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THE PROTECTING THE RIGHT TO ORGANIZE ACT: DETERRING UNFAIR LABOR PRACTICES

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

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THE PROTECTING THE RIGHT TO ORGANIZE ACT: DETERRING UNFAIR LABOR PRACTICES

Wednesday, May 8, 2019
House of Representatives,
Committee on Education and Labor,
Subcommittee on Health, Education, Labor, and Pensions,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:18 p.m., in room 2175, Rayburn House Office Building. Hon. Frederica S. Wilson [chairwoman of the subcommittee] presiding.

Present: Representatives Wilson, Norcross, Morelle, Wild, McBath, Underwood, Stevens, Courtney, Harder, Shalala, Levin, Trahan, Scott, Walberg, Roe, Allen, Banks, Fulcher, Taylor, Watkins, Wright, Meuser, and Johnson.

Also present: Representatives Foxx, Hayes, and Jayapal.

Staff present: Tylease Alli, Chief Clerk; Nekea Brown, Deputy Clerk; Ilana Brunner, General Counsel Health and Labor; David Dailey, Senior Counsel; Kyle deCant, Labor Policy Counsel; Mishawn Freeman, Staff Assistant; Christian Haines, General Counsel Education; Eli Hovland, Staff Assistant; Stephanie Lalle, Deputy Communications Director; Kevin McDermott, Senior Labor Policy Advisor; Max Moore, Office Aid; Merrick Nelson, Digital Manager; Banyon Vassar, Deputy Director of Information Technology; Katelyn Walker, Counsel; Courtney Butcher, Minority Director of Coalitions and Members Services; Akash Chougule, Minority Professional Staff Member; Rob Green, Minority Director of Workforce Policy; John Martin, Minority Workforce Policy Counsel; Hannah Matesic, Minority Director of Operations; Kelley McNabb, Minority Communications Director; Ben Ridder, Minority Legislative Assistant; Meredith Schellin, Minority Deputy Press Secretary and Digital Advisor; and Heather Wadyka, Minority Operations Assistant.

Chairwoman WILSON. The Subcommittee on Health, Employment, Labor, and Pensions will come to order. Welcome, everyone.

I note that a quorum is present. I ask unanimous consent that Representatives Suzanne Bonamici of Oregon, Pramila Jayapal of Washington, Jahana Hayes of Connecticut, Bradley Byrne of Alabama, and Ben Cline of Virginia be permitted to participate in today's hearing with the understanding that their questions will come after all members of the HELP Subcommittee on both sides of the aisle who are present have had an opportunity to question the witnesses. But we welcome our colleagues to this hearing.

Without objection, so ordered.

The subcommittee is meeting today in a legislative hearing to receive on Protecting the Right to Organize Act: Deterring Unfair Labor Practices. Pursuant to committee rule 7c, opening statements are limited to the chair and the ranking member. This allows us to hear from our witnesses sooner and provides all members with adequate time to ask questions.

I recognize myself now for the purpose of making an opening statement.

Today we are holding the first legislative hearing on H.R. 2474, the Protecting the Right to Organize, or the PRO Act, a comprehensive proposal to strengthen workers' rights to organize and to bargain for higher wages, better benefits, and safer working conditions. This hearing will focus specifically on the provisions of the bill that prevent employers from violating workers' rights through coercion, retaliation, and delay.

For generations, labor unions fueled our Nation's prosperity, protected the health and safety of American workers and supported a strong, strong, strong middle class. When union membership was at its peak of around 30 percent between the end of World War II and 1973, wage growth and worker productivity grew at nearly identical rates. But over the next 4 decades, as union membership declined, the link between rising productivity and rising pay was eroded.

Between 1973 and 2017, worker productivity increased by 73 percent, but wages only grew by 12 percent, adjusting for inflation. This shift has undermined the financial security of workers and their families and contributed to the severe income inequality we face today.

Yet, despite the proven benefits of strong unions, just one in ten workers is currently a union member. That is a level not seen since the 1930's, just before the passage of the National Labor Relations Act. But American workers have not given up on unions—far from it. Support for unions is at a 4 decade high. According to a poll of workers across the country by researchers at MIT, 48 percent of non-union workers said they would vote to join a union.

One major reason for the gap between worker enthusiasm and low union density is that toothless labor laws, more intense and more sophisticated employer opposition to unions, and relentless political attacks have dismantled workers' right to organize.

The current system allows employers to unlawfully discourage, delay, or prohibit union organizing with near impunity. Even when our labor laws work as intended, employees are often left with hollow victories after months or years of appeals.

Today we will evaluate how provisions in the PRO Act would deter employers from violating workers' rights to form unions. The PRO Act would do this in five ways:

First, it establishes meaningful penalties for companies that violate their employees' rights. Incredibly, there are no civil penalties that can deter employers from violating workers' rights to organize under current law, no matter how repeated or willful the conduct.

The PRO Act would authorize civil penalties for employers that retaliate against workers who seek to join a union.

Second, the PRO Act would streamline procedures to guarantee swift remedies. If a worker is unlawfully fired for organizing, they may have to wait years before receiving recourse. And justice delayed is justice denied.

The PRO Act would guarantee temporary reinstatement for workers while their cases are pending and would make National Labor Relations Board orders self-enforcing, like those of any other Federal agency.

Third, the PRO Act would ban employers from requiring employees to attend captive audience meetings.

Fourth, the PRO Act would establish a mediation and arbitration process to encourage employers and unions to reach a first collective bargaining agreement. Under current law, even if a union wins an election, employers can stall at the bargaining table with minimal consequences. The PRO Act would effectuate the NLRA's original purpose of promoting collective bargaining.

And, finally, the PRO Act fosters transparency so employees know their rights under the law. Other Federal labor and employment laws require employers to post notices of employees' rights, like Title VII of the Civil Rights Act, the Family and Medical Leave Act, and OSHA. The PRO Act will similarly guarantee that employers notify employees of their rights under the law.

This legislation is all about restoring workers' rights to organize and improving the quality of life for workers and their families in communities across America.

I want to thank our witnesses for giving us this time and expertise this afternoon, and I now yield to the ranking member, Mr. Walberg, my friend, for the purpose of an opening statement.

Mr. Walberg, the esteemed Mr. Walberg.

[The statement of Chairwoman Wilson follows:]

Prepared Statement of Hon. Frederica S. Wilson, Chairwoman, Subcommittee on Health, Employment, Labor, and Pensions

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Yet despite the proven benefits of strong unions—just one in 10 workers is currently a union member. That's a level not seen since the 1930's, just before the passage of the National Labor Relations Act.

But American workers have not given up on unions. Far from it. Support for unions is at a four-decade high. According to a poll of workers across the country by researchers at MIT, 48 percent of non-union workers said they would vote to join a union.

One major reason for the gap between worker enthusiasm and low union density is that toothless labor laws, more intense and more sophisticated employer opposition to unions, and relentless political attacks have dismantled workers' right to organize.

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Second, the PRO Act would streamline procedures to guarantee swift remedies. If a worker is unlawfully fired for organizing, they may have to wait years before receiving recourse, and justice delayed is justice denied. The PRO Act would guarantee temporary reinstatement for workers while their cases are pending, and would make National Labor Relations Board orders self-enforcing, like those of any other Federal agency.

Third, the PRO Act would ban employers from requiring employees to attend captive audience meetings.

Fourth, the PRO Act would establish a mediation and arbitration process to encourage employers and unions to reach a first collective bargaining agreement. Under current law, even if a union wins an election, employers can stall at the bargaining table with minimal consequences. The PRO Act would effectuate the NLRA's original purpose of promoting collective bargaining.

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This legislation is about restoring workers' right to organize and improving the quality of life for workers and their families in communities across America.

Mr. WALBERG. Oh, keep it up.

Madam Chairwoman, thank you. I appreciate serving with you on this committee. And we disagree on some things, we agree on plenty of things. And I would say today as well, that our esteemed Chair of the full Education and Labor Committee, as well as yourself and I, certainly agree on some things about the labor movement, the labor union, and the accomplishments that they have had. That has been a benefit to all of us who have been in the workplace, at whatever area of the workplace it has been.

Organized labor has a long history in America, in the work force of America, in its diverse looks and places and the work force. The early advocacy for fairness and decent treatment left an important legacy—and I say that sincerely—save lives, that have impacted benefits and futures for Americans, and giving an example, in many cases, to the rest of the world. But that legacy also is, as is continued unfortunately, to the modern labor movement, has appeared to have been abandoned or gone beyond need in many cases.

And that is what we are discussing today, and it is a vital discussion.

I grew up in a union household on the south side of Chicago. My father was a machinist and, in fact, tool and die maker and a union organizer. I remember seeing the buttons on his apron and on his cap of the Steelworkers Union. I saw that in my household and upon graduating from high school I went to work at US Steel South Works on the south side of Chicago, No. 2, electric furnace, as a laborer, as a furnace worker, a ladler repairman, as a mold platform operator, third helper on the furnace, and as a hooker.

And if you are a steel mill operator you will know what a hooker is.

But that was my life. And I can tell you that there were parts of those jobs that I performed that were safer, benefits were better, because of early work by my father and other union workers.

But there are other things about that as well. The lessons I learned from my father and my own experience as a union worker helped shape my understanding of labor unions, both the good and the bad. Americans have the right to organize. I will say that again—Americans have the right to organize—and to join a union if they choose to do so. The United States law has protected this freedom for over 80 years.

Outdated U.S. labor laws are in need of significant reforms. It is true. But those reforms should put workers, not union leaders, first. With all due respect, the sweeping legislation we are here to discuss today doesn't benefit workers. H.R. 2474 reads like a sweeping special interest wish list. Contrary to the statements of the bill's sponsors, this bill fails to promote the wellbeing or success of American workers. Instead, the legislation grants unprecedented power to special interests at the expense of workers and employers, and it takes two.

Among its many radical provisions, the bill requires employers to turn over workers' personal information, including their home addresses, cell phone and landline numbers, personal email addresses, and more. My workers aren't asking for that or wanting that, without workers ever having a say in the matter. H.R. 2474 will decimate workers' rights to privacy in order to satisfy union demands.

The bill also bans right-to-work, or as I call it, employee free choice laws, that allow workers to decide for themselves whether to join and pay a union, laws that have resulted in more jobs and higher incomes for workers. And in an effort to make it easier to create unions, the legislation contains a back-door card check scheme that Congress deemed too extreme in the last time Democrats were in power. The scheme provides that in the event that a union loses an election, employers must prove they did not interfere in the election's results. A completely ludicrous and unworkable standard. If an employer is unable to prove they didn't interfere, that union is automatically ushered into the work force without ever winning a secret ballot election.

Union membership across the United States is steadily declining. They have failed to adapt with the changing economy. And the absence of transparency and accountability in their activities has left many workers disillusioned and dissatisfied. But instead of making necessary changes to better serve their members, union leaders appear to be exerting their political influence to call for radical labor laws like this one, that will allow them to further consolidate power and bolster their own agendas.

