

# Sustainable Labor Rights

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*While ESG thrives, labor rights are being left behind. Environmental, social, and governance standards largely ignore workers’ rights to organize a union. American labor law has not kept pace with the technology that enables employers to engage in old-school and modern union-busting. Companies like Starbucks, Amazon, and Apple trumpet sustainability while using intimidation, surveillance, and coercion to quash their employees’ attempts to unionize. As the SEC and EU begin to mandate workforce-related disclosures for publicly traded companies, it’s time to revise ESG standards to prioritize sustainable labor rights. This paper is the first to propose changes to the ESG regime to fill critical gaps in legal protections for union organizing.*

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## INTRODUCTION

At Starbucks, we’ve always been about more than just the coffee. We are about humanity.

—Kevin Johnson, Starbucks Chairman and CEO<sup>1</sup>

We’re scared. We’re terrified. We just want to go to work like everybody else and do our jobs and not have to worry [about] when the other shoe is going to drop.

—Jasmine Leli, Starbucks Barista<sup>2</sup>

While Starbucks trumpets a commitment to sustainable global coffee bean cultivation, the company has been found to engage in targeted intimidation and coercion of its retail workers. When baristas at over 250 of its U.S. stores organized unions to demand better working conditions, it shuttered locations, reduced hours of union supporters, promised higher wages in exchange for rejecting the union, and held coercive, captive audience meetings.<sup>3</sup> Particularly egregious for a company that prides itself on a progressive culture, Starbucks threatened workers with a loss of gender-

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1. Starbucks, *Global Human Rights Statement* (Nov. 17, 2020), <https://stories.starbucks.com/press/2020/global-human-rights-statement> [<https://perma.cc/6YBJ-38WB>]. See also Phillip Durell, *ESG Investing: Is Starbucks a Responsible Investment?*, THE MOTLEY FOOL (Sept. 20, 2019), <https://www.fool.com/investing/2019/09/19/esg-investing-is-starbucks-a-responsible-investmen.aspx> [<https://perma.cc/AF3H-EXYY>] (quoting then-CEO and chairman Howard Schultz, “We are leading [Starbucks] to try to redefine the role and responsibility of a public company.”).

2. Andrea Hsu, *Starbucks Workers Have Unionized at Record Speed; Many Fear Retaliation Now*, NPR (Oct. 2, 2022), <https://www.npr.org/2022/10/02/1124680518/starbucks-union-busting-howard-schultz-nlrh> [<https://perma.cc/5U3T-NUBH>].

3. See U.S. Senate Committee on Health, Education, Labor & Pensions, *News: Help Majority Staff Report on Starbucks* (Mar. 26, 2023), <https://www.help.senate.gov/chair/newsroom/press/news-help-majority-staff-report-on-starbucks> (describing testimony from workers who report store closings after strikes and hours cut for workers who wore union pins. Starbucks CEO has commented on improved wages for non-unionized stores and held a “captive audience meeting...intended to...persuade workers to vote against forming a union.”) [<https://perma.cc/96PQ-Q755>]. The National Labor Relations Board (NLRB) has filed complaints against the company for “interfering with, restraining, and coercing employees,” such as unfairly disciplining union supporters or treating them more harshly than other employees. See, e.g., *N.L.R.B. v. Starbucks Corporation*, No. 1:22-cv-07255-ARR-JRC, Petition for Temporary Injunction (E.D.N.Y. Nov. 30, 2022).

affirming health care and abortion travel expenses in the wake of the *Dobbs* ruling.<sup>4</sup> Neha Cremin, a transgender barista in Oklahoma, describes being told in a one-on-one meeting with her manager, “If you unionize, when you are negotiating your benefits, you could gain, you could lose, or you could stay the same...I know specifically you have used the trans health-care benefits.”<sup>5</sup>

Labor organizing has experienced a revival.<sup>6</sup> Workers at REI voted for a union in March 2022, at Amazon in April, at Apple in June, at Trader Joe’s in July, and at Chipotle in August.<sup>7</sup> Unions won more National Labor Relations Board (NLRB) elections in 2022 than any other year since 2005 at a win rate tied for the highest on record.<sup>8</sup> Yet none of those unions has achieved a first contract, suggesting that even “sustainable” companies use tactics that undermine their workers’ collective bargaining rights. Workers are struggling to build power in an era of “limitless worker surveillance,”<sup>9</sup> in

4. Josh Eidelson, *Starbucks Threatens Trans Benefits in Anti-Union Push*, *Staff Say*, BLOOMBERG L. (June 14, 2022), <https://www.bloomberg.com/news/articles/2022-06-14/starbucks-threatens-trans-benefits-in-anti-union-push-staff-say> [<https://perma.cc/FYT5-R7WG>].

5. *Id.*

6. See NLRB, *First Three Quarters’ Union Election Petitions Up 58%, Exceeding All FY21 Petitions Filed* (July 15, 2022), <https://www.nlr.gov/news-outreach/news-story/correction-first-three-quarters-election-petitions-up-58-exceeding> [<https://perma.cc/V8F4-2HRZ>] (announcing that petitions for a union election filed with the NLRB increased 58% in the first three quarters of fiscal year 2022, at 1,892 compared with 1,197 filed during the same period in 2021); see also Rani Molla, *How Unions Are Winning Again, In 4 Charts*, VOX (Aug. 30, 2022), <https://www.vox.com/recode/2022/8/30/23326654/2022-union-charts-elections-wins-strikes> [<https://perma.cc/7TPZ-5HWV>] (noting that workers are not only filing more petitions for union elections, but also winning these elections at a higher rate).

7. See Noam Scheiber, *REI Workers in New York Vote To Unionize*, N.Y. TIMES (Mar. 2, 2022), <https://www.nytimes.com/2022/03/02/business/rei-union-new-york.html> [<https://perma.cc/A2CE-8H8Y>]; Tripp Mickle & Noam Scheiber, *Apple Workers at Maryland Store Vote to Unionize, A First in the U.S.*, N.Y. TIMES (June 18, 2022), <https://www.nytimes.com/2022/06/18/technology/apple-union-maryland.html> [<https://perma.cc/K47Q-XSNA>]; Noam Scheiber, *Trader Joe’s Workers at a Massachusetts Store Form a Union, a Milestone in the Chain*, N.Y. TIMES (July 28, 2022), <https://www.nytimes.com/2022/07/28/business/trader-joes-union.html> [<https://perma.cc/5QTY-V2H8>]; Ayana Archie, *A Chipotle Restaurant in Michigan Becomes the First in the Chain to Unionize*, NPR (Aug. 26, 2022), <https://www.npr.org/2022/08/26/1119564786/chipotle-michigan-union> [<https://perma.cc/HTG4-Z8CN>].

8. See Robert Combs, *Labor’s Triumphant Organizing Year May Not Be Its Last*, BLOOMBERG L. (Feb. 7, 2023), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-labors-triumphant-organizing-year-may-not-be-its-last> [<https://perma.cc/U393-K5HM>]; Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, ECON. POL’Y INST. BRIEFING PAPER NO. 235, at 5 n.4 (looking at National Labor Relations Board election data does not include private sector workers who organize a union through card check recognition or other means, or public sector workers whose union elections are overseen by state, county, or municipal authorities).

9. See Wilneida Negron, *Little Tech is Coming for Workers: A Framework for Reclaiming and Building Worker Power*, COWORKER.ORG (2021), at 6-16, <https://home.coworker.org/wp-content/uploads/2021/11/Little-Tech-Is-Coming-for-Workers.pdf> [<https://perma.cc/XL25-X623>]. Negron defines “little tech” (as contrasted with Big Tech companies such as Facebook, Amazon, Google, Microsoft, and Apple) as “an ecosystem of tech products, companies, and investors” operating within an “unregulated marketplace of tech products that are collecting and aggregating data about workers at almost

which their employers can surreptitiously track their locations, keystrokes, and eye movements; scan their emails and social media posts; and use AI to make hiring, discipline, and promotion decisions.<sup>10</sup> Across the country, workers express frustration with excessive monitoring and algorithmic management, especially in low-wage industries. A lack of regulation has resulted in virtually no guardrails on how employers can use this technology, sparking an explosion of worker organizing in the face of relentless technological pressure. Yet, as venerable labor reporter Steven Greenhouse asks, “Where are the workers when we talk about the future of work?”<sup>11</sup> The voices of those who stand to be most harmed by this technology—America’s workers—are left out of conversations about its use.<sup>12</sup>

Starbucks, which calls its workers “partners” rather than “employees,” treats its commitments to those partners as distinct from its commitments to “sustainability.” Labor rights are subsumed into global supply chain issues, and “aggressive sustainability targets” refer to expanding “plant-based options” and reusable packaging, not worker voice. As a movement seeks to hold corporations to account for their environmental, social, and governance (“ESG”) impacts on people and the planet, labor rights must take center stage in defining and demanding sustainability.<sup>13</sup> ESG standards reference international labor rights but do not prohibit employer conduct that chills organizing and silences workers.<sup>14</sup> With the SEC set to mandate human

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every step of the labor process—hiring/recruitment, workplace safety and productivity, workplace and public benefits, reskilling/retraining, et al.” *Id.* These technology products often “use workers as captive test subjects for new technologies and increase the potential for employment and labor organizing surveillance, exclusion, economic exploitation, and intimidation.” *Id.*

10. Richard A. Bales & Katherine V. W. Stone, *The Invisible Web at Work: Artificial Intelligence and Electronic Surveillance in the Workplace*, 41 BERKELEY J. EMP. & LAB. L. 1, 16-22 (2020). See generally Jo Constantz, *They Were Spying On Us: Amazon, Walmart, Use Surveillance Technology to Bust Unions*, NEWSWEEK (Dec. 13, 2021), <https://www.newsweek.com/they-were-spying-us-amazon-walmart-use-surveillance-technology-bust-unions-165860> [https://perma.cc/92VX-GRGL]; Ifeoma Ajunwa, *Algorithms at Work: Productivity Monitoring Platforms and Wearable Technology as the New Data-Centric Research Agenda for Employment and Labor Law*, 63 ST. LOUIS U. L.J. 21 (2019).

11. Steven Greenhouse, *Where Are the Workers When We Talk About the Future of Work?*, AM. PROSPECT (Oct. 22, 2019), <https://prospect.org/labor/where-are-the-workers-when-we-talk-about-the-future-of-work> [https://perma.cc/HD2Q-MJT7].

12. *Id.*

13. Daphne Howland, *Amazon Faces Worker Demands—From Shareholders*, RETAIL DIVE (May 11, 2022), <https://www.retaildive.com/news/amazon-faces-worker-demands-from-shareholders/623528> [https://perma.cc/E647-D7UD]. Social factors include labor standards; human rights; employee engagement; customer satisfaction; community relations; and Diversity, Equity, and Inclusion (DEI). Governance factors include board composition; executive compensation; audit committee structure; bribery and corruption; whistleblower programs; and accident and safety management. U.S. Gov’t Accountability Off., *Public Companies: Disclosure of Environmental, Social, and Governance Factors and Options to Enhance Them*, GAO-20-530 (2020), <https://www.gao.gov/assets/gao-20-530.pdf> [https://perma.cc/U6U4-8YWK].

14. See Glob. Reporting Initiative, *GRI 407: Freedom of Association and Collective Bargaining* (2016), at 5-6, <https://www.globalreporting.org/standards/media/1022/gri-407-freedom-of-association-and-collective-bargaining-2016.pdf> [https://perma.cc/F8FF-EFNM]. The Global Reporting Initiative’s

capital disclosures for publicly traded companies, a radical revision of ESG can help enforce sustainable labor rights.<sup>15</sup>

Part I of this Article examines how technological advances in the workplace have contributed to a more potent, less detectable form of union-busting. Automating old-school tactics of intimidation and coercion, the explosion of digital monitoring and electronic surveillance technologies poses an existential threat to workers' right to organize. Part II identifies existing U.S. labor and employment law limitations that have led to the unfettered deployment of high-tech (and low-tech) union-busting in the American workplace. Part III discusses the opportunities for filling this enforcement gap with the existing ESG regime. Part IV proposes specific changes to ESG standards and disclosure requirements that could help pressure large, publicly traded corporations to abide by international labor rights. This Part argues for delineating electronic surveillance and digital monitoring technologies as violating workers' freedom of association and for more robust ESG enforcement mechanisms.

## I. HOW SO-CALLED SUSTAINABLE EMPLOYERS BUST UNIONS

When Jennifer Bates first walked through the employee entrance to the Amazon fulfillment center, she was excited to work in the enormous warehouse “with the big smile” on the side.<sup>16</sup> Measuring nearly a million square feet—about 15 football fields—the Bessemer, Alabama facility's scale is matched only by the pace of work inside. Quickly, Jennifer felt like a “cog in this big machine.”<sup>17</sup> On her first day, she was instructed to download an app to monitor her every move, providing the company with a constant

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(GRI) Freedom of Association and Collective Bargaining standard requires disclosures of an organization's “management approach” to collective bargaining and freedom of association. It also requires disclosures of any supplier that may create risks to workers' freedom of association by virtue of its operation style (e.g., manufacturing plant) or geographic location. Additionally, it requires an employer to disclose the steps it takes to support workers' freedom of association. But the standards themselves do not make clear, as this paper will discuss in further detail, what actions on the part of a company could chill organizing activity. *See also* Bernd Waas, *The “S” in ESG and International Labor Standards*, 18 INT'L J. OF DISCLOSURE & GOVERNANCE 403, 410 (2021) (concluding that ESG standards lack specific international labor standards).

15. *See* Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee, Draft Recommendation of the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee Regarding Human Capital Management Disclosure 1 (Sept. 14, 2023), <https://www.sec.gov/files/20230914-draft-recommendation-regarding-hcm.pdf> [<https://perma.cc/P3J5-QG4W>]. *See also* Erin Martin & Celia Soehner, *How to Respond to SEC's Focus on Human Capital Disclosures*, BLOOMBERG L. (Oct. 14, 2022), <https://news.bloomberglaw.com/esg/how-to-respond-to-secs-focus-on-human-capital-disclosures> [<https://perma.cc/JTK9-EWSX>] (predicting further human-capital resources disclosure with additional rulemaking on the horizon).

16. The Daily, *A Union at Amazon*, N.Y. TIMES (Apr. 1, 2021), at 5:47, <https://www.nytimes.com/2021/04/01/podcasts/the-daily/amazon-union-vote-alabama.html?showTranscript=1> [<https://perma.cc/4YMB-5WB9>].

17. *Id.* at 15:31.

data stream of her location and productivity.<sup>18</sup> As she describes, “Wherever you are, whatever you’re doing, if you’re not scanning, then they say you’re not working. Even if you’re pushing the button that sends pods away, they still consider it not working. You’re walking away to push, you have ‘time off task.’ If you go to the restroom, you have ‘time off task.’”<sup>19</sup> Jennifer and her co-workers would discover that these electronic trackers could not only monitor the speed at which they packed boxes, but also detect and disrupt their collective response to that speedup: a nascent campaign to organize a union.<sup>20</sup>

Using data to accelerate the pace of work is nothing new for Amazon. Touted by its former CEO Jeff Bezos as “Earth’s Best Employer,” the publicly traded corporation is notorious for using data in ways that result in worker burnout, injury, and turnover.<sup>21</sup> While monitoring productivity isn’t inherently harmful, it can lead to unsustainable production levels. Such intensification can have dire impacts on workers’ health and safety, as evidenced by the high rates of injury documented in Amazon’s fulfillment centers.<sup>22</sup> Monitoring employees’ every move through electronic means can affect their stress levels, leading to adverse health consequences.<sup>23</sup> In Bessemer, Amazon workers organized with the Retail, Wholesale, and Department Store Union, and at warehouses on Staten Island, they formed an independent Amazon Labor Union. Ms. Bates, an African American

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18. *Id.* at 7:22.

19. *Id.* at 8:55.

20. *Id.* at 23:35.

21. See Lauren Rosenblatt, *After Layoffs, Ex-Amazon Workers Wonder About ‘Earth’s Best Employer’*, SEATTLE TIMES (Feb. 9, 2023), <https://www.seattletimes.com/business/after-layoffs-ex-amazon-workers-wonder-about-earths-best-employer> [<https://perma.cc/8TF6-5JKK>]; Jay Greene, *Amazon Now Employs More Than 1 Million People*, WASH. POST (Oct. 29, 2020), <https://www.washingtonpost.com/technology/2020/10/29/amazon-hiring-pandemic-holidays> [<https://perma.cc/27YJ-DCUB>] (noting that Amazon faced criticism for failing to protect workers from COVID-19).

22. See Marina Jabsy & Charlese Obernauer, *Time off Task: Pressure, Pain, and Productivity at Amazon*, N.Y. COMM. FOR OCCUPATIONAL SAFETY AND HEALTH (2019), <https://nycosh.org/2019/10/new-nycosh-report-time-off-task-emphasizes-unhealthy-workplace-practices-at-amazons-staten-island-distribution-center> [<https://perma.cc/KC22-6HFB>] (finding that Amazon workers experience harmful working conditions and a workplace culture that prioritizes line speeds over human safety); see also Martha Ockenfels-Martinez & Sukhdip Purewal Boparai, *The Public Health Crisis Hidden in Amazon Warehouses*, HUM. IMPACT PARTNERS (2021), <https://humanimpact.org/hiprojects/amazon> [<https://perma.cc/GTQ7-9NMY>] (finding that Amazon workers are facing a triple threat to their health, including (1) nearly double the national average rate of warehouse workplace injury; (2) Chronic stress from the workload and work quota system; and (3) risk of contracting chronic and infectious disease due to lack of restroom access and inadequate COVID-19 protections).

23. Virginia Doellgast & Sean O’Brady, *Making Call Center Jobs Better: The Relationship Between Management Practices and Worker Stress*, REP. FOR THE COMMC’N WORKERS OF AMERICA (2020), [https://www.researchgate.net/publication/344332175\\_Making\\_Call\\_Center\\_Jobs\\_Better\\_The\\_Relationship\\_Between\\_Management\\_Practices\\_and\\_Worker\\_Stress](https://www.researchgate.net/publication/344332175_Making_Call_Center_Jobs_Better_The_Relationship_Between_Management_Practices_and_Worker_Stress) [<https://perma.cc/V2WV-4F57>] (finding that intensive electronic monitoring in call centers was associated with higher levels of stress among workers).

grandmother of seven, says she was motivated to gain “dignity and respect” and an opportunity to sit at the table “because we didn’t feel like we were employees. We felt like we were slaves.”<sup>24</sup> This Part explores how union-busting has evolved from physical intimidation and coercion to data-driven technology unrestrained by ESG standards.

