

SMALL BUSINESSES BEFORE BUREAUCRATS ACT

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JANUARY 11, 2024.—Committed to the Committee of the Whole House on the State  
of the Union and ordered to be printed  
\_\_\_\_\_

Ms. FOXX, from the Committee on Education and the Workforce,  
submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 3400]

The Committee on Education and the Workforce, to whom was referred the bill (H.R. 3400) to amend the National Labor Relations Act to adjust the dollar thresholds for National Labor Relations Board jurisdiction over certain labor disputes, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Small Businesses before Bureaucrats Act”.

**SEC. 2. INCREASE OF DOLLAR THRESHOLD FOR NATIONAL LABOR RELATIONS BOARD JURISDICTION OVER CERTAIN LABOR DISPUTES.**

(a) IN GENERAL.—Section 14(c) of the National Labor Relations Act (29 U.S.C. 164(c)) is amended—

(1) by redesignating paragraph (2) as paragraph (3); and

(2) by inserting after paragraph (1) the following:

“(2) In establishing by rule any dollar threshold with respect to a class or category of employers for the purposes of declining to assert jurisdiction over certain labor disputes involving such class or category of employers, the Board shall establish such dollar threshold at an amount—

“(A) for calendar year 2024, equal to the product of—

“(i) the dollar threshold applicable to such class or category as of the day prior to the date of enactment of this paragraph, multiplied by

“(ii) ten; and

“(B) for any calendar year after 2024, equal to the product of—

“(i) the dollar threshold applicable to such class or category for calendar year 2024 (after the date of enactment of this paragraph), multiplied by

“(ii) the quotient obtained by dividing—

“(I) the Personal Consumption Expenditure Per Capita Index (as published by the Bureau of Economic Analysis) for such calendar year after 2024; by

“(II) the Personal Consumption Expenditure Per Capita Index for calendar year 2024.”

(b) PERSONAL CONSUMPTION EXPENDITURE PER CAPITA INDEX.—The Bureau of Economic Analysis of the Department of Commerce shall prepare and publish an index reflecting expenditures for personal consumption by Americans on a per capita basis for each year, beginning calendar year 2025, and such index shall be known as the “Personal Consumption Expenditure Per Capita Index”.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to any decision of the National Labor Relations Board relating to the assertion of its jurisdiction over a labor dispute made after the date of enactment of this section.

#### PURPOSE

H.R. 3400, the *Small Businesses before Bureaucrats Act*, provides small businesses in various industries relief from the National Labor Relations Board’s (NLRB or Board) continual flip-flopping of precedent, radical pro-union activism, and burdensome regulations. The bill amends the *National Labor Relations Act* (NLRA) to increase the Board-created monetary jurisdictional thresholds. The bill also ensures the NLRB’s monetary jurisdictional thresholds reflect economic growth.

#### COMMITTEE ACTION

118TH CONGRESS

##### *Hearing*

On May 23, 2023, the Subcommittee on Health, Employment, Labor, and Pensions held a hearing titled “Protecting Employees’ Rights: Ensuring Fair Elections at the NLRB.” Witnesses were Mr. Philip A. Miscimarra, Partner, Morgan, Lewis, Bethesda, MD; Mr. Aaron Solem, Staff Attorney, National Right to Work Legal Defense and Education Foundation, Springfield, VA; Ms. Angela Thompson, General Counsel, Communications Workers of America, Washington, D.C.; and Mr. Cecil Leedy, Board of Directors, LEW Electrical Services, Tampa, FL. Republican members and witnesses discussed upcoming NLRB cases and their impact on small businesses and how H.R. 3400 would relieve small businesses of regulatory burdens.

##### *Legislative Action*

On May 17, 2023, Representative Bob Good (R-VA) introduced H.R. 3400, the *Small Businesses before Bureaucrats Act*, with Representatives Scott Perry (R-PA), John Moolenaar (R-MI), Mary Miller (R-IL), Tiffany Thomas (R-WI), Jeff Duncan (R-SC), Eric Burlison (R-MO), Randy Weber (R-TX), Scott Franklin (R-FL), Anna Paulina Luna (R-FL), Andrew Clyde (R-GA), Ralph Norman (R-SC), Beth Van Duyne (R-TX), Brian Babin (R-TX), Tom Cole (R-OK), Ron Estes (R-KS), and Ben Cline (R-VA) as original co-sponsors.

On December 12, 2023, the Committee considered H.R. 3400 in legislative session and the Committee adopted by voice vote an Amendment in the Nature of a Substitute offered by Rep. Good, which made technical changes to H.R. 3400. The Committee re-

ported it favorably to the House of Representatives by a recorded vote of 23 to 20.

## COMMITTEE VIEWS

### *Introduction*

During the Biden administration, the NLRB has pursued an extreme agenda to transform national labor policy to favor labor unions at the expense of employee free choice and employer rights. The Biden NLRB is following the disturbing trend established during the Obama administration of overruling longstanding precedent and inappropriately expanding labor union privileges.

Despite a congressional mandate that the NLRB act as a neutral arbiter of labor disputes,<sup>1</sup> the NLRB has increasingly become a highly politicized agency. As a result, NLRB law swings like a pendulum depending on the political party occupying the White House. Such massive swings in Board precedent are harmful to the entire regulated community, particularly small businesses that rarely possess the resources to monitor continually shifting NLRB law and lengthy regulations or to pursue legal remedies in the courts.