Rather than empowering unions at the expense of workers and employers, reforms to the National Labor Relations Act, NLRA, and the Labor-Management Reporting and Disclosure Act, LMRDA, should improve union accountability and transparency.

The union elections process must be updated to give workers expanded voting rights. It is the height of hypocrisy that Americans

select their representation in Congress by secret ballot and congressional Democrats select their own leadership by secret ballot, yet they seek to deny that same right to Americans selecting their representation in the workplace.

Today's workers deserve better than what this extreme legislation has to offer.

Ten years on from the Great Recession and the American economy is achieving robust, record-breaking growth. Wages are rising while unemployment remains near record lows. And the number of job openings exceed the number of job seekers nationwide by 7 million. Workers have built this reality, spurred on by pro-growth policies, like the Republican-led tax law and regulatory reform.

Everyone sitting here on this dais is here because we prevailed in a debate over ideas back in our districts. We are here because our constituents decided we would be responsible enough and responsive enough to serve them. Congress may not be the most popular organization in America, but at least there are mechanisms in place for voters to change their minds and change their representation.

Those same basic American values and principles should apply to everyone, including organized labor. Resistance to those basic values and principles deserve a thorough examination. And, thankfully, that is what we are here to do today.

And I commit myself to that effort, Madam Chairwoman. And I yield back.

[The statement of Mr. Walberg to follows:]

Prepared Statement of Hon. Tim Walberg, Ranking Member, Subcommittee on Health, Employment, Labor, and Pensions

Thank you for yielding.

Organized labor has a long history in the American work force. Their early advocacy for fairness and decent treatment left an important legacy, one unfortunately that the modern labor movement has appeared to have abandoned. I grew up in a union household. My father was a machinist and union organizer for part of his career, and upon graduating from high school, I went to work at U.S. Steel South Works on the south side of Chicago. The lessons I learned from my father and my own experience as a union worker helped shaped my understanding of labor unions, both the good and the bad. Americans have the right to organize and join a union if they choose to do so, and United States law has protected this freedom for over 80 years.

Outdated U.S. labor laws are in need of significant reforms, it's true. But those reforms should put workers, not union leaders, first. The sweeping legislation we are here to discuss today doesn't benefit workers. H.R. 2474 reads like a sweeping special interest wish list. Contrary to the Statements of the bill sponsors, this bill fails to promote the wellbeing or success of American workers. Instead, the legislation grants unprecedented power to special interests at the expense of workers and employers.

Among its many radical provisions, the bill requires employers to turn over workers' personal information including their home addresses, cellphone and landline numbers, personal email addresses, and more without workers ever having a say in the matter. H.R. 2474 will decimate workers' right to privacy in order to satisfy union demands.

The bill also bans right-to-work laws that allow workers to decide for themselves whether to join and pay a union—laws that have resulted in more jobs and higher incomes for workers. And in an effort to make it easier to create unions, the legislation contains a backdoor "card-check" scheme that Congress deemed too extreme the last time Democrats were in power. The scheme provides that in the event that a union loses an election, employers must prove they did not interfere in the election's results a completely ludicrous and unworkable standard. If an employer is unable to prove they didn't interfere, that union is automatically ushered into the workplace without ever winning a secret ballot election.

Union membership across the United States is steadily declining. They have failed to adapt with the changing economy, and the absence of transparency and accountability in their activities has left many workers disillusioned and dissatisfied. But instead of making necessary changes to better serve their members, union leaders appear to be exerting their political influence to call for radical labor laws like this one, that will allow them to further consolidate power and bolster their own agendas.

Rather than empowering unions at the expense of workers and employers, reforms to the National Labor Relations Act (NLRA) and the Labor-Management Reporting and Disclosure Act (LMRDA) should improve union accountability and transparency. The union election process must be updated to give workers expanded voting rights. It is the height of hypocrisy that Americans select their representation in Congress by secret ballot and congressional Democrats select their own leadership by secret ballot, yet they seek to deny that same right to Americans selecting their representation in the workplace.

Today's workers deserve better than what this radical legislation has to offer. Ten years on from the Great Recession and the American economy is achieving robust, record-breaking growth. Wages are rising while unemployment remains near record lows, and the number of job openings exceeds the number of job seekers nationwide. Workers have built this reality, spurred on by pro-growth policies like the Republican-led tax law and regulatory reform.

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Chairwoman WILSON. Thank you, Mr. Walberg.

Material for the hearing record—I remind my colleagues that pursuant to committee practice, materials for submission for the hearing record must be submitted to the committee clerk within 14 days following the hearing, preferably in Microsoft Word format, by 5 p.m. on May 21, 2019, without objection.

I will now introduce our witnesses.

Mr. Richard Trumka is the distinguished president of the AFL–CIO. He was formerly the president of the United Mine Workers of America, and a third generation coal miner. Welcome.

Mr. Jim Staus is a former employee of the University of Pittsburgh Medical Center.

Mr. Philip Miscimarra is a partner in Morgan Lewis & Bockius LLP and former chairman of the National Labor Relations Board.

Mr. Mark Gaston Pearce is the former chairman at the National Labor Relations Board and currently the executive director and distinguished lecturer at the Workers' Rights Institute at Georgetown University Law Center.

Welcome today. Thank you for being here. We certainly appreciate your presence and your time. We look forward to your testimony.

And let me remind the witnesses that we have read your written statements and they will appear in full in the hearing record. Pursuant to committee rule 7d and committee practice, each of you is asked to limit your oral presentation to a 5 minute summary of your written statement. Let me also remind the witnesses that pursuant to Title 18 of the U.S. Code Section 1001, it is illegal to knowingly and willfully falsify any statement, representation, writing, document, or material fact presented to Congress, or otherwise conceal or cover up a material fact.

Before you begin your testimony, please remember to press the button on the microphone that is in front of you so that it will turn on and the members can hear you. As you begin to speak the light in front of you will turn green. After 4 minutes the light will turn yellow to signal that you have 1 minute remaining. When the light turns red your 5 minutes have expired and we ask that you please wrap it up.

We will let the entire panel make their presentations before we move to member questions. When answering questions, witnesses, please remember to once again turn your microphone on.

I will first recognize Mr. Trumka.

STATEMENT OF RICHARD L. TRUMKA J.D., PRESIDENT, AFL–CIO

Mr. TRUMKA. Chairman Wilson, Ranking Member Walberg, and members of the subcommittee, on behalf of the 12.5 million members and 55 unions of the AFL–CIO, thank you for inviting me to testify today.

I want to thank House Education & Labor Committee Chairman Bobby Scott and his colleagues for his foresight they have demonstrated in crafting this important legislation.

Gallup recently put the popularity of unions at 62 percent, a 15 year high. The Wall Street Journal reported that in 2018 it was the biggest year for collective action in 3 decades. Teachers, from West Virginia to Arizona, Google employees, workers in every sector and every region, are embracing the transformational power that comes from joining together in common cause.

MIT found that half, half of all non-union workers would join a union today if given the chance. That is more than 60 million Americans. So why haven't we seen a rise in union membership commensurate with this surge in approval, recognition, and desire? Well, the answer is clear: our woefully outdated labor laws no longer serve as an effective means for working people to have our voices heard.

The stated purpose of the National Labor Relations Act is to encourage collective bargaining. Yet in the more than 80 years since its passage, every amendment to the law has made it harder for workers to form unions.

Today, union busting consultants are paid tens of millions of dollars to deny workers a voice on the job. And once a union election is won, the same bad actors do everything in their power to undermine the collective bargaining process. Workers are forced to sit in meetings where the only item on the agenda is bashing the union. Pro-union workers are fired, employers refuse to bargain in good faith, some refuse to bargain at all, and far too often the financial consequences for breaking Federal law is virtually nonexistent. This must change. The Protecting the Right to Organize Act will change it.

Now, imagine if when running for office your opponent could force the electorate to listen to speeches urging them to vote against you. Imagine your opponent had the power to punish those voters if they did support you. Imagine that Congress refused to recognize your rightful election. And then imagine that once you finally were seated, you were denied the basic rights and responsibil-

ities that come with that office. That is the grim reality that workers face today. They see it in a number of places: misinformation, reprisals, delays, threats. And after all those obstacles are overcome, an outright refusal to recognize the election results.

I included several such examples in my written testimony. And that is why half of non-union workers want to join a union today, yet less than 12 percent actually have one. Why does it matter? Simply put, workers in unions bargain for higher wages and are much more likely to have healthcare and a pension. The union advantage is even greater for people of color and those without a college degree. Unionized workers have a real say in critical workplace issues, like time off to care for a loved one, the deployment of technology, protection from discrimination.

A happier, healthier, more upwardly mobile work force is good for our economy as consumers have additional money to spend, local tax revenues increase, education funding is bolstered, inequality shrinks. It is a virtuous cycle upward, not downward.

The union movement and all working people are hungry for proworker reforms to existing labor laws. The PRO Act would do many important things. Chief among them, provide more substantial relief for workers whose rights have been violated, ensure a process for reaching a first contract once a union is recognized, and create a true deterrent so that employers think twice before violating the law.

Something is happening in America. Workers are embracing collective action with a fervor that I have not seen in a generation. It is time for our laws to catch up, it is time to make the PRO Act the law of the land.

Thank you very much.

[The statement of Mr. Trumka follows:]

Testimony of Richard L. Trumka
President, AFL-CIO
Before the
House Committee on Education and Labor
Subcommittee on Health, Employment, Labor and Pensions
May 8, 2019
On
The Protecting the Right to Organize Act: Deterring Unfair Labor Practices

On behalf of the 12.5 million members and 55 unions of the AFL-CIO, thank you for inviting me to testify on the Protecting the Right to Organize (PRO) Act (H.R. 2474). The AFL-CIO strongly supports the PRO Act, and I personally want to commend Chairman Scott and the many co-sponsors of this bill for taking a bold step to restore fairness to the economy by strengthening the rights of working people to negotiate with our employers for better wages and working conditions.

Congress recognized that unions benefit all workers, not just union members, when it passed the National Labor Relations Act more than 80 years ago. The act's stated purpose is to encourage the practice of collective bargaining and protect the right of workers to form unions. In the depths of the Great Depression, Congress concluded that giving workers the power to form unions and bargain collectively would strengthen our economy and safeguard our democracy.

Unfortunately, since the act's passage, corporations and their political supporters have pushed America in the wrong direction. Almost every amendment to the NLRA has made it harder for workers to form unions. Every year, union-busting consultants have taken more and more corporate money to prevent workers from coming together to form unions and, when an election is won, to undermine the process of collective bargaining. State "right to work" laws, promoted by a network of billionaires, super PACs and special interest groups, have given even more power to big corporations at the expense of working people.

Today, unions represent the smallest share of the private sector workforce since before passage of the NLRA. As the density of unions has declined, income inequality has skyrocketed. Although income inequality is seen as one of the most intractable economic problems facing our nation, we know how to reverse it. The simple truth is that when a greater share of workers were in unions, our economy and society were more equal. According to the Economic Policy Institute, the decline in union density accounts for one-third of the rise in wage inequality among men and one-fifth among women.