### *A. Traditional Tactics of Intimidation and Coercion*

While technology can make union-busting easier or invisible, it did not invent the practice.<sup>25</sup> In the second half of the 19<sup>th</sup> century, the Pinkerton Detective Agency became one of the most notorious workplace espionage firms, hired to suppress and break unions in manufacturing, railroad, and other industrial sectors.<sup>26</sup> Its undercover agents would infiltrate unions to spy on union leaders, while its militarized plant guards would use machine guns, tear gas bombs, and clubs to break strikes.<sup>27</sup> Much of what we know about old-school union-busting was documented by a Congressional subcommittee convened in 1936 to investigate the role of private security companies in labor unrest.<sup>28</sup> Hundreds of witnesses who appeared before the LaFollette Committee testified to the widespread practice of industrial spies infiltrating workplaces. As a representative from the Chrysler Corporation explained, espionage reports were “the background with which we built our whole structure,” affirming that for the industry, “[i]t is a practice we have grown up with.”<sup>29</sup> That year, Chrysler would spend \$72,000 for the labor spy services of the Corporation Auxiliary Co., the equivalent of about \$1.6 million today.<sup>30</sup> The Committee concluded that espionage was “the most efficient method known to management to prevent unions from forming, to

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24. The Daily, *supra* note 16, at 28:35.

25. *See generally* Bronfenbrenner, *supra* note 8 (documenting employers’ use of threats, harassment, surveillance, and retaliation to combat union activity in the 1990s and 2000s). *See also* Nitasha Tiku et al., *From Amazon to Apple, Tech Giants Turn to Old-School Union-Busting*, WASH. POST (Apr. 24, 2022), <https://www.washingtonpost.com/technology/2022/04/24/amazon-apple-google-union-busting> [<https://perma.cc/T9FK-S5JF>] (describing major employers’ use of traditional union-busting strategies, including posting flyers, holding mandatory anti-union meetings, and hiring union-busting consultants)

26. David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1212-14 (1999). Founded in 1850 by a Scottish immigrant, the Pinkerton Detective Agency evolved from tracking down bank robbers to providing private security and disrupting labor organizing activity. Pinkerton agents were hired to infiltrate union meetings and break strikes using violence and intimidation. *Id.*

27. COMMITTEE ON EDUCATION AND LABOR, REPORT ON LABOR POLICIES OF EMPLOYERS’ ASSOCIATIONS PART II— THE ASSOCIATED INDUSTRIES OF CLEVELAND, S. REP. NO. 76-6, at 165-167 (1939) [hereinafter S. REP. NO. 76-6].

28. *See generally id.* (documenting the investigation conducted by the La Follette Committee on Education and Labor from 1936 to 1941, spearheaded by Senator Robert M. La Follette Jr.).

29. *Id.* at 112-13.

30. *Id.*

weaken them if they secure a foothold, and to wreck them when they try their strength.”<sup>31</sup>

Armed with security forces like the Pinkertons, employers filed charges against individual union members.<sup>32</sup> An employer might accuse a union supporter of theft, inciting to riot, or menacing. Professor Ross explains, “A private corporation initiated the investigation through a private detective agency; a private police force arrested the alleged offenders; the coal company attorneys prosecuted them. The state only provided the courtroom and the hangman.”<sup>33</sup> In this way, companies could “outsource” union-busting to prosecutors and private detectives and use the criminal case to discredit the union.<sup>34</sup>

Beginning in the 1970s, these old-school union-busters were replaced with “union avoidance consultants” or “anti-union persuaders,” an estimated \$340-million industry of consultants and law firms contracted to detect, prevent, and counteract union organizing.<sup>35</sup> These consultants can earn thousands of dollars per day crafting heavy-handed messaging about unionization risks, promising higher wages and improved working conditions if workers vote no.<sup>36</sup> They distribute anti-union messages, sometimes through

31. See ROBERT M. SMITH, *FROM BLACKJACKS TO BRIEFCASES: A HISTORY OF COMMERCIALIZED STRIKEBREAKING AND UNION-BUSTING IN THE UNITED STATES* xvi (2003).

32. See Karena Rahall, *The Siren Is Calling: Economic and Ideological Trends Toward Privatization of Public Police Forces*, 68 U. MIAMI L. REV. 633, 643-44 (2014).

33. Jacqueline E. Ross, *The Surveillance State and the Surveillance Private Sector: Pathways to Undercover Policing in France and the United States*, 40 LAW & HIST. REV. 261, 278 (2022).

34. *Id.* (quoting HAROLD W. AURAND, *FROM MOLLY MAGUIRES TO THE UNITED MINE WORKERS: THE SOCIAL ECOLOGY OF AN INDUSTRIAL UNION, 1869-1897* 25 (1971)).

35. See Lee Fang, *The Evolution of Union-Busting: Breaking Unions with the Language of Diversity and Social Justice*, THE INTERCEPT (June 7, 2022), <https://theintercept.com/2022/06/07/union-busting-tactics-diversity> [<https://perma.cc/77SZ-DCDF>] (citing The Labor Pros Consulting Firm, *Vulnerability Audit Proposal to the General Council of Hilton Worldwide*, <https://www.documentcloud.org/documents/22036103-labo-pros-contract> [<https://perma.cc/DVP9-3KNQ>]) (proposing consulting fees ranging from \$18,480 for two consultants for three days, reaching 75% of full-time employees, up to \$43,120 for two consultants for four days for 100% of all employees and managers, plus a \$75 per diem). See also Kate Bronfenbrenner, *Testimony Before the U.S. House Comm. on Educ. & Labor* (Sept. 14, 2022), at 7, <https://ecommons.cornell.edu/bitstream/handle/1813/111838/Bronfenbrenner106%20Housetestimonyfinal9142022.pdf> [<https://perma.cc/L372-UAYD>] (noting that these management consultants “assembled the key elements of the antiunion tool kit that we are so familiar with today: threats, interrogation, promises, intimidation, coercion, retaliation, miscommunication, and delay.”).

36. See, e.g., Lee Fang, *Amazon Hired Koch-Backed Anti-Union Consultant to Fight Alabama Warehouse Organizing*, THE INTERCEPT (Feb. 10, 2021), <https://theintercept.com/2021/02/10/amazon-alabama-union-busting-koch> [<https://perma.cc/FK3C-L7E2>] (citing LM-20 Form filed by Amazon.com with the Office of Labor-Management Standards, documenting payment of \$3,200 per day to Russell Brown, CEO of RoadWarrior Production LLC, “to persuade employees to exercise or not to exercise or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing.”).



company websites<sup>37</sup> (or, as REI recently did, a podcast<sup>38</sup>), and can help hire permanent replacement workers.<sup>39</sup> Adopting techniques from industrial psychology, they use surveys to identify union supporters and weed out workers with previous union involvement.<sup>40</sup> While paying consultants for advice on avoiding unionization is not illegal, their tactics often violate workers' legal rights to engage in collective action. U.S. companies spend millions each year on union-busting.<sup>41</sup>

Amazon's old-school union-busting tactics are well documented.<sup>42</sup> Back in 2000, when it was still called "Amazon.com," Steven Greenhouse reported that Amazon "[had] come out swinging in its fight to stop a new unionization drive, telling employees that unions are a greedy, for-profit business and advising managers on ways to detect when a group of workers is trying to

37. See, e.g., One.Starbucks, *The Voting Process & Why Partners Should Vote*, STARBUCKS, <https://one.starbucks.com/yourvote> [<https://perma.cc/94MJ-MD5V>]. Listing the "10 Things to Know About a Union," Starbucks identifies number one as, "Unions are a business, just like Starbucks, and make their money by collecting member dues," number two as "If certified, the union becomes your 'voice,' and you will no longer be able to address your individual terms and conditions of employment with your Starbucks leaders directly," and number eight as "Compensation can increase, decrease, or remain the same – it can be a gamble." Most notably, the company lists as the third item that, "When a union accuses a company of an unfair labor practice (ULP), the NLRB decides whether an investigation is warranted. Deciding that a ULP has merit is not an endorsement of the charge or a finding of wrongdoing." This is likely in response to the over 200 ULPs filed against the company and over 20 allegations of unfair terminations by baristas. *Id.*

38. Fang, *supra* note 35. The corporate internal podcast featured REI's CEO, Eric Artz, and Chief Diversity and Social Impact Officer, Wilma Wallace, discussing why "REI doesn't think unionization is the right thing for the co-op or for the employees." Notably, the pair claimed the company needed to maintain its focus on "inclusion" and "racial equity," messages that appeared particularly geared toward the company's progressive consumer base. *Id.*

39. See *Union Busting and Precarious Work Is Not the Answer to Sustainable Development*, INTERNATIONAL LABOR RIGHTS FORUM (Nov. 20, 2008), <https://laborrights.org/blog/200811/union-busting-and-precarious-work-not-answer-sustainable-development> [<https://perma.cc/V6U3-MYPT>].

40. Fang, *supra* note 35.

41. See Celine McNicholas et al., *Unlawful: U.S. Employers Charged with Violating Federal Labor Law in 41.5% of All Union Elections*, ECON. POL'Y INST. (Dec. 11, 2019), <https://www.epi.org/publication/unlawful-employer-opposition-to-union-election-campaigns> [<https://perma.cc/N2BE-GLE9>] ("The data show that U.S. employers are willing to use a wide range of legal and illegal tactics to frustrate the rights of workers to form unions and collectively bargain. . . . [E]mployers spend roughly \$340 million annually on 'union avoidance' consultants to help stave off union elections." Over the past few decades, employers' attempts to thwart organizing have become more prevalent, with more employers turning to the scorched-earth tactics of 'union avoidance' consultants."); see also Heidi Shierholz et al., *Latest Data Release on Unionization*, ECON. POL'Y INST. (Jan. 20, 2022), <https://www.epi.org/publication/latest-data-release-on-unionization-is-a-wake-up-call-to-lawmakers> [<https://perma.cc/CX44-L2MN>] (describing how "it is now standard, when workers seek to organize, for employers to hire union avoidance consultants"); John Logan, *The New Union Avoidance Internationalism*, 13 WORK ORG., LAB. & GLOBALISATION 2 (2019), <https://www.scienceopen.com/hosted-document?doi=10.13169/workorglaboglob.13.2.0057> [<https://perma.cc/S9AC-JZBX>].

42. See Rachel Phua, *Companies Are Required to Report Their Union Busting, But Many Don't*, AM. PROSPECT (Sept. 5, 2022), <https://prospect.org/labor/companies-required-to-report-their-union-busting-many-dont> [<https://perma.cc/9TSR-GNFH>] (noting that Amazon spent \$4.3 million on union avoidance consultants in one year alone.).

back a union.... [Amazon] gives supervisors antiunion material to pass on to employees, saying that unions mean strife and possible strikes and that while unions are certain to charge expensive dues, they cannot guarantee improved wages or benefits.”<sup>43</sup> Twenty years later, Amazon appears to have pursued an identical strategy, firing organizers in New York like Chris Smalls<sup>44</sup> and Gerald Bryson.<sup>45</sup> Of Smalls, an African American organizer in its JFK8 warehouse, Amazon’s general counsel wrote that he “is not smart, or articulate, and to the extent the press wants to focus on us versus him, we will be in a much stronger PR position.”<sup>46</sup> During the Bessemer campaign, Amazon was accused of using coercion and intimidation.<sup>47</sup> Using consultants, Amazon sent out anti-union flyers, blasted text messages, created an anti-union website, and pushed anti-union ads on Twitch (a

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43. See Steven Greenhouse, *Amazon.com Is Using the Web to Block Unions’ Effort to Organize*, N.Y. TIMES (Nov. 29, 2000), <https://www.nytimes.com/2000/11/29/business/amazoncom-is-using-the-web-to-block-unions-effort-to-organize.html> [<https://perma.cc/LDM9-JSUJ>].

44. See Irina Ivanova, *Amazon Fires Worker Who Organized Staten Island Warehouse Walkout*, CBS NEWS (Mar. 31, 2020), <https://www.cbsnews.com/news/amazon-fires-chris-smalls-walkout-staten-island-new-york-warehouse> [<https://perma.cc/LT4R-7H3W>].

45. See Karen Weiss, *A Judge Ruled that Amazon Must Reinstate a Staten Island Worker Who Was Fired*, NEW YORK TIMES (Apr. 18, 2022), <https://www.nytimes.com/2022/04/18/business/amazon-protest-firing-ruling.html> [<https://perma.cc/Y8SB-5VYJ>]. See also Josh Eidelson, *Amazon Threatened Workers Over Union Vote, Labor Officials Find*, BLOOMBERG (May 19, 2022), <https://www.bloomberg.com/news/articles/2022-05-19/amazon-threatened-workers-over-union-vote-labor-officials-find> [<https://perma.cc/KM3K-RL23>]. The NLRB’s Brooklyn-based regional director determined that, before that election, the company held mandatory “captive audience” meetings at the warehouse in which it threatened that if workers chose the union to represent them, Amazon could use minimum wage pay as the starting point for negotiations. The company also said they might take years to get an actual union contract, or never get one, and that while those contract talks were going on, Amazon couldn’t improve their working conditions. *Id.*

46. See Jay Greene, *Leaked Amazon Memo Details Plan to Smear Fired Warehouse Organizer: ‘He’s Not Smart or Articulate’*, VICE NEWS (Apr. 2, 2020), <https://www.vice.com/en/article/5dm8bx/leaked-amazon-memo-details-plan-to-smear-fired-warehouse-organizer-hes-not-smart-or-articula> [<https://perma.cc/K59D-VA32>]. That strategy backfired, as Amazon was found to have terminated both employees in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA) and was ordered to offer reinstatements and reimbursement of lost wages. Aaron Gregg, *Judge Orders Amazon to Reinstate Fired Worker, Pay Lost Wages*, WASH. POST (Apr. 19, 2022), <https://www.washingtonpost.com/business/2022/04/19/amazon-union-worker-nlr-staten-island> [<https://perma.cc/Q3T6-FPAY>]. In Bryson’s case, Amazon did not interview any witnesses or conduct anything that would appear to be a “good faith investigation” of the incident. The administrative law judge excoriated Amazon, saying that “an employer cannot manufacture the loss of an employee’s Section 7 protection by engaging in an ostrich-like, head in the ground, investigation that seeks to avoid evidence which might disclose information mitigating the employee’s misconduct.” See *Amazon.com Services LLC and Gerald Bryson*, No. 29-CA-261755, (N.L.R.B. April 18, 2022), <https://apps.nlr.gov/link/document.aspx/09031d4583739076> [<https://perma.cc/XG7A-W85D>].

47. See Lauren Gurley, *Amazon Sends “Vote No” Instructions to Unionizing Employees, Tells Them to Use New Mailbox*, MOTHERBOARD (Feb. 24, 2021), <https://www.vice.com/en/article/3anw9k/amazon-sends-vote-no-instructions-to-unionizing-employees-tells-them-to-use-new-mailbox> [<https://perma.cc/N2AB-J4RS>] (describing how Amazon installed a new USPS mailbox at the entrance/exit of the warehouse and then sent “vote not” instructions to Amazon workers, actions workers felt were intended to make them feel surveilled and monitored).

streaming site it owns).<sup>48</sup> Anti-union literature was posted in bathroom stalls and above urinals, making the “Vote No!” messaging inescapable.<sup>49</sup> The company held hundreds of captive audience meetings,<sup>50</sup> and in at least one of these meetings they referred to union organizers as “thugs.”<sup>51</sup> Amazon even asked the city to change the traffic lights outside the warehouse, a move organizers claimed was to prevent them from talking with workers during shift changes.<sup>52</sup> Off-duty uniformed police officers were hired to, as one worker concluded, “keep an eye on us.”<sup>53</sup> Echoing worker testimony from the LaFollette Committee, civil rights activist Reverend Dr. William J. Barber II observed, “They claim this is private property, but they’ve got public police on site, who are enforcing some kind of private rule.”<sup>54</sup> The company even reportedly hired the Pinkerton Agency, today a subsidiary of the Swedish-based Securitas AB, to infiltrate its European warehouses and monitor labor organizing activity.<sup>55</sup>

Even traditional, “low-tech” forms of union-busting have begun to shapeshift. One niche set of union avoidance consultants operates as “Diversity, Equity, and Inclusion (DEI) consultants,” a tactic designed to counter the efforts of more highly-educated workers, such as those in the tech

48. An archived version of Amazon’s “DoItWithoutDues.com” website for the Bessemer warehouse is available at <https://web.archive.org/web/20210201100407/https://www.doitwithoutdues.com>. For a description, see Lauren Gurley, *Amazon Launches Anti-Union Website to Derail Alabama Union Drive*, MOTHERBOARD (Jan. 15, 2021), <https://www.vice.com/en/article/5dpkad/amazon-launches-anti-union-website-to-derail-alabama-union-drive> [<https://perma.cc/L46R-M93R>]; see also Gurley, *supra* note 47.

49. See Jay Greene, *Amazon’s Anti-Union Blitz Stalks Alabama Warehouse Workers Everywhere, Even the Bathroom*, WASH. POST (Feb. 2, 2021), <https://www.washingtonpost.com/technology/2021/02/02/amazon-union-warehouse-workers> [<https://perma.cc/D9UB-EDY9>].

50. See, e.g., Noam Scheiber, *Mandatory Meetings Reveal Amazon’s Approach to Resisting Unions*, N.Y. TIMES (Mar. 24, 2022), <https://www.nytimes.com/2022/03/24/business/amazon-meetings-union-elections.html> [<https://perma.cc/U7BN-G9MX>].

51. See Lauren Gurley, *Amazon Told Workers Union Organizers Are ‘Thugs,’ Labor Board Investigation Finds*, MOTHERBOARD (Jan. 27, 2022), <https://www.vice.com/en/article/jgmdv7/amazon-told-workers-union-organizers-are-thugs-labor-board-investigation-finds> [<https://perma.cc/S2AL-9MTZ>].

52. See William Thornton, *Jefferson County Now Says Traffic Lights Were Changed Near Amazon*, AL.COM (Feb. 17, 2021), <https://www.al.com/business/2021/02/jefferson-county-now-says-traffic-lights-were-changed-near-amazon.html> [<https://perma.cc/7RP7-K5K5>].

53. More Perfect Union (@MorePerfectUS), X (Mar. 25, 2021, 4:20 PM), <https://twitter.com/MorePerfectUS/status/1375226020224192516?s=20> [<https://perma.cc/ML24-822D>].

54. *Id.* at 1:30.

55. See Lauren Gurley, *Secret Amazon Reports Expose the Company’s Surveillance of Labor and Environmental Groups*, MOTHERBOARD (Nov. 23, 2020), <https://www.vice.com/en/article/5dp3yn/amazon-leaked-reports-expose-spying-warehouse-workers-labor-union-environmental-groups-social-movements> [<https://perma.cc/U4CC-BD8J>].

industry.<sup>56</sup> As Lee Fang observes, “businesses facing worker uprisings are attempting to co-opt the language of social justice movements and embrace trends around self-growth and positive lifestyles to counter demands for unionization.”<sup>57</sup> This is particularly concerning, as employers may seek to justify their interrogation of workers (and, as discussed in the following Part, the digital monitoring of their moods, movements, and meetings) as relating to their DEI efforts, “wrapping anti-union talking points in a patina of racial sensitivity and commitment to diversity.”<sup>58</sup> Corporations have also used racial affinity groups, also known as employee resource groups (“ERGs”), as a form of “company union,” giving employees, especially those more likely to have legitimate grievances about discrimination and equity, a forum in which to feel “heard.”<sup>59</sup> But as one union organizer interviewed by Fang explains, these ERGs are “more about surveillance, about keeping an eye on workers.”<sup>60</sup>

### *B. Electronic Monitoring and Digital Surveillance*

In what has been described as the “datafication of employment,” technology that collects, analyzes, and leverages data to “squeeze every last drop of productivity” out of workers,<sup>61</sup> is radically reshaping and exacerbating the unequal balance of power in the modern workplace.<sup>62</sup> In this era of big data, companies leverage information to extinguish unionization

56. See Fang, *supra* note 35 (including titles such as “developers of ‘human capital,’ and champions of workplace ‘belonging’”). As the article notes, “the industry has undergone somewhat of a re-branding, with many labor relations executives now identifying as ‘people experts’ and diversity experts.” *Id.*

57. Fang, *supra* note 35.

58. *Id.* (pointing to critics who “say that many corporations merely channel concerns around racial injustice into a reputation-laundering strategy, one that can serve the bottom line of keeping workers in check” and citing a former union organizer who observes this when it comes to organizing in the tech industry).