### *Background on NLRB jurisdiction*

The NLRA, as amended by the *Labor Management Relations Act of 1947*, gives the NLRB power to assert jurisdiction over any question of representation or any unfair labor practice “affecting [interstate] commerce.”<sup>2</sup> The Act further provides that

The Board, in its discretion, may, by rule of decision or by published rules . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.<sup>3</sup>

This grant of authority to the Board is limited in several ways. The NLRA does not apply to the United States or any wholly owned government corporation or any state or political subdivision, or any person subject to the *Railway Labor Act*. Those entities are excluded from the definition of the term employer under the NLRA.<sup>4</sup> The Board’s definition of the term employee also limits its jurisdiction by excluding agricultural laborers, domestic service in an individual’s home, independent contractors, and supervisors.<sup>5</sup>

Along with these statutory limitations, the NLRB established in a series of decisions that it will decline to assert jurisdiction over certain employers and labor disputes. Primarily, the Board declines to assert jurisdiction over employers with annual gross volume or sales below certain thresholds when the impact on interstate commerce is marginal. In addition, the Board can decline to intervene

<sup>1</sup> See James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMP. LAB. L. & POL’Y J. 221, 243–44 (2004–2005).

<sup>2</sup> 29 U.S.C. § 159(c)(1)(B), 160(a).

<sup>3</sup> *Id.* § 164(c)(1).

<sup>4</sup> *Id.* § 152(2).

<sup>5</sup> *Id.* § 152(3).

in labor disputes that are so local in nature that it would not materially affect interstate commerce. In cases where the Board declines to assert jurisdiction over small employers, the NLRA does not prevent any “agency or the courts of any State or Territory . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction.”<sup>6</sup>

In a series of decisions, monetary jurisdictional standards were created for various industries where the Board will accept jurisdiction if the employer involved meets the specific monetary standards. The two predominant monetary jurisdictional standards involve non-retail and retail businesses.<sup>7</sup> The NLRB’s jurisdictional standard for non-retail businesses is direct sales of goods to consumers in other States, or indirect sales through others (called out-flow), of at least \$50,000 a year; or direct purchases of goods from suppliers in other States, or indirect purchases through others (called inflow), of at least \$50,000 per year. The retail business standard is at least \$500,000 in annual gross volume of business per year. In applying any of the annual gross volume of business standards, there must be evidence that some portion of the \$500,000 involves interstate commerce.

Generally, if an enterprise meets the total annual volume of business listed in the standard, it will be considered engaged in activities that “affect” commerce. However, the Board must find, based on evidence, that the enterprise does affect commerce. The Board has established the policy that when an employer whose operations affect commerce refuses to supply the Board with information necessary to confirm total annual business, the Board may exercise jurisdiction and disregard its jurisdictional monetary thresholds.<sup>8</sup>

#### *The NLRB’s activist union agenda*

Congress enacted the NLRA predominantly “to assure freedom of choice and majority rule in employee selection of representatives.”<sup>9</sup> Summarized succinctly, the NLRA is meant to ensure “the employees pick the union; the union does not pick the employees.”<sup>10</sup> The Biden NLRB has failed to adhere to these guiding principles and is implementing a radical agenda to force union representation on employees who would prefer to refrain from union activities. The Board majority’s and General Counsel’s extreme agenda is also at odds with congressional intent. Congress chose to establish the NLRB in 1935 as a “strictly nonpartisan” Board composed of “three impartial Government members.”<sup>11</sup> Such radical and politically motivated regulations and decisions by the Board make it imperative to exempt certain small businesses because they are least able to withstand these costs.

In April 2022, NLRB General Counsel (GC) Jennifer Abruzzo issued a memorandum that all employer discussions about union

<sup>6</sup>*Id.* § 164(c)(2).

<sup>7</sup>For a full list of the NLRB’s jurisdictional standards, see NLRB, BASIC GUIDE TO THE NLRA 33–34 (1997), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basic-guide.pdf>; NLRB, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES 1–27 (2017), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/OutlineofLawandProcedureinRepresentationCases2017Update.pdf>.

<sup>8</sup>*Tropicana Products*, 122 NLRB 121 (1958).

<sup>9</sup>*Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731, 739 (1961).

<sup>10</sup>*Colorado Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (D.C. Cir. 2018).

<sup>11</sup>Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1363 (2000) (quoting 1935 Senate committee report on the NLRA) (internal quotation marks omitted).

issues are “inherently” unlawful, even when the employer speech is not threatening or coercive. The GC is also prosecuting claims and arguing to the Board that it is an unfair labor practice for employers to require employees, on paid work time, to attend meetings where the employer expresses its opinion concerning unionization. Thus, the GC is urging the Board to discard decades of case law, NLRB precedent upholding an employer’s First Amendment right to educate its employees about unionization, and Congress’s amendments to the NLRA.<sup>12</sup>

Philip Miscimarra, former NLRB Chairman and a partner at Morgan Lewis, testified before the Committee about the GC’s attempted ban of employer speech related to union issues and how Congress already addressed such arguments when enacting the *Taft-Hartley Act*:

The General Counsel’s attempted broad ban on an employer’s union-related discussions is not new. The NLRB adopted precisely the same speech prohibition in a 1946 case—*Clark Bros. Co.*—which Congress repudiated the very next year by adding Section 8(c) to the NLRA as part of the *Taft-Hartley Act*. . . .

