket and boycott;
- Facilitate collective action in the workplace; and
- Create online analogues to in-real-life collective action.



PROVIDE A MEANINGFUL RIGHT TO STRIKE, WALK OUT, PICKET, AND BOYCOTT

The reforms described throughout this report would create a new process to bring employers and workers to the bargaining table. The dynamics at the bargaining table, however, are greatly influenced by the parties' ability to deploy "economic weapons" in support of their bargaining demands. Workers' ability to deploy effectively their most important economic weapons—strikes, walk outs, pickets, and boycotts—is critical to creating a system that produces not just a seat at the table but also the ability to influence the outcome of what happens at the table.

First and foremost, workers should be protected when they engage in collective action to advance any issue that is covered by the new definition of mandatory subjects of bargaining, as discussed in the next section. There are three elements to creating an effective right to strike, walk out, picket, and boycott: (1) being able to deploy those tools in a strategic manner, (2) being free from employer retaliation when doing so, and (3) having the financial wherewithal to support the deployment of those tools. Our recommended reforms address these three elements.

Enable workers to exercise the right to strike and picket strategically

Workers increasingly find that their working conditions are determined by an entity other than the one that signs their paychecks.[127] As businesses fissure, for example, large enterprises can contract with smaller ones to take over parts of their operations; the former controls the day-to-day working environment and exerts downward pressure on labor costs. Subcontracting, franchising, and supply-chain relationships all contain the potential for an entity other than the technical employer to have substantial control over working conditions. Moreover, the financialization of corporations—even those outside of the financial services industry—leads to providers of capital having direct and pervasive control over corporate policies, including policies that determine labor practices.

Companies adopt these contractual relationships, in part, to shed statutory employees and thus employer liability, while using their contracts and market power to retain significant influence over the contractor's conduct. Such companies replace in-house employees with multiple contractors, forming an interconnected network of contracts. Contracting relationships take on many forms, but common ones include: franchisor/franchisee; wholly owned supply chains split into separate companies focusing on design, production, distribution, retail, etc.; hub-and-spoke arrangements (e.g., a building owner that once employed cleaners, gardeners, and security now outsources these tasks); temp agencies; and independent contractor business models.

The same logic applies to parent companies that insulate themselves from employer liability by shunting operations into subsidiaries that the parent claims act independently. Likewise, private equity companies make their money through management fees but attach conditions to their investments that control how the companies in which they invest conduct their business. The private equity firms, however, insulate themselves from their companies' liabilities through a network of subsidiary limited liability companies (LLCs).[128] And monopsonistic buyers, such as Walmart, dictate prices, forcing suppliers to weaken working conditions.

Whatever the contractual arrangement, the result is that entities other than the nominal employer can exercise effective control over employees' working conditions and weaken workers' leverage. For example, employees must share the value they create not only with their nominal employer but also with the contracting party, which extracts cost savings through its contract. Moreover, a contractor may have less flexibility to improve its employees' working conditions because it does not control fundamental aspects of the work, often including the physical space where work is performed.

Even when workers' nominal employer is also the entity that exercises effective control over working conditions, workers who work for different employers will often want to act in solidarity with each other. At a minimum, this means refusing to cross each other's picket lines, but it can also mean engaging in sympathy strikes and picketing. However, this solidaristic activity can be impeded both by existing labor law[129] and by the possibility that webs of contractual relationships will obscure (at least in the minds of the public, if not the workers themselves) who ought to be treated as responsible for improving wages and working conditions.

Far from protecting these activities, the NLRA prohibits unions from picketing non-employer entities ("secondaries") in many circumstances, from inducing or encouraging secondary strikes and from demanding that companies deal only with union goods and services. Workers who engage in secondary activities also risk being fired.[130] And the hot-cargo prohibition in the NLRA prohibits unions from negotiating or agreeing with employers to buy, contract, or source with only unionized goods, services, or companies.[131]

The new labor law should protect and facilitate collective action that is effective—that is, workers should be able to choose, as the object of their collective action, the entity that they believe has the power to set the terms and conditions of their employment.

The new labor law should protect and facilitate collective action that is effective—that is, workers should be able to choose, as the object of their collective action, the entity that they believe has the power to set the terms and conditions of their employment. It should also protect and facilitate worker solidarity and mutual aid. Therefore, labor law should include:

Affirmative protection for employees who engage in collective action, such as strikes or picketing, regardless of their choice of focus

We recommend that the new labor law protect workers' concerted activity whether it is directed at the nominal employer, at an entity in a contractual relationship with that employer, or at a completely separate entity.[132] This protection should include anti-retaliation provisions that prevent employers from firing—or, as is discussed in greater detail below, replacing—workers who strike or picket, regardless of the object of the workers' collective action.

Disclosure requirements

Sometimes it will be obvious which entities are exercising effective control over workers, but this will not always be true. For workers to exercise their rights to strike and picket effectively, they need access to the types of information that enable them to make informed decisions about strategic objects of collective action. Ideally, this information would be available in an accessible location and format, such as the DOL's website, and would be updated on a routine schedule. This information would include:

- **Outsourcing agreements:** At minimum, a secondary employer that claims to lack control of the primary employer must immediately and affirmatively produce its agreements with the primary, in addition to relevant correspondence between the two entities, and any other

documents related to piercing the corporate veil. Such affirmative disclosure would expedite the proceedings and force companies to think carefully before claiming independence. Such a requirement would also be helpful whenever joint employer issues come into play.

- **Subsidiaries:** Currently, the Securities and Exchange Commission (SEC) requires publicly reporting companies to file an annual list of "significant" subsidiaries. Labor law should strengthen these rules to require companies to disclose all subsidiaries and provide greater detail on their operations, including how they fit within the corporate structure.[134]

- **Contracts:** Currently, the SEC requires publicly reporting companies to publicly list and file material contracts. However, the test for materiality is narrow and generally excludes contracts made in the ordinary course of business. Labor law should force companies to disclose all supplier and customer contracts. Likewise, the SEC should narrow its rules on confidentiality protections so that more material contracts become public. Again, these rules should also apply to privately held corporations involving multiple investors.

- **Financing:** Labor law should require companies to disclose the identity of their largest sources of capital, including major shareholders, private equity investors, banks, and other investors.

The ability for workers to direct their collective action at the effective employer or to act in solidarity with employees who work for different employers is a mechanism for preventing and addressing systemic forms of oppression. The most vulnerable workers are likely to work in fissured workplaces, and the prospect of losing labor law's protection if they strike or picket the "wrong" employer or carry out their picket in the "wrong" way is likely to chill worker protest. Further, solidarity strikes were—and could again become—powerful and effective tactics to ratchet up employees' leverage. For example, an employer is likely to seek to settle a labor dispute if truck drivers have stopped making deliveries to protest employee mistreatment.[135]

Although some of the information discussed above is already publicly available, requiring disclosure in a user-friendly format with the Secretary of Labor has important equity implications. Workers should not have to hire lawyers or accountants to search multiple government or corporate websites or databases in order to find the information that they need to exercise their rights effectively. If they do need professional assistance to find this information, only higher-income workers or those who belong to well-resourced worker organizations will benefit. As discussed throughout this report, women and workers of color predominate in low-wage sectors, which have low rates of union density, and are therefore the workers most in need of easier and lower-cost access to this kind of information. Access to this information could be made even more supportive of our equity goals by requiring that the information or a summary thereof be provided in multiple languages and in an accessible format.

Ensure that all workers can access the right to strike, regardless of income and access to resources

Protect strikes, regardless of duration or extent

> ***Strikes are the bedrock of labor power.***

Strikes are the bedrock of labor power.[136] The willingness to withhold labor in hopes of preventing the employer from maintaining production is one of the primary means by which workers have obtained better working and living conditions since well before the passage of the NLRA. Although strikes are a species of concerted activity protected by Section 7 of the NLRA,[137] the NLRB and the courts have, over time, created exceptions outlawing particular forms of strikes. Current law outlaws "intermittent strikes" where workers strike repeatedly over the same issue,[138] "partial strikes" where workers refuse to do only a portion of their assigned tasks,[139] and "slowdowns" where workers deliberately perform less work than they usually do.[140]

This has created a situation where the most protected form of a strike is an extended strike, which lasts until either the workers or the employer capitulate. As the employer has the ability to replace workers during the strike,[141] the workers are usually the first to call it quits. And although current law protects some short-term work stoppages, the case law in this area is unclear and inconsistent.

We recommend that the new labor law affirmatively protect intermittent strikes, partial strikes, and slowdowns in order to significantly enhance the effectiveness of work stoppages. Short-term and/or partial work stoppages carry less risk for workers because it is difficult for an employer to replace workers; they also reduce the economic impact of striking on workers and their families. Allowing this type of strike also helps to balance the economic weapons available to labor and management, which arguably encourages each side to resolve their differences.[142] Moreover, affirmative protection for strikes, regardless of their duration or frequency, removes a source of legal uncertainty about whether a work stoppage will eventually be deemed unprotected, which can exert a chilling effect on workers' willingness to engage in collective action.

> ***"Ensuring that workers are protected from employer retaliation when they engage in less financially risky forms of collective action should benefit relatively vulnerable workers who are predominately women and workers of color."***

Ensuring that workers are protected from employer retaliation when they engage in less financially risky forms of collective action should benefit relatively vulnerable workers who are predominately women and workers of color. Workers who are difficult to replace because of their specialized skills and who can rely on savings are in the best position to engage in a long-term strike, but workers who lack either of these benefits can be at greater risk of exploitation.

Ban permanent striker replacements

One of the most important reasons strikes in the U.S. are not effective is the employer's ability to permanently replace workers and continue business as usual during a strike. The possibility of permanent replacement greatly raises the stakes for workers in deciding whether or not to go out on strike; workers effectively have to face the possibility of not only losing their paychecks but also their jobs or even careers. Employers can also make effective rhetorical use of their right to hire replacement workers during union drives by telling workers that if they go out on strike, they can be permanently replaced.

We recommend that the new labor law ban employers from hiring permanent replacements for their workers who go out on strike.

We recommend that the new labor law ban employers from hiring permanent replacements for their workers who go out on strike. In the event that only some employees within a workplace decide to go on strike (e.g., in a minority union situation, or a strike by a group of non-union workers), it would be important to clarify that other employees cannot be compelled to pick up the slack. Our proposal that slowdowns and partial strikes qualify as concerted activity to which anti-retaliation protections attach should encompass an individual worker's refusal to perform what is essentially internal struck work.

Adoption of this recommendation would benefit workers who can be replaced relatively easily because there is an available labor pool with the relevant skills. It would also benefit workers who *believe* that they can be replaced relatively easily, whether or not that belief is actually correct because those workers would be less likely to strike in the first place. As workers with more generalized skills are likely to be more vulnerable for other reasons as well, we think that this recommendation would benefit workers who belong to systemically oppressed groups.

Accordingly, we support the provisions of the PRO Act that would make it an unfair labor practice for an employer to permanently replace an employee participating in a strike or to discriminate against an employee who is working or has unconditionally offered to return to work for the employer because the employee supported or participated in a strike.[144]

Expand access to financial support during a strike

One barrier to workers striking for any appreciable period of time is the loss of income that accompanies a strike. In contemporary America, most households do not have sufficient savings to withstand a period without their regular income. One in four Americans has no emergency savings, and about half of all Americans have zero to three months' expenses in savings.[145] In contrast, most businesses could withstand a temporary labor stoppage or slow down and have access to bank loans, diversified revenue streams, or private loans from other companies—avenues that are not available to most workers.[146]

Although most labor unions provide for strike funds, the amounts available do not come close to replacing striking workers' lost income. In the case of strikes by unorganized groups of workers, there may be no entity willing to pay strike benefits. And although a few states pay unemployment benefits to striking or locked-out workers, rules regarding eligibility vary widely. Even the states that do pay benefits tend to do so only under narrow sets of circumstances.

Tax-deductible strike funds:

To address the need for financial support during a strike, we recommend that the new labor law allow tax-deductible contributions to strike funds maintained by worker organizations, as well as non-union groups or even groups of workers. The Internal Revenue Code should be amended to allow for a deduction for contributions to a strike fund. Qualifying strike funds could be created by filling out a simple form identifying the group with an address or website for making contributions. This way, strike funds could be created either as short-term vehicles to support a particular group of strikers—much like a GoFundMe effort might be organized today—or as more durable "rainy day" strike funds that could be used as needed, with unionized workers encouraged to make regular voluntary contributions.

Regulations should govern how these funds are administered and overseen. At minimum, these regulations should ensure that funds are properly accounted for and then used for their intended purpose. For example, similar to how political campaigns operate, strike funds could be required to designate a treasurer who would be responsible for tracking payments in and out and for filing straightforward reports documenting the funds' contributions and payouts.

To ensure that our proposals make funds available to workers who are least able to sustain a strike financially, it would be important for strike funds to adopt fair and predictable criteria for disbursing money to workers. Because the purpose of a strike fund is to enable workers who are running out of money to keep going, these funds should, as a general rule, prioritize low-wage workers, and workers who have been on strike for longer periods of time. Equity concerns also undergird the importance of "rainy day" strike funds that are not linked to particular strikes, so that strikers whose situations receive less media attention or public sympathy—those for whom a strike-specific fund would be unlikely to attract many donations—can still access financial support. In general, strike funds should not be siloed. For example, regulations should not prevent a strike fund maintained by the Teamsters from being used to support low-wage retail workers who do not belong to a union.

Unemployment insurance benefits:

We also recommend that federal law mandate that all states pay unemployment benefits to striking or locked-out employees at the same rate paid to unemployed workers. The Social Security Act of 1935 ("the Act") directs the states to establish unemployment insurance programs and grants them

broad authority to set rules for eligibility for benefits.[147] State programs only need to meet minimal criteria to obtain federal approval.[148] Interpreting the Act as currently written, the Supreme Court has held that eligibility for striking and locked-out workers is a matter of state law and that payment of unemployment insurance to them is not preempted by the NLRA.[149] However, federal law does prohibit states from disqualifying individuals who refuse to cross a picket line to accept work.[150]

The unemployment insurance laws of all 50 states and D.C. disqualify, to some extent, striking workers.[151] Many state laws do extend limited eligibility to locked-out workers.[152] New York appears to be the only state that currently extends benefits to striking workers regardless of "fault," but only after seven weeks.[153] In Missouri, striking workers are eligible only if the employer is guilty of an unfair labor practice.[154] Rhode Island and Hawai'i previously extended benefits to striking workers but currently do not.[155]

To level the playing field for collective bargaining and restore the right to strike, we recommend that the new labor law extend eligibility for unemployment insurance benefits to any worker affected by a labor dispute, whether by strike or by lockout. Workers should be subject only to the same eligibility requirements as other individuals, as applicable.[156]

Section 303 of the Social Security Act should be amended to uniformly require all states to implement this coverage. This would establish parity among the states and help restore full bargaining power to the greatest number of workers.

ENHANCE WORKERS' ACCESS TO EACH OTHER FOR THE PURPOSE OF ENGAGING IN COLLECTIVE ACTION

Physical access

Workers' ability to engage in collective action at work is constrained, and these constraints include limitations on employees' physical access to their own work sites.[157] We recommend that off-duty employees have a legal right to remain on the employer's premises after their shifts or to return to work to solicit and distribute materials related to organizing, bargaining, and other forms of collective action in a non-work area (most logically, the breakroom or exits). Employees who are allowed on an employer's premises as a matter of course while they are on shift should not lose their access rights once their shift is over. Similarly, workers' access rights should not turn on whether they are actually employed by the entity that owns the worksite; any worker whose job takes them to a given location should have the same right to engage in protected concerted activity. In other words, the touchstone should be whether the employee has routine access to a location in order to do their jobs; if they do, then they should also have presumptive access to non-work areas during their off-work time.

Digital access

As discussed above in Section 3C, it is critical—in an economy where more and more workers do not share a physical workplace—that workers have digital access to each other. Accordingly, we recommend that the digital meeting spaces described above be required in all workplaces, not conditioned on any showing of support for an organizing campaign.

CREATE ONLINE ANALOGUES FOR IN-REAL-LIFE COLLECTIVE ACTION

As commerce moves increasingly to cyberspace, workers lose the ability to interact with the public and with consumers—and thus lose the ability to appeal for public and consumer support. Employers are mostly free to decide if or how to tell their online customers about strikes occurring "in real life." For example, someone who booked a hotel room online during the recent Marriott strikes may not have known about the strike before arriving at the hotel; customers placing orders on Amazon may never know that Amazon warehouse workers across the world had walked off the job, even if those walk outs were taking place at the exact same time that customers were placing their orders.

We recommend that the new labor law create mechanisms for digital picket lines by requiring employers to allow workers to mirror real-life collective action in online transactions.

We recommend that the new labor law create mechanisms for digital picket lines by requiring employers to allow workers to mirror real-life collective action in online transactions. Functioning essentially as a disclosure regime, the digital picket line would require employers to allow workers to inform online customers about strikes occurring at the employer's physical site. For example, when a customer goes to book a hotel room on the Marriott website (or a third-party site, such as Expedia or Booking.com), the company would be required to accede to the union's request to show the customer a pop-up window stating, "There is a strike occurring at this location; do you still want to proceed?" Then, the customer could click yes (an online analog to crossing a picketing line) or no.

3E. Expand Bargaining Rights

Recommendations:

- Expand the range of collective bargaining subjects to include any subjects that are important to workers and over which employers have control, including decisions about the basic direction of the firm and employers' impact on communities and our shared environment;

- Empower workers to bring community groups to the bargaining table; and
- Bar employers from unilaterally imposing contract terms on workers and allow either party to opt for interest arbitration when bargaining is at an impasse.