59. See *id.*

60. Fang, *supra* note 35 (explaining that the National Labor Relations Act expressly banned the creation of company unions because, as Professor Duff notes, “it’s very easy for a working person to mistake these groups as third parties.”).

61. See Sam Adler-Bell & Michelle Miller, *The Datafication of Employment: How Surveillance and Capitalism Are Shaping Workers’ Futures Without Their Knowledge*, THE CENTURY FOUND. (Dec. 19, 2018), <https://tcf.org/content/report/datafication-employment-surveillance-capitalism-shaping-workers-futures-without-knowledge> [<https://perma.cc/FM5R-DPQE>] (arguing that “data-mining techniques innovated in the consumer realm have moved into the workplace,” leading to heightened corporate surveillance and enhanced informational asymmetry and giving employers “nearly total control over every aspect of employment.”); see also Esther Kaplan, *The Spy Who Fired Me*, HARPER’S MAG. (March 2015), <https://harpers.org/archive/2015/03/the-spy-who-fired-me> [<https://perma.cc/24MH-FVX8>].

62. See Ifeoma Ajunwa, Kate Crawford & Jason Schultz, *Limitless Worker Surveillance*, 105 CAL. L. REV. 735, 743-44 (2017); see also Nieuwenhuijsen, K., D. Bruinvels, and M. Frings-Dresen, *Psychosocial Work Environment and Stress-Related Disorders, a Systematic Review*, 60 OCCUPATIONAL MED. 277, 281 (2010) (finding that high job demands, low job control, low co-worker support, low supervisor support, low procedural justice, low relational justice, and a high effort-reward imbalance predicted the incidence of stress-related disorders).

efforts and silence worker grievances.<sup>63</sup> With pinpoint accuracy, they can target employees most likely to support unionization and use “heat maps” to track attendance at union meetings.<sup>64</sup> Employers can censor union-related discussions on corporate messaging platforms through hidden content moderation functions.<sup>65</sup> Some have gone as far as “Zoom bombing” virtual worker meetings.<sup>66</sup> This constant surveillance creates a chilling effect on organizing activity.<sup>67</sup> Amazon’s extensive surveillance caused workers to believe their secret ballot votes were being monitored, leading the NLRB to call for a new election.<sup>68</sup>

Embedded high-tech tools help employers gather information about employees it once needed detective agencies to obtain. Security cameras

63. See Bronfenbrenner, *supra* note 33, at 12 (finding that “[14%] of employers who mounted [anti-union] campaigns surveilled social media, and [20%] used cameras to spy on their employees. Twelve percent used a combination of electronic surveillance techniques such as employee key cards, ID badges, phone and computer apps, GPS location devices, and tracking of movements, speed, and exit and entry.” Bronfenbrenner notes that given the undetectable nature of this technology, these figures likely undercount the use of surveillance in anti-union campaigns.)

64. See Hayley Peterson, *Amazon-Owned Whole Foods Is Quietly Tracking Its Employees with a Heat Map Tool that Ranks Which Stores Are Most at Risk of Unionizing*, BUS. INSIDER (Apr. 20, 2020), <https://www.businessinsider.com/whole-foods-tracks-unionization-risk-with-heat-map-2020-1?op=1> [<https://perma.cc/FDP3-3454>]. For example, the union-busting firm Labor Relations Institute offers “Eye in the Sky” reports that “alert [an employer] immediately if a union files a petition in the vicinity of any of [their] locations,” based on the premise that “union activity often happens in “clusters.” Labor Relations Institute, Inc., *Eye in the Sky*, <https://lrionline.com/positive-employee-relations-2/research/eye-in-sky> [<https://perma.cc/UH62-UNL9>].

65. See Robert Sprague, *More and More Employers Are Spying on Workers Online. Federal Regulators Are Okay with It*, PROMARKET (July 30, 2020), <https://www.promarket.org/2020/07/30/more-and-more-employers-are-spying-on-workers-online-federal-regulators-are-okay-with-it> [<https://perma.cc/ARZ8-JR5H>] (noting that “[Wh]en Facebook debuted features of its Facebook Workplace, an intranet-style chat and office collaboration product similar to Slack, it highlighted a tool that allows administrators to remove and block certain trending topics among employees. The example used: the word ‘unionize’”). One automated application uses AI to monitor workplace channels such as Slack for “inappropriate content” that can be tailored by the individual user. MODERATION API, <https://moderationapi.com/integrations/slack-content-moderation> [<https://perma.cc/UA69-X49G>].

66. See Constantz, *supra* note 10 (quoting organizers in the hotel industry describing Zoom meetings of the workers organizing committee at which, “managers of the company had busted into the meeting—they had crashed our Zoom call,” after which at least one worker was confronted by management for her involvement with the union).

67. See Annette Bernhardt et al., *Data and Algorithms at Work: The Case for Worker Technology Rights*, BERKELEY LAB. CTR. 22 (2021), <https://laborcenter.berkeley.edu/data-algorithms-at-work> [<https://perma.cc/2ANW-U9WX>] (noting that the “real-time and continuous capture of worker activities and behavior” makes electronic monitoring by employers ripe for misuse, “for example, in violating workers’ privacy, in using biased or incomplete monitoring evidence to discipline someone, or in pushing the pace of work to the point of injuries.”); see also Kathryn Zickuhr, *Workplace Surveillance is Becoming the New Normal for U.S. Workers*, WASH. CTR. FOR EQUITABLE GROWTH (Aug. 4, 2021), <https://equitablegrowth.org/research-paper/workplace-surveillance-is-becoming-the-new-normal-for-us-workers> [<https://perma.cc/7BUH-5YMU>].

68. Jay Greene, *Labor Board Calls for Revote at Amazon Warehouse in Alabama in Major Victory for Union*, WASH. POST (Nov. 29, 2021), <https://www.washingtonpost.com/technology/2021/11/29/amazon-warehouse-union-revote> [<https://perma.cc/CCB9-AFUX>].

capture workers' conversations and breakrooms; employer-provided phones and devices monitor workers' internet use, emails, and social media accounts and track their movements using GPS.<sup>69</sup> Companies like HireVue use artificial intelligence to screen job applicants, using "tone of voice" and "word choices" to make hiring decisions, and employers have access to other algorithmic tools that can predict whether the applicants are more likely to quit, become pregnant, or organize a union.<sup>70</sup> Human resource management consultants advise being on alert for "language on the resume, job application, during an interview or after hiring" that is "typical union language, like organize, job security, dignity, grievance and seniority,"<sup>71</sup> as well as "fair treatment...respect, past practice, arbitration...minimum wage and prevailing wage."<sup>72</sup> Technology automates union-busting practices that have existed for decades, including the use of "personality tests," which emerged in the 1930s as a legal alternative to the "black-listing" of union supporters and are now a pervasive and highly profitable algorithmic tool of industrial psychology.<sup>73</sup> Perceptyx can predict the likelihood of union organizing victories by comparing job satisfaction data against its database of 12 million surveys from other clients.<sup>74</sup> Tools designed to increase productivity make use of AI, machine learning, and data mining to screen pro-union workers.<sup>75</sup> In 2020, Amazon posted a job in its "Global Intelligence

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69. Other leading technology in the workplace surveillance space includes Microsoft's Workplace Analytics, which assigns employees an "influence score" based on their email, calendar, call, and chat data, indicating their level of connectedness within the company. Thomson Reuters CLEAR searches public records and can identify potential issues with individuals and organizations, including their history of workplace activism. Amazon has advertised for an analyst with experience using CLEAR to monitor organized labor, suggesting that the company has access to the tool. FlexiSpy is a spyware technology that can secretly record audio calls, access photos, and track locations on a worker's device, further undermining privacy in the workplace. Negron, *supra* note 9, at 63-64.

70. See Angela Chen, *The AI Hiring Industry Is Under Scrutiny, but It Will Be Hard to Fix*, MIT TECH. REV. (Nov. 7, 2019), <https://www.technologyreview.com/2019/11/07/75194/hirevue-ai-automated-hiring-discrimination-ftc-epic-bias> [<https://perma.cc/4F53-ABR4>]; see also Valentina Zarya, *Employers Are Quietly Using Big Data to Track Employee Pregnancies*, FORTUNE (Feb. 17, 2016), <https://fortune.com/2016/02/17/castlight-pregnancy-data> [<https://perma.cc/4658-QVBZ>]; Christina Nele, et al., *Smart Nudging: How Cognitive Technologies Enable Choice Architectures for Value Co-Creation*, 129 J. OF BUS. RSCH. 949 (May 2021) (reporting that businesses have adopted similar technologies to monitor customer interactions, "nudging" employees in real-time to adjust their behavior).

71. See *Recognizing and Responding to Union Salting*, PROJECTIONS, <https://projectionsinc.com/recognizing-and-responding-to-union-salting> [<https://perma.cc/7HQE-WWA2>].

72. See F. Beau Howard, *How to Spot a Union Ambush*, SHRM (March 9, 2016), <https://www.shrm.org/resourcesandtools/hr-topics/labor-relations/pages/union-organizing-activities.aspx> [<https://perma.cc/C4X9-TURU>].

73. See Nathan Newman, *How Workers Really Get Canceled on the Job*, AM. PROSPECT (Apr. 6, 2021), <https://prospect.org/labor/how-workers-really-get-canceled-on-the-job> [<https://perma.cc/2NJ2-87SX>].

74. Negron, *supra* note 9, at 63 (noting that Worktango and Littler Mendelson, the notorious union-busting law firm, offer similar services).

75. See Sarah Kessler, *Companies Are Using Employee Survey Data to Predict—and Squash—Union Organizing*, ONE ZERO (July 30, 2020), <https://onezero.medium.com/companies-are-using->

Program,” which would be responsible for gathering information about “labor organizing threats against the company” (as well as “hate groups” and “terrorism”).<sup>76</sup> The company has been accused of spying on its workers’ private Facebook groups, “systematically monitoring, categorizing, and analyzing the nominally closed social media pages utilized by their Flex Drivers, who are independent contractors who deliver packages and groceries for Amazon and Whole Foods in more than 50 cities across the United States and in several other countries.”<sup>77</sup>

Risk assessment by corporate employers is not new, but the technology’s speed and precision are “the next frontier of employer opposition to unions.”<sup>78</sup> Walmart uses Facebook’s Workplace, which can be used to monitor and control employees’ conversations, including discussions about unionization.<sup>79</sup> Whole Foods reportedly used “heat map” technology to determine which stores were at risk of unionizing, presumably so that it could squash it.<sup>80</sup> Its “elaborate scoring system” uses over “two dozen metrics, including employee ‘loyalty,’ turnover and racial diversity; ‘tipline’ calls to human resources; proximity to a union office; and Occupational Safety and Health Administration (OSHA) violations.”<sup>81</sup> The map measures “external

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employee-survey-data-to-predict-and-squash-union-organizing-a7e28a8c2158 [https://perma.cc/MV94-3N6E].

76. See Louise Matsakis, *Amazon Deletes Job Posts Seeking Analysts to Track ‘Labor Organizing Threats,’* WIRED MAGAZINE (Sept. 1, 2020), <https://www.wired.com/story/amazon-deletes-job-posts-labor-organizing-threats> [https://perma.cc/7YNP-KYDW]. Although the job posts were removed by Amazon, an archived version can be found at <https://web.archive.org/web/20200901153123/https://www.amazon.jobs/en/jobs/1026060/intelligence-analyst> [https://perma.cc/6QFE-J2DL].

77. See Lauren Gurley & Joseph Cox, *Inside Amazon’s Secret Program to Spy on Workers’ Private Facebook Groups,* VICE (Sept. 1, 2020), <https://www.vice.com/en/article/3azegw/amazon-is-spying-on-its-workers-in-closed-facebook-groups-internal-reports-show> [https://perma.cc/P2A2-DLD3].

78. See Peterson, *supra* note 64.

79. See Lee Fang, *Facebook Pitched a New Tool Allowing Employers to Suppress Words Like ‘Unionize’ in Workplace Chat Product,* THE INTERCEPT (June 11, 2020), <https://theintercept.com/2020/06/11/facebook-workplace-unionize> [https://perma.cc/7H47-ER5V]. See also Negron, *supra* note 9, at 65 (noting that fast food restaurants like McDonald’s reportedly use Oracle Business Intelligence Suite Enterprise Edition Plus, which scans social media for keywords like “wage theft” and cross-references posters’ names with company records); Constantz, *supra* note 10 (explaining that “given its outside role in the American economy, Amazon’s practices are likely to be imitated by other corporations. Among the measures that have raised eyebrows at the company are buying software that could help it analyze and visualize data on unions, monitoring employee listservs known for their activism and tracking the use of Facebook groups by contract drivers to plan strikes.”).

80. Peterson, *supra* note 64.

81. *Id.* (“The map also tracks local economic and demographic factors such as the unemployment rate in a store’s location and the percentage of families in the area living below the poverty line.”).

risks, store risks,<sup>82</sup> and team member sentiment.”<sup>83</sup> In response to concerns from its progressive customer base, Whole Foods explained that the map’s purpose was to “identify stores at risk of unionization...[to] mitigat[e] risk by addressing challenges early before they become problematic.”<sup>84</sup>

Such attempts to identify collective action are in and of themselves an intrusion on the right to organize, especially when employers then take steps, such as firing or intimidating workers, to halt the organizing activity.<sup>85</sup> As NLRB General Counsel Jennifer Abruzzo notes:

Close, constant surveillance and management through electronic means threaten employees’ basic ability to exercise their rights. In the workplace, electronic surveillance and the breakneck pace of work set by automated systems may severely limit or completely prevent employees from engaging in protected conversations about unionization or terms and conditions of employment that are a necessary precursor to group action.<sup>86</sup>

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82. *Id.* Store-risk metrics encompass several factors, including the average compensation offered to store employees, the total sales generated by a store, and a diversity index reflecting the racial and ethnic diversity of each store. Those stores posing a greater likelihood of unionization are characterized by lower diversity, less generous employee compensation, heightened total sales, and a higher frequency of workers’ compensation claims. *Id.*

83. Peterson, *supra* note 64. “Team member sentiment” is derived from employee surveys and singled out as “likely to be the first score to improve based on your efforts.” This is where union-busting activity, the statement suggests, should be focused. Changing the store’s physical location is not an easy option, but convincing (or threatening, intimidating, coercing) employees into changing their views on unionization may be. *Id.*

84. Peterson, *supra* note 64.

85. See generally Charlotte Garden, *Labor Organizing in the Age of Surveillance*, 63 ST. LOUIS UNIV. LAW J. 55, 55-68 (2018) (discussing the legal implications of employer monitoring of labor organizing).

86. Jennifer A. Abruzzo, NLRB General Counsel, *Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights*, Memorandum GC 23-02, at 7 (Oct. 31, 2022), <https://apps.nlr.gov/link/document.aspx/09031d45838de7e0> [<https://perma.cc/BN96-HVHC>] [hereinafter Abruzzo Memo]. See *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 n.10 (2014) (noting that “discussions of wages are often preliminary to organizing or other action for mutual aid or protection”). Cf. *Spring Valley Hospital Medical Center*, 363 NLRB 1766, 1766 n.3, 1782 (2016) (adopting, in the absence of exceptions, the judge’s finding that the employer violated Section 8(a)(1) by requiring employees to speak English only, which limited employees’ “ability to freely discuss and communicate about work conditions, wages and other terms and conditions of employment”).



The accelerated application of technology to the workplace has spurred debates about privacy,<sup>87</sup> ethics,<sup>88</sup> automation,<sup>89</sup> and discrimination.<sup>90</sup> For the 93% of U.S. workers who are not union members, “the profound asymmetry of power in the [U.S.] workplace means they have little to no say over the policies and decisions that affect them in their day-to-day work lives.”<sup>91</sup> An absence of worker voices in the discussion on the future of work has led to policy solutions focused on ensuring basic survival instead of how innovation and technology can create a more equitable, sustainable, and just workplace.<sup>92</sup> One of the most effective ways of ensuring that workers have a voice in these discussions is through a collective bargaining process that gives them consultation rights when such technology is proposed and implemented. And the primary way of ensuring that workers can engage in collective bargaining is through vigorous enforcement of their rights under the National Labor Relations Act (NLRA). However, protecting workers’

87. See Susan Park, *Employee Internet Privacy: A Proposed Act that Balances Legitimate Employer Rights and Employee Privacy*, 51 AM. BUS. L.J. 779 (2014); Robert Sprague, *From Taylorism to the Omnipicon: Expanding Employee Surveillance Beyond the Workplace*, 25 J. MARSHALL J. COMPUTER & INFO. L. 1 (2007); Ariana R. Levinson, *Carpe Diem: Privacy Protection in Employment Act*, 43 AKRON L. REV. 331 (2010). See also Robert Sprague, *Rethinking Internet Privacy in an Age of Online Transparency*, 25 HOFSTRA LAB. & EMP. L.J. 395 (2008).

88. See, e.g., Shelley McGill & Mark Baetz, *Technology Use Codes of Conduct: Is It a Choice Between Shaping the Organizational Culture and Effective Legal Enforcement?*, 15 EMP. RTS. & EMP. POL’Y J. 379 (2011).

89. In some industries, task standardization through technology can lead to automation when real-time data from workers performing each task is used to train algorithms or robots. For instance, chatbots can learn by observing call center agent calls. Josh Dzieza, *How Hard Will the Robots Make Us Work?*, THE VERGE (Feb. 27, 2020), <https://www.theverge.com/2020/2/27/21155254/automation-robots-unemployment-jobs-vs-human-google-amazon> [https://perma.cc/LR9M-DGHU].

90. See Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CAL. L. REV. 671 (2016); Frank A. Pasquale & Danielle Keats Citron, *Promoting Innovation While Preventing Discrimination: Policy Goals for the Scored Society*, 89 WASH. L. REV. 1413, 1413-14 (2014) (discussing anti-discriminatory policy goals that arise in the context of the “proliferation of networked identities and selves”). The paper doesn’t examine how this technology has been used to discriminate against workers. Discrimination based on race, gender, age, disability, and other categories has been widely documented regarding the harm that data-driven technologies have caused workers, particularly in hiring software. A classic example is a hiring algorithm that selects job candidates based on traits that align with a company’s existing workforce, replicating the workforce’s predominantly white and male demographics. Workers of color and women are also at a higher risk of harm from data-driven technologies due to the nature of their occupations, especially in low-wage jobs such as call centers and warehousing, where there is a greater likelihood of experimentation with monitoring or algorithmic management.