Both the Senate and House bills contained language directly responding to *Clark Bros.* (and similar cases) by restoring employer free speech rights that had been extinguished by the pre-1947 NLRB. . . .

The Taft-Hartley legislative history is replete with similar indications that Section 8(c) was a direct response to repudiate the reasoning of *Clark Bros.* and other NLRB cases. Indeed, opponents of the Taft-Hartley legislation—including freshman House member John F. Kennedy—agreed that Congress needed to restore the employer free speech rights that the NLRB had limited or ignored in pre-1947 cases.<sup>13</sup>

On November 4, 2022, the NLRB issued a proposed rule titled “Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships,”<sup>14</sup> which would rescind the Board’s 2020 election protection rule.<sup>15</sup> The proposed rule seeks to reimpose arbitrary, Board-created rules that limit access to secret ballot elections and impede employees’ rights under the NLRA to choose whether or not to form or join a union. The proposed rule flips the NLRA on its head by empowering unions to entrench themselves as employee representatives regardless of worker preference. A repeal of the NLRB’s 2020 election protection rule would permit labor unions to file blocking charges that delay holding decertification representation elections indefinitely and limit workers’ ability to exercise their

<sup>12</sup> <https://www.littler.com/publication-press/publication/nlrb-general-counsel-aggressively-seeks-expand-unions-right-demand>.

<sup>13</sup> *Protecting Employees’ Rights: Ensuring Fair Election at the NLRB: Hearing Before the Subcomm. on Health, Emp’t, Lab. & Pensions of the H. Comm. on Educ. & the Workforce*, 118th Cong. (2023) (statement of Philip A. Miscimarra, Partner, Morgan Lewis, at 5–7).

<sup>14</sup> Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, 87 Fed. Reg. 66,890 (proposed Nov. 4, 2022).

<sup>15</sup> Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction Industry Collective-Bargaining Relationships, 85 Fed. Reg. 18,366 (Apr. 1, 2020).

statutory right to petition for a secret-ballot election.<sup>16</sup> Such a policy would stifle employee free choice and undermine the ability of workers' to refrain from union activity, which is a right enshrined in Section 7 of the NLRA.

The Board has also taken aim at employees' right to vote by secret ballot in union representation elections, despite the agency's own longstanding policy that "representation elections should, as a generally rule, be conducted manually."<sup>17</sup> On August 25, 2023, the NLRB issued a decision in the *Cemex Construction Materials Pacific* case limiting the right of employees to vote in secret ballot elections, imposing mandatory union recognition, and creating a new framework in union representation proceedings that undermines employee free choice.<sup>18</sup> *Cemex* eliminates any requirement for unions to file NLRB election petitions and allows a union to demand recognition from employers based on a claim of majority support, which the Board does not need to verify. Under the new framework, if a union makes a claim of majority support, then the employer must immediately grant recognition without any NLRB election or promptly file its own NLRB petition seeking an election. If the employer fails to take either step, then the NLRB will order mandatory union recognition. In cases where an employer files a petition for an election, any unlawful conduct by the employer during the election proceeding will require the NLRB to set aside the election and issue a mandatory bargaining order requiring union recognition.

The U.S. Supreme Court and numerous U.S. circuit courts of appeals have held that alternative forms of certifying union representatives are inferior to onsite secret ballot elections and subject to abuses. The U.S. Supreme Court has stated that card check is "admittedly inferior to the election process" and has noted that "[w]e would be closing our eyes to obvious difficulties if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers."<sup>19</sup> The U.S. Court of Appeals for the Second Circuit stated that "it is beyond dispute that secret election is a more accurate reflection of the employees' true desires than a check of authorization cards collected at the behest of a union organizer."<sup>20</sup>

On October 27, 2023, the NLRB issued a final rule establishing a new standard for determining joint-employer status under the NLRA,<sup>21</sup> largely reviving the Obama NLRB's joint employer standard from the 2015 decision in the *Browning-Ferris case*.<sup>22</sup> Under the new rule, a joint employer relationship is established when employers share and codetermine, whether directly or indirectly, employees' essential terms and conditions of employment. The Board may also determine that joint employer status exists when two or more employers exercise or possess the power to control, whether directly or indirectly, employees' essential terms and conditions of

<sup>16</sup> [https://edworkforce.house.gov/uploadedfiles/02.2.23\\_nlr\\_b\\_election\\_rule\\_comment\\_letter.pdf](https://edworkforce.house.gov/uploadedfiles/02.2.23_nlr_b_election_rule_comment_letter.pdf).

<sup>17</sup> <https://www.nlr.gov/sites/default/files/attachments/pages/node-174/chm-part-ii-rep2019-published-9-17-20.pdf>.

<sup>18</sup> *Cemex Construction Materials Pacific, LLC*, 372 NLRB No. 130 (2023).

<sup>19</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969).

<sup>20</sup> *NLRB v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965).