> ***"Under the Supreme Court's interpretation of the NLRA bargaining mandate, many questions with the greatest and most direct impact on workers' lives are excluded from the employer's obligation to bargain."***

One of the fundamental principles of the *Clean Slate* recommendations is that workers should have the right to exercise collective power in all areas where employer and corporate power meaningfully impact workers' lives. This principle has profound implications for the question of *which subjects* workers ought to have a right to bargain over. In this regard, current law is perverse. Under the Supreme Court's interpretation of the NLRA bargaining mandate, many questions with the greatest and most direct impact on workers' lives are *excluded* from the employer's obligation to bargain.[158] Key questions regarding the scope and direction of the business, about subcontracting and capital substitution, about plant relocations, and about the very continuation of the enterprise are all often left exclusively in the hands of management because they are deemed to be at "the core of entrepreneurial control."[159] So too are other questions of major relevance to workers' lives, including the ethics of their employers' business practices; the impact that their firms have on our shared environment; and the ways in which their employers' decisions impact broader community conditions, such as the availability of affordable housing.

To ensure that workers can bargain over the corporate decisions that impact their lives, Clean Slate recommends three sets of reforms to the collective bargaining obligation: (1) the range of subjects over which employers must bargain with workers must be expanded, (2) workers must be empowered to bring community groups to the collective bargaining table, and (3) we need to change the rules regarding bargaining impasse by allowing for interest arbitration and by ending employers' ability to unilaterally implement contract terms.

Table 2: Topics for Worker Voice

Level of Worker Voice	Topics for Worker Voice
Workplace monitor	Compliance with employment and labor laws
Works Councils	• Equity issues, including discrimination and how to foster inclusiveness in a diverse workforce • Work scheduling • Job structures and definitions • Safety and health • New technology and its impact on the workforce • Compliance with labor and employment standards (in consultation with workplace monitors) • Community needs, including housing, childcare, transportation and environmental concerns • Entrepreneurial decisions that impact the workforce
Sectoral bargaining—low density	Wages, benefits, scheduling, leave time and workplace health and safety
Sectoral bargaining—high density	Any corporate decision that has a direct impact on workers' terms and conditions of employment or any subject over which the employer has control
Workplace Bargaining	Any topic not covered by a sectoral bargaining agreement or, for a topic covered by a sectoral agreement, any standard that goes above the sectoral agreement standard

EXPAND THE RANGE OF BARGAINING SUBJECTS

Under current law, workers generally have no right to bargain over so-called "managerial decisions," even when those decisions have profound consequences on workers' terms and conditions of employment. In *Fibreboard Paper Products v. NLRB,* Justice Stewart laid the groundwork for this massive incursion into the bargaining obligation by writing, in his concurrence, that it was "hardly conceivable" that decisions that lie at "the core of entrepreneurial control" should fall within the scope of the collective bargaining obligation. He concluded that the bargaining obligation reached only a "limited area" and that "those management decisions [that] are fundamental to the basic direction of a corporate enterprise . . . should be excluded from that area."[160] The Court adopted the thrust of Stewart's concurrence in *First National Maintenance Corp.,* where it held that employer

decisions based on matters of profitability and the scope and direction of the business are not typically mandatory subjects of bargaining, even if they have a direct impact on the terms and conditions of employment;[161] only the effects of such decisions were mandatory subjects of bargaining.[162] Many later cases have followed *First National Maintenance* and restricted employers' duty to collectively bargain. For instance, in *Dorsey Trailers, Inc. v. NLRB,* the Fourth Circuit held that the NLRA's mandate to bargain collectively "simply does not cover plant relocations or partial closings."[163] Similarly, in *NLRB v. Wehr Constructors, Inc.,* the Sixth Circuit held that an employer did not violate the NLRA when it subcontracted bargaining unit work "without bargaining in good faith with the [u]nion."[164]

The new labor law should reject the premise of the *Fibreboard/First National Maintenance* approach to the bargaining obligation and make clear that decisions that are fundamental to the basic direction of a corporate enterprise are squarely within the duty to bargain. The new statute should establish that any decision that has a direct impact on workers' terms and conditions of employment—including the existence of that employment—is a mandatory subject of bargaining. Obvious examples of such decisions would include subcontracting decisions, relocation decisions, decisions to close all or part of the business, capital substitution decisions (including those involving technology with impacts on job quality or employment levels), major changes in investment strategies, major advertising campaigns, and decisions with major environmental impacts. Workers' lives are profoundly shaped by these types of corporate decisions, and workers deserve a voice in making them.

However, as the recent teacher strikes, Wayfair and Google walk outs, and actions by health care workers across the country have shown, workers' lives are also impacted by firm decisions that might not be said to impact their 'terms and conditions of employment.'

However, as the recent teacher strikes, Wayfair and Google walk outs, and actions by health care workers across the country have shown, workers' lives are also impacted by firm decisions that might not be said to impact their "terms and conditions of employment." Wayfair workers, for example, protested their employer's decision to supply furniture to ICE;[165] teachers have demanded that their school districts do something about affordable housing;[166] and health care workers routinely make demands relating to *patient* safety.[167] A legal regime that ensures workers a bargaining right only with respect to "terms and conditions of employment" risks denying workers a voice on other critical issues. That is a mistake. If workers wish to bargain about a subject over which their employer has control—when acting as an employer—then the law should afford the workers a right to bargain.

As with all matters subject to the duty to bargain, of course, none of this implies that workers would have the right to make decisions unilaterally. Management would retain its right to reject employee demands, subject to the interest arbitration requirements discussed below. However, by including the workers' voices in the decision-making process, and thereby increasing the range of perspectives and types of information brought to bear on that process, we should expect firm decisions to take greater account of a broader range of interests and respond to a broader range of concerns.

> ***"If workers wish to bargain about a subject over which their employer has control—when acting as an employer—then the law should afford the workers a right to bargain."***

A further expansion in the bargaining obligation also makes sense. Because workers are impacted by conditions across the labor market—and not just by decisions made by their individual employers—the new statute also should require employers to bargain policies that relate to how they treat the products and services of other firms. This implies that so-called "hot-cargo" agreements also should be a mandatory subject of bargaining. Under current law, employers and unions are barred from entering into agreements that prohibit the employer from "handling, using, selling, transporting[,] or otherwise dealing in any of the products" of another business, such as a business where the workers are on strike or have called for a boycott.[168] Hot-cargo agreements simply allow unions to advance the interests of workers up and down supply chains and enable workers who are already unionized to help those who are trying to unionize for the first time. In a number of industries, women, people of color, and immigrants are particularly more likely to work for subcontractors, where they face lower wages and worse working conditions than directly hired workers. Thus, requiring employers to bargain over hot-cargo agreements can help raise standards for and facilitate unionization among more vulnerable subcontracted workers.

BRING COMMUNITY GROUPS TO THE BARGAINING TABLE

Labor law has, to date, constructed a bargaining obligation that is both limited and binary. It is limited, as described above, in the sense that it has required employers to only bargain over a narrow set of terms and conditions *of employment.* It is binary in that it only extends to two parties: the union, where one exists, and the employer. However, this structure of bargaining obligation ignores the multiple ways in which employer actions can impact workers' lives *beyond the workplace.* Take pollution, for example. A manufacturing facility might provide a safe workplace while at the same time dumping toxic chemicals or emitting air pollutants into the atmosphere. These emissions may not negatively impact workers while they are at work (i.e., they are not a workplace health and safety issue), but they might have a significant impact on workers in their lives outside of work. And, of equal importance, these emissions will impact the lives of everyone who lives in the community where the facility is located. Another example is housing. Imagine a private university that runs a hospital and owns property in an urban area. Low-wage hospital workers would have a significant interest in ensuring that university property

is dedicated to affordable housing, even though affordable housing is not a term or condition of employment. So too would other low-income residents of the community where the university property is located. Notably, with both of these examples—and many others like them—it is likely to be Black and Latinx communities with the most at stake.

> ***"...taking inspiration from the Bargaining for the Common Good movement, Clean Slate recommends that when an employer has influence beyond the workplace over subject matters that have major impacts on workers' communities, such as pollution and housing, the bargaining obligation ought to extend beyond the terms and conditions of employment and encompass these "community impact" subjects."***

Accordingly, and taking inspiration from the Bargaining for the Common Good movement,[169] *Clean Slate* recommends that when an employer has influence beyond the workplace over subject matters that have major impacts on workers' communities, such as pollution and housing, the bargaining obligation ought to extend beyond the terms and conditions of employment and encompass these "community impact" subjects. Moreover, when bargaining over community impact subjects, the workers' organization involved in collective bargaining should have the right to bring community organizations—those with members and expertise in the relevant area—to the bargaining table. In the hypotheticals above, for example, the worker organization would be entitled to bring community environmental justice groups to bargain over pollution controls and abatement and to bring housing groups and tenants unions to bargain over affordable housing development.

Moreover, when bargaining over community impact subjects, the workers' organization involved in collective bargaining should have the right to bring community organizations—those with members and expertise in the relevant area—to the bargaining table.

Although the law would require that the employer bargain with the worker organization over community impact subjects, it would remain within the discretion of the worker organization whether to include a community group in that bargaining. It would also be within the discretion of the worker organization to decide which community organization to include in bargaining. Similarly, it would be up to the worker organization to fashion rules of procedure and decision-making for bargaining conducted jointly with community organizations. For example, a worker organization might decide to give the community organization equal voice, veto power, or only consultative rights over proposals on community impact subjects. We note, however, that by including a community organization in the bargaining process, the worker organization would not thereby incur a "duty of fair representation" to the community organization's members.

IMPASSE, UNILATERAL CHANGES, AND INTEREST ARBITRATION

As we have stressed throughout this report, collective bargaining can be a powerful tool for achieving economic and political equality and for moving forward on gender and racial equity. Through collective bargaining, the lowest-paid workers can secure more of the economic pie. Racial and gender pay gaps can be narrowed. Workers also can secure contractual protections against discrimination and harassment, paid sick days and family leave, affirmative action hiring guarantees, support and protections for immigrant workers, and other policies and benefits that promote equity. For these gains to be realized, however, collective bargaining has to result in actual collective bargaining agreements.

Under current law, although employers are required to bargain in good faith, the stark fact is that it is just as difficult for workers to successfully secure a first collective bargaining agreement as it is for them to organize a union in the first place. This should not come as a surprise. As many commentators have pointed out, the duty to bargain is enforced by a laughably weak remedial regime.[170] In essence, and as a result of the Supreme Court's narrow interpretation of the NLRB's remedial authority, the only remedy that the Board can impose on an employer for a failure to bargain in good faith is an order to bargain in good faith.[171] The Board is foreclosed from ordering either party to accept a contract term and from imposing monetary damages on either party. As a result, an employer whose *goal* is to delay bargaining *ad infinitum* in order to never agree to a contract can simply delay bargaining *ad infinitum,* secure in the knowledge that the law can only require it to continue bargaining. Thus, Catherine Fisk and Adam Pulver conclude, in their recent study of bargaining under the NLRA, that the duty to bargain has essentially become a "dead letter."[172]

One possible approach to correcting this failure would be to empower the NLRB to seek meaningful remedies for violations of the duty to bargain. When faced with a recalcitrant bargaining party, the Board could order the acceptance of reasonable contract terms. Alternatively, the Board could be empowered to impose meaningful monetary damages on a party who violates the duty to bargain in good faith.

While such remedies would mark an improvement over the current regime, we favor the approach taken in the PRO Act: namely, interest arbitration for first contracts.[173] Under the new statute, once a union requested collective bargaining, the employer would have 10 days to commence bargaining. If, after 90 days of bargaining (or for an additional period of time if the parties mutually agreed to such an extension), no agreement is reached, then either party would have the right to request mediation conducted by the Federal Mediation and Conciliation Service. If the parties did not reach agreement within 30 days of the mediation request, then the dispute would be referred to a tripartite arbitration panel. One member of the panel would be selected by the union, one by the employer, and one neutral member mutually agreed to by both parties. A majority of the panel would be empowered to render a decision, determining the terms of the agreement, which would be binding on the parties for two years, unless amended by mutual agreement. The panel's decision would be based on the employer's financial status, the size and type of the

employer's business, the employees' cost of living, the employees' ability to sustain themselves and their dependents, and the wages and benefits provided by other employers in the same business.

As experience with interest arbitration in the public sector reveals, such a change in bargaining law is not likely to discourage meaningful collective bargaining.[174] In other words, it is unlikely to result in decisions being taken out of the parties' hands and transferred to arbitrators. To the contrary, because employers would know that a failure to reach agreement would result in arbitration, they would be *more likely* to engage in good faith bargaining than they are in a system where impasse enables them simply to implement their own position.[175] Put simply, interest arbitration is likely to create a labor relations system that results in meaningful collective bargaining and meaningful collective bargaining agreements.

We also recommend using interest arbitration in another context. Under current law, employers must bargain to impasse on all mandatory subjects.[176] Once impasse is reached, an employer gets to exercise very powerful economic weapons; she can lock out employees or unilaterally implement the firm's last offer. But current law makes it far too easy for employers to declare impasse, effectively allowing a stalemate on just one issue to trigger the employer's right to lockout or unilateral implementation.[177] The rules of impasse must be changed. In particular, the new labor law should establish that if an impasse is reached on any subject and during any round of contract negotiations, the union would have the option of requesting interest arbitration. Where the union requests arbitration, the employer would not have the right to unilaterally implement its favored contract terms. Instead, the matter at impasse would be submitted to the same arbitration process described above.

3F. Reform Corporate Law

Recommendations:

- Require 40 percent worker-chosen representatives on corporate boards;
- Require a supermajority board vote for decisions with the greatest impact on workers;
- Expand corporations' fiduciary duties to include a duty to workers; and
- Make managerial and entrepreneurial decisions mandatory subjects of bargaining.

Because corporate decisions that shape workers' lives are often made at the corporate-board level, rebalancing power requires that workers have a meaningful voice in how corporations make decisions. We are living in an era where this voice is severely lacking and where the lack of voice has predictable

effects. For example, the gap between productivity and workers' wages has continued to grow to a historically large degree: Since 1979, productivity has increased by approximately 70 percent, while hourly compensation has grown only 11.6 percent.[178] As the Bureau of Labor Statistics (BLS) noted in a 2017 paper, "after many decades of relative stability[,] the labor share [of total economic output generated by the private sector] began to decline in the United States . . . and in the early 21st century[,] it fell to unprecedented lows."[179]

> ***"Because corporate decisions that shape workers' lives are often made at the corporate-board level, rebalancing power requires that workers have a meaningful voice in how corporations make decisions."***

To ensure that workers' voices are integrated into corporate decision-making, we recommend that corporations be required to include a substantial number of worker representatives on corporate boards. To this end, we also recommend that worker organizations be given the right to bargain over so-called managerial decisions. However, placing workers on boards and expanding bargaining subjects is not enough. And it is not enough because corporate decision-making—as a product of corporate law and culture—is handcuffed by a commitment to "shareholder primacy." Accordingly, we also recommend legal reforms designed to institute a shift away from shareholder primacy. Here, our principal recommendation is that corporations should owe a fiduciary duty to workers as well as to shareholders.

REQUIRE WORKERS ON CORPORATE BOARDS

It is little known, but worker representation on corporate boards has a long history in U.S. corporate law. In the early 20th century, at least eight corporations had adopted a significant role for workers in their corporate governance.[180] When he became governor of Massachusetts, Calvin Coolidge signed a law allowing the Commonwealth's manufacturing corporations to have employees elected as board members.[181] The corporation that owned Filene's department store allowed workers to elect more than one-third of its board members by 1922.[182] In the 1970s, unions pushed for seats on the boards of several major U.S. companies, including Ford, United Airlines, AT&T, General Tire and Rubber, and Anheuser-Busch.[183] Eventually, however, the business community pushed back on the concept of workers on corporate boards. In 1978, the Business Roundtable came out strongly against workers on corporate boards.[184] With the precipitous decline in the labor movement at around this time, the phenomenon diminished.

Notably, however, the idea of worker representation on corporate boards is gaining momentum again. Indeed, there are currently two bills pending in Congress to guarantee workers representation on corporate boards: the Accountable Capitalism Act[185] and the Reward Work Act.[186] In addition, workers from Walmart and Google have publicly demanded seats on their employers' boards.[187] Putting workers on corporate boards is being recognized as an important tool for moving away from shareholder

primacy and toward "stakeholder corporate governance"—more on this below—and to thereby combat economic (and political) inequality.[188]

> ***The most direct way to give workers a voice on what happens in the corporate boardroom is to guarantee workers a seat at the corporate boardroom table.***

The most direct way to give workers a voice on what happens in the corporate boardroom is to guarantee workers a seat at the corporate boardroom table. It is essential, however, that workers have more than a symbolic voice. Experience shows that only one or two workers on a board does little to change the board's behavior and may even result in board behavior that is even more contrary to worker interests.[189] Our recommendations for workers on corporate boards call for a robust and meaningful voice. We recommend that larger corporations (e.g., those with 500 or more employees, or, as noted below, those with a federal charter) be required to reserve at least 40 percent of the seats on their corporate boards for worker-designated representatives. In addition, we recommend that a certain category of board decisions that most directly and significantly affect workers' working conditions—such as decisions to declare bankruptcy, close a plant, lay off a significant number of workers, or take any other action that would substantially decrease the proportion of corporate revenue devoted to paying wages—be supported by a supermajority of board members to be adopted.

We also believe that it is essential that the system of worker voice on corporate boards ensure that that worker voice genuinely reflects workers' interests. We recommend that workers' board seats be available for employees or individuals designated by workers and that those board members be selected by workers free from management interference. As discussed above, in workplaces where a worker organization represents at least 25 percent of the workforce, the worker organization(s) should designate the worker representatives on the board. In addition, we recommend that employers be required to provide workers or their designated representatives training for board service through a neutral, third-party educational service provider.[190]

IMPOSE A FIDUCIARY DUTY TO WORKERS, NOT JUST TO SHAREHOLDERS

The dominant ideology in contemporary corporate governance gives shareholder interests primacy over the interests of other stakeholders, including workers.[191] Under this approach to corporate governance, the goal of corporate managers is to pass on to shareholders the gains realized by minimizing labor costs. The consequences of this ideology are evident in workers' diminished share of profits. Crucially, if corporations only owe a fiduciary duty to shareholders, even corporate boards with worker representatives will be limited in the strategies that they can pursue and the decisions that they can make.