Unions win better wages and benefits for all types of working people. Union members earn, on average, 13% higher pay than nonunion members in the same occupation with the same level of experience and education. The union advantage is even greater for people of color and those without a college degree. Similarly, hourly wages for women in unions are more than 9% higher on average than for nonunion women with comparable characteristics.

Union members also have the power to negotiate for better, quality health insurance and retirement security, as well as paid sick and family leave. For example, 94% of workers with a union contract receive employer-provided health insurance versus 67% of workers without a union, and our plans tend to be better. Some 90% of union members participate in a retirement plan compared to 75% of nonunion members. Eighty-seven percent of union members have access to paid sick days versus 69% of nonunion members.

Unions also help workers without a union get ahead. In 2016, worker wages in states with lower union density lagged behind states with higher density by more than $100 a week. Unions also provide upward mobility for low-income families. Researchers at Harvard University found that children born to low-income families typically ascend to higher incomes in metropolitan areas where union membership is higher.

So it is little surprise that workers in every sector and every region are embracing the transformational power that comes from joining together in common cause. The year 2018 was the biggest for collective action in three decades and that surge is defining 2019 and shaping the early contours of the 2020 presidential election. Programmers at Google, school teachers in West Virginia and manufacturing workers at Volkswagen in Tennessee are standing up and speaking out.

Today, public support for unions is at a more than 15-year high. Importantly, the people who make up labor unions, our members and families, are the most supportive, but even a majority of nonunion members favor unions. Equally important, the strongest support for unions is from those ages 18–29, and the biggest jump in favorable attitudes toward unions has come from 30–39-year-olds.

Working people want union representation. A growing number of workers see unions as the preeminent source of power that will give them a voice on the job and a say in their own futures. Professor Thomas Kochan and colleagues at MIT and Columbia University found in their 2017 Worker Voice Survey that 48% of nonunion members would vote for a union if an election were held at their workplace, a 50% jump from similar studies conducted in 1977 and 1995. Some 48% of nonunion members want a union—that's more than 60 million people. But only 11.7%—or 14.7 million—were actually represented in 2018. Something is wrong. And that something is the law.

Our current labor law is frustrating workers' clear and growing desire to be represented. In too many ways, it's giving employers the power to decide whether or not their workers can unionize. This is a gross violation of the NLRA's stated mission, and it's why labor law reform is an urgent national necessity.

So what are workers up against? Let me give you just four examples and apply them to your experience as elected officials.

First, when you campaign for office, you have to talk to voters. You engage with them at town halls, coffee shops and worksites. For workers wanting to form a union, that communication is greatly restricted. Conversations about unionization must be done on

breaks, and representatives from unions can be denied access to worksites altogether.

Yet employers can force employees to listen to their anti-union rhetoric in forced "captive audience meetings." Employers can fire workers who simply stand up and leave such meetings and even those who have the audacity to express their own opinions after being told their role is only to listen.

Captive audience meetings give employers an unfair and often insurmountable advantage over unions in reaching voters with their message, particularly undecided voters. Yet this clearly coercive practice has been held to be lawful since passage of the anti-worker amendments to the Taft-Hartley Act in 1947. In addition, by forcing employees to listen to anti-union propaganda, employers are signaling the threat of consequences for a "yes" vote.

This is not a theoretical practice. It happens time and time again before union elections. A study of more than 200 representation elections found that employers conducted mandatory meetings 67% of the time. A more recent study found that in 89% of campaigns surveyed, employers required employees to attend captive audience meetings during work time and that the majority of employees attended at least five such meetings during the course of the campaign.

Let me give you an example. In late 2017, over 80% of the workers at a Kumho Tire plant in Macon, Georgia, had signed union authorization cards asking to be represented by the United Steelworkers (USW). The workers had been motivated by serious concerns about chemical exposures and inadequate safety training. In the period preceding the National Labor Relations Board election, workers were forced into daily captive audience meetings, grilled by supervisors in one-on-one interrogations and compelled to watch anti-union videos playing repeatedly on monitors in the facility. Ultimately, workers voted narrowly against union representation—164–136—despite 80% having supported the union prior to the employer's pressure tactics.

This PRO Act would ban captive audience meetings and require employers to attract an audience with the power of their ideas, just like candidates for public office. Importantly, it would not limit anyone's freedom to speak. Employers, like unions, would be free to express their views about union representation. The bill would simply ensure that no party can gain an unfair advantage by forcing employees to listen. Freedom of speech and the freedom not to listen would both be protected.

Second, when you run for office, you have no power over individual voters and you certainly would not consider punishing a constituent who voted for your opponent even if you had the power to do so. But in the workplace, employers have the power to terminate or take other adverse actions against employees; and before many union elections, employers abuse that power by firing employees who actively campaign for union representation.

Last year, the NLRB awarded over $50 million to employees the agency found to have been discriminatorily discharged or otherwise punished. More than 1,250 employees were ordered reinstated by the agency. But these numbers do not account for the chilling effect of punishing pro-union workers. There are no doubt thousands of workers

who have been scared out of exercising the right to support unions. And the NLRA's paltry fines have done little to nothing to deter employers from this illegal and destructive practice.

Right now, an employer who fires a union activist to chill an organizing drive faces merely the prospect of paying the employee back pay many years later. In fact, back pay awards only happen after a charge is filed, the General Counsel issues a complaint, a hearing is held, an administrative law judge finds a violation, the NLRB affirms the judge's finding and the board's order is enforced in a federal appeals court. During that typically multi-year period, the illegally fired employee is forced by law and by practical necessity to seek other employment, and any interim earnings ultimately reduce the employer's back pay liability.

Often the back pay award is no more than a couple thousand dollars, and sometimes less. And while the board can order an illegally fired employee reinstated, that order comes far too late to bring the worker back before a union election. In fact, a reinstatement offer often comes so late that most employees have moved on and decline to return. In 2018, only one-third of employees who were granted reinstatement after a board order accepted the offer. So if violating the law chilled the organizing drive, the employer will consider it a good investment. In other words, violating the law just makes good economic sense for many employers, nothing more than the cost of doing business.

And even after organizing drives have resulted in successful elections, union supporters are sometimes subjected to reprisal firings. In May 2018, flight engineers at Boeing's facility in South Carolina voted to form a union, but right before Christmas that year the company fired six pro-union engineers as it continued to appeal and delay the contract bargaining that should have been the immediate result of the election.

The PRO Act would fix these flaws and create a real deterrent by eliminating the reduction of back pay awards for interim earnings, providing for double back pay and permitting the award of civil penalties in an amount up to $50,000 against the employer and responsible owners and managers.

The bill also requires the NLRB to go into District Court to seek temporary reinstatement of a pro-union worker illegally fired during an organizing drive. This will eliminate the unequal treatment of unions and employers under existing law whereby the board is required to seek such relief against a union that merely engages in picketing of the wrong employer, but not against an employer who fires a union supporter.

Third, when you are elected in November, you take office in January. But when employees vote for a union, there is no set timetable, and often, the employer refuses to recognize its employees' chosen representative for years. That is like your opponent holding the seat after you win the election and continuing to occupy it throughout what should be your first term in office. How is that even possible? Again, flaws in current labor law permit this perverse outcome.

Today, when workers vote to be represented by a union, the NLRB certifies the election, but that certification is not enforceable and employers often disregard their employees' wishes and refuse to bargain with the union. The board is powerless to compel the

employer to recognize the union until the union files an unfair labor practice charge and the board finds the employer has violated the law. But even then, the board's order is not immediately enforceable. Rather, the board must proceed to a U.S. Court of Appeals to obtain an enforceable order to bargain.

This convoluted process can delay workers' democratically won first contract for years. And, at the end of it all, all the board is empowered to do is issue an order to bargain. Employees are not entitled to any form of compensation that would have resulted from bargaining had the employer recognized the results of the election in a timely manner—no back pay for lost wages and no compensation for lost pension contributions, for example.

Let me give you just one typical example. On Dec. 3 and 4, 2015, skilled trades workers at Volkswagen's factory in Chattanooga, Tennessee, voted to be represented by the UAW. The vote was 108 to 44 with 95% turnout. The NLRB's regional director certified those results on Dec. 14, 2015. But because the employer exploited every avenue of delay open to it under existing law, appealing to the board, refusing to bargain in order to force the board to cite it for committing an unfair labor practice and appealing that citation to an appeals court, for three and a half years after the vote, the workers' chosen representative was not recognized, bargaining did not begin and the board was powerless to do anything about it. The UAW had now taken matters into its own hands and petitioned to represent all employees at the factory.

The PRO Act would fix this problem in a straightforward manner. When employees vote to be represented, the board would not simply certify the union as the representative but, at the same time, order the employer to bargain. That order would be enforceable by the board in a federal district court after 30 days. Under the bill, when employees vote to be represented, bargaining will commence within a matter of months, just as you took your office shortly after you were elected.

And the PRO Act would take one more sensible step toward preventing delay even before employees are permitted to vote. The act removes the employer as a party to the hearing that often precedes an election. That makes sense because the election is to determine who will represent the employees in negotiations with the employer. The employer should not be given standing to delay that election or shape the voting unit through the preelection hearing. That is like Canada trying to influence your election because it is involved in trade negotiations with the U.S.

Finally, when you are elected and sworn into office, you immediately assume the duties of a sitting member of Congress. In contrast, when employees vote to be represented by a union, overcoming the myriad of obstacles I have just described, the union can be prevented from engaging in the type of workplace governance envisioned by the authors of the NLRA. That is because in far too many cases the employer never enters into a collective bargaining agreement with the workers. In over 30% of successful elections, employees who have voted for representation never receive the benefit of a negotiated agreement covering wages, benefits and working conditions. Can you imagine if 30% of elected officials were never seated?

How can this happen? Again, the answer lies in the weakness of existing law. Under the current NLRA, if an employer engages in surface bargaining, dragging out the process

without a good faith effort to reach a first contract, the NLRB is powerless to provide a remedy. The board cannot order the employer to agree to any contract term. The board cannot award damages to workers for lost wages or other injuries suffered as a result of the employer's failure to bargain in good faith, even in the face of overwhelming evidence that the unlawful conduct caused the injury. All the board can do is order the employer to bargain in good faith—a toothless remedy that does nothing to change these behaviors and tactics.

The PRO Act addresses this flaw by guaranteeing that workers who vote for a union get a collective bargaining agreement. The bill provides that if the parties are not able to reach agreement after 90 days, the Federal Mediation and Conciliation Service will assist the parties to reach agreement. And if there is still no agreement after 30 days, FMCS will appoint a tripartite panel to arbitrate the dispute and arrive at a fair agreement.

The PRO Act also recognizes that employees need the freedom to picket or withhold our labor in order to push for the workplace changes we seek. The bill protects employees' right to strike by preventing employers from hiring permanent replacement workers. It also allows unrepresented employees to engage in collective action or class action lawsuits to enforce basic workplace rights, rather than being forced to arbitrate such claims alone. Finally, the bill would ensure that employees are not deprived of our right to a union because an employer deliberately misclassified us as supervisors or independent contractors.