<sup>21</sup> 1A Standard for Determining Joint-Employer Status, 88 Fed. Reg. 53,946 (Oct. 27, 2023).

<sup>22</sup> *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015).

employment. Under this standard, what is considered an essential term and condition of employment is greatly expanded.

Such a broad and vague joint employer standard will result in damaging consequences for small businesses and workers. Analysis of the *Browning-Ferris* decision found it significantly harmed the franchise industry and others. For example, one study found the decision cost the “franchising sector as much as \$33.3 billion annually and has resulted in as many as 376,000 lost job opportunities.”<sup>23</sup> The losses for small franchisees were significant, with the average franchisee experiencing an annual revenue loss of \$142,000 per year.<sup>24</sup> Other research found that the “new joint employer standard could result in 1.7 million fewer jobs in the entire private sector and 500,000 fewer jobs in the leisure and hospitality industry alone.”<sup>25</sup>

President Biden, as well as the Board majority and GC, justify their radical pro-union policies by incorrectly claiming that the “policy of the federal government has been to encourage worker organizing and collective bargaining.”<sup>26</sup> The legislative history of the NLRA makes clear that that is not the case. The author of the NLRA, then-Sen. Robert Wagner (D-NY), said his legislation was meant to balance the right of employees to collectively bargain while ensuring that workers are not coerced to join unions against their will. At a Senate hearing in 1934, Sen. Wagner stated, “That is all that this bill does, so far as I can see. It leaves the worker a free man to organize or not to organize as he chooses.”<sup>27</sup>

The Biden NLRB’s decisions and rulemakings thwart congressional intent and are contrary to the purpose of NLRA by tilting labor law in favor of unions in ways that limit employees’ right to refrain from any and all union activity. H.R. 3400 would ensure that more small businesses are not unduly burdened by the Board’s radical policies.

#### *Regulations’ impact on small business*

To ensure a thriving economy, it is critical to create economic conditions that support the formation and existence of small businesses. Nearly all businesses—99.9 percent—in America are considered small businesses, and they employ 46.4 percent of the private sector employees.<sup>28</sup> From 1995 to 2021, a majority (62.7 percent) of net new jobs were created by small businesses.<sup>29</sup>

It is well understood that the impact of regulation imposes an outsized effect on small businesses compared to larger ones. However, the Biden administration has done little to relieve small businesses of regulatory burdens. Since taking office, the federal gov-

<sup>23</sup> RONALD BIRD, STATEMENT REGARDING THE ECONOMIC IMPACT OF THE PROSPECTIVE NLRB PUBLIC POLICY DECISION REGARDING THE DEFINITION OF JOINT EMPLOYER 2 (Jan. 28, 2019), [https://www.franchise.org/sites/default/files/2019-05/JE %20Econ%20Impact%200128.pdf](https://www.franchise.org/sites/default/files/2019-05/JE%20Econ%20Impact%200128.pdf).

<sup>24</sup> *Id.*  
<sup>25</sup> <https://www.americanactionforum.org/research/nlrbs-new-joint-employer-standard-unions-franchise-business-model/>.

<sup>26</sup> <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/26/fact-sheet-executive-order-establishing-the-white-house-task-force-on-workerorganizing-and-empowerment/>.

<sup>27</sup> NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, vol. 1, at 505 (quoting Sen. Wagner).

<sup>28</sup> <https://advocacy.sba.gov/2023/03/07/frequently-asked-questions-about-small-business-2023/#:~:text=Most%20businesses%20are%20small%2D%2099.9,46.4%25%20of%20private%20sector%20employees.>

<sup>29</sup> <https://advocacy.sba.gov/2023/03/07/frequently-asked-questions-about-small-business-2023/#:~:text=Most%20businesses%20are%20small%2D%2099.9,46.4%25%20of%20private%20sector%20employees.>

ernment has finalized 756 rules that cost \$437.2 billion and imposed over 200 million paperwork burden hours on the American public.<sup>30</sup> A recent analysis finds the Biden administration is imposing new regulatory costs at a faster rate than the Obama administration.<sup>31</sup>

While the Biden administration has paid lip service to gaining a better understanding of the distributional consequences of regulations,<sup>32</sup> federal agencies frequently disregard laws requiring them to analyze the impact of regulation on small businesses.<sup>33</sup> This is a travesty because the distribution of regulatory burdens falls most harshly on the shoulders of small businesses.

Research in this area finds that businesses employing fewer than “20 employees face an annual regulatory burden of \$6,975 per employee, a burden nearly 60 percent above that facing a firm employing over 500 employees.<sup>34</sup> For businesses with 50 or fewer employees, the costs of regulation are nearly 20 percent higher than the average for all businesses.<sup>35</sup>

Regulations represent a fixed cost for employers that require expenditures or investments. Smaller businesses, which bring in less revenue and produce lower output, have a harder time absorbing regulatory costs compared to larger firms. Smaller entities are also less likely to employ in-house counsel or human resource officers to navigate and comply with the never-ending flow of federal regulations.