Shareholder primacy has been criticized for allowing corporations to ignore their responsibilities to a broader array of stakeholders, including workers, communities, environmental concerns, and more.[192]

In a sign that this criticism is starting to have an impact, the Business Roundtable recently issued a statement, endorsed by 181 CEOs, on the purposes of a corporation in order to outline a broader view of corporate responsibility.[193] Although the statement is vague on specifics, it is nevertheless a sign of movement on an important issue. On the *New York Times* op-ed page, Salesforce CEO Marc Benioff declared that "capitalism, as we know it, is dead."[194] He concluded his call for a new stakeholder-driven capitalism by noting that when such a change is made, "our companies will be more successful, our communities will be more equal, our societies will be more just[,] and our planet will be healthier."

The first step in bringing about a shift away from shareholder primacy is to redefine the corporate fiduciary duty to include a duty to workers, in addition to shareholders.[195] The benefits of incorporation are a privilege created by the state, which represents the people in the communities in which corporations operate. It is only fair that corporations be required to take into account the well-being of those communities in exchange for the benefit that the communities bestow on them in the form of limited liability.

The American legal and political tradition did not always adhere to a shareholder-first philosophy. The concept of the corporation in the early United States was animated by the "concession theory," or the idea that a corporation is a grant of special privilege by the public that is only justified by the public interest served by the corporation.[196] A survey of state corporate charters in 1800, for example, found that two-thirds of the for-profit corporations in the U.S. served public purposes, primarily building infrastructure, such as canals, or providing banking or insurance services that were considered necessary for commercial prosperity.[197]

> ***"Our recommendation for this new fiduciary duty is to reinvest the concept of the American corporation with a public purpose."***

Over time, this public purpose has dropped from the concept of the American corporation, enabled by the adoption of legal doctrines that accorded "personhood" for for-profit corporations, accompanied by the penumbra of legal rights previously thought of as attendant to actual people.[198] Our recommendation for this new fiduciary duty is to reinvest the concept of the American corporation with a public purpose. However, this recommendation would shift that public purpose from that recognized during the era of the concession theory; instead of looking at what the firm produces in order to determine whether the corporation meets a public purpose requirement, we recommend looking to the role of workers in the firm to determine whether it is serving a public purpose.[199] Essentially, we recommend that corporations be required to fulfill the public purpose of contributing to a just and equitable economy by according their workers a voice.

RESTRUCTURE CORPORATE GOVERNANCE

In order to accomplish the corporate governance reforms discussed above, there may need to be changes with respect to who regulates corporate governance. Today, corporate governance is a matter of state law. Moreover, through operation of state choice of law rules and the "internal affairs" doctrine, the law of the state of incorporation governs. This structure has made it difficult for workers to have influence over corporate governance matters because corporations can choose to incorporate in whatever state is most accommodating of corporate interests and avoid any state where workers have political power that could be exercised to impose requirements to accommodate worker interests.

One option for effecting corporate governance change is through federal legislation. Thus, federal law may wish to reestablish a regime of conditional corporate chartering. Corporations over a certain size—whether publicly or privately held—could be required to obtain a federal charter for themselves and corporate "relatives" regardless of domicile. Federally chartered corporations should have specified operational requirements, including, but not limited to, those discussed immediately above. Federal chartering could be established as an option with incentives (i.e., favorable tax rules) as opposed to a mandate if it is necessary to minimize First Amendment issues.

Another option is for federal law to create incentives for states to change their laws to avoid the existing incentives for most companies to incorporate where constraints on their operations are the most lax. These incentives would have to encourage states to require that corporations *residing* in their state incorporate in the state. Shifting to a regime where the location of corporate residence governs applicable law—perhaps defined as the location of corporate headquarters, the location of the largest contingent of employees, and/or the location of the largest contingent of C-suite officers—precludes the gaming of the choice of state of incorporation.

MAKE MANAGERIAL AND ENTREPRENEURIAL DECISIONS MANDATORY SUBJECTS OF BARGAINING

As discussed above in the section on new rules for bargaining, under current law, employers may exclude workers from having a voice in many of the most important corporate decisions, even when they are represented by a union and even when those decisions have profound consequences on workers' terms and conditions of employment. The recommendations discussed above to expand workers' right to bargain over managerial and entrepreneurial decisions are another important mechanism for changing corporate culture to address the interests of workers.

3G. Reform the Rules of Democratic Participation

Recommendations:

- Mandate same-day voter registration, early voting, and vote by mail;
- Mandate paid time off to engage in civic activities, including voting; and
- Prohibit coercion of employees by employers in the political process.

Rebalancing power requires that the law gives workers a voice in our democracy so that they can effectively advocate for their interests in the halls of power, in the public square, and at the ballot box. The most important policy for ensuring workers a voice in our democracy is to enable the building of powerful, effective worker organizations. In this sense, all of the reforms recommended in this report are "democracy reforms." In addition to building strong worker organizations, however, we also need to remove the structural barriers of democracy that would block even newly revitalized worker organizations and newly empowered workers from fully participating in our political system. These barriers were built by decades-long efforts to skew the campaign finance system in favor of corporations and the wealthy and to suppress the votes of poor people and people of color.[200]

The evidence of the consequences of these barriers is stark. Martin Gilens concludes in his recent study that "the preferences of the vast majority of Americans appear to have essentially no impact on which policies the government does or doesn't adopt."[201] Or, as he puts it, "when preferences between the [wealthy] and the poor diverge"—when, in plain terms, the rich and the poor disagree—"government policy bears *absolutely no relationship to the degree of support or opposition among the poor.*"[202]

We can take a major step toward rebalancing the system and ensuring that the voices of working people and their organizations are not suppressed or drowned out by corporations and the wealthy by implementing the reforms outlined below.

MAKE REGISTERING TO VOTE AND VOTING EASIER FOR WORKERS

Participating in the electoral process is a crucial means for working people to exercise power and have their voices heard in government. Yet, today, nearly one in four eligible voters in the United States is not registered to vote,[203] and the U.S. has among the lowest levels of voting of all Organization for Economic Co-operation and Development (OECD) countries.[204] Lower registration rates among working people and in communities of color are rooted in a long history of exclusion from American democracy, including felon disenfranchisement laws passed in the Jim Crow era to prevent Black Americans from voting and a multiplicity of hurdles erected to make voting more difficult. In addition, there is a current assault on voting, including large-scale purges of voter rolls and manufactured claims of voter fraud.[205]

> ***When registration and voting rules require workers to show up at a particular place at a particular time, workers can effectively lose their ability to vote if the hours available overlap with their work hours.***

Many of these measures erect barriers to voting that are particularly difficult for middle-class and lower-wage workers to overcome. When registration and voting rules require workers to show up at a particular place at a particular time, workers can effectively lose their ability to vote if the hours available overlap with their work hours. Additionally, workers have no federally protected right to miss work in order to register to vote or vote, meaning that workers can be fired if they miss work for these reasons. Moreover, these kinds of obstacles hit low-wage workers especially hard. For example, low-wage workers are less likely than higher-wage workers to have paid time off, which means registering or voting may mean going without pay. This modern-day version of a poll tax means that even if low-wage workers can get the time off without being fired, they may not be able to afford to exercise their right to vote. These burdens, which fall disproportionately on women and people of color, effectively mute workers' collective voice in American democracy.

Changing laws around voting and voter registration in order to eliminate structural barriers and facilitate workers' participation in elections is thus central to empowering workers. Enacting same-day voter registration and making voting more accessible through robust early voting opportunities and paid time off to vote are the core components of these reforms, along with clearly prohibiting all forms of employer coercion.

By allowing citizens to register to vote and cast a ballot during early voting or on Election Day, same-day registration (SDR) streamlines the registration process for working people. This reform is especially valuable for low-wage workers without paid time off. They can take off from work or adjust their schedules—which, for many, requires paying for additional childcare and eldercare—just once to accomplish voting, instead of having to make arrangements once for registration and once for casting a ballot. States with SDR have the highest voter turnout rates in the nation, achieving turnout rates

up to 7 to 10 percentage points higher than states without SDR.[206] Although SDR has only been implemented at the state level so far, we recommend federal legislation mandating that states provide same-day voter registration for federal elections.[207]

In addition to changes in the registration process, changes in the voting process are necessary. To maximize workers' ability to cast a ballot, we recommend that laws be changed to enable all eligible voters to vote before the final Election Day, and early voting should be provided during weekend hours and on weekdays before and after traditional work hours. Jurisdictions should create multiple early voting locations that are easily accessible by public transportation and are clearly marked, and early voters should have the option to vote in any early voting site in their election jurisdiction, making it easier for workers to vote on a lunch break or other pauses in the workday. Currently, 37 states and the District of Columbia provide their residents with the option of voting early, although these systems vary significantly in terms of the days and times offered.[208] In addition, 27 states and the District of Columbia offer residents the option of voting by mail.[209]

Finally, we recommend that federal law require employers to provide workers with paid time off (up to four hours) for voting at the start or end of the workday in order to ensure that workers have time to stand in line and to travel to and from their polling place.

MANDATE PAID TIME OFF TO ENGAGE IN CIVIC ACTIVITY

> ***"In addition to being allowed to vote, a system of democracy that truly encourages working people's participation would also allow workers to engage more deeply in their democracy."***

Voting is a critical act for citizens, but it is also the minimum level of engagement in the political system. In addition to being allowed to vote, a system of democracy that truly encourages working people's participation would also allow workers to engage more deeply in their democracy. While the Constitution protects the rights of all to assemble and petition their government, exercising those rights is difficult for many workers. For the same reasons that many workers, especially women and workers of color, cannot afford to take time off to vote, they cannot engage in civic activities that are essential to the health of our democracy. President Teddy Roosevelt recognized the importance of all citizens having the time to participate in civic activities in his famous "New Nationalism" speech in Osawatomie, Kansas, in 1910:

> No man [sic] can be a good citizen unless he has a wage more than sufficient to cover the bare cost of living, and hours of labor short enough so after his day's work is done he will have time and energy to bear his share in the management of the community, to help in carrying the general load. We keep countless men from being good citizens by the conditions of life by which we surround them.[210]
>
> -TEDDY ROOSEVELT

Because the opportunity to participate robustly in democracy should not have a price on it, we recommend that federal law mandate that workers get a limited amount of paid time off to engage in activities that are essential to the mechanics of democracy, such as being a poll worker, registering people to vote, participating in a caucus, volunteering on a campaign, or meeting with or attending an event with an elected official.[211]

The highest form of civic activity in a democracy is to hold elected office. Our law should ensure that workers who want to serve in elected office have the time, flexibility, and financial support to allow them to serve with equal confidence as lawyers, business people, and independently wealthy people. We recommend that federal law require employers to provide unpaid leave to workers who are elected to public office and to offer reasonable accommodations to allow them to hold elected office and continue performing their jobs.

END COERCION OF EMPLOYEES BY EMPLOYERS IN THE POLITICAL PROCESS

To state the obvious, workers' ability to influence the political system to serve their interests is undermined when they are forced to act collectively in service of political views that are contrary to their own. But, in fact, more and more employers are putting workers in exactly that situation. As Alexander Hertel-Fernandez explained in his book *Politics at Work: How Companies Turn Their Workers into Lobbyists,* this phenomenon is widespread.[212] Hertel-Fernandez's research shows that around the 2016 election, about 30 to 40 percent of workers reported that their employers attempted to mobilize them to engage in political activity.[213] More worrying, Hertel-Fernandez found that nearly 30 percent of workers reported being concerned about retaliation with a substantially higher proportion of low-wage workers fearing or experiencing this kind politically based retaliation.[214]

To give workers redress when subjected to this kind of coercion, we recommend the PRO Act's approach of making it an unfair labor practice for an employer to "require or coerce an employee to attend or participate in such employer's campaign activities unrelated to the employee's job duties."[215] In addition, the prohibition on captive audience meetings, discussed above, should be extended to also preclude meetings regarding an employers' political views.

3H. Allow State and Local Labor Law Experimentation

Recommendations:

- Make federal labor law a federal floor and allow experimentation at the state and local level, provided that such experimentation expands or better protects the right to engage in collective bargaining and concerted activity;
- Require the Secretary of Labor to certify that state or local laws meet the standard of expanding or enhancing collective rights; and
- Make presumptively compliant certain state or local laws that further collective bargaining or concerted activity.

We need to encourage innovation in collective bargaining by setting federal labor law as a floor but allowing states and localities to adopt reforms that build up from a federal floor. While we believe that adoption of the *Clean Slate* recommendations at the federal level would greatly enhance the rights of all private-sector workers, in whatever state they live, we do not claim to have the last word on labor law reform.

In 1959, the Supreme Court adopted a broad preemption doctrine[216] that effectively blocked any state or local legislation that even arguably addressed the rights of workers to engage in collective bargaining. The Court expanded that preemption rule even further in 1976, holding that Congress intended to block state regulation of activity related to unionization or concerted activity, even in areas not regulated by the NLRA.[217] In 2002, Cynthia Estlund famously identified preemption as one of the causes of labor law's ossification, writing that labor law had been "sealed off—to a remarkably complete extent and for a remarkably long time—both from democratic revision and renewal and from local experimentation and innovation."[218] The objective of the Clean Slate project is to imagine the substantive reforms that make sense in a world where democratic revision is again possible. However, the problem of ossification is a danger, even with a reimagined labor law.

> ***"Moreover, the process of innovation is healthy."***

We can only address the reality of the economy that we can see today and project solutions based on current trends. Inevitably, there will be surprises in our country's economic and political development waiting not too far off from now, and these surprises will affect how workers exercise collective bargaining rights and engage in collective action. Moreover, the process of innovation is healthy. Justice Brandeis noted the value of citizens of a state choosing for their state to serve as "a laboratory; and [to]

try novel social and economic experiments without risk to the rest of the country."[219] Therefore, we believe that in order to prevent future ossification and encourage continued innovation, it is essential that a new labor law allow for local experimentation.

Allowing for experimentation in labor standards in the states is a feature of many federal statutes. The FLSA, for example, sets minimum wage and overtime standards as a floor, not a ceiling. Today, more than half of the nation lives in states that have a higher minimum wage than the federal level.[220] Almost two dozen states[221] and hundreds of cities[222] bar discrimination in employment against LGBTQ workers, even though federal law does not. The Occupational Safety and Health Act permits states to adopt standards that are "at least as effective in providing safe and healthful employment" as standards promulgated at the federal level, permitting those standards to be more protective.[223] For example, the California Department of Industrial Relations promulgated a standard to specifically protect workers in the health care sector from workplace violence;[224] there is no workplace violence standard at the federal level. The statutes we propose operate by setting a federal floor and allowing state innovation that enhances or expands protections for workers.

We recommend that the new labor law act as a federal floor and allow experimentation at the state and local level...

We recommend that the new labor law act as a federal floor and allow experimentation at the state and local level, provided that such experimentation expands or better protects the right to engage in collective bargaining and concerted activity. The challenge, however, is in setting standards for ensuring that state or local laws do not diminish collective rights. In the context of FLSA protections, it is easy for even the most number phobic among us to determine whether a state's minimum wage is higher or lower than the federal minimum wage. Describing the metric for measuring the quality of a collective right, however, is more challenging.

To ensure that states enhance or expand collective bargaining rights, we recommend that any state law regulating collective bargaining or concerted activity rights be certified by the Secretary of Labor as meeting a standard that is protective of workers' collective rights. To simplify the certification process, we recommend that certain types of state or local laws be presumptively compliant with the certification standard, including increases in penalties for employers that violate workers' collective rights, the expansion of coverage, the use of new electronic means of demonstrating support for union representation, and the expansion of the percentage of workers on corporate boards.

For topics not presumptively certifiable, we recommend that the Secretary of Labor be required to certify that the state or local law: (1) demonstrably strengthens workers' ability to form worker organizations or engage in collective bargaining, (2) preserves the rights and benefits of employees

under existing collective bargaining agreements, (3) continues existing collective bargaining and concerted activity rights, and (4) protects employees against a worsening of their positions in relation to their employment. We are guided in fashioning these conditions by the statute that protects the collective bargaining rights of employees of mass transit systems.[225] Federal transit law imposes, on any state or local agency that accepts federal funds for its mass transit system, a requirement that the agency put in place arrangements to protect the interests of mass transit employees.[226] The DOL has developed a process for adjudicating compliance with these standards that allows parties to register objections for the Secretary to consider in making a decision regarding certification.[227] We recommend that the new labor law direct the Secretary to adopt a similar process for considering certification of state or local laws that touch on collective bargaining or concerted activity rights. If the Secretary declines to certify a state or local law, the Secretary should be empowered to enjoin implementation of the statute.

SECTION 4

FURTHER CLEAN SLATE RECOMMENDATIONS FOR BUILDING WORKER POWER

The recommendations above define the minimum—albeit expansive—set of reforms necessary to rebuild American labor law from a clean slate. That set of reforms could be substantially buttressed by the additional recommendations set out below.

4A. Build Power Through New and Enhanced Mechanisms for Generating Revenue

Recommendations:

- Extend the right to dues checkoff to all worker organizations;
- Give employers tax credits for providing paid time off for participation in collective bargaining, works councils, corporate board duties, and other collective representation activities;
- Extend coverage to independent contractors;
- Ban right-to-work laws and allow fair share agreements; and
- Allow worker organizations to contract to provide workforce training programs.