91. Annette Bernhardt et al., *The Data-Driven Workplace and the Case for Worker Technology Rights*, 76 ILR REV. 3, 16 (2023); see also Joelle Gamble, *The Inequalities of Workplace Surveillance: When Bosses Watch over Our Every Move, the Data They Collect Ends up Making Us Even More Unequal*, THE NATION (June 3, 2019), <https://www.thenation.com/article/archive/worker-surveillance-big-data> [https://perma.cc/2K93-J2GF]; Yeshimabeit Milner and Amy Traub, *Data Capitalism + Algorithmic Racism, Data for Black Lives*, DEMOS (2021), <https://www.demos.org/research/data-capitalism-and-algorithmic-racism> [https://perma.cc/5L56-JF4T].

92. See Sarita Gupta, Stephen Lerner & Joseph A. McCartin, *It’s Not the “Future of Work,” It’s the Future of Workers That’s in Doubt*, THE AMERICAN PROSPECT (Aug. 31, 2018), <https://prospect.org/labor/future-work-future-workers-doubt> [https://perma.cc/3SVN-TKRY].

freedom of association in the future is threatened by existing weaknesses in domestic labor law, policy, and enforcement.

## II. LABOR LAW FAILS TO PROTECT WORKERS

While public support for unions has reached record levels, employer interference in organizing remains widespread, pernicious, and overwhelmingly effective.<sup>93</sup> Union density has steadily declined for decades, with only 6.1 percent of private-sector workers belonging to a union in 2021, down from 16.8 percent in 1983. Existing labor laws must keep pace with employers' technological tools to crush organizing. Electronic surveillance and data tracking may not be considered illegal, and employers may not be required to notify employees of their use. Even when companies are found to have engaged in unfair labor practices, such as terminating an employee for supporting unionization, existing remedies are limited, and claims may take years to resolve. This allows companies to union-bust with impunity. This section details four reasons why existing labor laws do not protect workers' rights to organize a union.

### *A. Section 7 of the NLRA is an Ineffective Analog Protection Against Digital Coercion*

The NLRA protects the rights of employees to engage in select concerted activities, such as forming a union and negotiating better working conditions, without interference from their employer. Section 7 of the NLRA guarantees employees the right to “engage in . . . concerted activities for . . . mutual aid or protection.”<sup>94</sup> Section 7 is enforced by section 8(a)(1) of the NLRA, which makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of” those rights.<sup>95</sup> Traditionally, these rights would be triggered when an employer engaged in many of the forms of old-school union-busting described above, like using spies to physically trail workers to and from union meetings<sup>96</sup> or threatening to fire workers for supporting a union.<sup>97</sup> But when it comes to modern forms of union-busting, involving digital surveillance and algorithmic

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93. See Greg Rosalsky, *You May Have Heard of the ‘Union Boom.’ The Numbers Tell a Different Story*, NPR PLANET MONEY (Feb. 28, 2023), <https://www.npr.org/sections/money/2023/02/28/1159663461/you-may-have-heard-of-the-union-boom-the-numbers-tell-a-different-story> [<https://perma.cc/23C5-D4CJ>] (describing the “union paradox: near-record-high popularity, but record-low participation.”).

94. 29 U.S.C. § 157.

95. 29 U.S.C. § 158(a)(1).

96. See *N.L.R.B. v. Comfort, Inc.*, 365 F.2d 867, 870-71 (8th Cir. 1966) (finding employer’s surveillance of employees’ union activities is an unfair labor practice).

97. See NLRB, *Interfering with Employee Rights (Section 7 & 8(a)(1))*, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1> [<https://perma.cc/ZR3G-3Y3Z>].

management, it can be harder to establish that an employer's use of that technology is indeed being used to "interfere with, restrain or coerce employees'" collective action.

General Counsel Abruzzo released a memo in October 2022 on "Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights," seeking to clarify the rights of workers in this new era of technology. As Abruzzo notes, some of what employers do with these new technologies is presumptively unlawful. This includes photographing workers engaged in protected concerted action since "pictorial recordkeeping tends to create fear among employees of future reprisals."<sup>98</sup> In those cases, the Board has sought to balance the rights of employers against the apparent risk of intimidation their actions pose to workers.<sup>99</sup> She adds that introducing new technology in response to workers engaging in conduct protected by Section 7 (e.g., organizing a union), using existing technology expressly for discovering whether workers are organizing a union, or using technology in a manner that makes workers feel that they are being watched, is illegal conduct.<sup>100</sup> Furthermore, employers violate Section 8(a)(1) if they retaliate against employees who take collective action in response to employer surveillance and monitoring (e.g., if workers circulate a petition to protest the employers' use of security cameras).<sup>101</sup>

Following the initial election at the Bessemer facility in February 2021, the NLRB nullified the results. Due to the COVID-19 pandemic, the thousands of workers at the site voted by mail instead of in person.<sup>102</sup> In the weeks leading up to the vote, workers received a steady stream of texts, emails, flyers, and announcements from Amazon management urging them to "Vote NO!" on creating a union.<sup>103</sup> The NLRB Hearing Officer found that Amazon's actions "interfered with employee free choice," making a fair election impossible.<sup>104</sup> The hearing officer also found Amazon's distribution of "vote no" pins and other anti-organizing paraphernalia to employees in the presence of managers and supervisors objectionable.<sup>105</sup> Though Amazon

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98. Abruzzo Memo, *supra* note 86, at 3 (citing *Brasfield & Gorrie, LLC*, 366 NLRB No. 82, slip op. at 5 (2018) (quoting *National Steel & Shipbuilding Co.*, 324 NLRB 499, 499 (1997), *petition for review denied*, 156 F.3d 1268 (D.C. Cir. 1998))).

99. *Id.* (citing *F.W. Woolworth Co.*, 310 NLRB 1197, 1197 (1993)).

100. *Id.* at 3-4.

101. *Id.* at 4.

102. See Noam Scheiber, *Union Vote at Amazon Warehouse in Alabama Is Overturned by Regional Labor Office*, N.Y. TIMES (Nov. 29, 2021), <https://www.nytimes.com/2021/11/29/business/amazon-bessemer-alabama-election.html> [<https://perma.cc/83A8-Z3P9>].

103. See Mike Spector, *How Amazon Interfered with Alabama Union Election – NLRB Official*, REUTERS (Aug. 3, 2021), <https://www.reuters.com/business/amazon-interfered-with-union-elections-says-us-labor-board-2021-08-03> [<https://perma.cc/LZM3-4ASF>].

104. *Id.* A tent erected around the mailbox adorned with a company campaign slogan, while not enough to invalidate the vote, amounted to electioneering that tainted the election. *Id.*

105. Spector, *supra* note 103.

tried to defend its installation of a new USPS mailbox to collect ballots—which it sited in direct view of surveillance cameras—was to give nearly 6,000 eligible voters a convenient option for voting, the NLRB found it generated reasonable suspicion among employees that the company was tracking their activities.<sup>106</sup>

While these types of open and notorious union-busting are prohibited by the NLRA, other conduct remains in a gray area of coercive, possibly legal, employer activity. The Abruzzo memo announced it would use the power of the board to “vigorously enforce[] extant law” and urged the Board to adopt “a new framework for protecting employees from intrusive or abusive forms of electronic monitoring and automated management that interfere with Section 7 activity.”<sup>107</sup> Citing the landmark Weingarten case, Abruzzo affirmed the Board’s responsibility “to adapt the Act to changing patterns of industrial life.”<sup>108</sup> Abruzzo also issued an earlier memo urging the Board to rule that mandatory captive-audience meetings are unlawful under the NLRA. While an employer would still be permitted to hold optional meetings to persuade employees against union membership or organizing, workers, Abruzzo explained, should have the right to decline to attend and be protected from further discrimination.<sup>109</sup> The full five-member NLRB Board will have to choose to apply the memo’s recommendations once a live case comes before it, so these rights have yet to be formalized.

Another weakness of the NLRA, as identified in decades of unfair labor practice cases, is that the line between employer communications that constitute permitted “predictions” and those which rise to an impermissible “threat” is murky at best. While an employer can’t threaten to move the plant to Mexico if the workers vote for a union, they can predict what might happen if the union makes the company uncompetitive, forcing them to consider relocation for financial reasons. The distinction is lost on the worker whose precarity makes the risk of job loss significant.<sup>110</sup> One video shown by

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106. Hearing Officer’s Report on Objections at 27, *Amazon.com Services, LLC v. Retail, Wholesale and Department Store Union* (No. 10-RC-269250).

107. Abruzzo Memo, *supra* note 86, at 5, 9. The framework that Abruzzo puts forth is taken nearly verbatim from that proposed by Professor Garden, in her 2018 paper, *Labor Organizing in the Age of Surveillance*. See Garden, *supra* note 85, at 68.

108. Abruzzo Memo, *supra* note 86, at 5.

109. Jennifer A. Abruzzo, NLRB General Counsel, *The Right to Refrain from Captive Audience and Other Mandatory Meetings*, Memorandum GC 22-04 (Apr. 7, 2022), <https://apps.nlr.gov/link/document.aspx/09031d458372316b> [<https://perma.cc/CX5R-EHM8>]. See also Noam Scheiber, *N.L.R.B. Counsel Calls for a Ban on Mandatory Anti-Union Meetings*, N.Y. TIMES (Apr. 7, 2022), <https://www.nytimes.com/2022/04/07/business/economy/nlr-union-amazon-starbucks.html> [<https://perma.cc/L9UK-RW2T>].

110. As a dissenting judge in a court decision that allowed such threats explained: “An employer can dress up his threats in the language of prediction (‘You will lose your job’ rather than ‘I will fire you’) and fool judges. He doesn’t fool his employees; they know perfectly clearly what he means.” *N.L.R.B. v. Goulb Corp.*, 388 F.2d 921, 929 (2d Cir. 1967).

Amazon to its Staten Island warehouse workers, just days before its union election, said as much about the union: “[T]heir answer to most things is they should shut down Amazon.”<sup>111</sup> The statement constituted a not-so-veiled threat that workers would lose their jobs if they voted to form a union. Likewise, Starbucks telling workers that they “may” lose their rights to gender-affirming surgery or educational benefits is perfectly legal under the NLRA. It does not take a legal scholar to understand why such statements would be coercive.

### *B. Loopholes in Required Disclosures*

While using “union-avoidance” consultants is not unlawful, the Labor Management Reporting Disclosure Act (LMRDA) requires employers to be transparent about those relationships. Indeed, “questionable conduct by some employers and their labor relations consultants that interfered with” workers’ rights under the NLR prompted Congress to enact the LMRDA.<sup>112</sup> Concerned that such consultants would engage in “union-busting” activities,<sup>113</sup> Congress concluded that their actions are ethically or morally questionable and therefore “should be exposed to public view” because they are “disruptive of harmonious labor relations and fall into a gray area,” even if the conduct was not unlawful or did not rise to the level of an unfair labor practice under the NLRA.<sup>114</sup>

Employers must disclose payments made to anti-union consultants to the U.S. Department of Labor’s Office of Labor-Management Standards. Disclosures must detail the activities of those consultants, such as whether they are conducting training sessions, preparing and distributing literature, or communicating with employees or supervisors.<sup>115</sup> Correspondingly, the union-avoidance firm must file a Form LM-20 that specifies whether they were hired “to persuade employees to exercise or not to exercise, or persuade

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111. See Scheiber, *supra* note 50.

112. History of LMRDA’s Reporting Requirements, 76 Fed. Reg. 36178, 36178-79 (citing 29 U.S.C. 151 et. seq.; S. REP. NO. 86-187 at 6, 10-12 (1959), reprinted in NLRB, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* [hereinafter LMRDA History] at 397, 402, 406-08).

113. LMRDA History, *supra* note 112, at 406.

114. *Id.* at 407-08. See also Lynn D. Moffa, *Reporting Nonpersuasion Under the LMRDA*, 1986 DET. C.L. REV. 759, 760 (1986).

115. Labor Management Reporting Disclosure Act (LMRDA) § 203(a), 29 U.S.C. § 433(a) (requiring employers to file a report, subject to certain exemptions, covering the following payments and arrangements made in a fiscal year: certain payments to, or other financial arrangements with, a labor organization or its officers, agents, or employees; payments to employees for the purpose of causing them to persuade other employees with respect to their bargaining and representation rights; payments for the purpose of interfering with employees in the exercise of their bargaining and representation rights or for obtaining information on employee or labor organization activities in connection with labor disputes involving their company; and arrangements (including related payments) with a labor relations consultant for the purpose of persuading employees with respect to their bargaining and representation rights, or for obtaining information concerning employee activities in connection with a labor dispute involving their company).

employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their choosing,” or, “to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding.”<sup>116</sup>

Employers can avoid these requirements if the union-busters they hire do not meet directly with employees but instead coach managers on what to say and do; a “loophole so large you could drive a yacht through it.”<sup>117</sup> Moreover, while an employer is prohibited from spending money on surveillance technology “to obtain information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer,”<sup>118</sup> it would generally be permitted to continue using such technology so long as it was put into place before any putative labor organizing and was used for a permissible purpose (e.g., cameras installed to prevent employee theft or email scanners to monitor productivity).

Union-busting disclosures are essential to countering a “culture of uncertainty and fear” created “when workers do not know where the anti-union material they encounter is coming from.”<sup>119</sup> Funk explains, “[W]hen workers know their employer has engaged union-busters to conduct potentially coercive activity, they are better prepared for the onslaught of lies and threats.”<sup>120</sup> As Rachel Phua notes, “Finding out a person you just talked to is getting paid \$400 an hour to dissuade you from joining a union could put that person’s message in a different—and discountable—light.”<sup>121</sup> Several proposals have surfaced that would, if enacted, require disclosing additional information. Responding to calls for a ban on using tax dollars to

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116. See, e.g., Road Warrior Productions, LLC, AGREEMENT & ACTIVITIES REPORT (FORM LM-20) (Feb. 7, 2021), <https://olmsapps.dol.gov/query/orgReport.do?rptId=740712&rptForm=LM20Form> [<https://perma.cc/BCR2-WDU9>]. Road Warrior is the union-busting firm retained by Amazon in connection with the organizing campaign of its Bessemer, Alabama plant. Amazon paid \$3,200 per day per each consultant retained, plus expenses. Employers must file within 90 days after the close of their fiscal year, and anti-union consultants must file within 30 days after being retained. *Id.*

117. See Rachel Phua, *Companies Are Required to Report Their Union Busting, but Many Don't*, AM. PROSPECT (Sept. 5, 2022), <https://prospect.org/labor/companies-required-to-report-their-union-busting-many-dont> [<https://perma.cc/9TSR-GNFH>].

118. 29 U.S.C. § 433(a)(3). See also O.L.M.S. FACT SHEET, FORM LM-10 EMPLOYER REPORTING: TRANSPARENCY CONCERNING PERSUADER, SURVEILLANCE, AND UNFAIR LABOR PRACTICE EXPENDITURES, at 3, [https://www.dol.gov/sites/dolgov/files/OLMS/regs/compliance/LM10\\_FactSheet.pdf](https://www.dol.gov/sites/dolgov/files/OLMS/regs/compliance/LM10_FactSheet.pdf) [<https://perma.cc/7T4Z-9FHJ>] (describing the obligation to report expenditures on “[s]urveillance equipment or other technology used to surveil and the time spent on installing, operating, and monitoring it, as well as analyzing the information the equipment produces,” among others).

119. Phua, *supra* note 117.

120. *Id.*

121. *Id.*

pay for union-busting, one proposed regulation would require that federal contractors disclose that status on Form LM10s, presumably adding an additional layer of scrutiny to the activities of consultants in those cases.<sup>122</sup> Another proposal, part of the “No Tax Breaks for Union Busting Act,” would classify employer interference in union organizing campaigns as “political speech,” disqualifying it as tax deductible.<sup>123</sup> The new definition would cover activity already unlawful under the NLRA as well as currently permissible activity such as captive audience meetings and anti-union advertising campaigns.<sup>124</sup>

### *C. Structural Enforcement Problems Plaguing the NLRA*

The NLRA, designed in an industrial era ill-matched to the future of work, is structurally insufficient in protecting workers’ rights to form a union.<sup>125</sup> Convincing at least fifty percent plus one of their coworkers to join a union in the face of what has likely been a brutal opposition campaign requires workers to “be like a little Navy SEAL team in order to successfully unionize under the radar of an employer,” says economist Suresh Naidu.<sup>126</sup> Even when workers elect a union in their workplace, it takes an average of 465 days to negotiate a new contract.<sup>127</sup> Structural enforcement issues further incentivize employers to violate workers’ rights to delay a vote or a contract. For example, when an employer fails to comply with an order issued in connection with an unfair labor practice, the NLRB relies on the U.S. Department of Justice (DOJ) to enforce it. However, the DOJ is only sometimes willing to do so, and even if it does seek to enforce the order, by the time the claims are resolved, the illegal conduct may have irreparably damaged the organizing campaign, or the workers may have moved on to other jobs with no desire to be reinstated. This is especially true today, as the landscape of contingent labor and other patterns of non-standard work do not match up with “the world of work that the Wagner model was designed to

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122. Revision of the Form LM-10 Employer Report, 87 Fed. Reg. 55952 (“[G]reater transparency is even more important when persuader activities are undertaken by employers that receive Federal funds through contracting relationships. Such Federal contractors are not permitted to receive reimbursement for the costs of engaging in those activities under the contract. But these Federal contractors still engage in those activities; they simply do not seek or obtain reimbursement from the government for the costs of the activities.”) (internal citations omitted).

123. No Tax Breaks for Union Busting Act, H.R. 8448, 117th Cong. (2022).

124. *Id.*

125. See Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651 (2021) (noting that absent regulation to protect workers’ collective rights, labor markets naturally strengthen employers’ bargaining power over workers).

126. See Rosalsky, *supra* note 93.

127. Robert Combs, *Analysis: It Now Takes 465 Days to Sign a First Contract*, BLOOMBERG L. (Aug. 2, 2022), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-now-it-takes-465-days-to-sign-a-unions-first-contract> [<https://perma.cc/3T2Z-Y5E4>].

govern.”<sup>128</sup> Professor Doorey notes that “workers are now more mobile, less attached to a single employer, and more vulnerable; they are also more likely to work for small employers, or in the white collar or service sectors where collective bargaining has rarely reached.”<sup>129</sup> Without the industry-wide collective bargaining that exists in other countries, American workers in low-wage, high-turnover industries are disincentivized from organizing their transient workplace.<sup>130</sup>

Moreover, the remedies available to workers when an employer violates the NLRA are inadequate to deter illegal conduct by employers or ensure disclosure compliance. The NLRB has no power to impose financial penalties or punitive damages. It can only order the employer to stop the illegal conduct and offer make-whole relief to the employee. Take, for example, the NLRB’s finding that Apple interrogated and coerced employees at an Atlanta store.<sup>131</sup> In that case, although the workers were ultimately successful in proving their claims, Apple was merely required to tack up a sign informing workers of their rights.<sup>132</sup> Even when employers are required to reinstate illegally terminated employees or provide back pay, employers that pay relatively low wages may view such penalties as a reasonable cost of avoiding unionization.<sup>133</sup> Brandi McNease, whose Chipotle store was illegally shuttered shortly before a union election, explained, “They closed it down because we were going to get our vote, and they were going to lose. It’s much easier for a multi-billion-dollar corporation to face whatever the consequences are of that than to allow a union into one of their stores.”<sup>134</sup>

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128. See David J. Doorey, *Graduated Freedom of Association: Worker Voice Beyond the Wagner Model*, 38:2 QUEEN’S L. J. 515, 523-24 (2012).