New analysis also shows regulations reduce economic growth. A 2020 study estimated that “regulatory restrictions have had a net effect of dampening economic growth by approximately 0.8 percent per annum since 1980. Had regulation been held constant at levels observed in 1980, our model predicts that the economy would have been nearly 25 percent larger by 2012.”<sup>36</sup> This is an unsurprising finding because small businesses make up the vast majority of businesses and job growth in America, and they also incur a more significant burden of the costs from regulations.

Given the vast amount of research confirming the hardships imposed on small businesses by regulations, it is imperative for administrative agencies to consider the impact of regulations on small entities and promulgate policies that impose as few burdens on small businesses as possible. H.R. 3400 improves the landscape for small businesses by raising the NLRB’s monetary thresholds so they are shielded from the Board’s extreme pro-union agenda.

### *Conclusion*

Small businesses and American families are struggling to make ends meet. Instead of understanding the hardship facing Americans, the Biden administration is actively making life more difficult by pursuing a radical regulatory agenda that increases costs and

<sup>30</sup> <https://regrodeo.com/?year%5B0%5D=&year%5B1%5D=2023&year%5B2%5D=2022&year%5B3%5D=2021>.

<sup>31</sup> [https://committeetounleashprosperity.com/wp-content/uploads/2023/06/CTUP\\_BurdenisBack\\_ComparingRegulatoryCosts.pdf](https://committeetounleashprosperity.com/wp-content/uploads/2023/06/CTUP_BurdenisBack_ComparingRegulatoryCosts.pdf).

<sup>32</sup> <https://www.federalregister.gov/documents/2021/01/26/2021-01866/modernizing-regulatory-review>.

<sup>33</sup> <https://strgnfibcom.blob.core.windows.net/nfibcom/NFIB-RFA-White-paper.pdf>.

<sup>34</sup> <https://webarchive.library.unt.edu/eot2008/20090118012955/http://www.sba.gov/advo/research/rs207tot.pdf>.

<sup>35</sup> [https://www.uschamber.com/assets/documents/230622\\_Testimony\\_RegulatoryFlexibilityAct\\_Report\\_HouseSmallB usiness.pdf](https://www.uschamber.com/assets/documents/230622_Testimony_RegulatoryFlexibilityAct_Report_HouseSmallB usiness.pdf).

<sup>36</sup> <https://doi.org/10.1016/j.red.2020.03.004>.



burdens. H.R. 3400 provides much needed relief for small businesses from the radical NLRB pro-union agenda amidst the broader regulatory onslaught of the federal government.

#### SUMMARY

##### H.R. 3400 SECTION-BY-SECTION SUMMARY

The following is a section-by-section analysis of the *Small Businesses before Bureaucrats Act* reported favorably by the Committee.

Section 1 provides that the short title is the “Small Businesses before Bureaucrats Act.”

Section 2 amends the NLRA to establish new monetary jurisdictional standards for categories of employers for the purposes of the Board declining jurisdiction over certain labor disputes. The thresholds are increased by a multiple of 10 in calendar year 2024 and increased in subsequent years by a formula established by the bill. This formula is based on an index called the “Personal Consumption Expenditure Per Capita Index,” which section 2 of H.R. 3400 requires the Department of Commerce’s Bureau of Economic Analysis to publish.

#### EXPLANATION OF AMENDMENTS

The amendment in the nature of a substitute is explained in the body of this report.

#### APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. H.R. 3400 provides small businesses in various industries relief from the NLRB’s continual flip-flopping of precedent, radical pro-union activism, and burdensome regulations so H.R. 3400 does not apply to the Legislative Branch.

#### UNFUNDED MANDATE STATEMENT

Pursuant to Section 423 of the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93–344 (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104–4), the Committee traditionally adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office (CBO) pursuant to section 402 of the Congressional Budget and Impoundment Control Act of 1974. The Committee reports that because this cost estimate was not timely submitted to the Committee before the filing of this report, the Committee is not in a position to make a cost estimate for H.R. 3400, as amended.

#### EARMARK STATEMENT

H.R. 3400 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of House rule XXI.

#### ROLL CALL VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee Report to include for each record vote

on a motion to report the measure or matter and on any amendments offered to the measure or matter the total number of votes for and against and the names of the Members voting for and against.

Date: 12/12/23

**COMMITTEE ON EDUCATION AND THE WORKFORCE RECORD OF COMMITTEE VOTE**

Roll Call: 1

Bill: H.R. 3400

Amendment Number: 4A

Disposition: Adopted by a Full Committee Roll Call Vote (23 y - 20 n)