Among the central challenges for any collective organization of workers is developing a sustainable system of revenue generation. Indeed, developing a viable funding stream is a critical task for any social movement organization that hopes to maintain its ability to advance member interests. Historically, labor unions in the U.S. have relied on dues and fees paid by employees to finance their operations. And, most often, these dues and fees have been paid to unions through "checkoff" mechanisms in which a small portion (generally about 1.25 percent)[228] of the employee's wages is deducted from the employee's paycheck and transferred to the union. The vast majority of employees have paid their union dues as a voluntary component of being a union member. In order to ensure that all workers who receive the benefits of union representation pay their fair share of the costs of

that representation—and to avert what would otherwise be a free-rider dilemma—current law enables private-sector unions and employers to make such payments a condition of employment in unionized firms. This is the case, at least, in all non-"right-to-work" states. In "right-to-work" states—which now total 27[229]—payment of union dues or fees cannot be made a condition of employment, despite the fact that unions retain the obligation to represent all workers within the bargaining unit.

The historical model of union financing, although able to sustain certain worker organizations in certain historical settings, has significant limitations. Primary among these, only exclusive representative collective bargaining unions—those that already represent a majority of a bargaining unit and have already concluded a collective bargaining agreement—can obligate an employer to bargain a dues checkoff system under current law. This means that new organizing work generally has to be financed out of the dues paid by *existing* members, creating an obvious strain on union finances and imposing a rather severe limitation on the type and quantity of new organizing that can be undertaken. Similarly, since only exclusive representative collective bargaining unions have been able to take advantage of this dues checkoff system, alternative types of worker organizations are left scrambling to develop alternative methods of financing. Current law also imposes limitations on the ability of worker organizations to develop and secure alternative sources of financing: Any organization classified as a labor organization is likely unable to receive tax-exempt gifts from foundations. Finally, the existence of right-to-work laws means that, even for many exclusive representative collective bargaining unions, the dues model cannot overcome the impediment of free-riding; unions must represent and negotiate for all of the workers in a bargaining unit, but in right-to-work states, they may not require any of those workers to pay for the representation that the law requires the unions to provide.

One other, more general point bears mention. Because the law has essentially restricted unions to one avenue of revenue generation—the dues model—it has been easy for unions' opponents to undermine unions by attacking this single revenue model. Hence, the National Right to Work

Committee and its allies have maintained a singular legal and political campaign designed to invalidate the dues checkoff system—and they have been winning. Most recently, of course, Right to Work's campaign was endorsed by five members of the Supreme Court in the *Janus* case where the Court held that agency fees are unconstitutional in the public sector.[230] Accordingly, *Clean Slate* not only recommends ways to shore up and expand the dues checkoff model of revenue generation but also recommends legal facilitation for a *variety* of revenue streams; some would depend on dues, some on government funding, some on philanthropy, and some on revenue earned from training programs run by worker organizations. On their own, each of the models we propose makes sense, but they also have the virtue of diversity—such that if any one stream fails, worker organizations would have others they can turn to.

Accordingly, and in order to ensure that all of the forms of worker organization contemplated by these recommendations have viable forms of revenue generation available to them, the new labor law should contain the following provisions.

First, the right to dues checkoff should extend to all worker organizations, irrespective of their status as an exclusive representative or non-exclusive representative of employees of a particular employer. Any employee, that is, should have the right to demand that the employer deduct from her paycheck the membership dues of any certified worker organization. When an employee makes such a request, the employer would be required to transmit the dues to the worker organization, on a monthly basis and at the employer's expense. Employees who make such requests would be entitled to anti-retaliation protections, backed by meaningful remedies. We are guided in this recommendation by the recent experience in New York City with a similar legal requirement.[231] Our recommendation, however, would be for a broader provision than the one enacted by the New York City Council; critically, our recommendation is that the law allow workers to checkoff dues and fees to any certified worker organization and not only, as in the New York law, to nonprofits that do not meet the definition of labor organization.[232]

Second, in order to ensure the successful functioning of all of the forms of worker representation we recommend, the new labor statute should provide for government financing of certain functions. Although these costs might be shifted to employers rather than to the government, having employers pay could result in pressure on worker organizations to moderate their demands out of a desire not to alienate the source of funding. With the government as the source of these payments, that risk is mitigated. Thus, with respect to workplace monitors and works councils, monitors and council representatives should be entitled to paid time off (with full vesting credit for all benefits during such periods) for all of the time spent related to their monitor and council functions. This not only includes time spent on monitor and council duties, but it also includes time spent in training for those functions. The employer's costs related to providing paid time off should be covered by the government through tax credits. Similarly, training associated with monitor and council activities should also be financed by the government, as should any reasonable costs of retaining economic and

legal expertise related to monitor or council business. With respect to workplace exclusive and non-exclusive bargaining agents, and with respect to sectoral bargaining panels, all worker participants should be entitled to paid time off—subsidized by tax credits—for their participation. The administrative costs of convening sectoral bargaining panels, including the reasonable costs borne by worker organizations for economic and legal advice, should be reimbursed by the government.

Third, philanthropic gifts from foundations, as well as from individuals, should be available to worker organizations that wish to receive them. Many foundations, for example, share the mission of fighting economic and political inequality and would be interested in subsidizing the organization and operation of worker organizations. Accordingly, tax law should treat contributions to worker organizations as deductible and enable charitable organizations to make contributions to worker organizations as well. Further, the new labor statute should affirm the proper interpretation of the law regarding the §302-type prohibition on employer payments to labor organizations. Such a prohibition would not apply to grants made to worker organizations unless those grants come from entities that actually employ workers who are members of the worker organization in question.

Fourth, as Congress and multiple Supreme Court decisions have recognized, bargaining agents that represent all of the workers in a given unit face a potentially severe free-rider problem.[233] This is because the benefits that such unions secure have the character of public goods: If a union bargains higher wages, better benefits, or fairer treatment at work, these improvements must be extended to all of the workers covered by the collective agreement. If unions are required to rely on voluntary payments from these workers for their financing, then unions would face free-riding by all of those workers who would rather receive benefits for free than pay for them. And free riding can cause an insidious, if predictable, problem: Ultimately, it can deny such unions the ability to finance their operations.

In the new labor law, this free-rider problem would be a threat in two places: at the workplace level for workers represented by an exclusive bargaining agent and at the sectoral level for workers in any sector for which a sectoral bargaining panel has been convened. In order to ensure that unions at both levels can operate, the new statute should affirmatively protect the ability of workplace exclusive bargaining representatives and sectoral workers' bargaining councils to collect fees from all of the workers on whose behalf they bargain.[234] Concomitantly, consistent with the PRO Act,[235] the statute must not allow states to enact or enforce so-called right-to-work laws that prohibit fair-share agreements of this kind.

Finally, we recommend a change to the way that training programs are run and financed. Currently, unions run private training programs funded with employer monies, and they administer training programs funded by the Department of Labor. In both contexts (and although unions have developed enormous expertise in training across a range of industries), they—unlike any other vendor, contractor, or private company administrator—are prohibited from charging anything above the actual cost of running

the program. Unions ought to be entitled to negotiate cost-plus contracts for training programs with both private employers and the DOL. Such a contract would allow payment of a negotiated fee—above the cost to the union of running the program—that is fixed at the inception of the contract. The fee should be capped at the reasonable fair market rate for such a training program, and the union should be permitted to use the revenue generated by the fee for general union purposes.[236]

4B. Build Power Through Labor Standards Enforcement

Recommendations:

- Give worker organizations greater standing and access to various stages of government enforcement actions, including giving them full-party status in administrative proceedings;
- Give worker organizations a formal advisory role informing enforcement agencies' operations and strategic priorities;
- Create incentives and mandates for employers to participate in worker-driven standards-setting and enforcement programs through licensing and permitting authority;
- Establish a private right of action for labor rights; and
- Ban forced arbitration and class action waiver agreements.

While we embrace the idea that a primary role for government enforcement would remain under a new labor law regime, we also believe that there are opportunities to develop new ways of enforcing rights in order to both effectively protect labor standards and build worker power. We see two principal strategies for achieving these dual goals: (1) give workers and their organizations a formal role within government enforcement of labor standards and (2) facilitate enforcement of labor standards by workers and their organizations outside of government. In this report, we focus on enforcement that explicitly seeks to build worker power and is also complementary to independent and robust worker enforcement and worker organization.

Before we address the strategies that explicitly address building worker power through enforcement, we note the general importance of labor standards enforcement. Although effective enforcement alone does not necessarily build worker power, ineffective enforcement and impunity by employers do erode it. The current workplace law enforcement system is broken for both procedural and substantive reasons. The standards and legal definitions developed in the early-to-mid 20th century do not correspond

appropriately to subsequent developments in the economy, such as the fissuring of the workplace and the precarity of modern work. Procedurally, the dual workplace enforcement regime initially designed to include robust government enforcement and a private right of action has been gutted by decades of insufficient funding for public enforcement and the rise of mandatory arbitration to foreclose private enforcement. And workers justifiably fear retaliation when they try to enforce the rights they have.

GIVE WORKERS A FORMAL ROLE WITHIN GOVERNMENT ENFORCEMENT OF LABOR STANDARDS

In their insightful work in this area, professors Janice Fine and Jennifer Gordon articulated a vision of "coenforcement" to describe how unions, worker centers, and other worker organizations could partner with government enforcement agencies.[237] Notably, these partnerships provide several power-building advantages for worker organizations. First, a partnership with a government agency can play a legitimizing role for a worker organization, encouraging workers to take the organization more seriously and encourage support. Second, when they are funded, coenforcement models provide support and access to resources that can facilitate organizing.[238] Third, workers who are fearful of reaching out to government agencies might be more likely to assert their rights if they can reach out to a worker organization.

There are several examples of these types of community partnerships. Created in 1973, the Occupational Safety and Health Administration's (OSHA) *Susan Harwood Training Grant* program[239] is perhaps the earliest example of this model. This long-tested program awards grants to organizations in order "to provide training and education programs for employers and workers on the recognition, avoidance, and prevention of safety and health hazards in their workplaces and to inform workers of their rights and employers of their responsibilities." With additional funding, the program could easily be adapted to address a wider range of workplace matters. More recently, San Francisco[240] and Seattle[241] have used city funds to contract with worker organizations in order to conduct outreach and community education regarding municipal labor standards laws and to refer cases to the offices.

The California Labor Commissioner's Office (LCO), also known as the Department of Labor Standards Enforcement, has engaged in a multi-year pilot, the California Strategic Enforcement Partnership program, in which a foundation has funded community-based worker organizations to partner with the LCO in the enforcement of labor laws. Specifically, the Bureau of Field Enforcement (BOFE) conducts proactive, worksite-wide, strategic, and targeted wage theft investigations and coordinates closely on "strategic cases" with the Legal, Judgement Enforcement, and Retaliation units to bolster case strategy and collect unpaid wages. This partnership is the most developed to date; there are teams of LCO employees matched with community partners/worker organizations based on targeted low-wage industries (agriculture, carwash, construction, janitorial, restaurant, residential care, and warehousing). As with the Susan Harwood Grants program and the municipal examples, the worker organizations conduct outreach and community education, refer cases, and generally serve as a bridge to the government enforcement agency. However, this partnership is more extensive in that teams meet regularly to discuss trends and wage theft enforcement tools in the industry, such as up the chain liability, and take on strategic cases and approaches that could more effectively drive compliance than in just one worksite. Also, worker groups provide referrals not just on specific worker complaints but also of industry bad actors. Worker groups seek to leverage the authority of the state and their own industry expertise to organize workers and change broader industry conditions. The level of collaboration is much more intensive, and the ongoing team-based approach fosters ongoing relationships, as well as joint strategic planning and ongoing communication.[242]

In other instances, government agencies have built strong and formalized partnerships with worker organizations without creating a funded program. The Fair Labor Division in the Massachusetts Attorney General's office has two sets of regular meetings with worker stakeholders: They have meetings with the Fair Wage Campaign (immigrant worker centers and legal services offices) every six to eight weeks and meetings with their Labor Advisory Council (comprising primarily labor leaders) every three to four months.[243] Participants in these meetings discuss cases, trends, challenges, new approaches, priorities, and other matters.[244] In addition, the office holds monthly wage theft clinics in conjunction with many of these organizations in order to meet the needs of workers with cases that the AG's office will not be able to handle.[245] Through these ongoing relationships, worker and community organizations not only have a structured and certain opportunity to have input with the office but also have relationships and a comfort level that allows them to immediately and independently reach out when needed. It also should be noted that the head of the Fair Labor Division herself comes from community and worker organizations.[246]

These partnerships create the kinds of benefits described above: improving enforcement, legitimizing organizations, and providing organizing resources. However, we believe that when worker organizations are given a central role in labor standards enforcement, the potential to build worker power can be even greater than partnerships limited to referrals, education, and outreach. A reimagined approach would

integrate unions and other worker organizations into enforcement processes. We recommend that the new labor law give worker organizations greater standing and access to various stages of a government enforcement action. This would include reforms that:

- Institute statutes or policies that grant standing to organizations to file complaints;
- Add provisions like OSHA's that enable workers to have representatives from unions or other organizations with them during an inspection as a matter of right;
- Allow workers to permit worker organizations to be informed of developments in cases being handled by the agency and create policies allowing for greater disclosure of investigative developments to worker witnesses or complainants;
- Implement a statutory right for workers and their representatives to participate in inspections during paid work time. These proposals could be modeled after the Mine Act regime, which allows two or more workers to identify a representative (either a person or an organization) to accompany a Mine Safety and Health Administration inspector anytime they inspect a mine[247] and to trigger an investigation into whether to shut down a mine in the case of especially serious threats to miners' health and safety;[248] and
- Give workers and worker organizations full-party status in administrative proceedings.

In addition, we recommend that the new labor law also create a vehicle for worker organizations to have a high-level formal advisory role in relation to central offices and leadership of enforcement agencies. While various industries have access to government through vehicles, such as lobbyists, trade groups, advisory boards, and the like, workers and worker organizations rarely enjoy the same kind of access to help set strategic priorities. We recommend that the new statute give workers' organizations a more formal advisory role informing enforcement agencies' operations and strategic priorities. Enforcement agencies should authorize free-standing, independent advisory committees that are empowered to regularly meet with the agency. The advisory group should include representatives from the largest worker organizations that represent workers covered by the relevant labor standards.

Models for these partnerships already exist. One example is the New York Child Performer Advisory Board, which is authorized by New York Labor Code Section 154.[249] New York's Labor Commissioner, Health Commissioner, and Mental Health Commissioner are charged with establishing a child performer advisory board with an institutionalized advising role regarding guidelines for employing child performers, with a special focus on preventing eating disorders. Advisory Board members

are appointed by the commissioner. State law requires that the Board include "representatives of professional organizations or unions representing child performers," employers, health professionals, advocacy organizations, and others at the commissioner's discretion.[250]

We would be remiss if we did not mention that there were some concerns about creating closer partnerships between enforcement agencies and worker organizations. These concerns include whether such partnerships undermine the independence of government enforcement and whether empowering workers is a proper role for a government enforcement agency (as opposed to the more specific mission of ensuring compliance with the FLSA, e.g.).

A related concern, from the worker organization perspective, is about independent worker organizations becoming too dependent on government funding as their main source of income.This can lead to "mission creep," in which the funding drives the organization's activities, creating less of a focus on organizing and more on supporting governmental investigatory case development. It also has the potential to compromise worker organizations' ability to criticize government agencies or advocate as vociferously on behalf of members because of concerns about jeopardizing needed funding.

On balance, however, we believe that the value—for both effective enforcement and worker power—that comes from these partnerships outweighs these concerns. In addition, we see other important benefits of these partnerships. When so many people are excluded or disengaged from participation in the political systems and governments that affect their lives, coenforcement provides a very concrete method for building community engagement and involvement in government processes and for fostering connection to government power. Involving grassroots worker organizations in the process of enforcement would help develop leadership within low-wage worker communities, including those of immigrants and people of color. It would involve directly affected workers in key aspects of government enforcement and would also help develop ongoing channels of communication and access for workers not only to labor agencies but also to other government agencies and decision-makers. It would also give worker organizations greater leverage and stature when dealing with recalcitrant or exploitative employers.

FACILITATE ENFORCEMENT BY WORKERS AND THEIR ORGANIZATIONS OUTSIDE OF GOVERNMENT ENFORCEMENT AGENCIES

Government enforcement agencies have not been able—and at times have not been willing—to fully vindicate workers' rights. Accordingly, we propose the following reforms designed to give workers enforcement tools beyond those available from government agencies.

Private labor standards enforcement regimes designed by workers

Working people across the country have come together to establish workplace standards that are monitored by independent, non-governmental organizations and proactively enforced. In Florida, the Coalition of Immokalee Workers (CIW), a farmworker human rights organization, launched the Fair

Food Program (FFP) in 2011.[251] The FFP is based on a series of binding contracts, known as Fair Food Agreements, between the CIW and participating retail buyers of hand-harvested produce, including Subway, Whole Foods, and Walmart—which require, among other things, that the participating retailers cut off purchases from FFP farms that become out of compliance with the CIW's Human Rights Code of Conduct.[252] In 2015, the program expanded from Florida tomatoes into tomatoes in Georgia, South Carolina, North Carolina, Maryland, Virginia, and New Jersey, as well as Florida strawberries and peppers.[253]

Since 2012, the Workers Defense Project (WDP) in Texas has raised the wages and safety standards for more than 19,000 construction workers.[254] WDP has partnered with local government to incentivize participation in WDP's Better Builder Program, which establishes a certification process based on employer compliance with wage and salary, health and safety, benefits, and skills training standards. For example, the Austin City Council adopted an expedited permitting program that dramatically lowers waiting times for projects where the developers have voluntarily adopted Better Builder® standards.[255] More government agencies could take a similar approach.

Through independent monitoring and by resolving issues outside of existing governmental enforcement regimes, these programs have proven to make workplaces safer and ensure fair pay. In both the CIW and WDP models, workers have developed standards for their sectors; have the ability to complain of violations of those standards; and are protected from retaliation by monitors, who, independent of the workers and the employers, investigate the alleged violations and, if violations are found, determine what actions are necessary to bring employers into compliance. In CIW's FFP, participating retailers help pay for the monitoring. In the WDP model, the developers pay the cost. The use of independent monitors provides safeguards for the employers subject to the worker-developed standards.