129. *Id.*

130. See Rosalsky, *supra* note 93 (describing the “union paradox: near-record-high popularity, but record-low participation.”).

131. See Mitchell Clark, *The NLRB Says Apple Interrogated and Coerced Employees in Atlanta*, THE VERGE (Dec. 5, 2022), <https://www.theverge.com/2022/12/5/23495357/apple-atlanta-union-cwa-nlr-complaint-coercing-interrogating> [<https://perma.cc/6ZD3-3EKU>].

132. *Id.*

133. Some workers are even more vulnerable to coercion and intimidation because of their immigration status and face significant barriers to bringing a claim. For example, employers specifically hire savvy bilingual consultants to quash organizing efforts using deportation threats. See Dave Jamieson, *When Immigrants Try to Organize, Their Employers Know Who to Call*, HUFFINGTON POST (July 26, 2023), [https://www.huffpost.com/entry/when-immigrants-try-to-organize-their-employers-know-just-who-to-call\\_n\\_64bbe8e8e4b0df863210c139](https://www.huffpost.com/entry/when-immigrants-try-to-organize-their-employers-know-just-who-to-call_n_64bbe8e8e4b0df863210c139) [<https://perma.cc/9D7P-G9C8>]. Despite this illegal conduct, “many alleged unfair labor practices involving immigrants are never litigated because workers are too often too afraid to speak up.” *Id.* One union organizer explained, “[Unfair labor practice charges] are nice when you can actually get witnesses to come forward. But when folks are being put in cages or deported regularly, they’re not going to come forward and give a statement on that stuff.” *Id.*

134. Steven Greenhouse, *Old-School Union Busting: How US Corporations Are Quashing the New Wave of Organizing*, THE GUARDIAN (Feb. 26, 2023), <https://www.theguardian.com/us-news/2023/feb/26/amazon-trader-joes-starbucks-anti-union-measures> [<https://perma.cc/KDK2-WAN9>]. In March 2023, Chipotle agreed to pay workers at the Chipotle located in August, Maine \$240,000 to settle their lawsuit. Amelia Lucas, *Chipotle to Pay Ex-Employees \$240,000 After Closing Maine Location*



These structural deficiencies are compounded by persistent underfunding of the NLRB, evidenced by the attrition of its employees. The number of full-time employees at the NLRB declined by a staggering thirty-one percent, from 1,789 in 2006 to 1,320 in 2019.<sup>135</sup> While the number of workers covered by the NLRB has increased by fifty percent, staffing levels at regional offices responsible for receiving workers' complaints have declined by thirty-three percent from 2010 to 2019; NLRB officials reportedly "associate this decline in staffing with a decrease in case numbers."<sup>136</sup> Legislative alternatives to the NLRA have been proposed, such as works councils and mandatory employee-elected committees, as well as new governance frameworks for incentivizing better behavior from employers.<sup>137</sup> Meanwhile, the Employee Free Choice Act has morphed into the Worker PRO Act, with little promise of passage in the current Congress.<sup>138</sup> Thus, the NLRA and NLRB remain the primary legal path to collective bargaining for American workers despite their barriers and limitations.

#### *D. Difficulties Enforcing International Human Rights in the American Workplace*

For workers in American-owned global corporations, such as Amazon and Starbucks, it can be particularly frustrating to experience violations of international human rights. As a baseline, companies that tout their sustainability record should abide by the United Nations Universal

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*that Tried to Unionize*, CNBC (March 27, 2023), <https://www.cnbc.com/2023/03/27/chipotle-to-pay-ex-employees-closing-location-union.html> [<https://perma.cc/ED7S-LVQ9>].

135. See Ihna Manguadayao and Celine McNicholas, *Congress Should Boost NLRB Funding to Protect Workers' Well-Being*, ECON. POL'Y INST. (Feb. 28, 2022), <https://www.epi.org/blog/congress-should-boost-nlr-b-funding-to-protect-workers-well-being> [<https://perma.cc/7765-YHCG>].

136. *Id.*

137. See Sharon Block and Benjamin Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, LABOR AND WORKLIFE PROGRAM, HARVARD LAW SCHOOL (2020), [https://uploads-ssl.webflow.com/5fa42ded15984eaa002a7ef2/5fa42ded15984e5a8f2a8064\\_CleanSlate\\_Report\\_FORW\\_EB.pdf](https://uploads-ssl.webflow.com/5fa42ded15984eaa002a7ef2/5fa42ded15984e5a8f2a8064_CleanSlate_Report_FORW_EB.pdf) [<https://perma.cc/53R6-HPUA>] (recommending a new labor law that would contain "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.").

138. Alex N. Press, *The PRO Act Is the Most Ambitious Labor Law Reform Bill in Generations*, JACOBIN (Feb. 25, 2021), <https://jacobin.com/2021/02/labor-law-reform-bill-pro-act-workers> [<https://perma.cc/2ZYT-5QGD>]. See also Jake Johnson, *Sanders, Democrats, and a Lone Republican Revive PRO Act to Strengthen Workers' Rights*, COMMON DREAMS (Feb. 28, 2023), <https://www.commondreams.org/news/sanders-democrats-and-a-lone-republican-revive-pro-act-to-strengthen-workers-rights> [<https://perma.cc/2LQT-A3ZF>] (noting that "Rep. Brian Fitzpatrick (R-Pa.) was the only Republican to join Sanders and congressional Democrats in reintroducing the PRO Act, which received just five GOP yes votes—including Fitzpatrick's—when it passed in 2021. The bill's legislative hurdles are likely even steeper in the present with Republicans in control of the House.").

Declaration of Human Rights,<sup>139</sup> the International Covenant on Civil and Political Rights,<sup>140</sup> and the International Covenant on Economic, Social, and Cultural Rights.<sup>141</sup> Though Amazon has argued that the NLRB has upheld the use of captive audience meetings for over seventy years, and retaining union-busters is not technically illegal under the NLRA, such practices would likely be regarded as illegal by the International Labour Organization (ILO).<sup>142</sup> This section explains why international law is an important source of labor rights and why workers face significant barriers to enforcing them.

The ILO shapes the contours of workers' freedom of association through conventions and recommendations.<sup>143</sup> ILO recommendations guide policy, legislation, and practice; they are not open to ratification. Conventions, however, have legal effects after ratification by a member state. Two of the 190 conventions currently in force are particularly relevant to this discussion: Convention No. 87 on Freedom of Association and Protection of the Right to Organise<sup>144</sup> and Convention No. 98 on the Right to Organise and Bargain Collectively.<sup>145</sup> Yet, despite the robust canon of international human rights

139. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (1948). The International Labour Organization (ILO) is a United Nations agency established in 1919 with the goal of ensuring that all individuals have access to decent and productive work under conditions of freedom, equity, security, and human dignity. The ILO operates through three main bodies in Geneva, Switzerland: The International Labour Conference, the Governing Body, and the Secretariat. The ILO advances international labor standards by ratifying conventions and recommendations, such as the right to freedom of association, the protection of the right to collective bargaining, the elimination of forced labor, and the eradication of workplace discrimination. It also promotes international labor migration and sustainable economic and social development to reduce poverty through its development programs. The ILO serves as a platform for dialogue and collaboration between governments, workers' organizations, and employers' organizations on labor-related topics. It facilitates tripartite negotiations on wages, working conditions, and employment policies. See *How the ILO Works*, INT. LAB. ORG., <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang-en/index.htm> [https://perma.cc/AV78-GYCR]; *Mission and Impact of the ILO*, INT. LAB. ORG., <https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang-en/index.htm> [https://perma.cc/XX5V-FKMJ].

140. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

141. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

142. David Weissbrodt & Matthew Mason, *Compliance of the United States with International Labor Law*, 98 MINN. L. REV. 1842, 1852 (2014) ("By permitting anti-union campaigns, U.S. law does not comply with ILO freedom of association and non-interference principles. The United States is exceptional among ILO member states in permitting anti-union campaigns.").

143. *Id.* at 1845 (noting that while the principles and rights established in the ILO Constitution and the 14 ILO conventions ratified by the U.S. apply to federal and state labor law, the U.S. has only ratified two of the eight core ILO conventions: the convention on the abolition of forced labor (ILO Convention No. 105) and on the worst forms of child labor (ILO Convention No. 182)).

144. Int'l Lab. Org., *Convention 87: Freedom of Association and Protection of the Right to Organise*, I.L.O. No. 87 (July 8, 1948), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100\\_ILO\\_CODE:C087](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100_ILO_CODE:C087) [https://perma.cc/UDN5-MPAN].

145. Int'l Lab. Org., *Convention 98: The Right to Organise and Collectively Bargain*, I.L.O. No. 98 (July 1, 1949), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100\\_ILO\\_CODE:C098](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100_ILO_CODE:C098) [https://perma.cc/KCN2-UR6A].

that embrace workers' freedom of association, to which multinational corporations often pledge allegiance, the ability of the UN, ILO, and the Organization for Economic Co-operation and Development (OECD) to ensure workers' rights to organize is severely constrained. While companies refer in their sustainability reports to upholding "international standards and frameworks," few reference the freedom of association and freedom from coercion, intimidation, and harassment established by international human rights.<sup>146</sup> Nor do those companies enact policies that align with the interpretations of these two laws developed by the ILO Committee on Freedom of Association or the ILO Committee of Experts on the Application of Conventions and Recommendations.<sup>147</sup>

Using human rights law to protect domestic labor rights is not straightforward. ILO decisions are not binding in the United States, and the ILO has no enforcement authority.<sup>148</sup> The "polestar principle" of non-interference developed through ILO case law and guidance can be heard echoing in shareholder proposals demanding greater respect for workers' freedom of association.<sup>149</sup> Some of the actions by employers that the

146. See, e.g., Shareholder Association for Research & Education, *Shareholder Proposal Requesting Additional Reporting on Freedom of Association (Voluntary Submission)* (May 5, 2022), <https://www.sec.gov/Archives/edgar/data/1018724/000121465922006346/o55224px14a6g.htm> [<https://perma.cc/NM7D-9PEN>] (describing a "report" titled "Amazon's Human Rights Commitment, Policy and Practice: Freedom of Association and Collective Bargaining," published by Amazon on March 11, 2022, which presented a self-declaratory statement in which Amazon affirmed that it "respects international human and labor rights standards and complies with all local laws" without discussing or analyzing whether its practices align with the international standards and frameworks developed by the United Nations and the International Labour Organization).

147. The ILO has a sophisticated and complex mechanism for monitoring compliance with its conventions by member states. The Committee on Freedom of Association (CFA) is responsible for investigating complaints about freedom of association violations and has issued opinions on over 3,300 cases. The CFA has a tripartite structure, with input from member states, employer organizations, and employee organizations. *Committee on Freedom of Association*, INT'L LAB. ORG., <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang-en/index.htm> [<https://perma.cc/TG9L-5KQX>].

148. The U.S. has not ratified Conventions 87 and 98, but it has accepted the jurisdiction of the Committee on Freedom of Association in complaints filed against it. The U.S. employer representative at the ILO, the U.S. Council for International Business, explained: U.S. ratification of convention 87 "would prohibit all acts of employer and union interference in organizing, which would eliminate employers' rights under the NLRA to oppose unions." USCIB, *Issue Analysis: U.S. Ratification of ILO Core Labor Standards*, 5 (2007), [https://www.uscib.org/docs/US\\_Ratification\\_of\\_ILO\\_Core\\_Conventions.pdf](https://www.uscib.org/docs/US_Ratification_of_ILO_Core_Conventions.pdf) [<https://perma.cc/C3LU-K65Q>].

149. See, e.g., SHARE, *Shareholders Deliver Rebuke to Amazon for Practices Called "Waste of Time and Money"*; *Support Resolution on Freedom of Association*, PR NEWSWIRE (May 30, 2022), <https://www.prnewswire.com/news-releases/shareholders-deliver-rebuke-to-amazon-for-practices-called-waste-of-time-and-money-support-resolution-on-freedom-of-association-301557364.html> [<https://perma.cc/TYQ6-4RHX>] ("This is a big win for workers, and for investors who recognize that good human capital management practices are crucial to companies' success. As one of the largest employers in the world, Amazon has the power to influence labour rights globally," said Sarah Couturier-Tanoh, Manager of Corporate Engagement and Shareholder Advocacy at SHARE. 'Amazon can no longer ignore its union problem as workers, investors and regulators expect the board and the management to demonstrate a genuine intention to respect workers' rights, including freedom of association and collective

Committee on Freedom of Association has determined to violate the Conventions are imposing pressure, instilling fear, and making threats of any kind; creating an atmosphere of intimidation and fear; pressuring or threatening retaliatory measures against workers for union membership or organizing; dismissing a worker for union membership or organizing (including by invoking some employee breach of a work rule when the real motive is the workers' union activity); transferring, downgrading, or blacklisting workers; and artificially promoting workers to positions of authority to gerrymander the bargaining unit or persuade workers not to join the union.<sup>150</sup> The ILO's lack of enforcement authority in the U.S. compromises the ability of workers to raise standards using those labor rights. However, if ESG standards more directly and explicitly incorporated international human rights and labor law, they could provide an effective way for ESG to live up to its promises.

The OECD Guidelines for Multinational Enterprises is another international instrument that incorporates ILO standards on freedom of association and requires companies to “respect the right of workers to establish or join trade unions or representative organizations of their own choosing...[and] respect the right of workers to have trade unions of their own choosing recognized for the purpose of collective bargaining.”<sup>151</sup> Not only does the OECD have a stated policy respecting the right to organize, its highest decision-making body, the Committee on Investment, has made clear that rather than engaging in “efforts...to discourage organizing activities of employees,” management should “adopt[] a positive approach towards the activities of trade unions and an open attitude toward organizational activities of workers in the framework of national rules and practices.”<sup>152</sup> Leaked audio from a captive audience meeting held by a union-busting consultant at Amazon's JFK8 warehouse, starkly contrasts the OECD to the U.S.:

There are no guarantees as to what could happen, right? . . . We can't make any promises things will get better or stay the same. They could get worse.

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bargaining across its operations.”). See also Comptroller of the City of New York, *Notice Exempt Solicitation Submitted Pursuant to Rule 14a-6(g)*, SEC.GOV (Apr. 21, 2022), <https://www.sec.gov/Archives/edgar/data/1018724/000121465922005572/e420220px14a6g.htm> [<https://perma.cc/T9FJ-3PRX>] (describing shareholders calling Amazon out for failing to uphold their own policies regarding workers' freedom of association and international human rights).

150. Int'l. Lab. Org., *Compendium of Decisions of the Committee on Freedom of Association*, 201-239 (2018), [https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/WCMS\\_632659/lang-en/index.htm](https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/WCMS_632659/lang-en/index.htm) [<https://perma.cc/92P6-4UCT>].

151. Org. for Econ. Coop. and Dev., *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, 28 (2023), [https://read.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct\\_81f92357-en](https://read.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en) [<https://perma.cc/GN7S-QFEQ>].

152. Org. for Econ. Coop. and Dev., *OECD Guidelines for Multinational Enterprises: A Glass Half Full*, 92 (2018), <https://www.oecd.org/investment/mne/OECD-Guidelines-for-MNEs-A-Glass-Half-Full.pdf> [<https://perma.cc/5S5D-5NQR>].

We can't promise what's going to happen. Amazon can't promise you that they're going to walk into negotiation and that the negotiations will start from the same [pay and benefits workers have already]. They could start from minimum wage, for instance. I don't think that will happen, but it's a possibility.<sup>153</sup>

Notably, the OECD, recognizing the array of domestic labor law protections to which multinational companies are subject, makes clear that mere compliance with domestic law does not necessarily ensure compliance with the Guidelines. Like our federalist system of employment laws, the OECD Guidelines are a floor above which members may exceed but below which members will be found to violate.<sup>154</sup> Likewise, the voluntary UN Global Compact, to which thousands of companies have pledged, incorporates Conventions 87 and 98 by reference, and sets forth in one of its “Ten Principles” that “Employers should not interfere in workers’ decision to associate, try to influence their decision in any way, or discriminate against either those workers who choose to associate or those who act as their representatives.”<sup>155</sup>

### III. USING ESG TO FILL THE GAP

One of the things we need to win is public pressure. Can we let billionaires and billionaire companies continue to bully their way out of union campaigns? That's essentially what is happening. It's not fair. We need as much help as we can get. We need the public to recognize that these companies are not as good as they say they are.

—Michelle Eisen, Starbucks Barista<sup>156</sup>

ESG can help hold companies accountable to be “as good as they say they are.” Mainstream investors have begun to embrace ESG as an investment strategy, and publicly-traded, public-facing consumer brands have taken notice.<sup>157</sup> While shareholder activism is not new, historically such

153. Jason Koebler and Lauren Kaori Gurley, *Leaked Audio: Amazon Union Buster Warns Workers 'Things Could Become Worse,'* MOTHERBOARD TECH BY VICE (Feb. 16, 2022), <https://www.vice.com/en/article/jgmbvg/leaked-audio-amazon-union-buster-warns-workers-things-could-become-worse> [<https://perma.cc/FD8B-QC8W>].

154. See Org. for Econ. Coop. and Dev., *Guide for National Contacts Points on the Initial Assessment of Specific Instances*, 8 (2019), <https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-the-Initial-Assessment-of-Specific-Instances.pdf> [<https://perma.cc/FU42-4UFX>].

155. Int'l Lab. Org., *The Labour Principles of the UN Global Compact: A Guide for Business*, 15 (2008), [https://d306pr3pise04h.cloudfront.net/docs/issues\\_doc%2Flabour%2Fthe\\_labour\\_principles\\_a\\_guide\\_for\\_business.pdf](https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Flabour%2Fthe_labour_principles_a_guide_for_business.pdf) [<https://perma.cc/S7WR-YP8X>].