The PRO Act would go a long way toward bringing U.S. labor law into compliance with international norms. The International Labor Organization has adopted eight conventions containing core labor standards. The U.S. has ratified only two, not including number 87 on Freedom of Association and Protection of the Right to Organize and number 98 on the Right to Organize and Collective Bargaining. Only five other ILO member states have ratified two or fewer core conventions.

In 2007, the U.S. Council for International Business reported that U.S. law had been found to "directly conflict with" five of the core conventions, including both 87 and 98, and was inconsistent with international norms in numerous respects, including failing to cover low-level supervisors, many public employees and other workers, permitting coercive employer interference with organizing and restricting the right to strike. The PRO Act addresses each of those deficiencies.

Our outdated labor laws are making us weaker at home and diminishing our standing in the world. In more cases than not, a free and fair process for forming a union simply does not exist in America today. That must change. And it starts with making the PRO Act the law of the land. Thank you very much.

Chairwoman WILSON. Thank you so much, Mr. Trumka.

We will now recognize Mr. Staus. Welcome.

STATEMENT OF JIM STAUS, PITTSBURGH, PA

Mr. STAUS. Madame Chair Wilson, Ranking Member Walberg, and members of the committee, thank you for the opportunity to testify today.

My name is Jim Staus. I am a part-time porter in Pittsburgh, Pennsylvania.

I am honored to speak with you today about the PRO Act. Seven years ago I started to organize a union at University of Pittsburgh Medical Center, or UPMC. I learned firsthand what workers face when they try to stand up for better wages and safer working conditions.

When I went to work at the UPMC in 2006, I thought that if I worked for the biggest employer in the city I would be able to provide for my family. If you ask my neighbors about good jobs, they say try to work at the hospital, they pay well. But I quickly learned that things at the hospital were not what I pictured. UPMC is a $19 billion global entity. I still started at $9.60 an hour. I was surprised that I was making so little, but I thought if I just worked hard things would change. So I went to work at 5 a.m. each day and gave my best.

My job was demanding. I had to carry 300 pounds of supplies per unit per shift. My job should have been performed with a power jack, but we had to use manual ones. We had no back braces either. I am not a doctor and I cannot prove that I got hurt from working without proper safety equipment. I can, however, tell you that I have had two knee replacement surgeries. I can also tell you that I could not make ends meet. I needed government assistance to put food on the table for my family the whole time. One particularly rough winter, our water was shut off, so my wife and I had to melt snow to be able to flush our toilets.

Still, I enjoyed my job. I liked helping people recover from illness and injuries. In 2012, UPMC workers began to talk about forming their union. I wanted in. In Pittsburgh, everyone knows the union turned dangerous, low-paying steel jobs into middle class jobs. If workers came together, I knew that I could make a better future for my wife, Cindy, and daughter, Hannah, my co-workers too.

But instead of respecting our rights to organize our hospital better, UPMC launched a fierce anti-union campaign. We were faced with threats and intimidation. One of the first scare tactics was holding a mandatory staff meeting to attack the union.

Management's harassment of me got worse when I wore a sticker saying "I am with Ron" to support Ron Oakes, who was illegally fired from UPMC for union organizing.

After that I became the prime target for management anti-union campaign. Management followed me around and threw out my pro-union literature. I was ostracized to the point where many co-workers were scared to talk to me about the union.

Then things came to a head. After years of having positive work evaluations, I was placed on a performance improvement plan. Soon after, in 2013, I was illegally fired, along with others who wanted the union. We fought the terminations.

In 2014 a judge from the National Labor Relations Board said UPMC has violated our rights and ordered them to put us back to work. In 2018 the NLRB told them again, but UPMC is still appealing my case.

Sadly, my story is not unique. Working people are supposed to have union rights, but we have to risk everything to exercise them. We need new laws like the PRO Act to hold companies accountable and to make it easier for people to join unions. We must stop them from using scare tactics, like captive audience meetings. We need real penalties so companies will think twice about illegally firing people, like Ron and myself. We need to force companies to make things right quickly when they break the law.

The Federal Government twice found UPMC wrongly fired me, but 6 years later I still haven't returned to work or seen a penny of back-pay. And everything I have earned since I was fired is deducted from what UPMC owes me. By trying to provide for my family at another job, I am working off UPMC's debt. That is not right.

I urge the members of this committee to support the PRO Act and help ensure what happened to me doesn't happen to anybody again.

Thank you.

[The statement of Mr. Staus follows:]

May 8, 2019

Testimony of Jim Staus, Former University of Pittsburgh Medical Center Employee, House Education and Labor Committee, Health, Employment, Labor and Pensions Subcommittee "The Protecting the Right to Organize Act: Deterring Unfair Labor Practices"

Madame Chair Wilson, Ranking Member Walberg and Members of the Committee, thank you for the opportunity to testify today. My name is Jim Staus. I am 57 years old. I am a part-time day porter and I live in Pittsburgh, Pennsylvania.

I am honored to speak with you about the "Protecting the Right to Organize Act" or the PRO Act.

Seven years ago I started to organize a union at UPMC. I learned firsthand about the trauma workers face when they try to stand up on the job for better wages, safer working conditions and a stronger voice.

When I went to work at the UMPC in 2006, I thought that if I worked for the most powerful and influential employer in my city, I would be able to provide for my family. If you ask people in my area about getting a good job, they say, "try to work at the hospital. They pay well and treat you right."

However, I quickly learned that things at the hospital were not what I pictured. UPMC is an $19 billion dollar global health company. It has 87,000 employees. It operates dozens of hospitals across Pennsylvania and overseas. It's the biggest private sector employer in my state.[1] Still I only made $9.60 an hour when I started as a supply technician.

I was surprised to learn that I would be making so little at first, but I thought that if I just worked hard at UPMC, I would advance. Things would change. So I went to work at 5 a.m. each day prepared to give my best to UPMC.

Being a supply technician is very hard physical work. I had to carry anywhere from 100 to 300 pounds of supplies per shift. My job should have been performed with a power lifting jack, but we used manual ones after the lift broke. We didn't have simple safety equipment like back braces either. I'm not a doctor so I can't prove that working at UPMC without proper safety equipment was harmful to me. I can, however, tell you that I've had two knee replacement surgeries.

I can also tell you that I could not make ends meet. I needed government assistance to put food on the table for my family the whole time I worked there. And UPMC kept charging me and my co-workers more and more for our health insurance and our co-pays. During my time at UPMC, I paid about $300 a month for my family's health insurance.

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[1] https://www.upmc.com/about/facts

One particularly rough winter, I couldn't afford to pay the water bill. Our water was shut off, so my wife and I had to melt snow to be able to flush our toilets.

Still I continued to give UPMC my best. I liked my job and I enjoyed the friendships I had with my coworkers. I knew I was helping people as they recovered from illnesses and injuries.

In 2012, I saw an opportunity to improve the job I loved. UPMC workers began to meet to talk about forming their union. I wanted in. In Pittsburgh, everyone knows that the way dangerous, low-paying steel jobs became middle class jobs was through the union. If workers came together, I knew that things could get better at the hospital too. I also knew being a part of a union could make a better future for my wife Cindy and my daughter Hannah and my coworkers too.

But instead of respecting our right to organize and make our hospital better, UPMC launched a fierce anti-union campaign with the assistance of a national union-busting law firm. The same employees who helped the hospital to heal patients and be profitable were now treated as the enemy.

As employees fighting for a union, we faced threats and intimidation. One of the first scare tactics that management used as we started organizing was holding a mandatory captive audience meeting to attack the union. This is when your boss takes you off your job to have a chat to make sure you know just how much it matters to them that you don't form the union. When the person who signs your paycheck makes this a mandatory conversation, it almost doesn't matter what actually comes out of their mouths. The meeting is the message.

Management's harassment of me intensified when I wore a sticker asking "Where's Ron?" to support one of my colleagues Ron Oakes who was the first worker illegally fired by UPMC for union organizing.

After that, I became the prime target for management's anti-union campaign. Management would follow me around the hospital and throw out pro-union literature that I shared with my coworkers. I was often a scapegoat and ostracized to the point where many coworkers were too scared to talk about the union with me.

And then things came to a head. After years of having only positive work evaluations, I was placed on a performance improvement plan. People I worked with were surprised to find out that I was on one of these plans but they knew it was because of my union activity.

Management's bullying continued until I was illegally fired in 2013. Other UPMC workers who wanted the union were also illegally fired. We fought our terminations and our cases were combined. In 2014, a judge from the National Labor Relations Board agreed that UPMC had violated our rights and ordered them to put us back to work. UPMC appealed, and in 2018 the NLRB again told UPMC that my firing was illegal and to put me back to work with backpay.

UPMC refused to comply with the NLRB's 2018 order and appealed to federal appeals court, where the case is currently pending.

My fight for a better life as part of a union has cost my family and me dearly. When the largest employer in the city fires you, even if they've fired you illegally, it's not easy to find work.

Sadly, my story isn't unique. Working people like me at UPMC and around the country are supposed to have union rights, but we have to risk everything to exercise them. And even when our employers violate our rights and are found guilty, they just appeal and delay.

The system is stacked against us.

Working people need new laws like the PRO Act to hold companies accountable and make it easier for people to join unions.

We need to stop companies from using scare tactics like ordering captive audience meetings to attack the union and people who support the union. If the PRO Act became law it would prohibit employers from forcing staff to attend these hostile meetings.

We also need real penalties so profitable companies will think twice about wrongfully firing people like Ron Oakes and me just for talking to our co-workers about having a voice on the job. Under current law there's no real incentive for employers not to willfully violate workers' rights. If the PRO Act were law, when a corporate giant like UPMC breaks the law, like they did when they fired me and my co-workers, they would be held accountable. They wouldn't feel comfortable to do it again to others because it would hurt their pockets.

And we need to force companies to make things right quickly when they break the law. Although the federal government twice found that UPMC wrongly fired me, six years later I still haven't returned to work at UPMC and I still haven't seen a penny of back-pay. In fact, under current law, everything I earn since I was fired is deducted from what UPMC owes me. By trying to provide for my family at another job, I am working off UPMC's debt.

That's not right.

If the PRO Act were law, this wouldn't have happened. The NLRB's orders would be self-enforcing and UPMC could be required to reinstate me and others they illegally fired while our cases are pending. I would have immediately gotten back to work and received my full back pay, and would not be penalized for my earnings at other jobs while I was unlawfully fired.

I urge the members of this Committee to support the PRO Act and to pass this bill.

Thank you and I look forward to your questions.

Chairwoman WILSON. Thank you, Mr. Staus.

We will now recognize Mr. Miscimarra.

Mr. MISCIMARRA. Thank you.

Chairwoman WILSON. You are welcome.

STATEMENT OF PHILIP A. MISCIMARRA J.D., PARTNER, MORGAN, LEWIS & BOCKIUS LLP

Mr. MISCIMARRA. Chairperson Wilson, Ranking Member Walberg, and Subcommittee members, thank you for the invitation to be here.