In a new labor law, we recommend that the federal government—through its power of licensing, contracting, permitting, and grant-making—should incentivize voluntary, private labor standards enforcement systems. In the private enforcement systems envisioned here, workers in a sector would establish labor standards that are adopted by entities at the top of the sector's supply chain and ensure that employers throughout the chain adhere to those standards. Independent monitors and auditors would supervise compliance with the standards. If an employer is noncompliant with the standards, it would lose the privilege of doing business with the entity at the top of the chain. We further recommend that

in sectors with a majority-immigrant workforce, these enforcement programs be designed in a culturally inclusive process that accounts for language barriers and fear of retaliation. Take, for example, the FFP's multi-lingual, 24/7 worker complaint hotline and its mandatory worker-to-worker, on-farm education, which is on-the-clock paid work time. The enforcement programs must ensure that there would be consequences for employers that retaliate against workers who report violations.

Worker access to the courts

- Private right of action for labor rights

The NLRA does not provide a private right of action for redress of unfair labor practices. This has been a source of frustration for workers, unions, and their advocates and has led to a call for a private right of action in the PRO Act.[256]

The primary reason to create a private right of action for enforcement of labor rights is to permit workers to have more control over their own rights enforcement, which is especially critical when the Executive Branch is controlled by an administration that does not support workers' rights. Workers and their organizations should be able to control the pursuit of workers' rights—both the initiation of litigation and the strategic judgments made in the course of litigation, including the right to settle a case or continue to litigate it. A private right of action would allow workers and union advocates to pursue cases that the NLRB General Counsel might not pursue, to make arguments that the General Counsel might not make, and to resolve cases in the time and on the terms that make strategic sense to them and their clients, as opposed to what makes sense from the government's standpoint. It also would provide an alternate forum as a hedge against a hostile NLRB.

We recommend that a new labor law provide for a private right of action for vindication of labor rights—including a fee-shifting provision, like that proposed in the PRO Act.

- Ban mandatory arbitration and class action waivers

By 2018, an estimated 56.2 percent of non-union, private-sector workers had been forced to sign away their right to go to court, whether they know it or not.[257] Anticipating a surge in corporate use of forced arbitration following the Supreme Court's decision in *Epic Systems Corp. v. Lewis,* 584 U.S. __ (2018), the Economic Policy Institute and the Center for Popular Democracy estimate that, by 2024, more than 80 percent of private-sector, non-union workers will be shut out of court by forced arbitration

clauses with class-action waivers.[258] In 2017, about one-third of employers that required workers to sign an arbitration clause also required workers to sign class- and collective-action waivers, which prohibit workers from joining class-action lawsuits or participating in class arbitration.[259]

We recommend that the new labor law prohibit forced arbitration by amending the Federal Arbitration Act to outlaw mandatory pre-dispute arbitration clauses in employment contracts and to clarify that the right to engage in concerted activity includes the right to bring class and collective legal actions.[260] We further recommend that the new labor law make it an unlawful practice to include a pre-dispute forced arbitration clause in any employment contract (rather than simply making existing clauses unenforceable). This legislation should not affect collective bargaining agreements that require labor arbitration between worker organizations and employers. Legislation to abolish forced arbitration should further authorize civil penalties and equitable remedies for including forced arbitration clauses in a contract, ban retaliation for refusing to sign an arbitration agreement, and allow plaintiffs suing to invalidate forced arbitration clauses or for retaliation to collect attorney's fees and costs.

4C. Set Conditions on Use of Taxpayer Money

Recommendations:

- Require all federal contractors and recipients of federal funds and their subcontractors to comply with policies that support worker voice and create decent jobs; and
- Prohibit employers who have a record of noncompliance with labor laws from receiving federal funds.

Through contracts, grants, and other funding vehicles, the federal government spends more than $1 trillion every year to deliver essential goods and services.[261] There are approximately 24,000 businesses with federal contracts, employing about 28 million workers.[262] The revenue that funds these spending vehicles comes from American taxpayers, many of whom are middle- and low-wage workers struggling to get by.

Contracting with the federal government or otherwise receiving federal funds is a privilege. That privilege should come with a requirement to respect the interests of the workers who are funding their contracts—not work against their interests. Yet, today, there are few conditions that serve workers' interests—and too often, even the jobs covered by existing protections pay poverty wages, and contractors do not respect workers' right to form a union. We recommend that the new labor law harness the power of this spending by requiring recipients to support worker voice and create decent jobs.

Some of these standards are already set by law—such as the Service Contract Act and Davis Bacon Act, which require construction and service contractors to pay their workers the prevailing wage—as well as executive actions.[263] For example, President Lyndon Johnson signed Executive Order 11246 to protect the contracted workforce from discrimination.[264] President Barack Obama signed several executive orders (later withdrawn by the Trump Administration) requiring contractors to post notices informing employees of their right to bargain collectively and successor service contractors to provide a right of first refusal to workers employed on the previous contract, encouraging federal agencies to enter into project labor agreements on large construction projects, and preventing companies from using federal funds to fight the efforts of workers to form a union.[265]

As the Center for American Progress recommended in its published report, existing workplace policies that protect contracted workers should apply to all recipients of federal funding.[266] This would ensure that these standards reach far more workers and raise standards in several low-wage industries—industries that, as noted elsewhere in this report, employ a disproportionate number of women and people of color. Health care, for example, which is publicly subsidized, has become the largest source of jobs in America.[267] Most directly, the U.S. spends hundreds of billions of dollars each year on Medicare, Medicaid, and health care benefits for government employees and veterans.[268] Homecare workers whose work is funded by federal Medicaid grants to states, for example, should be covered by these protections.

Eligibility for federal contracts or receipt of federal funds should be conditioned on a record of compliance with labor law. In addition, protections that should be extended to all workers within an enterprise in order to be eligible for federal funds, in addition to compliance with other aspects of the new labor law, are as follows:

- Application of prevailing wage and benefit protections;
- Application of Office of Federal Contract Compliance Programs (OFCCP) anti-discrimination protections; and
- Requirement to use hiring halls administered by worker organizations.

These protections should flow down to subcontractors of federal contractors and other recipients of federal funds.

4D. Ensure Broader Inclusion in the Definition of Employee

Recommendations:

- Only exclude supervisors and managers whose duties predominately involve exercising supervisory or managerial power;
- Include graduate student TAs and RAs, volunteers who are covered by the FLSA, and student athletes.

INCLUSION OF CERTAIN SUPERVISORS AND MANAGERS

In 1947, Congress added supervisors to the list of exclusions in the NLRA,[269] and the Supreme Court subsequently held that "managers" were excluded as well.[270] While an exclusion for individuals with real supervisory and managerial power may be defensible, the NLRB and courts excluded many workers who do not manage or supervise in the common-sense meaning of those terms. Those include many college professors and nurses,[271] as well as lower-level supervisors within retail and fast food establishments.[272]

We believe that the economic interests of these lower-level supervisors and managers generally align much more closely with the interests of employees than employers. The rationale for excluding these millions of supervisors and managers from the Act's coverage had nothing to do with whether they had bargaining power over their own wages or working conditions. Just think about the context in which most of the cases arose: cases involving licensed practical nurses in nursing homes. In an industry with more and more market concentration, exercised by bigger and bigger corporations,[273] it is unlikely that licensed practical nurses feel like they have agency in their own work lives just because, in between changing bedpans and taking temperatures, they direct a few of their colleagues over what shifts to cover. The effect of these exclusions, however, is to further split workers off from the possibility of creating a common project of exercising countervailing power.

A new labor law should exclude only those supervisors and managers who exercise sufficient power such that their interests are aligned with the employers' interests (i.e., those supervisors and managers whose principal responsibilities involve the exercise of genuine management prerogatives). We recommend that only those supervisors and managers whose duties predominately involve exercising supervisory or managerial power should be excluded from the definition of employee. The precise contours of "predominately" would have to be litigated or refined through regulation but could include a numeric cutoff, such as excluding only those whose supervisory or managerial tasks take up a majority[274] or even 80 percent or more of their time.[275]

INCLUSION OF WORKERS WITH MULTIPLE PURPOSES FOR WORK

The Board and courts have adopted exclusions based on determinations that certain work relationships are not primarily economic in nature. As our premise, we take the view expressed by the majority of the NLRB in *Columbia University*, 364 NLRB No. 90 (2016), and adopt that the protection of the right to collective bargaining should be broad and should extend to any employment relationship, regardless of whether the employees and employer also have some other non-economic relationship, such as an educator-student relationship in the context of graduate student teaching assistant cases.[276] We also ground our recommendations in agreement with the dissent in *Toering Electric Co.,* 351 NLRB 225 (2007), that it is bad law and bad policy to condition protection under the Act on a worker's motivation for seeking or holding employment.[277]

Graduate student TAs and RAs

Graduate student teaching assistants (TAs) and research assistants (RAs) provide labor that is essential to the functioning of all major U.S. universities. We hasten to add that such labor was essential to the completion of this report. And yet, graduate student TAs and RAs have often been excluded from coverage by the Board and courts on the grounds that their relationship with their employer—their universities—is primarily educational rather than economic.[278] However, the employment status of graduate student TAs and RAs should be beyond dispute: Their work is essential to their universities, they are paid (though, too often, poorly), and the university charges tuition to those who study with and learn from these graduate students. Consistent with our general recommendation, the new labor law would deem it irrelevant that these employees also have an educational relationship with the university for which the work. They would be entitled to the new act's protection.

Volunteers

Many health care facilities, nonprofit organizations including radio stations, local fire departments, and other institutions rely, in part, on volunteer labor. As the Supreme Court put it in a leading case considering volunteers under the FLSA, the "ordinary volunteerism" of individuals who "drive the elderly to church, serve church suppers, or help remodel a church home for the needy" does not trigger concerns

about economic inequality and substandard working conditions.[279] But in other cases, employers may utilize volunteer labor in order to replace paid employees.[280] And when paid employees are unionized or seeking to unionize, the question arises whether volunteers should be included in bargaining units.

Just as the Court found in *Tony and Susan Alamo Foundation* that covering all volunteers under the FLSA is unnecessary and ill-advised, so would including all volunteers within the coverage of the new labor law, because many such relationships do not trigger concerns about employer power. We recommend that the new labor law cover volunteers if they otherwise meet the definition of employee under the ABC test and receive any remuneration. In addition, we recommend that the new labor law align its coverage with FLSA coverage and cover even those who receive no remuneration but who are "volunteering" for a for-profit entity.

Student athletes

Similar issues as those outlined above arise with student athletes. The Board has declined to reach the question of whether student athletes, who generate significant income for their universities in exchange for their athletic performance, are employees—thereby continuing to deny student athletes collective bargaining rights.[281] We recommend that the new labor law explicitly cover student athletes who meet the definition of employee.

4E. Utilize New and Enhanced Mechanisms for Organization-Building

Recommendations:

- Create a Worker Organization Administration (WOA);
- Facilitate the growth of worker-controlled hiring halls;
- Give worker organizations a greater role in providing benefits to workers, such as by serving as health care navigators or administrators of portable benefits systems; and
- Require that the federal workforce training system involve worker organizations.

To build as comprehensive a system for a new labor law as possible, we need to provide worker organizations with access to new and enhanced mechanisms for building power. The recommendations in this section aim to provide that access.

CREATE A WORKER ORGANIZATION ADMINISTRATION TO TRAIN WORKERS IN ORGANIZING AND REPRESENTATIONAL RESPONSIBILITIES

The mission of the Small Business Administration (SBA) is "to aid, counsel[,] and protect the interests of small business concerns to preserve free competitive enterprise and to maintain and strengthen the overall economy of our nation."[282] The federal government gives no similar support to worker organizations, despite their important role in maintaining and strengthening the overall economy of our nation. We recommend that the new labor law include the creation of an analogue to the SBA for worker organizations, known as the "Worker Organization Administration."[283]

Specifically, the SBA provides counseling and training both online and through their local and regional offices.[284] Last year, SBA's appropriation for Small Business Development Centers (SBDCs) was more than $100,000,000.[285] SBDCs provide a wide range of counseling and technical assistance to small businesses through an extensive business education network that comprises 63 lead centers managing over 900 outreach locations in all 50 states and the insular territories.[286] In Fiscal Year 2018, SBDCs trained and advised more than 440,000 entrepreneurs and helped create nearly 14,500 small businesses.[287]

We recommend that the Worker Organization Administration be directed to fulfill a similar mission and receive a commensurate level of funding. Worker Organizing Development Centers (WODCs) should be established around the country to provide technical assistance and counseling to workers interested in starting worker organizations and organizations interested in initiating organizing campaigns. In addition, the WOA could contract with worker organizations to train workers participating in works councils, serving as workplace monitors, and serving on corporate boards.

HIRING HALLS

Workers at all levels of skill, education, and compensation face daunting challenges in seeking new jobs. It takes time and effort to find open jobs, to apply for positions, and to secure an interview. Employers and employees alike waste time and resources seeking a match. Many employers demand more skills or credentials than they are willing to pay for and focus on credentials rather than on competency, which creates disparate impacts on the basis of race, gender or gender identity, ability, and background, including criminal records.

Low-road employment agencies have become the labor intermediaries in many industries. These agencies engage in wage theft; charge exorbitant fees; prevent workers from using unemployment insurance or workers' compensation; and do not provide health benefits, vacation or sick days, or retirement plans.[288] The many tech-enabled job matching services (e.g., Monster, Indeed, Glassdoor, or Craigslist), which are private-sector versions of hiring halls, have no accountability to workers, give workers no voice in governance, and are strongly motivated to remain union-free. Worker-owned and -controlled job-matching services, however, would give workers power in the job-matching process, allowing them to establish floors for wages and benefits and otherwise improve workplace standards, all while creating an empowered worker community. The law could better support the expansion of worker-controlled hiring halls.

BENEFITS NAVIGATION AND ADMINISTRATION

Health care navigators

Just as helping workers connect with job opportunities is likely to incentivize workers to join worker organizations, helping workers connect with benefits is likely to do the same thing. For a world in which employers do not provide benefits (or one in which some workers do not have an employer who does so), workers need help navigating expansive benefits options. We recommend that the law create incentives, or even mandates, for employers to use worker organizations as independent benefits navigators in order to assist workers in understanding their rights and benefits.

In the context of health care, for example, the law could require that any employer that does not provide health insurance coverage for its employees or independent contractors must provide them access to a health care navigator affiliated with a worker organization, to the extent that such organizations are available to provide this service.[289] Employers should be required to pay worker organizations for these navigation services at rates set by the Centers for Medicare and Medicaid Services. Additionally, worker organizations would serve as brokers for worker benefits rather than providing or designing the benefits themselves. For example, worker organizations could serve as Affordable Care Act (ACA) health care navigators to help workers purchase their own health insurance through the ACA's individual market. This model provides an opportunity for worker organizations to work in the interests of the workers they are supporting, create more worker-oriented transparency in the system (rather than workers

navigating through private profit-motivated organizations), create a stronger relationship with those workers by providing for their needs outside the workplace, and take advantage of an opportunity to generate revenue through brokerage revenues from benefits providers.

Portable benefits administration

Too many workers have neither employment benefits nor a voice at work. This is an even more significant problem for employees who are not employed by a single employer. The prevalence of non-traditional work, including the gig economy, exacerbates the problem. Workers need a new model to build power and receive benefits. Worker organizations can administer benefits for workers, thereby solving both the access to benefits and voice problems. It is beyond the ambition of this project to offer a detailed proposal for a new portable benefits system. We only propose that any government-created or -subsidized portable benefits system require that worker organizations administer the benefits.

Training funds

The U.S. workforce training system is uneven. The country does not do enough workforce training, and the training that does occur outside of existing joint labor-management programs is too often of low quality and often does not lead to a good job. Better integration of worker organizations into the job training system could have the benefit of improving the quality of training and create a powerful incentive for workers to join worker organizations.

We recommend that the federal workforce training system be reformed to require the involvement of worker organizations. Specifically, workforce boards should be required to be tripartite, and a majority of the grant money awarded by the boards should be required to go toward funding training administered by labor-management partnerships or worker organizations.

SECTION 5

TOPICS FOR FURTHER CONSIDERATION

The above reforms constitute the Clean Slate recommendations. Although we are not yet in a position to recommend the following, we view the topics below as highly promising reforms. Only because of time constraints, we were unable to finalize them as recommendations.

5A. Creation of Labor Courts

Recommendation for consideration:

- Create specialized courts to adjudicate labor and employment cases, which could result in speedier and better enforcement.

Currently, many workplace matters are adjudicated in general courts before judges that do not have specific expertise on the laws in question. Moreover, courts are not structured in a way that accommodates the time-sensitive issues that come up in workplace disputes, such as the need for swift action after retaliation. Finally, multiple different adjudicative forums for the various legal issues that arise out of the workplace exist, including organizing issues, safety and health, discrimination, and workers' compensation.

One way to create a more holistic, responsive, and effective method of ensuring worker access to a meaningful justice system is to create a system of dedicated labor courts. There are already certain specialized courts that exist in the state and federal system, including bankruptcy courts in the federal system, as well as family, criminal, commercial, and small claims courts, among others, in state systems. Specialized labor courts could exist at the federal level, state level, or both. Judges would get specialized training on workplace laws and issues, and third parties (such as worker organizations) would have formal standing to file claims alleging violations and to seek relief. These courts would be empowered to handle the range of workplace matters arising under federal or state law, would have swift mechanisms for time-sensitive matters, and would also have assistance (including, ideally, legal representation) for pro se litigants.

More knowledgeable judges in a dedicated labor court could be trained in the broad dynamics at play in workplace disputes. Courts would be open at times outside of traditional business hours

to ensure access for workers with long work schedules. They would also be located in sites easily accessible by public transportation. There would be ready access to interpretation and translation. Filing fees would be non-existent or de minimus, or, in the alternative, would be readily waived. All of these logistical considerations would provide for more ready access for traditionally disadvantaged and disenfranchised groups. Therefore, we recommend considering the creation of a system of labor courts.