156. Greenhouse, *supra* note 134.

157. See Rakhi Kumar et al., *Into the Mainstream: ESG at the Tipping Point*, HARVARD L. SCH. F. ON CORP. GOV. (Jan 13, 2020), <https://corpgov.law.harvard.edu/2020/01/13/into-the-mainstream-esg-at-the-tipping-point> [<https://perma.cc/AH2K-GG94>] (noting significant “push” factors for investors toward ESG and also significant “pull” factors driving them away, including a lack of comparable, clear data).

investors were often affiliated with religious organizations, charitable institutions, and certain pension funds.<sup>158</sup> ESG's precursor, the movement for corporate social responsibility (CSR), developed in response to criticism by consumers and community members that corporations were putting "profits over people" and creating or enabling child labor and sweatshops.<sup>159</sup> CSR emerged as a way for corporations to deflect that criticism and gained significant traction in the 1990s with the United Nations' introduction of the Global Compact, which encouraged companies to voluntarily adopt sustainable and socially responsible policies and practices.<sup>160</sup> In the ensuing decades, CSR initiatives took the form of commitments to ethical sourcing, environmental sustainability, and community engagement. Separating meaningful responses from corporate "greenwashing" was a challenge, especially without legal accountability, government regulation, and transparency. This led some critics to regard CSR as "an empty vessel," sparking the search for more effective solutions.<sup>161</sup>

Seeking greater accountability and transparency, the movement toward ESG reporting sought to embrace and extend traditional financial reporting to provide a more comprehensive view of a company's potential risks and opportunities. Professors Schanzenbach and Sitkoff have identified two motivations for ESG investing: "collateral benefits ESG" and "risk-return ESG."<sup>162</sup> The first approach, "collateral benefits ESG," is driven by moral and ethical considerations. Investors who use this approach seek to align their investments with their values and principles, even if it means sacrificing some financial gain.<sup>163</sup> These investors view ESG investing as contributing positively to society and the environment. The second approach, "risk-return ESG," is primarily motivated by the potential for financial returns and risk mitigation. These investors recognize the economic benefits of investing in

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158. See LISA M. FAIRFAX, *SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER ACTIVISM AND PARTICIPATION* 77-78 (2011) (noting that shareholder proposals in the 1950s were used to bring attention to racial discrimination and segregation); see also Kasey Wang, *Why Institutional Investors Support ESG Issues*, 22 U.C. DAVIS BUS. L.J. 129, 129-31 (2021) ("For decades, investors have raised shareholder proposals related to environmental, social, and governance (ESG) issues at U.S. companies' annual meetings.").

159. See Mark Anner, *Corporate Social Responsibility and Freedom of Association Rights*, 40 POL. & SOC. 609, 610 (2012) ("As media exposés and social movement activists highlight extreme labor abuses in factories producing for well-known global brands, corporations have been pushed to monitor their employment relations practices through multi-stakeholder programs.").

160. See U.N. GLOB. COMPACT, *THE TEN PRINCIPLES*, <https://www.unglobalcompact.org/what-is-gc/mission/principles> [<https://perma.cc/MA56-LCH3>] ("[A principles-based approach to doing business] means operating in ways that, at a minimum, meet fundamental responsibilities in the areas of human rights, labour, environment and anti-corruption.").

161. DAVID DOOREY, *LOST IN TRANSLATION: RANA PLAZA, LOBLAW, AND THE DISCONNECT BETWEEN LEGAL FORMALITY AND CORPORATE SOCIAL RESPONSIBILITY* 4 (2017).

162. Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 397-98 (2020).

163. *Id.*

companies prioritizing ESG factors, like “more efficient and lower cost value chains, or communities that are more functional and healthier to do business in.”<sup>164</sup> For any of these strategies to succeed, however, investors need data. The ability of companies to measure—and investors, consumers, and employees to compare—greenhouse gas emissions, energy efficiency, and DEI efforts, transformed what were once CSR promises into key performance indicators.<sup>165</sup> ESG took a leap forward in 2019 when the Business Roundtable issued its statement “redefining” the corporation’s purpose to promote “an economy that serves all Americans.”<sup>166</sup> The ESG regime purports to establish and reveal whether a corporation is actually doing so.

This Part examines the existing ESG regime as it relates to workers’ rights. This includes (a) voluntary ESG standards and frameworks promulgated by the Global Reporting Initiative and the Value Reporting Foundation (formerly the Integrated Investment Reporting Council and the Sustainability Accounting Standards Board), (b) the various ESG rating agencies measuring institutional performance of those standards, and (c) public regulators mandating ESG standards in the U.S. and European Union (EU).

## A. The ESG Standard Setters

### 1. The Global Reporting Initiative

In 2000, the not-for-profit Global Reporting Initiative (GRI) introduced the first set of international reporting guidelines for sustainability.<sup>167</sup> The GRI standards are divided into (a) universal standards that apply to all organizations and (b) sector standards grouped into economic,

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164. Paul Polman & Andrew Winston, *Yes, Investing in ESG Pays Off*, HARVARD BUS. REV. (Apr. 13, 2022), <https://hbr.org/2022/04/yes-investing-in-esg-pays-off> [<https://perma.cc/9AEK-XX5V>].

165. See, e.g., ETSY, INC, ESG REPORTING: OUR IMPACT GOALS, STRATEGY & PROGRESS (2021), [https://s22.q4cdn.com/941741262/files/doc\\_downloads/2021-SASB-TCFD-Disclosures.pdf](https://s22.q4cdn.com/941741262/files/doc_downloads/2021-SASB-TCFD-Disclosures.pdf) [<https://perma.cc/6LGR-6W6L>] (providing precise metrics on year-over-year environmental, social, and governance goals).

166. See *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘an Economy that Serves All Americans’*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/8E6B-EWW9>] (announcing a Business Roundtable Statement on the Purpose of Corporation, which was updated with a new commitment to all stakeholders in addition to shareholders).

167. Glob. Reporting Initiative, *Our Mission and History*, <https://www.globalreporting.org/about-gri/mission-history> [<https://perma.cc/W7EJ-5VXY>]. According to GRI, 78% of the world’s largest companies voluntarily use its standards to report their ESG performance. Glob. Reporting Initiative, *Four-In-Five Largest Global Companies Report with GRI* (Oct. 31, 2022), <https://www.globalreporting.org/news/news-center/four-in-five-largest-global-companies-report-with-gri> [<https://perma.cc/F3TK-NSRM>].

environmental, and social categories.<sup>168</sup> GRI reporting companies must provide a sustainability report narrative outlining how their policies, resources, and specific actions comply with the standards, which include workplace issues, such as employment policies, labor-management relations, occupational health and safety, and prohibitions against forced labor.<sup>169</sup> Notably, the introduction to the Labor/Management Relations standard (GRI 402) states that it operates with reference to ILO instruments and adopts the definition of “collective bargaining” in ILO Convention No. 154.<sup>170</sup> Likewise, GRI 407-1 incorporates by reference “the various outcomes of the ILO Supervisory bodies and the recommendations of the ILO Committee of Freedom of Association.”<sup>171</sup>

Nevertheless, the GRI standards fall short of protecting workers’ rights to organize. For example, GRI 402 requires a company’s “consultation” practices to align with international norms but provides no stronger protections for workers from union-busting than the NLRA or ILO.<sup>172</sup> Nothing in the standard would preclude an employer from hiring an anti-union persuader or holding captive audience meetings. Similarly, the Freedom of Association and Collective Bargaining Standard (GRI 407) only requires employers to report on operations and suppliers where workers’ rights may be violated or at risk but fails to specify what types of actions or policies would violate those rights.<sup>173</sup> In the absence of a clear prohibition, companies can comply while still engaging in the forms of union-busting described herein. For example, Starbucks’ ESG report primarily focused on complying with COVID-19 restrictions and addressing harassment

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168. GLOB. REPORTING INITIATIVE, THE GRI STANDARDS: A GUIDE FOR POLICY MAKERS 9, <https://www.globalreporting.org/media/nmmnwfsm/gri-policy-makers-guide.pdf> [<https://perma.cc/8BTY-S6GR>].

169. *Id.* at 11. Multiple GRI standards touch and concern the workplace. These include 401, which deals with “employment”; 402 on “labor-management relations”; 403 on “occupational health and safety”; 404 on “training and education”; 405 on “diversity and equal opportunity”; 406 on “non-discrimination”; 407 on “freedom of association and collective bargaining”; 408 on “child labor”; 409 on “forced or compulsory labor.” Several other standards also intersect with workers, such as GRI 410 on security practices, GRI 411 on the rights of indigenous people, GRI 412 on human rights assessment, and GRI 414 on supplier social assessment. See generally GLOB. REPORTING INITIATIVE, CONSOLIDATED SET OF THE GRI STANDARDS (2023), <https://www.globalreporting.org/how-to-use-the-gri-standards/gri-standards-english-language> [<https://perma.cc/8TFM-88D4>] [hereinafter GRI Standards Consolidated Set].

170. GRI Standards Consolidated Set, *supra* note 169, at 651.

171. *Id.* at 730 (citation omitted).

172. *Id.* at 646 (noting that collective bargaining “can play an important role.”).

173. *Id.* at 730. Freedom of Association and Collective Bargaining Standard (GRI 407), requires only that employers report:

- a. “Operations and suppliers in which workers’ rights to exercise freedom of association or collective bargaining may be violated or at significant risk either in terms of: i. type of operation (such as manufacturing plant) and supplier; ii. countries or geographic areas with operations and suppliers considered at risk;” and
- b. “Measures taken by the organization in the reporting period intended to support rights to exercise freedom of association and collective bargaining.” *Id.*



experienced by employees rather than disclosing any of the legal proceedings in which the company was found to have interfered with its workers' rights to organize.<sup>174</sup>

## 2. *The Value Reporting Foundation (VRF)*

The Value Reporting Foundation (VRF) is the result of the 2022 merger of two of the most significant institutions in the ESG landscape: the International Integrated Reporting Council (IIRC) and the Sustainability Accounting Standards Board (SASB). The IIRC was established in 2010 as a “global coalition of regulators, investors, companies, standard setters, the accounting profession, academia and NGOs.”<sup>175</sup> Originally convened by the Prince of Wales as an “accounting for sustainability” initiative, the IIRC became a cross-section of corporate, accounting, securities, regulatory, governmental, and academic leaders with a mission to improve coordination among ESG rating agencies through its “Integrated <IR> Framework.”<sup>176</sup> Integrated reporting is defined by the IIRC as “a concise communication about how an organization’s strategy, governance, performance, and prospects, in the context of its external environment, lead to the creation of value in the short, medium, and long term.”<sup>177</sup> The <IR> Framework recommends certain “content elements” that a reporting company should disclose, which may include information about labor relations and compliance with labor laws and standards, as one of six different forms of capital: financial, manufactured, intellectual, human, social and relationship, and natural.<sup>178</sup>

The Sustainability Accounting Standards Board (SASB) was formed in 2011 with a mission to “establish and maintain industry-specific standards that assist companies in disclosing financially material, decision-useful information to investors.”<sup>179</sup> Similar to traditional financial accounting

174. STARBUCKS, GLOBAL ENVIRONMENTAL & SOCIAL IMPACT REPORT 4-25 (2021), <https://stories.starbucks.com/uploads/2022/04/Starbucks-2021-Global-Environmental-and-Social-Impact-Report-1.pdf> [<https://perma.cc/VK6C-6BFQ>].

175. Sustainability Accounting Standards Bd., *IIRC and SASB Announce Intent to Merge in Major Step Towards Simplifying the Corporate Reporting System*, PR NEWSWIRE (Nov. 25, 2020), <https://www.prnewswire.com/news-releases/iirc-and-sasb-announce-intent-to-merge-in-major-step-towards-simplifying-the-corporate-reporting-system-301180179.html> [<https://perma.cc/SY6N-9VAX>].

176. See UNITED NATIONS ENV'T PROGRAMME FIN. INITIATIVE, INTERNATIONAL INTEGRATED REPORTING COMMITTEE Q&A FOR STEERING COMMITTEE MEMBERS, [https://www.unepfi.org/fileadmin/investment/IIRC\\_QA.pdf](https://www.unepfi.org/fileadmin/investment/IIRC_QA.pdf) [<https://perma.cc/PLD8-S74H>].

177. INT'L INTEGRATED REPORTING COUNCIL, FOCUSING ON VALUE CREATION IN THE PUBLIC SECTOR 6 (2016), [https://www.integratedreporting.org/wp-content/uploads/2016/09/Focusing-on-value-creation-in-the-public-sector-\\_vFINAL.pdf](https://www.integratedreporting.org/wp-content/uploads/2016/09/Focusing-on-value-creation-in-the-public-sector-_vFINAL.pdf) [<https://perma.cc/GBZ2-KV7J>].

178. INTEGRATED REPORTING, INTERNATIONAL <IR> FRAMEWORK 18 (2021), [http://www.integratedreporting.org/wp-content/uploads/2022/08/IntegratedReportingFramework\\_081922.pdf](http://www.integratedreporting.org/wp-content/uploads/2022/08/IntegratedReportingFramework_081922.pdf) [<https://perma.cc/66JD-YBD8>].

179. See SUSTAINABILITY ACCOUNTING STANDARDS BD., GOVERNANCE ARCHIVE, <https://sasb.org/about/governance-archive> [<https://perma.cc/F5WM-RBEV>].

boards, such as the Financial Accounting Standards Board (FASB) and the International Accounting Standards Board (IASB), SASB sought to establish consistent, comparable data regarding a company's environmental impact, labor practices, and human rights performance, using the same materiality standard as financial disclosures.<sup>180</sup> SASB standards identify four worker-related topics: labor practices, employee health and safety, employee engagement, diversity and inclusion, and supply chain management, which are each then tailored to the company's industry.<sup>181</sup> While the inclusion of labor practices is promising, upon closer examination it is clear that SASB standards are even less protective than GRI.

For example, looking at the SASB standards for the Restaurant industry, which would include Starbucks, there is no specific disclosure requirement for anything related to workers' freedom of association or collective bargaining rights.<sup>182</sup> The standard lists three areas for which a company should provide detailed metrics. These relate to (1) voluntary and involuntary turnover rate for employees; (2) average hourly wage, by region and percentage of restaurant employees earning minimum wage, by region; and (3) total amount of monetary losses as a result of legal proceedings associated with labor law violations and employment discrimination. The standard provides a list of the "labour laws" that could be violated, which does not include the NLRA.<sup>183</sup> Though the list of such laws is non-exhaustive, the absence of the core protection for workers' collective bargaining rights is a glaring omission. Likewise, the definition of "labour violation," though "not limited to[] those relating to wages, work hours, overtime, and meal and rest breaks," lacks any clear language or guidance regarding freedom of association, which is telling.<sup>184</sup> Moreover, the financial losses to be disclosed exclude "legal and other fees and expenses incurred by the entity in its defence."<sup>185</sup> Arguably, a reasonable investor would want to know the

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180. For a fascinating discussion of the differing approaches to materiality by the SEC and SASB, and their implications for ESG, see Ruth Jebe, *The Convergence of Financial and ESG Materiality: Taking Sustainability Mainstream*, 56 AM. BUS. L.J. 645, 648 (2019).

181. SUSTAINABILITY ACCOUNTING STANDARDS BD., HUMAN CAPITAL, PRELIMINARY FRAMEWORK: EXECUTIVE SUMMARY 3 (2020), [https://www.sasb.org/wp-content/uploads/2020/12/Human-Capital\\_Executive-Summary\\_2020-December\\_FINAL.pdf](https://www.sasb.org/wp-content/uploads/2020/12/Human-Capital_Executive-Summary_2020-December_FINAL.pdf) [<https://perma.cc/T9TU-Q4AE>] (noting that "human capital is the second most prevalent issue across the SASB standards, second only to climate risk.").

182. SUSTAINABILITY ACCOUNTING STANDARDS BD., RESTAURANTS SUSTAINABILITY ACCOUNTING STANDARD 24-27 (2023), [https://d3flraxduht3gu.cloudfront.net/latest\\_standards/restaurants-standard\\_en-gb.pdf](https://d3flraxduht3gu.cloudfront.net/latest_standards/restaurants-standard_en-gb.pdf) [<https://perma.cc/ERC2-4ZD6>].

183. *Id.* at 26. The listed laws are: U.S. Age Discrimination in Employment Act (ADEA); U.S. Americans with Disabilities Act; U.S. Equal Pay Act of 1963; U.S. Fair Labor Standards Act; U.S. Genetic Information Nondiscrimination Act (GINA); U.S. Pregnancy Discrimination Act (PDA); U.S. Rehabilitation Act of 1973; U.S. Title VII of the Civil Rights Act of 1964. *Id.*

184. *Id.*

185. *Id.*

amounts a company was spending to suppress labor organizing—even if, as is often the case, the company is not financially penalized for doing so—as it is a diversion of funds that could be put to other, more productive, and sustainable uses.

The architects of the <IR> Framework and the SASB Standards describe them as a complementary set of principles-based tools.<sup>186</sup> While the Framework is “industry agnostic” and instructs *how* information should be disclosed, the Standards guide *what* should be disclosed.<sup>187</sup> Though companies are encouraged to make SASB-related disclosures in their public filings, a recent review of the top 100 largest U.S. companies included in the *Fortune* 500 revealed that companies are not disclosing most of the recommended metrics under the SASB Standards, reinforcing the premise that unless mandated by the SEC, companies will remain unwilling to disclose ESG performance.<sup>188</sup> For example, Starbucks’ 2022 ESG Report includes only two of the three SASB labor metrics: its turnover rates (which it touts as “significantly lower than industry turnover rates”) and data related to minimum wage (“100% of U.S. partners earn above the minimum wage.”)<sup>189</sup> There is no mention in these disclosures of any monetary losses because of any legal proceeding associated with any labor law violation. Likewise, Chipotle’s 2022 Sustainability Report, which makes both GRI and SASB disclosures, makes no mention of the unfair labor practices filed against it in 2022.<sup>190</sup>

### B. The ESG Rating Agencies

The rise of ESG ratings directly responds to urgent issues such as climate change and social inequality and acknowledges the critical role of governance in holding companies accountable to their stakeholders.<sup>191</sup>

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186. Janine Guillot, *Strengthening an Integrated Report Using SASB Standards*, SASB BLOG (Mar. 9, 2021), <https://sasb.org/blog/strengthening-an-integrated-report-using-sasb-standards> [<https://perma.cc/4NXJ-LXB8>] (quoting the CEOs of SASB and IIRC as describing the “complementarity of the <IR> Framework and SASB Standards”).

187. *Id.*

188. See Ganesh M. Pandit, *First Look at the Human Capital Disclosures on Form 10-K*, CPA J. (Oct. 2021) <https://www.cpajournal.com/2021/10/27/first-look-at-the-human-capital-disclosures-on-form-10-k> [<https://perma.cc/H3L6-D54R>].

189. STARBUCKS, GLOBAL ENV’T & SOC. IMPACT REP. 11, 70 (2021), <https://stories.starbucks.com/uploads/2023/04/2022-Starbucks-Global-Environmental-Social-Impact-Report.pdf> [<https://perma.cc/X4NR-5U7T>].

190. See generally CHIPOTLE, SUSTAINABILITY REP. 121-129 (2022), [https://www.chipotle.com/content/dam/chipotle/pages/sustainability/us/2023/Chipotle\\_2022\\_SustainabilityReport.pdf](https://www.chipotle.com/content/dam/chipotle/pages/sustainability/us/2023/Chipotle_2022_SustainabilityReport.pdf) [<https://perma.cc/YZ9Z-NL7S>].