I am a partner in the law firm, Morgan Lewis & Bockius, but I had the privilege of serving as Chairman of the National Labor Relations Board, as board member and acting chairman from 2013 to December 2017. I might add, I served on the NLRB with my friend, Mark Pearce, who is seated here to my left. I am also a Senior Fellow in the Wharton Center for Human Resources at the University of Pennsylvania's Wharton School.

Everyone in Congress wants to do good when considering changes in our Federal labor laws. Based on four reasons, I think the changes proposed in H.R. 2474, though intended for good, would do significant harm.

First, this legislation disregards the remarkable work done by the NLRB, and especially its dedicated career professionals and staff members throughout the country. Parties can pursue and NLRB charge from start to finish without a lawyer. Also, nearly 20,000 unfair labor practice charges are filed annually and roughly 90 percent are completely resolved within three or 4 months and employees get near immediate relief in those cases. And in the 5 or 6 percent of cases that are not resolved at this early stage, the overwhelming majority of Board decisions are unanimous.

Here is my second point, the National Labor Relations Act carefully balances the competing interests of employees, employers, unions, and the public. H.R. 2474 would dramatically change this balance. For example, the bill would permit union strikes and boycotts targeting neutral parties, basically everybody who does business with the struck employer. These secondary boycotts have been unlawful for more than 70 years.

Another example, any struck employer would be prohibited from continuing operations using permanent replacements.

Employers but not unions would be barred from being parties in NLRB elections cases. In many cases the bill would eliminate the employee right to vote in NLRB elections, substituting mandatory union recognition with an election.

In many first contract negotiations the bill would eliminate the employee right to vote on contract ratification, substituting arbitrator-imposed terms for a 2-year period or more. The bill provides for two-track NLRB and court litigation over the same issues with expanded damages.

The bill would override state laws adopted in more than half the country that prevent employees from being forced to make mandatory union agency fee payments. And the bill would even redefine the terms "employer" and "employee."

My third reason for opposing this bill involves the role played by economic weapons.

Now, the NLRA was adopted during the Great Depression. It centers around a bargaining model where leverage is based on each side's potential infliction of economic injury on the other party. In a global economy this puts unions and employers in a relay race. And in the United States, unions have an incentive to use the baton to injure the employer instead of running the race against global competitors.

H.R. 2474 increases the intensity of the weapons while expanding the role played by conflict and economic injury. I think this moves U.S. labor policy in the wrong direction, especially when it comes to trade, jobs, and our place in the world economy.

Finally, as everyone knows, recent years have spawned dramatic advances in robotics, self-driving vehicles, artificial intelligence, and automation. Simply stated, this is the worst time in U.S. history, and probably the worst time in human history, to adopt a national labor policy that increases employment-related conflict costs and disruptions, which companies can and will avoid by using more fully automated systems. This bill, if enacted, will inevitably cause more investment in technology and less investment in people.

I will conclude with this, Congress produced a remarkable achievement in the National Labor Relations Act, which the Supreme Court said is not intended to serve any party's individual interest, but to foster in a neutral manner, a system in which conflict between these interests may be resolved.

H.R. 2474 departs from this neutrality, and I think it would disadvantage employees, employers, unions, and the public interest.

Thank you again, and I look forward to the Subcommittee's questions.

[The statement of Mr. Miscimarra follows:]

Statement of

Philip A. Miscimarra
Partner, Morgan Lewis & Bockius LLP
Senior Fellow, The Wharton School, University of Pennsylvania

before the

Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and Labor
United States House of Representatives

May 8, 2019

Doing Good and Doing No Harm:
Protecting U.S. Employees, Employers, Unions and the Public Interest in a Changing World

Chairperson Wilson, Ranking Member Walberg, and Subcommittee Members, thank you for your invitation to participate in this hearing. I am honored to appear before you today.[1]

I am a partner in the law firm, Morgan Lewis & Bockius LLP. However, I had the privilege of serving as Chairman of the National Labor Relations Board ("NLRB" or "Board"), in addition to serving as a Board Member and Acting Chairman. I was appointed to the Board by President Obama and most of my tenure at the NLRB (as a Board Member), commencing in August 2013, occurred during the Obama administration. My last year at the Board, which ended in December 2017, occurred during the Trump administration. I am also a Senior Fellow in the Wharton Center for Human Resources at the University of Pennsylvania's Wharton School, and (excluding my time at the NLRB), I have been affiliated with the Wharton Center for Human Resources and have been a labor lawyer in private practice representing management for more than 30 years.

Summary – Doing Good and Doing No Harm

Congress has a difficult set of responsibilities when overseeing U.S. labor and employment policy. Our main federal labor law – the National Labor Relations Act ("NLRA" or "Act"), also known as the Wagner Act[2] – is not perfect. But the statute has produced enormous benefits for millions of Americans, including employees, unions, employers and the U.S. economy, for more than 80 years.

Everyone in Congress – and everyone on this Subcommittee – wants to do good when considering changes in our federal labor laws, which means keeping what works and changing what can be improved. However, as an NLRB Member, I wrote that "when changing existing

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[1] My testimony today reflects my own views, which should not be attributed to Morgan Lewis & Bockius LLP, The Wharton School, the University of Pennsylvania, or the National Labor Relations Board. I am grateful to Lauren M. Emery, Alex D. Perilstein and Richard Marks for their assistance.

[2] 49 Stat. 449 (1935), 29 U.S.C. §§ 151 *et seq.* The NLRA is often called the Wagner Act because its principal sponsor in the Senate when the NLRA was first adopted in 1935 was Senator Robert F. Wagner (Dem-NY).

law," one should "first endeavor to *do no harm*: we should be vigilant to avoid doing violence to undisputed, decades-old principles that are clear, widely understood, and easy to apply."[3]

Congress writes on a broader canvas than the NLRB, and it is the duty of Congress to evaluate potential changes in our federal labor laws. However, in my opinion, the changes proposed in H.R. 2474, the Protecting the Right to Organize Act ("PRO Act") – though intended for good – will operate in practice to do significant harm. I maintain this view based on four considerations:

First, the PRO Act disregards many ways in which enforcement of the National Labor Relations Act has been substantially more effective than other labor and employment laws.

Second, the PRO Act does not adequately consider the competing interests of employees, employers, unions and the public, which have been carefully balanced by Congress for important reasons in the past 80-plus years.

Third, the biggest problem with the PRO Act is the expansion of economic weapons and economic injury, which have been the engine driving collective bargaining under the NLRA. Increasing the scope of these economic weapons, and making them more destructive, will have a destabilizing impact on U.S. employees, employers, the general public, *and* unions. This is especially true in the global economy that exists today, which was unimaginable when the NLRA was enacted in the 1930s during the Great Depression.

Fourth, the PRO Act does not recognize the significant risks to U.S. employment that are already posed by automation, artificial intelligence and other dramatic advances in technology. Inevitably, the PRO Act's expansion of employment-related costs and conflict will magnify increased investments of every business in new technology rather than people. For this reason, the PRO Act will not enhance employment policy. To the contrary, it will place U.S. employees at a more severe disadvantage, in comparison to new technology, with the greatest negative impact on many of the most vulnerable employees, including minority members, employees in manufacturing, and high school graduates who lack college degrees, among others. This will produce additional spillover negative consequences on families, communities, state and local governments, and the unions who hope to benefit from this legislation.

I will briefly address each of these topics in order.

1. <u>What the NLRA Does Well (and Could Do Better)</u>

The NLRA has benefited millions of employees, unions and employers – and the public interest in a robust U.S. economy – throughout the statute's 83-year history. And the Act's

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[3] *Purple Communications, Inc.*, 361 NLRB 1050, 1067 (2014) (Member Miscimarra, dissenting). The phrase "do no harm" is commonly attributed to the Hippocratic Oath in medicine, which includes a pledge "to abstain from doing harm," but a closer approximation of the phrase appeared in Hippocratic corpus, "Of the Epidemics" (Book I, section 11, 5), which states: "The physician must ... have two special objects in view with regard to disease, namely, to do good or to do no harm." A more common interpretation of the phrase is that "'given an existing problem, it may be better not to do something, or even to do nothing, than to risk causing more harm than good." Wikipedia, "Primum non nocere" (available at https://en.wikipedia.org/wiki/Primum_non_nocere).

benefits remain ongoing. The PRO Act does not acknowledge the many ways in which the NLRA and its enforcement have been remarkably effective, based on the hard work of the Agency's dedicated attorneys, field examiners, Regional Directors, judges and other Agency professionals and staff members:

- Parties can pursue an NLRB charge from start to finish without any need for an attorney or legal representation, which differs from most other federal and state employment-related statutes.
- During each of the past several years, approximately 20,000 unfair labor practice charges have been filed with the NLRB, and as noted below, roughly 95 percent of these cases are resolved within 3-4 months – with relief being provided in cases involving probable violations.
- In most cases, the up-front investigation takes 90-120 days, resulting in a finding that roughly 60 percent of the cases lack merit (resulting in dismissal or withdrawal of the charge, which represents the end of the case, without any further proceedings or appeals); and with a finding that 40 percent of the cases have probable merit.
- In the cases found to have probable merit, the NLRB's Regional Office successfully works out settlements in roughly 90 percent of the cases, usually in the same 90-120 day timeframe, which represents the end of the case – including Board-required remedies – without any further proceedings or appeals. *In the fiscal year ending September 30, 2018, the Board successfully settled 97.5 percent of the unfair labor practice cases found to have probable merit.*
- In total, the Board successfully accomplishes a final, binding resolution of *roughly 95 percent* of all unfair labor practice charges *after an up-front investigation that usually occurs within 90-120 days after the charge is filed.*
- In the roughly 5 percent of unfair labor practice cases that are not resolved, the Board's General Counsel issues a complaint, which marks the commencement of more formal NLRB litigation which culminates in a decision by the NLRB (if exceptions are filed from the interim decision rendered by an Administrative Law Judge). In recent years, the Board has consistently decided the overwhelming majority of cases in unanimous decisions. *In the Board's fiscal year ending September 30, 2018, roughly 85 percent of the Board's decisions were unanimous.*

I have always agreed that the NLRA affords important rights and imposes important obligations that must be respected by employees, employers and unions alike. Although the PRO Act rests on a central premise that existing protection is inadequate, it is important to recognize that the violators of the NLRA – under existing law – face a broad array of penalties, possibly including civil and criminal contempt. The Board recognized this in *Pacific Beach Hotel*,[4] in which I stated:

> The National Labor Relations Act provides that, if the Board finds that any party "has engaged in or is engaging in any such unfair labor practice," the Board shall devise

[4] 361 NLRB 709 (2014).