5B. Promotion of Competition in the Labor Market

Recommendations for consideration:

- Ban noncompete, no-hire, and no-poach agreements; and
- Reform antitrust law to account for labor market consequences of firm coordination and mergers.

The harm caused by the consequences of weakened competition in labor markets, specifically its contribution to rising income inequality, has come into greater focus in recent years. Although the policy prescriptions to address this failure of competition live in antitrust and not labor law, we believe that consideration of reforms to address labor market competition may be an appropriate complement to the *Clean Slate* reforms.

First, we note that the proliferation of restraints on worker mobility across the labor market, including noncompete agreements between employers and workers and no-hire or no-poach agreements between firms, is an increasingly powerful impediment to worker power. Workers who cannot plausibly leverage the threat of going to work elsewhere are substantially less likely to act concertedly to change workplace conditions. In 2019 alone, five states (Maryland, Washington, Maine, New Hampshire, and Rhode Island) passed bans on noncompete agreements for low-wage workers.[290] Senator Marco Rubio (R-FL) introduced a bill, the Federal Freedom to Compete Act (S. 124), to ban noncompete agreements for certain entry-level, lower-wage workers,[291] and Senators Chris Murphy (D-CT) and Todd Young (R-IN) introduced the 2019 Workforce Mobility Act (S. 2614) to ban all noncompete agreements.[292]

In the context of the fissured workplace, businesses' increasing ability to coordinate across traditional firm boundaries is especially apparent in the labor market.[293] In this context, employers often attempt to "have their cake and eat it too" by creating degrees of separation between themselves and their workers in an attempt to avoid being on the hook for labor standards violations while at the same time controlling, either directly or indirectly, entities within the fissured workplace.

For example, franchisors inhibit worker mobility within the fissured workplace, thus suppressing wages,[294] and purported "gig economy platforms" set prices across purported "independent contractors" preventing them from competing over price.[295] Yet, because the antitrust laws have evolved to be relatively lax with respect to "vertical restraints," these powerful impediments to competition may be permissible under the antitrust laws.

Thus, we recommend consideration of how labor and employment laws can take into account the ways that firms coordinate across the fissured workplace or exercise controls across firm boundaries. For instance, the scope of the employment laws could correspond to firms' control over consumer prices. Under this approach, a firm could not exercise pricing controls without being considered an employer of the independent contractors or franchisees who implement those prices. To take one example, the fact that Uber controls the prices of rides provided by Uber drivers would compel Uber to treat its drivers as employees, not independent contractors.

There is mounting evidence that firms' growing monopsony power (i.e., their power in the labor market relative to other potential competitors for labor) is suppressing wages and undermining working conditions.[296] We recommend consideration of reforms to ensure that workers can exert their power in the increasingly monopsonistic labor market, including how to ensure that workers have a voice in the merger review process.

5C. Reform of the Campaign Finance System

Recommendations for consideration:

- Restructure the public campaign finance system in order to limit corporate influence and allow greater participation by workers and their organizations; and
- Create a federal democracy voucher program.

Working people and their unions are severely disadvantaged by the existing campaign finance system. Business interests dominate campaign spending, with an overall advantage over organized labor of about 16 to 1.[297] Even among political action committees (PACs)—which the Center for Responsive Politics notes is the preferred method for labor unions to provide campaign funds—business has a nearly seven-to-one fundraising advantage.[298] At the same time, the legal rules on raising and spending political money are tilted against unions—in large part because they so often purport to treat unions and corporations similarly. Yet, unions and corporations are not the same: Unions are membership organizations that are subject to procedures of internal democracy, whereas corporations lack meaningful internal democracy.

One effect of the Supreme Court's decision in *Citizens United* [299] was to cut off avenues to control corporate campaign spending and the corrupting influence it has wrought. In the wake of *Citizens United,* the only rationale that the Court (as constituted for the foreseeable future) will entertain to justify restrictions on political spending as a campaign finance matter is the governmental interest in preventing *quid pro quo* corruption or the appearance of *quid pro quo* corruption.[300] The practical result is the ongoing disparity between the impact of campaign finance regulations on the political power of unions and working people and the impact of the same or parallel regulations on the political power of corporations and well-paid managers.

In the absence of a Constitutional amendment to overturn *Citizens United,* there are steps that Congress could consider taking to enhance workers' voice in the political system. To effectively rebalance the system between workers and corporations, we should consider a public system at the federal, state, or local level that is well-funded and designed to allow candidates to run robust campaigns at every stage of the election cycle. Among the objectives of a public campaign finance system should be limiting the influence of corporate donations. A public system could use multiple types of public funding, including public funding to match small-dollar donations, which amplifies the voices and dollars of working people; seed-money grants that allow candidates (including candidates from working-class backgrounds) to get their campaigns running; and vouchers for residents to donate to campaigns, which encourage candidates to engage all residents, including workers with limited income, to contribute to campaigns. In such a system, however, recognition should be accorded to the democratic nature of unions.

CLEAN SLATE WORLD

What would a Clean Slate world look like? Or feel like? We can't know for sure because it hasn't happened yet, but we have a vision of what multiple pathways to voice and power would mean for workers who have so little of either under the law today:

- Every worker in the U.S. will have the opportunity of voting for someone to represent them and their interests in the workplace; many will have more than one representative – a workplace monitor, works council representatives and union representatives. Workers will have the chance to know the people on the ballot – they will be their coworkers or organizers who have become familiar through regular contact. Workers will feel safer when they try to organize because they will have just-cause protection from dismissal and better insulation from employer interference.

- When something unfair happens in the workplace, workers will have more options than choosing to take on the boss alone or just enduring it. They will feel supported and be able to turn to a coworker or a union for solidarity. If they get fired, they'll have a right to know why.

- Questions that currently make workers uncertain about their rights – like who is an independent contractor and who is an employee, who works for the main company and who works for a contractor, who can join a union and who can't – will no longer constitute such obstacles. Workers regardless of their professions and legal classification will have the same rights on the job and it will be far harder for employers to play legal games to avoid their responsibilities.

- Wages will go up. Workers of color and women will see their wages approach – and ideally reach – parity with their white and male counterparts. They will also get an equitable chance to join unions. Companies will no longer be able to hide behind an asserted need to compete by keeping labor costs down because wages will be consistent across sectors.

- Workers will influence big decisions in the firms where they work. Through their representatives on the corporate board, the works council, and the sectoral bargaining panel, workers will have a voice on topics like whether to use robots, contract with ICE or take the climate crisis seriously. Workers will have a right to know how the companies they work for are spending their money, including what companies they contract with, how much money goes to stock buy backs versus how much goes to wages, and how much the CEO gets paid.

- Workers will feel connected to each other in new ways. Even workers in the gig economy and those who don't share a physical workspace will be able to engage with each other in their company's digital meeting space. And if they work for a company that exists only on the internet, they can make sure their company's customers know when they go on strike by setting up a digital picket line together.

- Workers will have a louder voice in our democracy. No one will have to choose between a paycheck and being able to go vote because they'll have a right to vote by mail or get paid for time off to go to the polling station. With stronger worker organizations, politicians will pay more attention to what workers want and elected officials will feel pressure to be more responsive.

A Clean Slate world won't be a utopia – workers would still get laid off and fired; those who work in the C suite would still make more money than those who work on the shop floor; and our democracy would continue to be imperfect. But, we hope that if our Clean Slate recommendations could move from the pages of this report to the pages of our law books, the result could be an economy and democracy that is in a real way much fairer, more equitable and more just.

SECTION 6

CONCLUSION: WHAT COMES NEXT

As stated at the outset, the ambition of the Clean Slate for Worker Power project is quite broad, and, as a result, this report has of necessity been long and detailed. We have set out to establish a roadmap for facilitating forms of worker power that are capable of contributing to a more equitable economy and politics, and this mapping has required a significant degree of detail. However, given the ambition of the project, this report is, in another very real sense, not nearly detailed enough. After all, reforming a set of rules that undergird one of the largest and most complex labor markets in human history is a complicated affair, and it is an undertaking that requires much further work. As such, this report is best viewed as establishing principles to guide such a continuing effort and not an attempt to be the final word on such an effort.

We now turn to the work of translating these recommendations into implementable policies. This project will require far more than the drafting of legislative language; it requires answering many of the questions that we have yet to resolve. Throughout *Clean Slate,* we have attempted to flag the areas that are most in need of further thought and exploration. For example, although we have begun to sketch the contours of a sectoral bargaining system, we have left open many questions about how it would work in practice. Other sections of the report address topics for which we felt incapable of making firm recommendations, and we have instead proposed areas for further consideration. We look forward to continuing to work on these critical questions.

Although the focus of this report is federal labor law reform, we are not naïve about the timeline for the adoption of reforms as bold and innovative as we have recommended—nor are we indifferent to the exciting prospects for meaningful reform at the state and local level. Accordingly, in addition to addressing the detailed policy questions that require further attention, we are also committed to supporting innovations in worker organizing at the state and local level. These innovations are critical for multiple reasons, including: (1) the conditions for so many workers are so dire that immediate reform is necessary, before the time that federal change becomes possible; (2) state and local efforts can make federal change more attainable; and (3) the support of organizations and leaders at the state and local level can help build the infrastructure that will be necessary to make federal reforms successful when federal reforms are possible.

Accordingly, to advance innovations at the state and local level, *Clean Slate* will, in the coming months, award seed grants meant to facilitate these efforts.

Finally, we engaged in this work at an auspicious time for a labor law reform project of this scope. When we started, the dominant public narrative was one of unmitigated bad news for the labor movement: Union density was continuing its decades-long decline, the Supreme Court was destined to take another whack at the financial stability of unions, and the number of major strikes and collective actions was at an all-time low. Then, something happened during this phase of the Clean Slate project: The narrative shifted. Although the labor movement remains in deep crisis, as discussed throughout this report, workers grabbed national headlines in ways that we have not seen in decades—teachers took to the streets in the RedforEd movement;[301] Google workers walked out by the tens of thousands around the world;[302] Marriott workers engaged in a strike that crossed the nation and yielded innovative collective bargaining provisions;[303] and the public told Gallup pollsters that they support unions at levels not recorded in decades.[304] Everyone involved in Clean Slate is grateful for the inspiration provided by these acts of collective courage.

We hope that one day, in the not-too-distant future, all workers will have the labor law that they deserve.

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Please note: The listing of the individuals below only conveys the fact of their participation; it is not an endorsement of the recommendations by them personally or by the institutions with which they are affiliated. Institutions are listed for identification purposes. The individuals are entitled to great credit for making the project possible but are not responsible for the resulting recommendations.

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END NOTES

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[14] While we recognize that public-sector unions are just as critical to the project of economic and political equality, our report focuses on private-sector workers and their organizations. A clean slate for public-sector workers is a necessary complement to this project. We note that the Public Service Freedom to Negotiate Act (H.R. 3463) would helpfully extend collective bargaining rights to all public-sector workers and would be a good next step. The extent to which the workers covered by the Railway Labor Act should continue to have a separate legal regime is another topic that merits additional consideration.

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[36] *See, e.g.,* David Cooper & Teresa Kroger, *Employers Steal Billions from Workers' Paychecks Each Year*, Econ. Policy Inst. (May 10, 2017), https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/.

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[44] *See generally* David Weil, The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It (2014).

[45] *Id.* at 10–11.

[46] Note that in Section 4D, we make recommendations for the inclusion of other categories of workers currently denied the right to collective bargaining, including supervisors and workers deemed to have relationships with employers that are not primarily economic in nature.

[47] We note that while both of these categories of workers are denied any rights to engage in collective bargaining under current federal law, they do enjoy collective bargaining rights under state law in several states.

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[53] *Id.* at 406, 410.

[54] *Sure-Tan v. NLRB,* 467 U.S. 883, 891–92 (1984).

[55] *Hoffman Plastic Compounds v. NLRB,* 535 U.S. 137, 140 (2002).

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[57] *Id.* at 1, 10 (Kavanaugh, J., dissenting).

[58] Although beyond the scope of a new labor statute, the law should be clarified so as to prevent Immigration and Customs Enforcement (ICE) from raiding a workplace where workers have complained about labor violations. Worksite raids are destructive of workers' rights. The practice of separating immigration enforcement from workplace enforcement was institutionalized in an agreement between the U.S. Department of Labor (DOL) and ICE. The firewall between DOL and ICE, currently established in a Memorandum of Understanding (MOU) between the agencies, should be codified in federal law. Similarly, undocumented workers who make complaints about unsafe working conditions or illegal labor practices should be protected from deportation, using a streamlined administrative procedure.

[59] Protecting the Right to Organize (PRO) Act, H.R. 2474, 116th Cong., § 2(f) (2019).

[60] *See, e.g.,* NLRB v. Hearst Publ'ns, Inc. 322 U.S. 111, 127–35 (1944).

[61] NLRA § 2(3). Notably, independent contractors are not just excluded from the NLRA but are also prohibited by antitrust law from acting collectively to demand working conditions. *See, e.g.,* Elizabeth Kennedy, *Comment, Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors,"* 26 Berkeley J. Emp. & Lab. L 143, 168–74 (2005); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action,* 47 Loy. U. Chi. L.J. 969, 977–79 (2016).

[62] *See, e.g., Steinberg & Co.*, 78 NLRB 211, 221 (1948) ("[A]n employer-employee relationship exists where the person for whom the services are performed reserves the right to control the manner and means by which the result is to be accomplished"); St Joseph News-Press, 345 NLRB 474, 477–78 (2005) (enumerating factors that include the skills required, the ownership of tools, the method of payment, the ability to hire staff without managerial approval, the parties' perception of the relationship, and the risk of loss or opportunity for profit).

[63] *Compare Pennsylvania Academy of Fine Arts,* 343 NLRB 846 (2004) with *Lancaster Symphony Orchestra,* 357 NLRB No. 152 (2011).

[64] Rebecca Smith & Sarah Leberstein, Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy 3, Nat'l Emp. Law Project (2015).

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[67] *See* Sophia Bollag, *California's New Gig Economy Law Challenged In Court By Truck Drivers*, Sacramento Bee (Nov. 12, 2019), https://www.sacbee.com/news/politics-government/capitol-alert/article237294734.html. The truck drivers' case is *California Truckers Association v. Becerra,* No. 3:18-cv-02458 (S.D. Cal. filed Oct. 25, 2019).

[68] *See* Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers,* 52 Idaho L. Rev. 953, 967 (2016). Several NLRB cases have considered whether work-release inmates may be included in a bargaining unit with non-inmate employees. *See Rosslyn Concrete Constr. Co. v. NLRB,* 713 F.2d 61, 63 (4th Cir. 1983) (declining to address whether prisoners are employees where employer did not raise the issue before the NLRB); *Nat'l Welders Supply Co.,* 145 N.L.R.B. 948 (1964) (excluding work-release inmates from the bargaining unit on grounds of lack of community of interest due to substantial difference in wages and other conditions of employment with non-inmate employees).

[69] *See* Noah Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships,* 61 Vand. L. Rev. 857, 882-83 n.101–103 (2008) (citing over 45 cases in which courts found no employment relationship, and only seven in which courts found an employment relationship).

[70] *See* Peter Wagner and Daniel Kopf, *The Racial Geography of Mass Incarceration,* Prison Policy Initiative (July 2015), https://www.prisonpolicy.org/racialgeography/report.html.

[71] These recommendations apply to privately as well as publicly owned prisons. On the case for covering incarcerated workers under the NLRA, *see generally* Fink, *supra* note 68.

[72] *See Brevard Achievement Center, Inc. and Transport Workers Union of America, Local 525, AFL-CIO,* 342 NLRB No. 101, 986–87 (2004).

[73] *Id.* at 996 (Lieberman and Walsh, dissenting).

[74] *See* 29 U.S.C. § 159(a) (1970).

[75] *Id.*

[76] *See, e.g.,* Celine McNicholas, Margaret Poydock, Julia Wolfe, Ben Zipperer, Gordon Lafer, and Lola Loustaunau, *Unlawful,* Econ. Policy Inst. (Dec. 11, 2019), https://www.epi.org/publication/unlawful-employer-opposition-to-union-election-campaigns/ (finding that U.S. employers are charged with violating federal law in 41.5 percent of all union election campaigns).

[77] Formally, this can be achieved by allowing: (1) the worker organization to accrete the second (and all subsequent) units to the existing one, thereby forming a single, ultimately enterprise-wide, unit; and (2) the worker organization to extend its existing collective bargaining agreement to all of the newly organized units within the enterprise, thereby creating a single, ultimately enterprise-wide, collective bargaining agreement. Should any of the workplaces within the enterprise be deemed separate employers, the law should mandate—again, at the election of the worker organization—multi-employer bargaining units and multi-employer bargaining.

[78] To accommodate very small workplaces, one workplace monitor may cover multiple sites.

[79] *See generally* Joel Rogers and Wolfgang Streek, editors, Works Councils: Consultation, Representation, and Cooperation in Industrial Relations (1995).

[80] In our discussion of revenue generaton below, we note that employers should be eligible for tax credits to defray these costs.

[81] See Section 4E on the creation of a Worker Organization Administration to provide training for workplace monitors and works council members.

[82] This would also be true for exclusive representation established through current Section 8(f) pre-hire agreements.

[83] *See* Jewell Smokeless Coal Corp., 170 NLRB 392, 393 (1968) (Board considers "industrial realities" in determining joint employer status).

[84] Cal. Lab. Code § 2810.3 (2014), *available at* http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201320140AB1897.

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[88] *See generally* Kate Andrias, *The New Labor Law,* 126 Yale L.J. 2 (2016); Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act,* 128 Yale L.J. 616 (2019).

[89] *See* Shane Godfrey, Int'l Labour Org., Multi-Employer Collective Bargaining in South Africa (2018), *available at* https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_632263.pdf; Arturo Bronstein, *National Labour Law Profile: Republic of Argentina,* Int'l Labour Org. (last visited Nov. 22, 2019), https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158890/lang--en/index.htm; *What's Happening To Collective Bargaining In Europe?,* European Trade Union Inst. (2019), https://www.etui.org/Services/Facts-Figures/Benchmarks/What-s-happening-to-collective-bargaining-in-Europe.