Sponsor/Amendment: Rep. Good/ HR3400\_ANS/ MOTION TO REPORT

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mrs. FOXX (NC) (Chairwoman)	X			Mr. SCOTT (VA) (Ranking)		X	
Mr. WILSON (SC)	X			Mr. GRIJALVA (AZ)		X	
Mr. THOMPSON (PA)	X			Mr. COURNTEY (CT)		X	
Mr. WALBERG (MI)	X			Mr. SABLAN (MP)		X	
Mr. GROTHMAN (WI)	X			Ms. WILSON (FL)		X	
Ms. STEFANIK (NY)	X			Ms. BONAMICI (OR)		X	
Mr. ALLEN (GA)	X			Mr. TAKANO (CA)		X	
Mr. BANKS (IN)	X			Ms. ADAMS (NC)		X	
Mr. COMER (KY)	X			Mr. DESAULNIER (CA)		X	
Mr. SMUCKER (PA)	X			Mr. NORCROSS (NJ)		X	
Mr. OWENS (UT)	X			Ms. JAYAPAL (WA)		X	
Mr. GOOD (VA)	X			Ms. WILD (PA)		X	
Mrs. MCCLAIN (MI)			X	Mrs. MCBATH (GA)			X
Mrs. MILLER (IL)	X			Mrs. HAYES (CT)		X	
Mrs. STEEL (CA)	X			Ms. OMAR (MN)		X	
Mr. ESTES (KS)	X			Ms. STEVENS (MI)		X	
Ms. LETLOW (LA)	X			Ms. LEGER FERNÁNDEZ (NM)		X	
Mr. KILEY (CA)	X			Ms. MANNING (NC)		X	
Mr. BEAN (FL)	X			Mr. MRVAN (IN)		X	
Mr. BURLISON (MO)	X			Mr. BOWMAN (NY)		X	
Mr. MORAN (TX)	X						
Mr. JAMES (MI)	X						
Ms. CHAVEZ-DEREMER (OR)		X					
Mr. WILLIAMS (NY)	X						
Ms. HOUCHIN (IN)	X						

TOTALS: Ayes: 23

Nos: 20

Not Voting: 2

Total: 45 / Quorum: 43 / Report:

(25 R - 20 D)

## STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause (3)(c) of House rule XIII, the goal of H.R. 3400, the *Small Businesses before Bureaucrats Act*, is to provide certain small businesses with relief from some of the NLRB's adjudicatory and regulatory burdens.

## DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 3400 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

## STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the committee's oversight findings and recommendations are reflected in the body of this report.

## REQUIRED COMMITTEE HEARING

In compliance with clause 3(c)(6) of rule XIII the following hearing held during the 118th Congress was used to develop or consider H.R. 3400: on May 23, 2023, the Subcommittee on Health, Employment, Labor, and Pensions held a hearing titled "Protecting Employees' Rights: Ensuring Fair Elections at the NLRB."

## NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received a cost estimate for the bill from the Congressional Budget Office. The Chairwoman of the Committee shall cause such estimate to be printed in the Congressional Record upon its receipt by the Committee.

## COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 3400. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when, as with the present report, the Committee has requested a cost estimate for the bill from the Director of the Congressional Budget Office.

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omit-

ted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

**NATIONAL LABOR RELATIONS ACT**

\* \* \* \* \*

SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) *In establishing by rule any dollar threshold with respect to a class or category of employers for the purposes of declining to assert jurisdiction over certain labor disputes involving such class or category of employers, the Board shall establish such dollar threshold at an amount—*

- (A) *for calendar year 2024, equal to the product of—*
  - (i) *the dollar threshold applicable to such class or category as of the day prior to the date of enactment of this paragraph, multiplied by*
  - (ii) *ten; and*
- (B) *for any calendar year after 2024, equal to the product of—*
  - (i) *the dollar threshold applicable to such class or category for calendar year 2024 (after the date of enactment of this paragraph), multiplied by*
  - (ii) *the quotient obtained by dividing—*
    - (I) *the Personal Consumption Expenditure Per Capita Index (as published by the Bureau of Economic Analysis) for such calendar year after 2024; by*
    - (II) *the Personal Consumption Expenditure Per Capita Index for calendar year 2024.*

[(2)] (3) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

\* \* \* \* \*

## MINORITY VIEWS

### INTRODUCTION

H.R. 3400, the *Small Business before Bureaucrats Act*, amends the National Labor Relations Board's (NLRB's) jurisdictional standards so that fewer businesses would be covered by the National Labor Relations Act (NLRA) and thus fewer workers would be covered by the law's protections. The extreme bill reflects Committee Republicans' commitment to undermining Americans' rights to join a union and bargain collectively for higher pay, better benefits, and safer workplaces. H.R. 3400 garnered bipartisan opposition when the Committee on Education and the Workforce marked it up on December 12, 2023.

### SURGE IN WORKER ORGANIZING AND LABOR UNION POPULARITY

At a time when workers are organizing across the country and labor unions are popular, Committee Republicans regrettably opted to advance H.R. 3400.

The NLRB recently reported a 3 percent increase in election petitions for union representation for Fiscal Year (FY) 2023 compared to the year before, and the highest number of petitions since FY 2015.<sup>1</sup> This uptick builds upon the dramatic increase seen in FY 2022 where the agency recorded a 53 percent increase in petitions over FY 2021.<sup>2</sup> In the first six months of 2023, unions won 80 percent of representation elections—the highest number of victories in the first half of a year since 2013.<sup>3</sup> In addition to the rise in worker organizing, public support for labor unions remains strong at 67 percent approval.<sup>4</sup>

In addition to the rise in organizing, there has been a noticeable shift for unions at the bargaining table in 2023. Union workers have successfully negotiated significant wage increases, improved benefits, and safer working conditions, among other gains. Some examples include:

- Teamsters/UPS: On August 22, 2023, members of the International Brotherhood of Teamsters voted to ratify a new five-year national contract—covering over 340,000 workers—with the United Parcel Service (UPS).<sup>5</sup> The contract includes

<sup>1</sup> Press release, NLRB Off. of Pub. Affrs., Unfair Labor Practices Charge Filings Up 10%, Union Petitions Up 3% in Fiscal Year 2023 (Oct. 13, 2023), <https://www.nlr.gov/news-outreach/news-story/unfair-labor-practices-charge-filings-up-10-union-petitions-up-3-in-fiscal>.