> an order "requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act." Not only can the Board devise remedies consistent with its authority under the Act, the Board has the authority in appropriate cases to seek interim injunctive relief under Section 10(j). Moreover, the Board's orders are subject to enforcement in the courts. When any party violates a court's enforcement of an NLRB order, that violation is subject to potential civil and criminal contempt proceedings and penalties, including potential fines and imprisonment.[5]

In *Pacific Beach Hotel*, the five-member Board unanimously imposed the standard remedies of reinstatement, backpay and benefits (including compensation for any adverse tax consequences associated with the Board-ordered backpay and benefits), the rescission of unlawful unilateral changes, bargaining over such changes, a cease-and-desist order, and the posting of a remedial notice. The Board also required the employer to do the following:

- reimbursement of the union's bargaining expenses that resulted from the employer's recurring bargaining-related misconduct;
- mailing to all employees a Board-required "Explanation of Rights" particularized to the types of violations presented in the case, and a copy of the Board's remedial order;
- publication of the Board-required "Explanation of Rights" in local newspapers or other publications twice a week for a period of 8 weeks;
- required reading of the Board's remedial order and the "Explanation of Rights" to employees by a management representative in the presence of a Board agent and a union representative;
- union access to the premises consistent with applicable contract provisions and/or past practice; and
- Board access for the purpose of inspecting and confirming compliance with the Board-ordered remedies.[6]

In addition to the Board's standard remedies, and those described above (including remedial orders, reinstatement, backpay, and interim injunctions), the Board has the authority – which it has often exercised – to require immediate union recognition and bargaining without an election, which is commonly called a "Gissel bargaining order," when employers have committed unfair labor practices that preclude the holding of a fair election. *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

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[5] *Id.* at 274 (Member Miscimarra, concurring in part and dissenting in part).

[6] *Id.* at 720-23. In *Pacific Beach*, I agreed with all of these remedies, given the facts presented in that case. *Id.* at 723-24 (Member Miscimarra, concurring in part and dissenting in part). However, I dissented in relation to two issues: Board-ordered reimbursement for attorneys' fees; and the majority's suggestion that Board-ordered front pay might be considered appropriate in future similar cases. *Id.*

2. Competing Interests of Employees, Employers, Unions and the Public

Federal labor law has always involved controversy,[7] including significant disagreements between employees, employers and unions. Former NLRB Chairman John Fanning served on the NLRB for nearly 25 years and stated:

> Labor relations has always been a field that arouses strong emotions – sometimes more emotion than reason. . . . As someone who has participated in some 25,000 decisions of the Board, I can assure you that the *one factor every case has in common . . . is the presence of at least two people who see things completely different.*[8]

Based on the importance of employment-related issues, the NLRA reflects fundamental choices by Congress in the careful balancing of interests between employers, unions, employees, and the public.[9] The NLRA was adopted in 1935 after 18 months of work by the House and Senate. Important NLRA amendments were adopted in 1947 as part of the Labor Management Relations Act (the Taft-Hartley Act).[10] The Act was also substantially amended in 1959 as part

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[7] Ironically, even *before* the NLRA's enactment, Senator Wagner was among the first legislators in Congress to comment critically about the NLRB, which was created pursuant to a joint resolution (Public Resolution 44), and Senator Wagner's criticisms focused on the pre-Wagner Act NLRB's deficiencies under then-existing law. Regarding the pre-Wagner Act NLRB, Senator Wagner stated:

> The Board . . . was handicapped from the beginning, and it is gradually but surely losing its effectiveness, because of the practical inability to enforce its decisions. . . . [T]he Board may refer a case to the Department of Justice. But since the Board has no power to subpena [sic] records or witnesses, its hearings are largely *ex parte* and its records so infirm that the Department of Justice is usually unable to act.

79 Cong. Rec. 2371 (Feb. 21, 1935), *reprinted in* 1 NLRA Hist. 1311-12 (Senator Wagner's statement regarding National Labor Relations Bill).

The NLRB was created pursuant to Public Resolution 44, which was adopted by the 73d Congress in 1934, after it became clear the broader Wagner Act legislation would require further consideration (by the 74th Congress) in 1935. *See* Pub. Res. 44 (H.R.J. Res. 375), 73d Cong. (1934, as passed and signed by the President), captioned "To effectuate further the policy of the National Industrial Recovery Act" ("NIRA"), which authorized the President "to establish a board or boards authorized and directed to investigate issues, facts, practices, or activities of employers or employees arising under NIRA section 7a" and which would be "empowered . . . to order and conduct an election by a secret ballot of any of the employees of any employer, to determine by what person or persons or organization they desire to be represented. . . ." *Id.* §§ 1, 2. *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 (hereinafter "NLRA Hist.") at 1255B (1949). *See also* 78 Cong. Rec. 12016-17 (June 16, 1934), *reprinted in* 1 NLRA Hist. 1177-79 (explanation by Senator Robinson of purpose underlying joint resolution).

[8] Fanning, John. "The National Labor Relations Act: Its Past and Its Future," in William Dolson and Kent Lollis, eds., FIRST ANNUAL LABOR AND EMPLOYMENT LAW INSTITUTE 59-70 (1954) (emphasis added), *quoted in* Matthew M. Bodah, *Congress and the National Labor Relations Board: A Review of the Recent Past*, 22 J. Lab. Res. 699, 713 (Fall 2001) (hereinafter "Bodah, *Congress and the NLRB*"). Former Chairman Fanning became a Board member on December 20, 1957 and remained on the Board until December 16, 1982. *See* http://www.nlrb.gov/who-we-are/board/board-members-1935.

[9] The Act's central provision dealing with protected rights is Section 7, 29 U.S.C. § 157, which protects the right of employees "to bargain collectively through representatives of their own choosing . . . and to refrain from any or all of such activities," except as affected by union security agreements in states that do not prohibit such agreements. *Cf.* NLRA § 14(b), 29 U.S.C. § 164(b) (permitting state right-to-work laws prohibiting union security agreements).

[10] 61 Stat. 136 (1947), 29 U.S.C. §§ 141 *et seq.*

of the Labor Management Reporting and Disclosure Act (the Landrum-Griffin Act).[11] And in 1974 the Act was amended based on the Health Care Amendments to the National Labor Relations Act.[12]

Balancing the interests of employees, employers, unions and the public is the province of Congress. The Supreme Court has stated the National Labor Relations Board (NLRB or Board) is *not* vested with "general authority to define national labor policy by balancing the competing interests of labor and management."[13]

Stability has also been a central consideration throughout the history of the NLRA. The Supreme Court has stated: "To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act. . . ."[14] Stability in our labor laws is important for employees, employers and unions alike. To this effect, for example, the Supreme Court has held management "must have some degree of certainty beforehand . . . without fear of later evaluations labeling its conduct an unfair labor practice," and a union must likewise have certainty regarding "the limits of its prerogatives, whether and when it could use its economic powers to try to alter an employer's decision" and "whether, in doing so, it would trigger sanctions from the Board."[15]

The PRO Act would impose an array of changes that, in numerous respects, would dramatically change the balancing of competing interests that has been carefully constructed by Congress in the course of more than eight decades:

- *More Widespread Strikes, Picketing and Boycotts.* The bill would protect debilitating "intermittent" strikes (prohibited under current law) and would extend lawful strikes, boycotts and picketing beyond the primary employer involved in a particular dispute, and permit unions – for the first time in 70 years – to cause picketing, boycotts and strikes to all "neutral" employers in the U.S. (and their employees) that have nothing to do with the dispute except that the "neutral" employers happen to do business with the primary employer. This would eliminate careful "secondary boycott" protections adopted by Congress in 1947 (after a large number of post-World War II strikes had a significant adverse impact on the economy) and strengthened by Congress in 1959 (after neutral parties were subjected to additional types of "secondary" boycotts that were not covered by the 1947 amendments).

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[11] 73 Stat. 541 (1959), 29 U.S.C. §§ 401 *et seq.*

[12] 88 Stat. 395 (1974).

[13] *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965). The Supreme Court has held that, concerning "a judgment as to the proper balance to be struck between conflicting interests, 'the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'" *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965) ("Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute").

[14] *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362-63 (1949). *See also NLRB v. Appleton Elec. Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (a "basic policy of the Act [is] to achieve stability of labor relations").

[15] *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 678-79, 685-86 (1981).

- *Eliminating Potential Permanent Replacements.* The bill would not only expand the scope of lawful strikes, boycotts and picketing, it will eliminate the right of employers to hire permanent replacements. Although the right to hire permanent replacements is rarely exercised and is subject to significant limitations under current law, completely eliminating this right dramatically changes the careful balancing of competing interests that currently exists, and will predictably increase the frequency and length of strikes, boycotts and picketing.

- *Excluding Employers from Union Election Cases.* The bill will eliminate the right of employers to participate as a "party" in Board proceedings when a union seeks to represent employees. This means only the union would have "party" status, even though representation cases require determinations about whether a particular unit is "appropriate," whether particular individuals are "supervisors" (who, as a matter of law, must be excluded from the unit), and what individuals are eligible to vote. As to these important issues, the employer is the party most familiar with these important issues, which makes it counterproductive for Congress to remove the employer from participation in these cases.

- *Eliminating Protected Employer Speech.* The bill would eliminate the right of employers, which is affirmatively protected under current law, to express opinions and provide other information to employees in the workplace regarding union representation issues, and it disregards the protection that current law affords to employees against unlawful interference with protected right and unlawful retaliation based on union activities.

- *Eliminating More Employee Elections on Union Representation.* The bill would require bargaining orders in all cases – effectively denying employees the right to vote in an NLRB-conducted election – where employer conduct is considered to have interfered with the election, which would eliminate the balancing of competing interests reflected in existing case law that permits bargaining orders only in extreme cases.

- *Eliminating Employee Ratification Votes.* The bill would impose inflexible deadlines when employers and unions engage in bargaining for initial contracts, potentially resulting in imposed contract terms – that would be binding for two years or more – without a mutual agreement between the parties, and without any employee right to vote on ratification.

- *Two-Track NLRB and Court Litigation, with Expanded Damages.* The bill would create an employee private right to pursue a separate "civil action" in federal district court, after 60 days following the filing of unfair labor practice charges, unless the Board has initiated its own injunction proceedings in federal court, with an expansion of damages available from the NLRB, the court, or both.

- *Re-Defining the Terms "Employer" and "Employee."* The bill would adopt expansive definitions of "joint employer" and "employee" status, and more narrowly define "independent contractor" status, notwithstanding current joint employer

rulemaking by the NLRB, and contrary to Board and court decisions involving employee and independent contractor status.[16]

- *Eliminating Union Liability for Unlawful Secondary Strikes.* The bill would repeal Section 303 of the Labor Management Relations Act, which makes unions liable to employers in federal court actions involving damages resulting from unlawful secondary strikes, boycotts and picketing.

- *Overturning* Epic Systems *and State Right-to-Work Laws.* The bill would overturn the Supreme Court decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), which held that the NLRA did not prohibit employee-employer agreements regarding the resolution of legal claims on an individual rather than class action basis, and the bill would repeal NLRA Section 14(b), pursuant to which more than half of the states have enacted right-to-work laws against union security arrangements that condition employment on the payment of mandatory union dues or agency fees.