[90] *See* Diane MacDonald, *Sectoral Certification: A Case Study of British Columbia,* 5 Can. Lab. & Emp. L.J.. 243, 268–73 (1997). Black and Latinx workers are overrepresented in nonstandard work with the lowest job quality—temporary help agency work. While Black workers comprise 12.1 percent of the overall workforce, they comprise 25.9 percent of temporary help agency workers; Latinx workers are 16.6 percent of all workers but 25.4 percent of temporary help agency workers. Nat'l Employment Law Project, *America's Nonstandard Workforce Faces Wage, Benefit Penalties, According to U.S. Data,* Press Release (June 7, 2018), https://www.nelp.org/news-releases/americas-nonstandard-workforce-faces-wage-benefit-penalties-according-us-data/. In addition, "gig" workers doing "electronically mediated work" are disproportionately Black and Latinx. See Nat'l Employment Law Ctr., Rights At Risk: Gig Companies' Campaign to Upend Employment as We Know It 18 n.3 (2019), https://s27147.pcdn.co/wp-content/uploads/Rights-at-Risk-4-2-19.pdf.

[91] *See* Sandra Polaski, *Sectoral Bargaining in Comparative Perspective,* Presentation to Clean Slate Convening on Levels, Actors, and Scope of Bargaining (Jan. 2019); Maarten Van Klaveren & Denis Gregory, European Trade Union Inst., Restoring Multi-Employer Bargaining In Europe: Prospects And Challenges 17 (2019).

[92] *See, e.g.,* Brenda Gannon et al., *Inter-industry Wage Differentials and the Gender Wage Gap: Evidence from European Countries,* 38 ECON. & SOC. REV. 135, 151 (2005), *available at* https://www.researchgate.net/publication/4800835_Inter- industry_Wage_Differentials_and_the_Gender_Wage_Gap_Evidence_from_European_Countries.

[93] The statute might also provide a role for the BLS in providing independent economic analyses of the impact of sectoral agreements.

[94] *See North American Industry Classification System,* U.S. CENSUS BUREAU (2017), https://www.census.gov/eos/www/naics/.

[95] We note that no bargaining would be necessary over membership dues checkoff because, as discussed above, dues checkoff must be made available to all worker organizations.

[96] *See* Victoria Basualdo & Cecilia Nahon, *Report on the Case of Argentina,* 12 (Mar. 9, 2019); Law No. 14250 on Collective Agreements (2004) (Arg.), *available* at https://www.ilo.org/dyn/irlex/en/f?p=14100:1100:0::NO::P1100_ISO_CODE3,P1100_SUBCODE_CODE,P1100_YEAR:ARG,,2015.

[97] 40 U.S.C. 3141 et seq. (2019).

[98] 41 U.S.C. 6701 et seq. (2019).

[99] *Payne v. Western & Atl. R.R.,* 81 Tenn. 507, 518–19 (1884).

[100] 29 U.S.C. §§ 157–58(a) (2018).

[101] Jay M. Feinman, *The Development of the Employment at Will Rule,* 20 AM. J. LEGAL HIST. 118, 132 (1976).

[102] *See* JEFFREY PFEIFFER, THE HUMAN EQUATION: BUILDING PROFITS BY PUTTING PEOPLE FIRST (1998).

[103] Andrew Oswald et al., *Happiness and Productivity,* 33 J. LAB. ECON. 789 (2015).

[104] Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases,* 1985 DUKE L.J. 594, 611–12 (1985).

[105] MONT. CODE ANN. § 39-2-904.

[106] MONT. CODE ANN. § 39-2-903.

[107] *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 113 (1956).

[108] *See* Lora Engdahl, *A Little-Known Agency That Is Supposed To Protect Workers Is Instead Eroding Workers' Basic Labor Rights,* ECON. POLICY INST. (Oct. 24, 2019), https://www.epi.org/blog/a-little-known-agency-that-is-supposed-to-protect-workers-is-instead-eroding-workers-basic-labor-rights/.

[109] As discussed above, when workers choose an exclusive representative, that organization would replace any non-exclusive bargaining representatives (though it would not replace works councils or monitors). Thus, where there is an exclusive representative, access and list rights, and the right to dues checkoff would be available to the exclusive representative but not to any non-exclusive representatives.

[110] *See* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,* 96 HARV. L. REV. 1769, 1776–81 (1983).

[111] PRO Act, H.R. 2474, 116th Cong. § 2(d)(3) (2019).

[112] Should worker organizations and employers wish to negotiate rules for organizing and recognition that better enable the formation of worker organizations, the law should permit them to do so. For example, neutrality-type agreement should not constitute unlawful employer assistance or violations of Section 302 of the Labor Management Relations Act.

[113] *See* Burton Crager, *Company Unions Under the National Labor Relations Act,* 40 MICH. L. REV. 831, 832–33 (1942). For the definitive contemporary account, see Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production,* 94 Colum. L. Rev. 753 (1994).

[114] *See, e.g.,* Celine McNicholas, Margaret Poydock, Julia Wolfe, Ben Zipperer, Gordon Lafer, and Lola Loustaunau, *Unlawful,* ECON. POLICY INST. (Dec. 11, 2019), https://www.epi.org/publication/unlawful-employer-opposition-to-union-election-campaigns/ (finding that U.S. employers are charged with violating federal law in 41.5 percent of all union election campaigns).

[115] John Schmitt & Ben Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns,* CTR. FOR ECON. & POLICY RESEARCH 11 (2007).

[116] *See, e.g.,* Shearer's Foods, Inc., 340 N.L.R.B. 1093, 1094 (2003); *see also* Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing* 10 (Econ. Pol. Inst., EPI Briefing Paper No. 235, 2009).

[117] *See* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,* 96 HARV. L. REV. 1769, 1774 (1983).

[118] PRO Act, H.R. 2474, 116th Cong. § 2(d)(3) (2019)

[119] PRO Act, H.R. 2474, 116th Cong. § 2(i) (2019).

[120] This requirement would provide a necessary corrective to the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002).

[121] *See generally* Weiler, *supra* note 117.

[122] *Id.*

[123] *See Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019) (overturning *Purple Communications*, 361 NLRB 1050 (2014)).

[124] Daisuke Wakabayashi et al., *Google Walkout: Employees Stage Protest Over Handling of Sexual Harassment*, N.Y. Times (Nov. 1, 2018), https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html.

[125] *See* Monica Anderson & Madhumita Kumar, *Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption*, Pew Research Ctr., (May 7, 2019), https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption.

[126] *Id.*

[127] *See generally* Weil, *supra* note 44.

[128] In July 2019, Democrats in the Senate and House introduced the Stop Wall Street Looting Act to address these private equity issues. Specifically, the proposed legislation would require private equity firms to share financial responsibility for the companies under their control, limit the ability of equity firms to immediately extract wealth from their controlled companies, and require greater transparency, amongst other regulations. *See* Elizabeth Warren, Warren, Baldwin, Brown, Pocan, Jayapal, Colleagues Unveil Bold Legislation to Fundamentally Reform the Private Equity Industry (July 18, 2019), https://www.warren.senate.gov/newsroom/press-releases/warren-baldwin-brown-pocan-jayapal-colleagues-unveil-bold-legislation-to-fundamentally-reform-the-private-equity-industry.

[129] 29 U.S.C. § 158(b)(4) (2018). The PRO Act currently pending in Congress would repeal Section 8(b)(4).

[130] The importance of protecting workers' secondary activity is underscored by the success of the Coalition of Immokalee Workers in winning improvements in working conditions by targeting the large companies that purchase produce, rather than agricultural employers. See Steven Greenhouse, *In Florida Tomato Fields, A Penny Buys Progress*, N.Y. Times (Apr. 24, 2014), https://www.nytimes.com/2014/04/25/business/in-florida-tomato-fields-a-penny-buys-progress.html.

[131] 29 U.S.C. § 158(e) (2018).

[132] Among other advantages, this change would bring labor law into compliance with the First Amendment. *See generally* Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past As Prologue*, 118 Colum. L. Rev. 2057 (2018).

[133] 17 C.F.R. Part 210.

[134] Arguably, because the SEC's regulatory reach extends beyond publicly traded companies to generally prohibit misrepresentation to investors, the SEC could theoretically require privately held companies that involve multiple investors to also disclose similar information for the benefit of such investors or potential investors.

[135] Indeed, the effectiveness of this tactic was in part what led to the Taft-Hartley and Landrum-Griffin amendments to the NLRA. *See* Joe Burns, *Secondary Strikes Are Primary to Labor's Revival*, LaborNotes (Nov. 4, 2010), https://labornotes.org/2010/11/secondary-strikes-are-primary-labor%E2%80%99s-revival.

[136] *See generally* Craig Becker, *"Better than a Strike": Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. of Chic. L. Rev. 351 (1994).

[137] 29 U.S.C. § 157 (2018).

[138] *See Walmart Stores, Inc.*, 368 NLRB No. 24 (July 25, 2019).

[139] *See NLRB v. Insurance Agents*, 361 U.S. 495, 496 (1960).

[140] *See, e.g., Davis Electrical Constructors, Inc.*, 216 NLRB 102 (1975); *General Electric Co.*, 155 NLRB 208 (1965); *Elk Lumber Co.*, 91 NLRB 333 (1950).

[141] *See NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

[142] Employers are able to resist strikes now via permanent or temporary replacement workers, with the latter permitted even when employers lock out their workforces. Later in this section, we also recommend reducing employers' abilities to rely on replacement workers.

[143] *See NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

[144] PRO Act, H.R. 2474, 116th Cong. § 2(d)(1) (2019).

[145] Anna Bahney, *Nearly a Quarter of Americans Have No Emergency Savings*, CNN (June 20, 2018), https://money.cnn.com/2018/06/20/pf/no-emergency-savings/index.html.

[146] *See* Sho Chandra, *Corporate America Has Amassed a Record Amount of Cash*, Bloomberg (Sept. 21, 2017), https://www.bloomberg.com/news/articles/2017-09-21/corporate-america-has-amassed-a-record-amount-of-cash.

[147] *See N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 536–40 (1979) (citing legislative history).

[148] 42 U.S.C. § 503(a) (2018); 26 U.S.C. § 3304 (2018).

[149] *See N.Y. Tel.*, 440 U.S. at 541–42 (upholding New York's law granting benefits to striking workers as not preempted by the NLRA); Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471, 488–89 (1977) (upholding Ohio's law denying benefits to

striking workers as not preempted by the Social Security Act or the Federal Unemployment Tax Act).

[150] 26 U.S.C. § 3304(a)(5)(A) (2018).

[151] Mark A. Rothstein et al., Employment Law § 10:14, fn. 1–6 (6th ed. 2019).

[152] *See, e.g.,* Mass. Gen. Laws ch. 151A, § 25 (only locked-out workers eligible; striking workers disqualified). For a comparison of states' unemployment insurance coverage for workers affected by labor disputes, see Dep't of Labor, Comparison of State Unemployment Insurance Laws 5–20 (2019), *available at* https://oui.doleta.gov/unemploy/pdf/uilawcompar/2019/complete.pdf.

[153] N.Y. Lab. Law § 592 (2019).

[154] Mo. Ann. State § 288.040.6 (Vernon 2019).

[155] *See* R.I. Gen. Laws 1956, § 28-44-16; Haw. Rev. Stat. § 393-30(4).

[156] For example, a requirement to demonstrate that they are actively seeking new employment should not apply to striking or locked-out workers.

[157] Under *Tri-County Medical Center*, 222 NLRB 1089 (1976), employers can prohibit off-duty employees from re-entering the premises, essentially limiting their organization activities to parking lots. And under the Board's recent decision in *Bexar County Performing Arts Center Foundation,* subcontracted employees who do not work exclusively at a particular worksite do not have the right to engage in concerted activity at that site. 386 NLRB No. 46 (2019).

[158] *See Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (distinguishing between mandatory subjects of bargaining that relate to the terms and conditions of employment and permissive subjects of bargaining (entrepreneurial decisions)).

[159] *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

[160] 379 U.S. 203, 223 (1964) (Stewart, J., concurring)

[161] 452 U.S. 666, 681 (1981).

[162] *Id.*

[163] 233 F.3d 831, 844 (4th Cir. 2000).

[164] 159 F.3d 946, 955 (6th Cir. 1998).

[165] Meghan B. Kelly & Laney Ruckstuhl, *Wayfair Employees Protest Sale of Furniture to Migrant Detention Center,* NPR (June 26, 2019), https://www.npr.org/2019/06/26/736308620/wayfair-employees-protest-sale-of-furniture-to-migrant-detention-center.

[166] Kathleen Foody & Don Babwin, *Affordable Housing Among Striking Chicago Teachers' Demands,* Associated Press (October 21, 2019), https://apnews.com/7bc567d71d974a8789ffe955df254b02.

[167] *E.g.,* Patrick McGeehan, *Nurses Strike in New York: Threat Increases Over 'Safe Staffing' Levels,* N.Y. Times (Mar. 30, 2019), https://www.nytimes.com/2019/03/30/nyregion/nyc-nurses-strike.html.

[168] 29 U.S.C. § 158(e) (2018).

[169] The Bargaining for the Common Good movement suggests the potential for even broader reforms—such as creating truly community-based bargaining obligations for other economic actors, such as landlords, banks, or developers—that would empower both workers and their communities. Such possible reforms deserve further exploration.

[170] *See, e.g.,* Julius G. Getman, *The NLRB: What Went Wrong and Should We Try to Fix It?,* 64 Emory L.J. 1495, 1497 (2015) ("By its decision in *H.K. Porter,* denying to the Board the power to effectively remedy employer failures to bargain in good faith, the Court has given encouragement to the widespread practice by employers of refusing to come to agreement with newly certified unions").

[171] *See H.K. Porter Co. v. NLRB,* 397 U.S. 99 (1970).

[172] Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act,* 70 LA. L. Rev. 47, 49 (2009).

[173] PRO Act, S.1306, 116th Cong. (2019).

[174] *See* Robert G. Howlett, *Interest Arbitration in the Public Sector,* 60 Chi.-Kent L. Rev. 815 (1984).

[175] *See* Henry S. Farber & Harry C. Katz, *Interest Arbitration, Outcomes, and the Incentive to Bargain,* 33 Ind. & Lab. Rel. Rev.. 55–63 (1979).

[176] *See* David P. Twomey, NLRA *Impasse Cases: What's Right, What's Not Right, and What Can Be Done About It,* 65 Lab. L.J. 117 (2014).

[177] *See CalMat Co.,* 331 NLRB 1084, 1097 (2000).

[178] Econ. Pol. Inst., The Productivity–Pay Gap (2009), https://www.epi.org/productivity-pay-gap.

[179] Bureau of Labor Statistics, Monthly Labor Review, Estimating the U.S. labor share (2017), https://www.bls.gov/opub/mlr/2017/article/estimating-the-us-labor-share.htm.

[180] Ewan McGaughey, *Democracy in America at Work: The History of Labor's Vote in Corporate Governance,* 42 Seattle U. L. Rev. 697, 719 (2019).

[181] *Id.* at 697, 718.

[182] *Id.*

[183] *Id.* at 697, 729-30.

[184] *Id.* at 697, 735.

[185] S. 3348, 115th Cong. (2018).

[186] S. 915, 116th Cong. (2019).

[187] Alexia Fernández Campbell, *Bernie Sanders Calls Out Walmart Executives During Their Annual Meeting,* Vox (June 5, 2019), https://www.vox.com/policy-and-politics/2019/6/5/18653662/walmart-shareholders-meeting-bernie-sanders; *See* Wakabayashi et al., supra note 124.

[188] *See* Lenore Palladino, *21st Century Corporate Governance: New Rules for Worker Representation on Corporate Boards* (2019), Roosevelt Institute Working Paper, https://rooseveltinstitute.org/21st-century-corporate-governance-new-rules-for-worker-representation-on-corporate-boards/; Kent Greenfield, Corporations Are People Too (And They Should Act Like It) 211-213 (2018), content/uploads/2019/09/RI_Policies-for-Worker-Representation-on-Corporate-Boards-Working-Paper-201910.pdf.

[189] Susan R. Holmberg, *Workers on Corporate Boards? Germany's Had Them for Decades,* N.Y. Times (Jan. 6, 2019), https://www.nytimes.com/2019/01/06/opinion/warren-workers-boards.html.

[190] See discussion below of the creation of a Worker Organization Administration to provide training for worker representatives on corporate boards.

[191] *See* Lenore Palladino, *Ending Shareholder Primacy in Corporate Governance,* Roosevelt Institute Working Paper (2019), https://rooseveltinstitute.org/ending-shareholder-primacy-corporate-governance/.

[192] *See* Lynn A. Stout, The Toxic Effects of Shareholder Primacy, 161 U. Pa. L. Rev. 2003, 2010–15 (2013).

[193] Business Roundtable, Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans, (2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

[194] Marc Benioff, *We Need a New Capitalism,* N.Y. Times (Sept. 14, 2019), https://www.nytimes.com/2019/10/14/opinion/benioff-salesforce-capitalism.html.

[195] See Kent Greenfield, Corporations Are People Too (And They Should Act Like It) 211-213 (2018). There may be strong arguments for extending the fiduciary duty to other stakeholders also, but such an expansion and its implications are beyond the scope of our project.

[196] *See* Larry E. Ribstein, *Why Corporations?,* 1 Berkeley Bus. L.J.183, 208–210 (2004).

[197] Simeon E. Baldwin, History of the Law of Private Corporations in the Colonies and States (1909).

[198] *See generally* Adam Winkler, We the Corporations: How American Businesses Won Their Civil Rights (2018).