<sup>2</sup> *Id.*

<sup>3</sup> *NLRB Election Statistics Mid-Year 2023*, Bloom. Law 1 (Aug. 2023), <https://aboutblaw.com/9Wb>. (Between January 2023 and June 2023, unions won 662 out of 827 representation elections.)

<sup>4</sup> Lydia Saad, *More in U.S. See Unions Strengthening and Want It That Way*, GALLUP (Aug. 30, 2023), <https://news.gallup.com/poll/510281/unions-strengthening.aspx>.

<sup>5</sup> Press release, IBT, Teamsters Ratify Historic UPS Contract (Aug. 22, 2023), <https://teamster.org/2023/08/teamsters-ratify-historic-ups-contract/#:~:text=Five%2DYear%20National%20Agreement%20Passes%20Overwhelmingly%2C%20One%20Supplement%20to%20Be%20>

wage increases for existing full- and part-time workers that total to \$7.50 per hour over the life of the contract (resulting in an average top wage of \$49 an hour for full-timers), a minimum hourly wage of \$21 for part-timers, an end to the two-tier wage scheme and forced overtime for UPS drivers, and air conditioning for new purchased vehicles.

- Graduate Students/MIT: On September 22, 2023, graduate student workers at the Massachusetts Institute of Technology, affiliated with the United Electrical, Radio and Machine Workers (UE), ratified their first contract with the university’s administration.<sup>6</sup> The graduate workers secured third-party arbitration for harassment complaints, dental insurance, approximately 12 percent wage increases, \$10,000 childcare grant based on need, and a 70 percent public transportation subsidy.

- WGA/AMPTP: On October 9, 2023, the Writers Guild of America (WGA) announced the ratification of its new three-year contract with the Alliance of Motion Picture and Television Producers (AMPTP).<sup>7</sup> The Minimum Basic Agreement includes increases to weekly rates, residual payments, viewership-based bonuses from streaming services, protections against AI infringing on writers’ credits and compensation and rewriting original material, as well as staffing and employment length minimums.

- Kaiser Permanente: On November 9, 2023, the Coalition of Kaiser Permanente Unions—representing more than 85,000 health care workers—ratified its four-year contract with Kaiser Permanente.<sup>8</sup> Across the board, workers will see a 21 percent pay increase over four years with minimum wages of \$25 per hour in California and \$23 at facilities in other states after three years. The contract also commits the company to improving staffing through investments in job training programs, referral bonuses, and widespread job fairs.

- UAW/Big Three: On November 20, 2023, the United Auto Workers (UAW) announced that their members at Ford, General Motors, and Stellantis (Big Three) had voted to ratify their respective contracts with the automakers.<sup>9</sup> The contracts, covering 150,000 workers, include over a 10 percent immediate raise, a 25 percent wage increase for top-earning workers and up to a 160 percent increase for low-earning workers over the contract term, the right to strike over plant closures, the reopening of Stellantis’s Belvidere, IL facility, more paid time off, boosts to employer contributions to 10 percent for 401(k) ac-

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Renegotiated&text(WASHINGTON)%20%E2%80%93%20Today%2C%20Teamsters,in%20the%20history%20of%20UPS.

<sup>6</sup>Press Release, UE, MIT Graduate Workers’ First UE Contract Sets New Standards (Oct. 6, 2023), <https://www.ueunion.org/ue-news/2023/mit-graduate-workers-first-ue-contract-sets-new-standards>.

<sup>7</sup>*Summary of the 2023 WGA MBA*, WGA, <https://www.wgacontract2023.org/the-campaign/summary-of-the-2023-wga-mba> (last visited Nov. 20, 2023).

<sup>8</sup>Bhanvi Satija & Leroy Leo, *Kaiser healthcare workers ratify new contract*, Reuters (Nov. 9, 2023), <https://www.reuters.com/business/healthcare-pharmaceuticals/kaiser-healthcare-workers-ratify-new-contract-2023-11-09/>.

<sup>9</sup>Jeanne Whalen, *UAW members ratify record contracts with Big 3 automakers*, The Wash. Post (Nov. 20, 2023), <https://www.washingtonpost.com/business/2023/11/20/uaw-contract-ford-general-motors-stellantis/>.

counts, an increase to the pension multiplier for pre-2007 hires, and annual bonuses for current retirees.