- *Other Changes.* The bill would make significant other modifications in current law, increasing the damages at issue in many types of NLRB cases, preventing any changes in significant aspects of the NLRB's 2014 Election Rule, requiring the seeking of injunctions in all cases involving disputed allegations of antiunion discrimination or unlawful interference with protected rights (already sought by the Board under current law on a discretionary basis),[17] and more.

The mere recitation of these changes makes clear that the PRO Act does not involve anything that resembles the "delicate task" of "weighing the interests of employees in concerted activity" and "the interest of the employer in operating his business in a particular manner" or "balancing" such interests "in the light of the Act and its policy." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963). In this respect, the PRO Act departs from the careful work previously done by Congress that has accomplished an even-handed balancing of the interests of employees, employers, unions and the public.

3. Increased Costs and Conflict – In a Global Economy – Disadvantage U.S. Employees, Employers, Unions and the Public Interest

The NLRA centers around economic injuries – potential strikes and lockouts – which have been the primary ingredient in collective bargaining in the United States for more than eighty years. However, this model was adopted when there was a national economy, and the Act still centers around a bargaining model where each side's leverage largely stems from economic damage it may inflict on the other party.[18]

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[16] See, e.g., 83 Fed. Reg. 46681 (2018) (Notice of Proposed Rulemaking regarding joint employer standards); *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019); *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009).

[17] *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

[18] *See NLRB v. Insur. Agents' Int'l Union*, 361 U.S. 477, 489 (1960), where the Supreme Court referred to the bargaining contemplated by the Act, and observed that the parties "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . The presence of economic weapons in reserve, and their

In a global economy, this places unions and companies in a relay race, and all too often in the United States, existing law creates an incentive for the union to use the baton to injure or maim the employer, instead of running the race against fierce global competition. Companies and employees suffer greatly from this type of conflict, especially small businesses.

I am a proponent of collective bargaining, and it is to the credit of companies and unions that – throughout the past 80 years and continuing at present – there are many instances of successful agreements and collaboration between employers, unions, and employees on an array of complex issues. And since the 1930s, all kinds of employers in the United States have flourished, as have many unions and millions of employees, both represented and unrepresented.

Yet, it is also undeniable that labor-management conflict under the NLRA has, at times, imposed real costs on employers, unions, employees, and others. The Taft-Hartley amendments resulted in large part from labor-management strife that occurred in the aftermath of World War II (during which there had been stringent wage-price controls).[19] Commentators have also written that collectively bargained gains—though conferring important benefits—have involved tradeoffs causing or contributing to layoffs, shutdowns, and the decline of certain employers and industries.[20]

The PRO Act dramatically increases the scope and intensity of the economic weapons available under the NLRA, while retaining the central role played by economic injury – the cornerstone of the NLRA – which was developed when nothing resembled the current global economy. As noted above, the PRO Act would increase the scope and magnitude of strikes, picketing and boycotts, it would eliminate the ability of employers to continue operations using permanent replacements, it would curtail the right of employers to participate as parties in union election cases, it would produce legally-imposed contract terms for up to two years after a short period of initial contract negotiations, it would foster two-track NLRB and court litigation with expanded damages, and it would require more multiple-entity bargaining based on "joint employer" status, among other things.

These changes will invariably create greater conflict – with more uncertainty, increased litigation, and substantially higher costs – in connection with employment in the United States. In our global economy, I believe this would move U.S. labor policy in the wrong direction, which would operate to the detriment of employees, employers, unions and the U.S. economy.

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actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."

[19] Jack Barbash, *Unions and Rights in the Space Age, in* The U.S. Department of Labor Bicentennial History of the American Worker 248 (Richard B. Morris ed., 1976), *available at* http://www.dol.gov/oasam/programs/history/chapter6.htm.

[20] Management and union representatives agree to collectively bargained contract terms, so one cannot easily suggest that one side bears sole responsibility for the consequences of labor negotiations. Long-term trends, however, are clearly influenced by the legal framework that governs collective bargaining, including the economic weapons available to the parties, among other factors. For two interesting accounts regarding the impact of collective bargaining on very different industries, see John Helyar, *The Lords of the Realm: The Real History of Baseball* (1994); John Hoerr, *And the Wolf Finally Came: The Decline of the American Steel Industry* (1988).

4. Increased Employment-Related Costs and Conflict Will Adversely Affect U.S. Employees and Employment, Based on Changing Technology and Automation

It is no secret that recent years have spawned dramatic advances in robotics, self-driving vehicles, artificial intelligence and other types of automation and technological changes. These advances have already affected many workplaces, and further changes in technology are likely to occur more rapidly, with a broad-based impact on many types of employment, the manner in which work is performed, and many existing types of work are likely to cease entirely.[21]

This past January, I participated in a Congress on Artificial Technology at MIT, and participated on a panel moderated by Denis McDonough (former White House Chief of Staff to President Obama) addressing the impact of changing technology on various types of employment, especially in manufacturing.[22] I noted that the impact of technological change at work has been a significant focus in labor law decisions through the NLRA's history, but policymakers – and the NLRB and the courts – have significantly lagged behind in their efforts to deal with these issues.

The U.S. economy has been remarkably resilient in its capacity to address evolving jobs and a changing workplace. Nonetheless, there are real concerns about the risk that automation and technological advances may cause widespread dislocation affecting many professions and occupations. Illustrative of these concerns are the following observations from one study dealing with the potential adverse impact of changing technology on employment:

> Our model predicts that *most workers in transportation and logistics occupations*, together with the *bulk of office and administrative support workers*, and *labour in production occupations, are at risk*. These findings are consistent with recent technological developments documented in the literature. More surprisingly, we find that *a substantial share of employment in service occupations, where most US job growth has occurred over the past decades . . . are highly susceptible to computerisation*. Additional support for this finding is provided by the recent growth in the market for service robots . . . and the gradually

[21] *See, e.g.*, Carl Benedict Frey and Michael A. Osborne, "The future of employment: How susceptible are jobs to computerization?" *Technological Forecasting & Social Change* 114 (2017): 254-80 (estimating 47% of US jobs at risk of being lost to computerization); Q.-C. Pham, R. Madhavan, L. Righetti, W. Smart, and R. Chatila, "The Impact of Robotics and Automation on Working Conditions and Employment," IEEE Robotics and Automation Magazine (June 2018): 126-28; Laura Schultz, "The Impact of Artificial Intelligence on the Labor Force in New York State," Nelson A. Rockefeller Institute of Government (November 13, 2018) (https://rockinst.org/blog/the-impact-of-artificial-intelligence-on-the-labor-force-in-new-york-state/#_ftnref1); Darrell M. West, "Will robots and AI take your job? The economic and political consequences of automation," *The Brookings Institution*, (April 18, 2018) (https://www.brookings.edu/blog/techtank/2018/04/18/will-robots-and-ai-take-your-job-the-economic-and-political-consequences-of-automation/); Annie Nova & John W. Schoen, "Automation threatening 25% of jobs in the US, especially the 'boring and repetitive' ones: Brookings study," *CNBC*, (January 25, 2019) (https://www.cnbc.com/2019/01/25/these-workers-face-the-highest-risk-of-losing-their-jobs-to-automation.html); Subhash Kak, "Will robots take your job? Humans ignore the coming AI revolution at their peril," *NBC News* (February 7, 2018) (https://www.nbcnews.com/think/opinion/will-robots-take-your-job-humans-ignore-coming-ai-revolution-ncna845366); Danielle Paquette, "Robots could replace nearly a third of the U.S. workforce by 2030," *Washington Post* (November 30, 2017); Derek Thompson, "A World Without Work," *The Atlantic* (July/August, 2015); David Rotman "How Technology Is Destroying Jobs," *MIT Technology Review*, (July/August 2013).

[22] See MIT, AI Policy Congress (https://internetpolicy.mit.edu/seminars-events/ai-policy-2019/).

> diminishment of the comparative advantage of human labour in tasks involving mobility and dexterity. . . .[23]

The prospect of ongoing dramatic technological changes creates a greater need than has ever previously existed for policymakers to focus on ways to increase the efficiency and decrease the costs associated with employment regulation in the U.S.[24]

When it comes to increasing the efficiency and decreasing costs associated with the process by which employment policy is administered, our current system of U.S. employment regulation – for all of its merits – has room for improvement. Most conspicuous in the U.S. is the proliferation of different federal, state and local employment-related laws and regulations. It is difficult to discern a national employment policy from the current array of requirements, which places U.S. employers, employees and unions at a disadvantage in comparison their counterparts in other countries. In the U.S., employment laws vary widely from state to state, and which are enforced in hundreds of different agencies, courts and tribunals. Even on the federal level, some issues are addressed by the NLRB, other issues handled by the Equal Employment Opportunity Commission ("EEOC"), additional issues are regulated by the U.S. Department of Labor ("DOL"), and other agencies deal with particular industries (e.g., the National Mediation Board, which regulates airline and railroad labor-management relations) or government employees (e.g., the Federal Labor Relations Authority, which regulates federal government labor-management relations). Many types of federal protection (e.g,. afforded by Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and others) are typically addressed in federal court litigation. Additional types of employment-related protection or employment-related obligations are addressed in many different ways by an even larger assortment of state and local agencies and courts throughout the United States. It is also true, to state the obvious, that employees, unions and employers in the U.S. have nothing that resembles a one-stop shop regarding employment law and policy.

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[23] Carl Benedict Frey and Michael A. Osborne, "The future of employment: How susceptible are jobs to computerization?" *Technological Forecasting & Social Change* 114 (2017).

[24] One scholar has observed that increased employment regulation effectively increases the costs associated with the employment of human labor, as follows:

> It is crucial to recognize . . . that *the existing law of work adds to the costs of employing human labor, and that new and improved worker benefits and higher labor standards would further increase those costs.* As such, the law of work contributes both to firms' flight from direct employment through fissuring and to their substitution of machines for human workers. In response to fissuring, many scholars and advocates seek to shore up what I call the "fortress of employment" by extending firms' legal responsibility for workers in their supply chain, in most cases by expanding the definitions of "employee" and "employer." *But automation confounds that strategy by offering firms a more complete exit from the costs, risks, and hassles associated with human labor.* Extending firms' responsibility for workers in their supply chain not only fails to meet the challenge of automation; it also modestly exacerbates that challenge by raising the cost of human labor versus machines. *As technology becomes an increasingly capable and cost-effective competitor to human workers, it may doom the prevailing strategy of shoring up the fortress of employment.*

Cynthia Estlund, "What Should We Do After Work? Automation and Employment Law," 128 Yale L. J. 254, 262 (2018) (emphasis added; footnote omitted).

The PRO Act moves the existing patchwork system of employment-related protection in the wrong direction. As indicated previously, it will increase the scope of NLRA coverage, it will substantially expand the economic weapons available under the NLRA, and it will diminish the rights of employees to decide questions regarding union representation and collective bargaining.

The PRO Act's expansion of employment-related costs and conflict will inevitably increase investment in new technology rather than people. Rather than enhancing employment policy, this will have a significant adverse impact on employment and employees, with spillover negative consequences for families, communities, and unions alike.