191. Patagonia and Unilever are two examples of companies with high ESG ratings. Patagonia, a clothing and outdoor gear company, has earned high ESG ratings for its dedication to sustainability and social responsibility. It has implemented initiatives to minimize its environmental impact and support environmental and social causes, such as setting a target to use 100% recycled or renewable materials by 2025. Unilever is a global consumer goods company that has received high ESG ratings for decreasing its

However, navigating the complex landscape of ESG rating systems and standards can be challenging for companies and investors, and regulatory dissonance hampers accountability.<sup>192</sup> Numerous rating agencies, using differing algorithms and data sources, weigh environmental, social, and governance metrics for thousands of companies and funds worldwide. Some of the most prominent rating agencies include MSCI, ISS ESG, Sustainalytics, Refinitiv, and FTSE Russell. The ratings themselves vary considerably, from numeric to alphabetical; Morningstar assigns mutual funds a certain number of “globes,” with a higher number indicating lower ESG risk.<sup>193</sup>

The impact of these rating agencies, particularly regarding social metrics, is still being determined.<sup>194</sup> There can be wide variation across rating agencies. Tesla, for example, was rated highly by MSCI while earning low ESG marks from FTSE Russell.<sup>195</sup> Recent research reveals that companies in ESG portfolios with high Sustainalytics ratings have worse compliance records for labor and environmental law than companies in non-ESG portfolios.<sup>196</sup> A similar study found that U.S. firms that joined the Principles for Responsible Investment (PRI) had worse ESG ratings than those that did not.<sup>197</sup> These data may be skewed by companies using the ESG rating process as an intentional means to measure and incentivize improvement above their existing low ratings. However, Bloomberg’s review of MSCI ratings showed that most upgrades were only for “rudimentary business practices” rather

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environmental impact and enhancing economic and social development in its communities. The company has launched several sustainability initiatives, including implementing 100% renewable electricity by 2030. *How to Navigate Risk and Improve Supply Chain Resilience with ESG Due Diligence*, PERMUTABLE (May 17, 2023), <https://permutable.ai/improve-supply-chain-resilience-esg-due-diligence> [https://perma.cc/5VA3-P9DM]; *Our Environmental Responsibility Programs*, PATAGONIA, <https://www.patagonia.com/our-responsibility-programs.html> [https://perma.cc/GHM9-KL96] (last visited Dec. 3 2023); *Five Ways We’re Working Towards 100% Renewable Energy by 2030*, UNILEVER (Sept. 13, 2022), <https://www.unilever.com/news/news-search/2022/five-ways-were-working-towards-100-renewable-energy-by-2030> [https://perma.cc/7R6L-T8RF].

192. See generally Adam Sulkowski & Ruth Jebe, *Evolving ESG Reporting Governance, Regime Theory, and Proactive Law: Predictions and Strategies*, 59 AMER. BUS. L.J. 449 (2022).

193. See Brian Tayan, *ESG Ratings: A Compass Without Direction*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Aug. 24, 2022), <https://corpgov.law.harvard.edu/2022/08/24/esg-ratings-a-compass-without-direction> [https://perma.cc/9WUM-HPS4] (“These are just a few ESG ratings providers. Other well-known firms include S&P Global, Vigeo Eiris (owned by Moody’s Investor Services), HIP, and TruValue Labs.”).

194. See Aneesh Raghunandan & Shivaram Rajgopal, *Do ESG Funds Make Stakeholder-Friendly Investments?*, 27 REV. ACCT. STUD. 822 (2022).

195. James Mackintosh, *Is Tesla or Exxon More Sustainable? It Depends Whom You Ask*, WALL. ST. J. (Sept. 17, 2018), <https://www.wsj.com/articles/is-tesla-or-exxon-more-sustainable-it-depends-whom-you-ask-1537199931> [https://perma.cc/C7UP-MJVJ].

196. Tayan, *supra* note 193.

197. See Rajna G. Brandon et al., *Do Responsible Investors Invest Responsibly?*, 26 REV. OF FIN. 1389 (2022).

than substantive improvements.<sup>198</sup> Upgrades were often driven by “check-the-box” practices, such as conducting an employee survey, rather than actual reductions in carbon emissions.<sup>199</sup> While each rating agency employs a proprietary algorithm to calculate its ratings, it is unclear whether compliance with ILO conventions is a measurable ESG metric. These findings raise questions about the current value of ESG ratings, especially as a tool to protect workers’ rights.

### C. The ESG Regulators

Critics of ESG investment vehicles have been vocal in their opposition, characterizing the trend as “marketing hype” and “disingenuous promises” from the financial community.<sup>200</sup> The growing demand for more stringent disclosure requirements, echoing in Europe and the United States, has led investors and other stakeholders to call for a move from voluntary standards to government regulation.<sup>201</sup> The Securities and Exchange Commission (SEC), the Department of Labor (DOL), the Environmental Protection Agency (EPA), and the European Union (EU) have all taken steps to regulate ESG reporting, incorporate ESG factors in retirement plan investment strategy, and develop specific, measurable ESG targets.<sup>202</sup>

#### I. U.S. Regulators

In August of 2020, the SEC adopted a new rule requiring public companies to report on their human capital resources, including the number

198. Tayan, *supra* note 193.

199. *Id.*

200. Tariq Fancy, *Financial World Greenwashing the Public with Deadly Distraction in Sustainable Investing Practices*, USA TODAY (Mar. 16, 2021), <https://www.usatoday.com/story/opinion/2021/03/16/wall-street-esg-sustainable-investing-greenwashing-column/6948923002> [<https://perma.cc/GEV2-4RHN>].

201. See John Streur, President and CEO, Calvert Research and Management, *Letter re: Human Capital Disclosure Gary Gensler, Chair, Securities and Exchange Commission* 11-12 (Aug. 30, 2021), <https://www.sec.gov/comments/climate-disclosure/cl112-9190246-249462.pdf> [<https://perma.cc/4QFD-VE7G>] (calling for mandatory and universal human capital metrics that are “robust and reliable disclosure on par with financial disclosures.”); see also Kenneth P. Pucker & Andrew King, *ESG Investing Isn’t Designed to Save the Planet*, HARVARD BUS. REV. (Aug. 1, 2022), <https://hbr.org/2022/08/esg-investing-isnt-designed-to-save-the-planet> [<https://perma.cc/Y2VL-DGUN>] (calling for regulatory action that shifts “from input-based disclosures to outcome-based impacts”); Erin Martin & Celia Soehner, *How to Respond to SEC’s Focus on Human Capital Disclosures*, BLOOMBERG L. (Oct. 14, 2022), <https://news.bloomberglaw.com/esg/how-to-respond-to-secs-focus-on-human-capital-disclosures> [<https://perma.cc/T2CT-UQWV>] (noting that since the human-capital disclosure rules were finalized, “investors and other stakeholders also have placed pressure on companies to publicly disclose EEO-1 data that describes the gender, race, and ethnicity of their employees across job categories, including through direct requests to the SEC that it mandate this disclosure.”).

202. Sec. & Exch. Comm’n, *SEC Proposes to Enhance Disclosure by Certain Investment Advisors and Investment Companies About ESG Investment Practices* (May 25, 2022), <https://www.sec.gov/news/press-release/2022-92> [<https://perma.cc/H2FF-PG7F>].

of employees and any human capital measures or objectives the company focuses on in its management practices.<sup>203</sup> This “human capital” disclosure requirement is principles-based, meaning companies can tailor their disclosures to fit their unique circumstances.<sup>204</sup> However, there is wide variance in how companies are complying with this rule, with little to suggest it is having an impact on workers’ right to organize. A review of initial corporate human capital disclosures by Professor Pandit revealed that most include an opening paragraph referencing the company’s commitment to its employees, their well-being, and the number of employees.<sup>205</sup> But seventy percent reported barely any metrics related to human capital.<sup>206</sup> A range of information was provided, falling roughly into the following themes: DEI, retention, training, safety, COVID-19 relief, financial benefits and rewards, and employee engagement.<sup>207</sup> None dealt explicitly with collective bargaining or freedom of association, perhaps not surprising given the low rate of unionization in the private sector.<sup>208</sup> As Professor Pandit notes, while more companies are disclosing how they manage their “human capital,” that information is scattered throughout Form 10-K and sustainability reports, making it difficult for investors to glean comparable data.<sup>209</sup> In a letter to the

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203. Modernization of Regulation S-K Items 101, 103, and 105, 17 C.F.R. § 229, 239, 240 (2020).

204. *Id.* See also Streur, *supra* note 201, at 2 (calling for more consistency among disclosures as “resulting disclosures have not provided the standardized, consistent, and quantitative information that would be most useful to investors.”).

205. See Pandit, *supra* note 188.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* The SEC has also declared that it will not disregard a shareholder proposal from a proxy statement simply because it concerns a “significant social policy” not directly linked to the company’s operations. See Sec. & Exch. Comm’n, *Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)* (Nov. 3, 2021), <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals> [<https://perma.cc/MU2L-MNVSc>]. The SEC cites the example of “human capital management issues with a broad societal impact,” which, it contends, are typically the domain of the Board of Directors to address rather than the purview of a shareholder vote. *Id.* This announcement comes amidst growing investor scrutiny of Amazon, as activist investors seek to remove directors from the company over allegations of improper capital management, particularly regarding Amazon’s labor practices, state and federal law violations, and the company’s own human rights policy. See, e.g., Comptroller of the City of New York, *supra* note 149 (“Amazon’s actions also run contrary to its own publicly stated corporate policies on human rights and freedom of association. They are in direct opposition to the United Nations Guiding Principles on Business and Human Rights and Fundamental Principles and Rights at Work of the International Labor Organization (ILO), which Amazon has committed to respect. These widely accepted international standards recognize the fundamental right of workers to exercise their right to organize, which require freedom from company interference with an employee’s decision to associate. Furthermore, Amazon’s Global Human Rights Principles state: ‘We respect freedom of association and our employees’ right to join, form, or not to join a labor union or other lawful organization of their own selection, without fear of reprisal, intimidation, or harassment.’ Amazon has not adequately engaged, responded to, or explained why their recent actions run contrary to its stated corporate policies on human rights and freedom of association. In addition, its actions in response to unionization efforts at its facilities have drawn negative publicity and further exacerbated the perception that Amazon is labor-unfriendly, which jeopardizes the company’s reputation and raises concerns among shareholders.”).

SEC, the CEO of Calvert Capital, a social investment fund, notes that the language used in human capital disclosures, “such as that around diversity and inclusion and employee safety, is generic and does little to provide useful information,” and calls instead for the SEC to require that companies disclose the percentage of a company’s workforce that is under a collective bargaining agreement and—for sectors with high union density—metrics that score companies on those union relationships.<sup>210</sup>

In March 2021, the SEC established a Climate and ESG Task Force to identify instances of “ESG-related misconduct.” The Commission intends to employ cutting-edge data analysis techniques to scrutinize information from registrants, searching for any discrepancies or omissions in their disclosure of climate risks.<sup>211</sup> The SEC’s mandate, however, does not extend to other ESG-related disclosures, such as human rights or labor practices.<sup>212</sup> On March 21, 2022, the SEC proposed mandated disclosure rules requiring public companies (issuers) to include climate-related risks in their registration statements and periodic reports (the “issuer rule”).<sup>213</sup> Two months later, the SEC proposed further amendments to require certain investment advisors and investment companies to make ESG disclosures (the “investor rule.”)<sup>214</sup> This is significant given the SEC’s historical resistance to mandating environmental and climate disclosures. Likewise, the amendments reflect a marked shift from an earlier investor environment in which corporations loudly resisted the imposition of such rules, citing First Amendment protections or arguing that “social” or “political” issues are beyond the scope of the SEC’s mission.<sup>215</sup>

The proposed rules reflect the increase of investor and other stakeholder attention on ESG matters and the growing consensus within the corporate and

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210. See Streur, *supra* note 201, at 2-3.

211. Sec. & Exch. Comm’n, *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues* (Mar. 4, 2021), <https://www.sec.gov/news/press-release/2021-42> [<https://perma.cc/C4N3-6WUY>].

212. *Id.* (stating that they will “evaluate and pursue tips, referrals, and whistleblower complaints on ESG-related issues.”).

213. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21335 (Mar. 21, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249); Sec. & Exch. Comm’n, *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors* (Mar. 21, 2022), <https://www.sec.gov/news/press-release/2022-46> [<https://perma.cc/7XXK-CBPV>] (stating companies must disclose information about climate-related risks that “are reasonably likely to have a material impact on [their] business, results of operations, or financial condition.”).

214. Sec. & Exch. Comm’n, *ESG Disclosures for Investment Advisors and Investment Companies*, <https://www.sec.gov/files/ia-6034-fact-sheet.pdf> [<https://perma.cc/ERV3-ZQJH>].

215. See Nicola M. White, *Companies Resist SEC Climate-Disclosure Requests as Rules Stall*, BLOOMBERG L. (Feb. 14, 2022), <https://news.bloomberglaw.com/securities-law/companies-resist-sec-climate-disclosure-requests-as-rules-stall?context=article-related> [<https://perma.cc/VNN9-WAFS>] (noting company pushback around SEC request for more climate-related disclosure); see also Hester M. Peirce, *We Are Not the Securities and Environment Commission – At Least Not Yet*, SEC. & EXCH. COMM’N (Mar. 21, 2022), <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321> [<https://perma.cc/7QMV-XK7C>] (arguing existing disclosure rules cover material climate-related risks and that the proposed rule will undermine the SEC’s regulatory framework).

investment communities that corporations should focus on ESG.<sup>216</sup> As SEC Commissioner Jaime Lizárraga notes, “As ESG investment continues to grow, there is greater need for accurate and reliable data to support ESG-related claims and assertions. And that’s where quality data comes in.”<sup>217</sup> These recent rule changes aim to “ensure that [ESG] claims made to investors are supported by verifiable information so as not to make disclosures misleading.”<sup>218</sup> Commissioner Lizárraga explains that at the time the rule was proposed, there were approximately \$364 billion assets invested in funds with names that suggested an ESG-focused strategy.<sup>219</sup> The proposed SEC rule amendments seek to advance “truth in advertising” and the public interest by updating the regulatory toolbox of “quantitative, qualitative, prescriptive, or principles-based disclosures.”<sup>220</sup>

Eight months after the SEC proposed its ESG-related rule amendments, the DOL issued guidance clarifying that retirement plan fiduciaries may consider ESG factors when making investment decisions.<sup>221</sup> By using financially material ESG data, fiduciaries can make informed investment decisions that consider ESG factors while still meeting their obligations to act in the best interests of plan participants. The rule, “Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights,” reverses what it describes as a “longstanding position that [Employee Retirement Income Security Act of 1974 (ERISA)] fiduciaries may not sacrifice investment returns or assume greater investment risks as a means of promoting collateral social policy goals.”<sup>222</sup> After a public commentary period, the DOL recognized the reasonable basis for finding that climate change and other ESG factors are material economic conditions.<sup>223</sup> The DOL cites as one example of a factor that an ERISA fiduciary may take into account when making investment decisions, “reduced turnover and increased productivity associated with collective bargaining.”<sup>224</sup> Meanwhile, the EPA

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216. See Lisa M. Fairfax, *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 TEX. L. REV. 273, 275 (2022).

217. Jaime Lizárraga, *Meeting Investor Demand for High Quality ESG Data*, SEC. & EXCH. COMM’N (Oct. 17, 2022), <https://www.sec.gov/news/speech/lizarraga-speech-meeting-investor-demand-high-quality-esg-data> [https://perma.cc/375X-4JEN].

218. *Id.*

219. *Id.*

220. *Id.*

221. See U.S. DEP’T OF LAB., *US Department of Labor Announces Final Rule to Remove Barriers to Considering Environmental, Social, Governance Factors in Plan Investments*, DOL (Nov. 22, 2022), <https://www.dol.gov/newsroom/releases/ebsa/ebsa20221122> [https://perma.cc/2DCD-NZ28].

222. Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73823 (Dec. 1, 2022) (to be codified at 29 C.F.R. pt. 2550).

223. *Id.* at 73826.

224. *Id.* at 73832.



has been working to address environmental issues related to ESG.<sup>225</sup> Under the Biden administration, the EPA has clarified that it will be more active in regulating greenhouse gas emissions and other environmental concerns.<sup>226</sup>

## 2. European Union Regulators

Governmental regulators for the EU have adopted various disclosure requirements and investor guidelines. The Sustainable Finance Disclosure Regulation (SFDR) requires financial market participants to disclose information on how they integrate ESG factors into their investment decisions and how they align their investments with the Paris Agreement on climate change.<sup>227</sup> In what may hold potential for robust and mandatory reporting on labor rights, the EU Parliament adopted an updated Corporate Sustainability Reporting Directive (CSRD), set to go into effect in 2024.<sup>228</sup> While large, public EU corporations were already subject to non-financial reporting on climate change and environmental issues, the CSRD includes an expanded set of social and governance standards developed by the European Financial Reporting Advisory Group (EFRAG).<sup>229</sup> Under the CSRD, even non-EU entities will have to provide new sustainability disclosures if they have significant (i.e., greater than €150 million) EU revenues and an EU branch or subsidiary.<sup>230</sup>

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225. See ENV'T PROT. AGENCY, EPA'S STRATEGIC PLAN 25 (2022), <https://www.epa.gov/system/files/documents/2022-03/fy-2022-2026-epa-strategic-plan.pdf> [<https://perma.cc/XP7R-ZHA9>] (stating that the EPA will assess "environmental, economic, and social" impacts of consumption).

226. *Id.* at 6. See also Scott H. Kimpel, et al., *A Preview of ESG Regulation Under the Biden Administration*, NAT'L. L. REV. (Feb. 16, 2021), <https://www.natlawreview.com/article/preview-esg-regulation-under-biden-administration> [<https://perma.cc/8VKL-D3FF>] (stating that "EPA's regulatory actions could impact ESG-related risks," like greenhouse gas emissions).

227. European Comm'n, *Sustainability-Related Disclosure in the Financial Services Sector*, [https://finance.ec.europa.eu/sustainable-finance/disclosures/sustainability-related-disclosure-financial-services-sector\\_en](https://finance.ec.europa.eu/sustainable-finance/disclosures/sustainability-related-disclosure-financial-services-sector_en) [<https://perma.cc/AJA2-XZ7U>]; see also European Comm'n, *The European Green Deal Sets out How to Make Europe the First Climate-Neutral Continent by 2050* (Dec. 11, 2019), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_6691](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6691) [<https://perma.cc/QTD2-VTKK>] (stating that goals of the European Green Deal require mobilization of the private sector).

228. European Parliament, *Sustainable Economy: Parliament Adopts New Reporting Rules for Multinationals* (Oct. 11, 2022), <https://www.europarl.europa.eu/news/en/press-room/20221107IPR49611/sustainable-economy-parliament-adopts-new-reporting-rules-for-multinationals> [<https://perma.cc/6TGB-8L2L>].