The above-cited contract victories are a snapshot of the labor movement's recent achievements. In the first nine months of 2023, unions have secured workers an average 6.6 percent first-year raise (not including lump-sum payments), the highest wage increase secured in union contracts in over 30 years.<sup>10</sup> Almost 900,000 union workers have won immediate pay raises of 10 percent or more in 2023.<sup>11</sup>

#### BACKGROUND ON NLRB'S JURISDICTIONAL STANDARDS & H.R. 3400

The NLRB does not have jurisdiction over all employers. According to the Congressional Research Service (CRS), the NLRB has established standards that an employer must meet before the board asserts jurisdiction over a question of union representation.<sup>12</sup> These jurisdictional standards are generally based on an employer's annual sales or gross revenue.<sup>13</sup> For example, a retail business must have sales of at least \$500,000 annually.<sup>14</sup> A nonretail business "must have either \$50,000 in annual direct or indirect sales to buyers in other states or make \$50,000 in direct or indirect purchases from sellers in other states."<sup>15</sup> These standards have been in effect since August 1, 1959.<sup>16</sup>

Specifically, HR 3400 increases the NLRB's dollar volume thresholds for determining whether it will assert jurisdiction at first by a factor of ten and then annually using a formula involving the Department of Commerce's Personal Consumption Expenditure Per Capita Index.<sup>17</sup> For example, retailers that do annual business of less than \$500,000 per year are not currently subject to the NLRB's jurisdiction pursuant to the Board's current jurisdictional standard. This bill would multiply that \$500,000 threshold by ten, so that retailers that do less than \$5 million in annual business will not be covered. According to the bill's author, Rep. Bob Good (R-VA), "upon implementation of this bill, more than 50 [percent] of retail and non-retail businesses will be exempt and relieved from NLRB jurisdiction."<sup>18</sup>

<sup>10</sup> Josh Eidelson et al., *Unions Are Winning Big for the First Time in Decades*, Bloomberg (Oct. 31, 2023), <https://www.bloomberg.com/news/articles/2023-10-31/uaw-strike-UPS-drivers-writers-union-mark-record-wins-for-us-labor-movement#xj4y7vzkg>.

<sup>11</sup> Chris Isidore, *Unions are the strongest in decades. Nearly a million Americans got double-digit raises as a result*, CNN (Nov. 21, 2023), <https://www.cnn.com/2023/11/21/business/big-pay-days-union-members/index.html#:~:text=Nearly%20a%20million%20Americans%20got%20double%20digit%20raises%20as%20a%20result,By%20Chris%20Isidore&text=Nearly%20900%2C000%20Americans%20sitting%20down,increase%20they%20won%20%E2%80%93%20to%20thank>.

<sup>12</sup> Cong. Rsch. Serv., RL32930, *The National Labor Relations Act (NLRA): Union Representation Procedures and Dispute Resolution* (2013), <https://crsreports.congress.gov/product/pdf/RL/RL32930/37>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

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

<sup>16</sup> *Id.*

<sup>17</sup> According to the Department of Commerce, the Personal Consumption Expenditure Per Capital Index is a measure of the prices that people living in the United States pay for goods and services and is known for capturing inflation or deflation across a wide range of consumer expenses.

<sup>18</sup> Press Release, Office of Congr. Bob Good, (May 12, 2022), <http://good.house.gov/media/press-releases/rep-good-introducessmall-businesses-bureaucrats-act>.



## H.R. 3400'S POTENTIAL HARM TO EMPLOYERS

It is not only workers who will be negatively impacted by H.R. 3400, but employers also could be harmed as well. Committee Democrats were initially advised by Committee Republicans that H.R. 3400 would be discussed as part of a Subcommittee on Health, Employment, Labor, and Pensions (HELP) legislative hearing on December 13, 2023. However, Committee Republicans abruptly changed course, opted to bypass a legislative hearing on H.R. 3400, and instead markup the bill on December 12, 2023. Before that was known to Committee Democrats, the Democratic witness for the HELP Subcommittee hearing, Mr. Richard Griffin, drafted his written testimony. In it, Mr. Griffin pointed out that, if H.R. 3400 became law, a “substantial number of businesses would not be regulated by the uniform federal statute governing private sector labor relations, and thus would be subject to all kinds of union organizing activity that the NLRA currently limits—there would be no limits on recognitional picketing or secondary boycotts for example.”<sup>19</sup> Mr. Griffin also noted that “[S]tates may well rush in to fill this regulatory void, since there would be no federal preemption of their legislative activity as to those businesses exempt from the NLRA’s reach, and businesses would be subject to a patchwork quilt of various state regulatory measures.”<sup>20</sup> Had Committee Republicans not hastily bypassed a legislative hearing on H.R. 3400, Mr. Griffin’s points on the bill’s implications for employers could have been more fully explored. Regrettably, that did not occur.

## CONCLUSION

For the reasons stated above, Committee Democrats, and one Committee Republican, opposed H.R. 3400 when the Committee on Education and the Workforce considered it on December 12, 2023. We urge the House of Representatives to do the same.

ROBERT C. “BOBBY” SCOTT,  
*Ranking Member.*  
 JOE COURTNEY,  
 GREGORIO KILILI CAMACHO  
 SABLAN,  
 MARK DESAULNIER,  
 PRAMILA JAYAPAL,  
*Members of Congress.*

○

<sup>19</sup> Statement of Richard F. Griffin, Bredhoff & Kaiser, P.L.L.C., *Protecting Workers and Small Businesses from Biden’s Attack on Worker Free Choice and Economic Growth: Hearing Before the H. Subcomm. on Health, Emp’t., Lab. & Pensions of the H. Comm. on Educ. & the Wrkf.*, 118th Cong. (2023), at 16.

<sup>20</sup> *Id.*