[199] Creating a fiduciary duty to workers also makes sense when considering how integral is the contribution of workers to the corporation. Their contribution can be thought of as an investment, loosely akin to the investment made by capital investors. The term "sweat equity" to describe the sense of ownership that workers derive from their contribution to the value of the firms for which they work is a recognition of this dimension of workers' "investment" in their firms. In *Firms as Political Entities: Saving Democracy Through Economic Bicamerialism,* Isabelle Ferreras advances the theory of the firm as a joint enterprise between capital and labor investors, thereby justifying a fiduciary duty to each. Including workers' interests in the ambit of the corporate fiduciary duty is a mechanism to recognize the unique interest that workers have and the contribution that they make in both protecting the firm from failure and realizing its full potential.

[200] *See generally* Zachary Roth, The Great Suppression: Voting Rights, Corporate Cash, and the Conservative Assault on Democracy (2016).

[201] *See* Gilens, *supra* note 12 at 1.

[202] *See* Gilens, *supra* note 12 at 81 (emphasis added).

[203] Pew Charitable Trs., Why Are Millions of Citizens Not Registered to Vote? 1 (2017), https://www.pewtrusts.org/-/media/assets/2017/06/ei_why_are_millions_of_citizens_not_registered_to_vote.pdf.

[204] Drew Desilver, *U.S. Trails Most Developed Countries in Voter Turnout,* Pew Res. Ctr. (May 21, 2018), pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries/.

[205] Justin Levitt, *The Truth About Voter Fraud,* Brennan Ctr. For Justice 3 (2007), brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf.

[206] Nonprofit Vote & U.S. Elections Project, America Goes to the Polls 2016 11 (2017), http://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf; Project Vote, Same Day Registration (2015), http://www.projectvote.org/wp-content/uploads/2015/06/SameDayFactSheet-PV-Feb2015.pdf. *See also Same Day Voter Registration,* Nat'l

Conf. of State Legislatures (June 28, 2019), http://www.ncsl.org/research/elections-and-campaigns/same-dayregistration.aspx#HowSDRWorks (studies also show intrastate increases in voter participation: "Multiple studies place the effect between an increase of 3 to 7 percent, with an average of a 5 percent increase").

[207] *See, e.g.,* Same Day Registration Act of 2019, H.R. 93, 116th Cong. (2019).

[208] *Absentee and Early Voting,* Nat'l Conf. of State Legislatures (Aug. 17, 2017), http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

[209] *Id.*

[210] Theodore Roosevelt & Earnest H. Abbott, The New Nationalism 24 (1910).

[211] We recommend that employers be eligible for a tax credit equal to any expenses related to compliance with this requirement.

[212] Alexander Hertel-Fernandez, Politics at Work: How Companies Turn Their Workers into Lobbyists (2018).

[213] *Id.* at 5.

[214] *See* Hertel-Fernandez, *supra* note 212 at x–xi.

[215] H.R. 2474 § 2(d)(3), 116th Cong. (2019).

[216] *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959).

[217] Lodge 76, *Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm.,* 427 U.S. 132 (1976).

[218] Cynthia L. Estlund, *The Ossification of American Labor Law,* 102 Colum. L. Rev.. 1527, 1530 (2002); *see generally* Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States,* 124 Harv. L. Rev. 1153 (2011).

[219] *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[220] *State Minimum Wages,* Nat'l Conf. of State Legislatures (Jan. 7, 2019), http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx.

[221] *Non-Discrimination Laws,* Movement Advancement Project (last visited Dec. 23, 2019), http://www.lgbtmap.org/equality-maps/non_discrimination_laws.

[222] *Local Non-Discrimination Ordinances,* Movement Advancement Project (last visited Dec. 23, 2019), https://www.lgbtmap.org/equality-maps/non_discrimination_ordinances/policies.

[223] 29 U.S.C. § 667(c)(2).

[224] Cal. Code Regs. Tit. 8, § 3342.

[225] 49 U.S.C. § 5333(b).

[226] *Id.*

[227] 29 C.F.R. § 215.3(d).

[228] *See, e.g., Union Dues: Overview,* I.B.E.W. 45, http://www.ibew45.org/union_dues/ (last visited Nov. 24, 2019); H.P.A.E., HPAE Membership Dues: What You Need To Know 1 (2016), http://www.hpae.org/wp-content/uploads/2016/11/HPAE-Dues-Sheet-Salem.pdf.

[229] *Right to Work States,* Nat'l Conf. of State Legislatures, http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx (last visited Nov. 24, 2019).

[230] *Janus v. A.F.S.C.M.E.,* Council 31, 138 S. Ct. 2448 (2018).

[231] N.Y.C. Admin. Code § 20-1302.

[232] N.Y.C. Admin. Code § 20-1302(5)(h).

[233] *See, e.g., Int'l Ass'n of Machinists v. Street,* 367 U.S. 740, 761 (1961) (discussing congressional recognition of the free rider problem); *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 222–225 (1977).

[234] We note that the PRO Act would provide that "collective bargaining agreements providing that all employees in a bargaining unit shall contribute fees to a labor organization for the cost of representation, collective bargaining, contract enforcement, and related expenditures as a condition of employment shall be valid and enforceable notwithstanding any State or Territorial law." H.R. 2474 § 4(j), 116th Cong. (2019).

[235] H.R. 2474 116th Cong. § 2(k) (2019).

[236] To the extent that ERISA prohibits unions from receiving these funds, consideration should be given to amending ERISA.

[237] Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations,* 38 Pol. & Soc'y 522 (2010).

[238] Catherine Fisk & Seema Patel, *California Co-Enforcement Initiatives that Facilitate Worker Organizing,* Harv. L. & Pol'y Rev. Online (2017), https://harvardlpr.com/wp-content/uploads/sites/20/2017/11/Patel-Fisk-CoEnforcement.pdf.

[239] *Susan Harwood Training Grants,* Occupational and Safety Health Administration, https://www.osha.gov/dte/sharwood/ (last visited Dec. 22, 2019).

[240] Janice Fine, *Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed Where the State Alone Has Failed?* 45 Pol. & Socy'y 359, 377–78 (2017).

[241] Janice Fine & Gregory Lyon, *Segmentation and the Role of Labor Standards Enforcement in Immigration Reform,* 5 J. ON MIGRATION & HUM. SEC. 431, 440 (2017).

[242] https://s27147.pcdn.co/wp-content/uploads/CA-Enforcement-Document-Letter-11-27-18-1.pdf

[243] Terri Gerstein & Mark Erlich, *Confronting Misclassification and Payroll Fraud,* HARV. L. SCH. LABOR & WORKLIFE PROGRAM 16 (2019), https://lwp.law.harvard.edu/files/lwp/files/misclassification_ and_payroll_fraud.pdf.

[244] *Id.*

[245] *Id.*

[246] Cynthia Mark, LINKEDIN, https://www.linkedin.com/in/cynthia-mark-1029453/ (last visited Nov. 23, 2019).

[247] 30 U.S.C. § 813(f).

[248] 30 U.S.C. § 813(g).

[249] N.Y. Lab. Law § 154.

[250] N.Y. Lab. Law § 154.1.

[251] FAIR FOOD PROGRAM, https://www.fairfoodprogram.org/ (last visited Nov. 23, 2019).

[252] *About the Fair Food Program,* FAIR FOOD PROGRAM, https://www.fairfoodprogram.org/about-the-fair-food-program/ (last visited Nov. 23, 2019).

[253] *Our History,* ALLIANCE FOR FAIR FOOD, http://www.allianceforfairfood.org/our-history (last visited Nov. 23, 2019).

[254] *Impact,* WORKERS DEFENSE FUND, http://www.workersdefense.org/impact-2/ (last visited Dec. 22, 2019).

[255] Scott Braddock, *Austin Prepares to Launch New Expedited Building Permit Program,* CONSTRUCTION CITIZEN (Mar. 22, 2017), https://constructioncitizen.com/blog/austin-prepares-launch-new-expedited-building-permit-program/1703221.

[256] H.R. 2474, 116th Cong. § 2(i) (2019).

[257] Kate Hamaji et al., *Unchecked Corporate Power,* CTR. FOR POPULAR DEMOCRACY 22 (2019), https://populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf.

[258] *Id.* at 11.

[259] *See* Hamaji et al., *supra* note 257. This proposal is focused on forced arbitration imposed on individual workers, as a mandatory condition of their jobs and as a result of the power disparity between workers and employers. This is distinct from the separate topic of agreed-upon arbitration between unions and employers, which is not a subject of this proposal.

[260] We note that the PRO Act would make it an unfair labor practice "to enter into or attempt to enforce any agreement, express or implied, whereby prior to a dispute to which the agreement applies, an employee undertakes or promises not to pursue, bring, join, litigate, or support any kind of joint, class, or collective claim arising from or relating to the employment of such employee in any forum that, but for such agreement, is of competent jurisdiction." H.R. 2474 116th Cong. § 2(d)(5) (2019).

[261] Karla Walter, *Ensuring Government Spending Creates Decent Jobs for Workers,* CTR. FOR AM. PROGRESS ACTION FUND 1 (2018), https://cdn.americanprogressaction.org/content/uploads/sites/2/2018/01/29045127/ CreateDecentJobs-report4.pdf.

[262] *Delivering For Taxpayers,* NAT'L EMP. LAW PROJECT 1 (2018), https://s27147.pcdn.co/wp-content/uploads/Delivering-for-Taxpayers-Taking-On-Contractor-Fraud-Abuse-Improving-Jobs.pdf.

[263] *Id.* at 2.

[264] Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

[265] *See* NAT'L EMP. LAW PROJECT, supra note 262.

[266] *See* WALTER, *supra* note 261.

[267] Derek Thompson, *Health Care Just Became the U.S.'s Largest Employer,* THE ATLANTIC (Jan. 9, 2018), https://www.theatlantic.com/business/archive/2018/01/health-care-america-jobs/550079/.

[268] *American Health Care: Health Spending and the Federal Budget,* Comm. for a Responsible Fed. Budget (May 16, 2018), https://www.crfb.org/papers/american-health-care-health-spending-and-federal-budget.

[269] 29 U.S.C. §§ 152(3), (11).

[270] *NLRB v. Bell Aerospace Co.,* 416 U.S. 267 (1974).

[271] *See NLRB v. Yeshiva Univ.,* 444 U.S. 672 (1980) (denying collective bargaining rights to university professors). But *see Pac. Lutheran Univ. & SEIU, Local 925,* 361 NLRB No. 157 (2014) (committing to placing more weight on faculty role in managerial decisions that affect university as a whole before deeming them managers); *NLRB v. Ky. River Cmty. Care, Inc.,* 532 U.S. 706 (2001) (establishing three-part test for supervisory status that looks at the extent to which employee directs others' work, their responsibility for their work, and their exercise of independent judgement); *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006) (applying *Kentucky River* test somewhat narrowly, but still finding that certain nurses are supervisors).

[272] *See, e.g., American Diversified Foods, Inc. v. NLRB,* 640 F.2d 893 (1981) (holding that shift managers at an Arby's restaurant met the definition of "supervisors" under the NLRA);

[273] Alex Spanko, *Concentration of For-Profit, Chain SNFs Grew Over Last Six Years,* Skilled Nursing News (July 12, 2017), https://skillednursingnews.com/2017/07/concentration-profit-chain-snfs-grew-last-six-years/.

[274] We note that the PRO Act would exclude any supervisors who engage in supervisory activities for a majority of their time. H.R. 2474 § 2(a)(3)(A), 116th Cong. (2019).

[275] In defining who is a supervisor, the new labor law should not rely on a workers' responsibility for assigning or directing other workers, consistent with Section 2(a)(3)(B) and (C) of the PRO Act.

[276] *Trs. of Columbia Univ.*, 364 N.L.R.B. No. 90, slip op. at 4–5 (Aug. 23, 2016).

[277] *Toering Elec. Co.,* 351 N.L.R.B. 225, 238–245 (2007) (Members Liebman and Walsh, dissenting in part).

[278] *Compare Brown Univ. & Int'l Union,* 342 NLRB 483 (2004) (graduate student teachers are not employees under "primary beneficiary" test, since their relationship with university is primarily educational) *with Trs. of Columbia Univ.,* 364 N.L.R.B. No. 90 (Aug. 23, 2016) (graduate student teachers are covered under NLRA). The NLRB announced in May 2019 that it plans rulemaking around the issue. Jurisdiction—Nonemployee Status of University and College Students Working in Connection With Their Studies, 84 Fed. Reg. 49691 (proposed Sept. 23, 2019) (to be codified at 29 C.F.R. pt. 103).

[279] *Tony & Susan Alamo Found v. Sec'y of Labor,* 471 U.S. 290, 302–303 (1985). *See also* U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act at n.1 (Jan. 2018), https://www.dol.gov/whd/regs/compliance/whdfs71.htm ("WHD also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation, for religious, charitable, civic, or humanitarian purposes to nonprofit organizations. Unpaid internships for public sector and nonprofit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible").

[280] *See, e.g., Rhea Lana, Inc. v. United States Dep't of Labor,* 925 F.3d 521 (D.C. Cir. 2019), (upholding Labor Department's determination that purported volunteers at consignment sales run by a for-profit company were employees under the FLSA because, among other things, they were acting for the primary benefit of the company without compensation other than the opportunity to shop early.) In this sort of situation, unpaid labor can drive down labor standards across an industry (here, used merchandise stores) as competitors must price their merchandise higher to recoup labor costs.

[281] *See Northwestern Univ. & College Athletes Players Ass'n,* 362 N.L.R.B. No. 167 (Aug. 17, 2015) (finding that processing a petition for student athletes at a single institution would not promote stability in labor relations, and declining to assert jurisdiction).

[282] *Organization,* U.S. Small Bus. Admin. (SBA), https://www.sba.gov/about-sba/organization (last visited Nov. 23, 2019).

[283] Credit for this idea goes to Pete Davis, Harvard Law School, Class of 2018, who raised it in his final project for the seminar, "Organizing for Economic Justice in the New Economy," in Spring 2018.

[284] *Counseling & Training,* SBA, https://www/sba.gov/about-sba-navigation-structure/counseling-training (last visited Nov. 23, 2019).

[285] *Small Business Administration (SBA) Funding: Overview and Recent Trends,* Cong. Research Serv. 17–18 (Oct. 3, 2019), https://fas.org/sgp/crs/misc/R43846.pdf.

[286] *About Office of Small Business Development Centers,* SBA, https://www.sba.gov/offices/headquarters/osbdc/about-us (last visited Nov. 23, 2019).

[287] U.S. Small Bus. Admin., FY 2020 Congressional Justification and FY 2018 Annual Performance Report 52 (2019), https://www.sba.gov/sites/default/files/2019-04/SBA%20FY%20 2020%20Congressional%20 Justification_final%20508%20 %204%2023%202019.pdf.

[288] *Lasting Solutions for America's Temporary Workers,* Nat'l Emp. Law Project 2–5 (2019), https://s27147.pcdn.co/wp-content/uploads/Lasting-Solutions-for-Americas-Temporary-Workers-Brief.pdf.

[289] Workers would not be required to use the navigators and should remain free to access health care through brokers or technology platforms of their own choice.

[290] *Legislative Update: Recent Changes to Florida, Maine, New Hampshire, and Rhode Island Noncompete Laws – and D.C.'s New Noncompete Bill,* Fair Competition Law (Oct. 14, 2019), https://www.faircompetitionlaw.com/2019/10/14/legislative-update-recent-changes-to-florida-maine-new-hampshire-and-rhode-island-noncompete-laws-and-d-c-s-new-noncompete-bill/.

[291] Freedom to Compete Act, S. 124, 116th Cong. (2019).

[292] Workforce Mobility Act, S. 2614, 116th Cong. (2019).

[293] *See, e.g,* Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power,* 82 L. & Contemp. Probs. 45 (2019), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4918&context=lcp; David Seligman, *Having Their Cake and Eating It Too: Antitrust Laws and The Fisured*

Workplace, paper presented at the Harvard Law School "Unrigging the Market" Conference (June 13, 2018), https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_seligman_june_13_2018.pdf.

[294] *See* Alan Krueger & Orley Ashenfelter, I.Z.A. Institute of Labor Economics, Theory and Evidence on Employer Collusion in the Franchise Sector (2018), http://ftp.iza.org/dp11672.pdf.

[295] *See* Hal Singer, *Uber Under the Antitrust Microscope,* Forbes (Feb. 25, 2019), https://www.forbes.com/sites/washingtonbytes/2019/02/25/uber-under-the-antitrust-microscope-is-there-a-firm-exemption-to-antitrust/#2af673d42a47.

[296] *See* José Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data,* NBER Working Paper NO. 24, 395 (2019), https://www.nber.org/papers/w24395.pdf.

[297] *Business-Labor-Ideology Split in PAC & Individual Donations to Candidates, Parties, Super PACs and Outside Spending Groups,* Ctr. for Responsive Pol., https://www.opensecrets.org/overview/blio.php (last visited Nov. 24, 2019).

[298] *Id.*

[299] *Citizens United v. FEC*, 558 U.S. 310 (2010).

[300] *See McCutcheon v. FEC*, 572 U.S. 185, 208 (2014) ("And because the Government's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo corruption,* the Government may not seek to limit the appearance of mere influence or access").

[301] Moriah Balingit, *First, It Was West Virginia. Then, Kentucky and Oklahoma. Now, Arizona and Colorado Teachers Prepare to Walk Out,* Washington Post (Apr. 26, 2018), https://www.washingtonpost.com/news/education/wp/2018/04/26/first-it-was-west-virginia-then-kentucky-and-oklahoma-now-arizona-and-colorado-teachers-prepare-to-walk-out/.

[302] *See* Wakabayashi et al., *supra* note 124.

[303] Karen Schwartz, *Deal in San Francisco Ends Nationwide Marriott Strikes,* N.Y. Times (Dec. 3, 2018), https://www.nytimes.com/2018/12/03/travel/san-francisco-marriott-strike-over.html

[304] Jeffrey M. Jones, *As Labor Day Turns 125, Union Approval Near 50-Year High,* Gallup (Aug. 28, 2019), https://news.gallup.com/poll/265916/labor-day-turns-125-union-approval-near-year-high.aspx.