229. See Thibault Meynier et al., *EU Finalizing ESG Reporting Rules with International Impacts*, HARVARD L. SCHOOL FORUM ON CORP. GOV. (Jan. 30, 2023), <https://corpgov.law.harvard.edu/2023/01/30/eu-finalizes-esg-reporting-rules-with-international-impacts> [<https://perma.cc/C6ZX-7YRC>]. In addition to the SFDR and the CSRD, the EU has recently adopted the EU Taxonomy Regulation (EU) 2020/852 and is continuing to negotiate related legislative and regulatory initiatives, including the Directive on Corporate Sustainability Due Diligence and the EU Green Bond Standard. *Id.*

230. Meynier et al., *supra* note 229.

Disclosing this information to the EU markets may place increased pressure on U.S. companies to provide comparable data to U.S. investors and other stakeholders. But what, exactly, will these companies need to disclose, and will it advance worker protections? The European Sustainability Reporting Standards (ESRS) disclosure requirements are currently being developed for the European Commission by the EFRAG.<sup>231</sup> These draft requirements cover workers' and human rights, anti-corruption and bribery, corporate governance, and diversity and inclusion, and will include both general and sector-specific standards.<sup>232</sup> Using a "double-materiality" approach, companies will be required to "report both (i) the impacts of their activities on people and the environment, and (ii) how various sustainability matters affect the company."<sup>233</sup> Rather than as a standalone Sustainability Report, the CSRD requires companies to integrate this information into their financial disclosures, which must be certified by an accredited third-party auditor.<sup>234</sup> The requirements will roll out incrementally over four years, with full compliance expected by 2028.<sup>235</sup>

#### IV. ENHANCING ESG TO SAFEGUARD LABOR RIGHTS

The sluggish pace of U.S. law to safeguard workers from high-tech and old-school union-busting has animated this paper's call for changes to ESG standards and disclosure requirements. Workers must have the right to negotiate the terms and conditions of data collection, electronic monitoring, GPS tracking, and algorithmic management because these policies have the potential to fundamentally alter their ability to unionize.<sup>236</sup> None of the existing standards or frameworks in the ESG regime address this critical need. Just as the Labor-Management Reporting and Disclosure Act of 1959 recognized the importance of disclosing an employer's anti-union tactics, companies should be required to reveal—and engage in good-faith

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231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. The need to enforce that right using ESG would be less urgent in the United States if our existing laws and enforcement mechanisms could protect workers' right to organize. Efforts to safeguard workers' right to organize, such as the Protecting the Right to Organize (PRO) Act, have been hindered by Republicans in the Senate and opposition from some Democratic senators to eliminating the filibuster. Proposed Department of Labor rules could prevent companies from using federal funds to hire consultants or require earlier disclosure of information, but they have yet to be finalized. *Proposed Rule Form LM-10 Employer Report, OFF. OF INFO. & REG. AFFS.*, <https://www.reginfo.gov/public/do/eAgendaViewRule?publd=202110&RIN=1245-AA13> [<https://perma.cc/3HPW-QX3Y>].

negotiations over—the use of data-driven technologies in the workplace.<sup>237</sup> As Terri Gerstein, from Harvard’s Work-Life Program, notes, “Greater disclosure and more attention will likely reveal that what’s on the scale isn’t typically a thumb. Often, it’s more like a hammer.”<sup>238</sup>

What could organizing look like under a more robust ESG regime? How might workers benefit from more specific disclosures by companies purporting to be “sustainable?” On a fundamental level, it could create a universal language around organizing activities, labor rights, and employer interference with those rights. When a company like Starbucks can call its employees “partners” while violating the rights they are entitled to as “workers,” they are engaging in a potent form of greenwashing. The largest, most powerful, and most profitable companies necessarily have the largest marketing budgets. Robust ESG standards and reporting requirements would require a company like Amazon to account for how its use of automation and surveillance align with its claim to be “Earth’s Best Employer.” Inadequate penalties for violating the NLRA and ILO Conventions may make ESG ratings a more effective incentive to uphold labor rights.

In their evolving ESG standards and reporting mandates, the EU and SEC should require employers to report on their compliance with labor and human rights laws. Employers should be required to disclose the use of all surveillance technology, and rating agencies, regulators, and ESG advisors should integrate those disclosures into rating metrics. They should also clarify the kinds of union-busting conduct that violate these legal rights. This may catalyze operational changes, placing pressure on corporations with documented violations of workers’ freedom of association, such as Amazon and Starbucks, to alter their surveillance and coercion policies, ultimately leading to broader reforms of domestic labor laws. ESG is heralded for its potential to reduce carbon emissions, strengthen corporate governance, and advance social responsibility. Yet, its reporting governance is described as an “institutionally dense and fragmented” landscape.<sup>239</sup> Companies report being stuck on a “reporting treadmill in which they spend more time gathering and reporting data than improving their operations.”<sup>240</sup> As Professors Sulkowski and Jebe note, an “alphabet soup” of disparate and

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237. See Bernhardt, *supra* note 67, at 21; Mathew T. Bodie, *The Law of Employee Data: Privacy, Property, Governance*, 97 IND. L.J. 707 (2022); see also Brishen Rogers, *The Law and Political Economy of Workplace Technological Change*, 55 HARV. C.R.-C.L. L. REV. 531 (2020).

238. Terri Gerstein, *What Amazon and Starbucks Don’t Let Us Know*, AM. PROSPECT (Apr. 13, 2022), <https://prospect.org/labor/what-amazon-starbucks-dont-let-us-know-union-busting> [<https://perma.cc/38WG-QFGV>].

239. See Adam Sulkowski & Ruth Jebe, *Evolving ESG Reporting Governance, Regime Theory, and Proactive Law: Predictions and Strategies*, 59 AM. BUS. L.J. 449 (2022).

240. *Id.* at 451. Illustrating the lack of standard metrics by which corporations are held accountable for their compliance with international labor rights, the Motley Fool scored Starbucks a “perfect 10” for ESG companies using Glassdoor ratings to determine whether employees were treated well. Durell, *supra* note 1.

disconnected ESG rating agencies are “narrowly focused on climate-related risks,” yielding a “confused governance space.”<sup>241</sup> This Part proposes changes to the ESG landscape in ways that help strengthen labor rights and their enforcement.

#### *A. Mandate Labor Standards that Work for Workers*

The absence of specific benchmarks for workers’ rights creates a significant loophole in the voluntary GRI and SASB standards, allowing companies to undermine the human rights the standard ostensibly protects. For example, Starbucks posted into its ESG portal a report it hired the law firm Covington LLP to prepare (with an introduction by former Attorney General Eric Holder), entitled, “On the Progress of its Efforts to Promote Civil Rights, Equity, Diversity, and Inclusion.”<sup>242</sup> The content provided that most closely related to workplace matters was “Sustaining the Third Place,” referencing Starbucks’ long-term stated ambition of creating “public spaces where everyone feels like they belong.”<sup>243</sup> This described the company’s compliance with COVID-19 restrictions and harassment experienced by employees (whom Starbucks calls “partners”), which it measured through conversations with forty members of “Starbucks’ Partner Networks.”<sup>244</sup> While the report acknowledged that the company had settled allegations brought by the Equal Employment Opportunity Commission (EEOC) that its promotion practices discriminated against employees based on race or national origin, it still maintained that its “internal analysis did not support that conclusion.”<sup>245</sup> ESG standards should align reporting requirements with existing human rights instruments and conventions, including the ILO’s Declaration on Fundamental Principles and Rights at Work. More stringent regulatory requirements can pressure ESG rating agencies to ensure voluntary standards that closely align with governmental mandates.<sup>246</sup>

To make ESG work for workers, the draft European Sustainability Reporting Standards must include specific, measurable protections for

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241. Sulkowski et. al., *supra* note 239, at 466-67.

242. Covington & Burling LLP, *Starbucks 2021 Civil Rights Assessment*, STARBUCKS (Mar. 31, 2021), at 1, 5, <https://stories.starbucks.com/uploads/2021/03/Starbucks-2021-Civil-Rights-Assessment.pdf> [<https://perma.cc/CJ4Z-TMAM>].

243. *Id.* at 3.

244. *Id.*

245. *Id.* at 5.

246. The incentive for ESG rating agencies to create more robust standards, even in the voluntary ESG space, will be to remain relevant as governmental (e.g., SEC, EU) standards reach more companies and funds. This is akin to auto companies innovating to comply with more stringent California emissions standards. *See, e.g.*, Justin Ho, *For Automakers, California Emissions Standards Play a Key Regulatory Role*, MARKETPLACE (Apr. 22, 2021), <https://www.marketplace.org/2021/04/22/for-automakers-california-emissions-standards-play-a-key-regulatory-role> [<https://perma.cc/CFM9-7NJY>] (explaining that “automakers comply with California’s stricter standards for the entire American market [because] manufacturers want a consistent production process, which can help control costs”).

collective action. A company like Starbucks (which, given its size and scope of EU operations, will be required to comply with the CSRD) would then be required to account for the numerous unfair labor practices filed against it that accuse the company of interfering with workers' ILO and U.S. labor law protections. The disclosure requirement of the ESRS S1 "Own Workforce" standard is intended to illuminate the material impacts a company's policies and practices have on its workers.<sup>247</sup> To meet this standard, companies must explain how these impacts may create (or prevent, mitigate, or remediate) material risks or opportunities, two sides of the same ESG coin.<sup>248</sup> Companies should calculate the financial impacts of material risks and opportunities over the short, medium, and long term. The draft ESRS provides an example using the effect of "equal opportunities, discrimination, and hiring."<sup>249</sup> Gender discrimination can create risks by reducing the company's ability to hire and retain top talent and harming its reputation; conversely, creating opportunities for women can improve the firm's reputation and ability to hire and retain qualified workers.<sup>250</sup>

Unlike the GRI and SASB standards, which do not require disclosing employer interference in worker organizing, the draft EFRAG social standards would mandate such a disclosure, along with documentation that there has been no discrimination against union members or their representatives.<sup>251</sup> Employers must also show evidence of "bargaining in good faith, recognition of, adequate time off for duties, and dismissal protection for workers' representatives."<sup>252</sup> Notably, the standards call for increasing resources for workers' representatives and expanding "sustainability issues" negotiated through collective bargaining.<sup>253</sup> Though, as Professor Fairfax argues, focusing exclusively on mandatory reporting—as superior to voluntary reporting—misses an opportunity for the "dynamic

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247. See EUROPEAN FIN. REPORTING ADVISORY GRP. (EFRAG), [DRAFT] EUROPEAN SUSTAINABILITY REPORTING STANDARD S1 OWN WORKFORCE GENERAL STANDARD 6 (2022), <https://www.efrag.org/Assets/Download?assetUrl=%2Fsites%2Fwebpublishing%2FSiteAssets%2FESRS%2520S1%2520on%2520Own%2520workforce%2520%E2%80%93%2520General.pdf> [<https://perma.cc/FT5X-XCEB>].

248. *Id.* at 5.

249. *Id.*

250. *Id.* The standards note that "own workforce" includes workers in a formal employment relationship, as well as independent contracts ("self-employed workers"). They do not include workers upstream or downstream in the supply chain, as the separate ESRS S2 Workers in the value chain standard covers those workers. *Id.*

251. EFRAG, *ESRS S1 Own Workforce*, in DRAFT EUROPEAN SUSTAINABILITY REPORTING STANDARDS 47 (2022), <https://www.efrag.org/Assets/Download?assetUrl=%2Fsites%2Fwebpublishing%2FSiteAssets%2F13%2520Draft%2520ESRS%2520S1%2520Own%2520workforce%2520November%25202022.pdf> [<https://perma.cc/BFE7-NFRV>].

252. *Id.*

253. *Id.* at 48.

disclosure” feedback loop that voluntary disclosures help to advance.<sup>254</sup> The recommendations of this paper do not preclude more innovative and expansive disclosures on a voluntary level.

### *B. Close Old-School and High-Tech Union-Busting Loopholes*

Making ESG work for workers should not require adding an “E” for employee or “L” for labor to the existing paradigm. Interfering with workers’ rights to organize violates human rights and labor law, two concerns already covered squarely by the “S.” Rather than requiring only a general discussion of “human capital”<sup>255</sup> and employee diversity in annual reports, the SEC should require that companies disclose any practices that threaten workers’ freedom of association. Investors are already calling for more detailed information about collective bargaining relationships.<sup>256</sup> Unlike other regulations, such as the EU’s Non-Financial Reporting Directive (NFRD), the latest set of SEC rules regarding human capital do not mandate specific standards or disclosure frameworks.<sup>257</sup> ESG disclosure requirements should clearly define employer conduct that interferes with workers’ right to form and join unions without interference or retaliation from their employers. Captive audience meetings, digital surveillance, data mining, artificial intelligence, and other practices that threaten or coerce workers should be clearly defined as violating workers’ freedom of association. Efforts to screen workers using electronic monitoring or predictive algorithms for their sympathy with unions should be presumptively illegal.

Regulators and rating agencies should set clear guidelines on what constitutes union-busting in the data era. As the EU prepares to make sustainability a mandatory subject of collective bargaining, the same should be required for workplace technology. ESG standards, disclosures, guidance, and rating metrics should clarify that modern tactics like digital surveillance are union-busting and impermissible under international law. The NLRB’s General Counsel, Jennifer Abruzzo, has emphasized the need for employers to disclose their use of monitoring technologies and the reasons for their use.<sup>258</sup> In her recent memo, Abruzzo stated that employees must be given the information to make informed decisions and protect their Section 7 rights.<sup>259</sup> Integrating these metrics will promote transparency and accountability in using technology in the workplace, allowing workers to make informed decisions about their employment. Workers should have the right to review

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254. See Fairfax, *supra* note 216.

255. The author objects to the use of the term “human capital,” which dehumanizes and devalues the dignity and value of labor.

256. See Streur, *supra* note 201, at 3.

257. *Id.* at 6.

258. Abruzzo Memo, *supra* note 86, at 8.

259. *Id.*

or correct data that is being collected and the right to challenge decisions that are made based on electronic monitoring or algorithms. The Board should require employers to disclose such technologies unless exceptional circumstances require covert use, and ESG disclosure requirements should adopt a similar standard and framework.

ESG standards must also require that companies disclose their engagement with union-avoidance “consultants,” just as they are already required to disclose to the NLRB.<sup>260</sup> This increased transparency will enable investors and consumers to make informed decisions about the companies they support and invest in. Additionally, it will incentivize companies to avoid using these controversial practices, advancing fair labor practices and workers’ rights. Requiring companies to disclose their use of anti-union persuaders to ESG rating agencies is an essential step toward promoting transparency and ethical business practices.

### *C. Adopt a Materiality Standard that Affirms the Value of Labor*

GRI uses a “double materiality” approach that considers the risks and opportunities for the organization, its workers, consumers, investors, and impacted communities. This is important because a financial materiality standard solely assesses whether social factors have a material impact on a company’s economic performance. While this standard is helpful in many respects, it can be inappropriate when dealing with labor rights violations. The financial materiality standard focuses on whether an issue will affect a company’s financial performance rather than its human rights impact. If an unfair labor practice costs the company nothing, it may not be deemed material. If the only penalty for violating workers’ freedom of association is posting a confessionary flyer in the break room, materiality may not be triggered. After all, undermining workers’ rights to bargain for better wages may, in the short term, generate financial savings for the company (at a high cost to workers’ rights). If materiality is calculated only by a reasonable investor standard, disclosing violations of workers’ rights may never be required. Rather than relying solely on the financial materiality standard, ESG reporting should include a broader range of factors that consider the impact of a company’s actions on society and the environment. Incorporating a “double materiality” standard that considers the impact of a breach on workers and external stakeholders will be essential for ESG to protect workers’ rights.<sup>261</sup>

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<sup>260.</sup> Such requirements should not include the “direct contact” loophole discussed in Section I.B, *supra*.

<sup>261.</sup> The author acknowledges that significant questions remain about the likelihood that a company would disclose its union-busting practices, especially those that do not fit neatly into established illegal conduct (e.g., electronic surveillance). Therefore, ESG standards around labor practices must be

## CONCLUSION

ESG and data-driven technologies can remedy or reinforce inequality, enhance or deskill jobs, and enable or suppress labor organizing. Whether ESG is used to make the world more equitable and sustainable will depend on the power of workers, consumers, investors, and regulators to demand respect for labor rights. The architects of the NLRA and ILO could not have imagined the speed and scale at which workers are now surveilled, coerced, and threatened.<sup>262</sup> Workers have a significant stake in how this data, surveillance, and artificial intelligence will be used, and they need robust collective bargaining rights to help shape the future of work. However, such negotiations cannot occur so long as employers can undermine their workers' freedom of association. The rights of workers to form unions free from intimidation, coercion, and suppression have not changed. What must change is our approach to protecting those rights.

Global economic inequality contributes to the climate crisis and is exacerbated by it. Social unrest and the Great Resignation have signaled to the marketplace that corporations must back up their CSR statements with meaningful actions.<sup>263</sup> Yet an ESG regime should not permit employers to earn public kudos while privately using captive audience meetings to coerce workers or predictive algorithms to discriminate against them. ESG can lead the way, clarifying conduct that violates international labor and human rights, which can create the pressure needed for more robust private enforcement. To do so, ESG standards, metrics, and discourse must prioritize and protect workers' rights with the same specificity as carbon emissions. From Amazon

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sufficiently developed (much as they have for carbon impact and emissions) and measurable, especially given the rapidly shifting technological landscape.

262. While outside the scope of this Article, additional regulation around data privacy is necessary. Like consumers, employees have valid privacy and human rights interests. The lack of comprehensive data privacy regulations in the United States puts workers in data-driven workplaces at risk. The European Union has set a substantial standard with the General Data Protection Regulation (GDPR) and a forthcoming AI law. Still, the U.S. lags with a patchwork of state privacy laws primarily focusing on consumer rights without a federal standard. As the use of data-driven technologies in the workplace increases, there is a growing concern about the potential for these technologies to amplify existing biases and power imbalances. This regulatory deficit poses a considerable threat to workers in the data-driven workplace, where technology can exacerbate biases and power imbalances. Without adequate regulation, workers may be subject to surveillance and algorithmic decision-making based on inaccurate or biased data. It will be necessary for the U.S. to take swift action to secure the rights and privacy of workers in the data-driven workplace, such as passing comprehensive data privacy laws at the federal level, recognizing a general right to worker privacy, and implementing restrictions on the use of algorithms in the workplace.

263. See, e.g., Donald Sull, Charles Sull & Ben Zweig, *Toxic Culture Is Driving the Great Resignation*, MIT SLOAN MGMT. REV. (Jan 11, 2022), <https://sloanreview.mit.edu/article/toxic-culture-is-driving-the-great-resignation> [<https://perma.cc/2KA5-9C4Q>] (finding that an organization's "toxic culture" is a strong predictor of employee attrition during the period in 2021 in which a record-breaking number of employees quit their job, known as the "Great Resignation." The authors include as critical elements of a toxic culture the "failure to promote diversity, equity, and inclusion; workers feeling disrespected; and unethical behavior.").



warehouses to Trader Joe's aisles to Starbucks counters and Microsoft labs, workers demand justice in their workplaces and a say in shaping their futures. In an era of artificial intelligence and machine learning, workers must be front and center in discussions about the future of their work, whether through collective bargaining, regulation, or public policy. As Jennifer Bates, the Bessemer warehouse worker explains, "Companies have devalued employees into thinking that [they're] not valuable...people have begun to stand up and say, you know what? They're nothing without us."<sup>264</sup>

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264. Sara A. O'Brien, *This Warehouse Worker Became the Face of a Union Push at Amazon. She's Still Bracing for the Fallout*, CNN BUS. (Oct. 21, 2021), <https://www.cnn.com/2021/10/21/tech/amazon-jennifer-bates-risk-takers/index.html> [<https://perma.cc/6T8Y-YZS4>].