Conclusion

More than 80 years of careful work by Congress produced a remarkable achievement in the National Labor Relations Act. As recognized by the Supreme Court, the NLRA "is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved."[25] Here as well, I must recognize the hard work done and important contributions made by the National Labor Relations Board, the Board's General Counsel, and especially the career professionals and other staff members at the Agency – in Washington DC and throughout the country – who work so hard in their public service.

I believe H.R. 2474 significantly detracts from this long history of fostering neutrality and balance in our federal labor laws. Moreover, I believe this legislation – if it were adopted – would significantly disadvantage employees, employers, unions and the public, who depend on Congress – and the other branches of government – not only to protect important rights and but also to be guardians of a robust national economy.

The NLRA is not perfect, and two improvements – much more limited than the PRO Act – could enhance the NLRA's protection.

First, the NLRB has had great difficulty resolving more quickly the relatively small percentage of unfair labor practice cases that end up being decided by the Board in Washington DC. During my tenure, I was part of an internal task force – in which Board Member Lauren McFerran participated, and supported by then-Chairman Mark Pearce – addressing ways to increase the speed with which Board cases get decided.[26] These efforts are continuing, and the

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[25] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680-681 (1981). *See also NLRB v. Great Dane Trailers, Inc.*, 388 U.S. at 33–34 (referring to the Board's "duty to strike the proper balance" regarding employer interests and "employee rights in light of the Act and its policy").

[26] The NLRB adopted an election rule in 2014 that significantly changed the Board's procedures governing union representation elections, which had the effect of accelerating the speed with which union elections take place. *See* 79 Fed. Reg. 74308 (2014); Hassan A. Kanu, "Labor Board Rule to Speed Up Union Elections Shows mixed Results," BNA Bloomberg, May 3, 2017 (reporting that, after the Board's 2014 Election Rule took effect in 2015, the average time between petition-filing to an election dropped from 39 days, prior to the Rule's implementation, to 24 days in 2015-2016 and 2016-2017, with unions winning approximately 66 percent of the elections before and after the Rule took effect) (available at https://www.bna.com/labor-board-rule-n57982087458/).

current Board's strategic plan would accomplish a four-year 20 percent reduction in case-processing time associated with unfair labor practice cases.[27] This effort will greatly benefit employees, employers and unions throughout the country, without any amendments to the NLRA, and I hope it will be fully supported by Congress.

Second, other legislation is pending that relates to the respective rights of employees, employers and unions under our federal labor laws, including the Secret Ballot Protection Act (providing for secret ballot elections by which employee sentiments regarding union representation are kept private, similar to current NLRB practice), and the National Right to Work Act (providing for the curtailment of mandatory agency fee payments, which would extend to private sector employees the Supreme Court decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018)). These legislative initiatives are substantially more limited than the radical changes incorporated into the PRO Act, and would provide greater choice to employees in connection with matters pertaining to union representation and collective bargaining.

This concludes my prepared testimony. I have provided an extended version of my remarks for the record. I look forward to any questions members of the Subcommittee may have.

PHILIP A. MISCIMARRA

[5/8/2019]

In separate dissenting views set forth in the Election Rule, I expressed my support (joined by former Board Member Harry I. Johnson III) for having elections occur after a minimum period between 30 and 35 days after petition-filing, with changes to the Board's internal case-handling procedures so that nearly all election issues would be resolved more quickly. *See* 79 Fed. Reg. at 74458-59 (dissenting views of Members Miscimarra and Johnson).

[27] NLRB Office of Public Affairs, "NLRB Issues Strategic Plan for FY 2019 to FY 2022" (Dec. 7, 2018) (available at https://www.nlrb.gov/news-outreach/news-story/nlrb-issues-strategic-plan-fy-2019-fy-2022). Along these lines, the Board's General Counsel Peter B. Robb issued a memo that would likewise reduce case-processing time in the Board's Regional Offices. See GC Mem. 19-02 (Dec. 7, 2018) (available at file:///C:/Users/MP015920/Downloads/GC%2019_02%20Reducing%20Case%20Processing%20Time.pdf.pdf).

Chairwoman WILSON. Thank you. Thank you very much.

We will now recognize Mr. Pearce. Welcome.

STATEMENT OF MARK GASTON PEARCE J.D., EXECUTIVE DIRECTOR AND DISTINGUISHED LECTURER, GEORGETOWN UNIVERSITY LAW CENTER'S WORKERS' RIGHTS INSTITUTE

Mr. PEARCE. Thank you, Chairperson Wilson, thank you Ranking Member Walberg.

I really appreciate the opportunity to speak here today. This is a special privilege for me because I spent half of my 40 year career working with the National Labor Relations Board, first as a lawyer, then ultimately as a Board member and as a chairman.

The Nation Labor Relations Board is the agency charged with enforcing the foremost labor law in the country, the National Labor Relations Act. It has, however, been hampered in effectively enforcing the Act because of its remedies failing to deter unlawful conduct. That is why the statutory change is needed, to update the law to reflect today's workplace.

Compare Congress with an auto plant charged with producing legislation to protect working people in this country. The NLRA would be described as a heavy duty vehicle with major design flaws, an underpowered engine, and only three wheels.

I would like to highlight four main shortcomings of the law as it exists today: inadequate remedies for violations, procedural obstacles to relief, insufficient protections during the bargaining process, unfair remedies in cases involving undocumented workers.

With regard to inadequate remedies, Section 10(c) of the National Labor Relations Act limits remedies to a cease-and-desist order; in the event of an unlawful firing, reinstatement with back pay; along with a required notice posting. That has been, in effect, a slap on the wrist.

By contract, other worker protections statutes, like Title VII of the Civil Rights Act and the Fair Labor Standards Act, provide compensatory damages, liquidated damages, and sometimes punitive damages. These people have been harmed, they have been damaged. They don't have to have a requirement that requires them, as this worker just testified, to pay back the debts of the wrongdoer in order to be entitled to compensation.

Limitations in the current statutory scheme make it economically rational for employers to violate the Act. An example being a case that is cited by both me and my colleague, Mr. Miscimarra, Pacific Beach Hotel, which is detailed in my written statement. That is a case where for the span of 10 years the employer blatantly violated the National Labor Relations Act, and each time when the Board went back they would have to go into court to enforce the orders. Each time, the parties had to pony up big legal expenses in order to get that done. Each time, employees were told that they would get recompensed and that the unilateral changes that were being created will be rectified. And each time the employer violated it. For 10 years. The question becomes what does an employee think of an Act when for 10 years they are being abused by an employer and there is nothing in the Act to stop it from happening?

Procedural obstacles to relief have been significant. When workers filed charges with the NLRB, they are often left to work for a

significant period of time. And in many instances, as the Chairperson eloquently said, justice delayed is justice denied. By the time a case worked its way through the NLRB process, its litigation in Federal court, several years may have lapsed. For this reason, only one-third of those people entitled to reinstatement accept reinstatement. The PRO Act would help address the problems of delay by authorizing the Board to seek injunctions in Federal district court.

Strengthening the protections of the bargaining process is something that is also going to be needed, and that is detailed also in my report, with mediation and arbitration of contract issues, an essential piece of a bargaining process designed to facilitate collective bargaining.

I can say a lot more, but I am out of time.

Thank you very much.

[The statement of Mr. Pearce follows:]

TESTIMONY BEFORE THE
HOUSE COMMITTEE ON EDUCATION AND LABOR,
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS
UNITED STATES HOUSE OF REPRESENTATIVES

May 8, 2019

"The Protecting the Right to Organize Act: Deterring Unfair Labor Practices"

Mark Gaston Pearce
Former Chairman, National Labor Relations Board
Executive Director, Distinguished Lecturer
Workers Rights Institute, Georgetown Law Center

Thank you for this opportunity to testify before you today about the Protecting the Right to Organize Act of 2019. This is a special privilege for me because I have spent half of my forty-year career working with the National Labor Relations Board, first as a lawyer, then ultimately as Board Member and Chairman. The National Labor Relations Board is the agency charged with enforcing the foremost labor law in the country, the National Labor Relations Act. This agency has, however, been hampered in effectively enforcing the Act because of the inadequacy of its remedies.

I started my career at the National Labor Relations Board's Buffalo, New York Regional Office. For the better part of 15 years I conducted representation elections for workers as an NLRB agent. I was a Hearing Officer who heard evidence and made determinations about objectionable conduct affecting an election, and, as a Field Attorney and District Trial Specialist, I investigated and prosecuted violations of the National Labor Relations Act. I then worked with two private law firms in Buffalo, one of which I co-founded. These firms were counsel to numerous local unions and several national unions in a variety of industries. In April of 2010 I was honored to be appointed by then-President Barack Obama to the National Labor Relations Board as Board Member, and later designated Chairman. I served in these positions for over eight years.

While with the law firms and as an information officer with the NLRB, I spent a significant amount of my time advising the public and clients who had been subjected to unfair labor practices. I would advise workers of their rights under the National Labor

Relations Act and the consequences of their employers' conduct. In every instance, I encouraged workers to rely the Act's protections despite employer intimidation, misrepresentation, and abuse. All too often, because of a protracted process and virtually toothless respondent sanctions for unfair labor practices, victimized workers seeking and awaiting justice would lose their jobs. They might be blackballed and go through extended periods of unemployment. They would lose the support of their friends. Their families would suffer and become dysfunctional. Ultimately, these victimized workers lose hope.

After I became a Board Member, I observed how cases would be tied up for years on appeal, how vacancies on the Board would cause case processes to grind to a halt, and how efforts to provide the public with relief during periods of loss of quorum and political gridlock were curtailed and often reversed as a result of judicial intervention. As a Board Member, I did all I could to ensure that the Act was fully enforced, but given the age of the Act and the many judicial opinions construing its terms, the Board is constricted in how it interprets many of the Act's important provisions. That's why statutory change is needed to update the law to reflect today's workplace.

Inadequate Remedies for Violations

The Act's inadequate remedies for unlawful conduct not only fail to deter or fully remedy violations, but in fact incentivize unlawful practices. The National Labor Relations Act provides only limited remedies for violations. Section 10(c) of the NLRA limits the remedies to a cease-and-desist order and, in the event of an unlawful firing, reinstatement with back pay, along with a required notice posting. By comparison, victims of race- or sex-based discrimination are eligible for compensatory and, in some cases, punitive damages under Title VII of the Civil Rights Act. And, individuals who are owed unpaid wages or overtime can recover both lost wages and liquidated damages when they file claims under the Fair Labor Standards Act.

I have found that the lack of effective remedies under the NLRA is of obvious importance for individual workers who are fired for organizing a union or engaging in other protected activity under Section 7 of the NLRA. Because employers often calculate that noncompliance is less costly, the Board's limited remedies stand in the way of its ability to fulfill its statutory mission to "encourag[e] the practice and procedure of

collective bargaining" and "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing[.]" 29 U.S.C. § 151. Although the Board has made several important improvements to remedies, because of limitations in the current statutory scheme, it is economically rational for employers to violate the Act. The PRO Act addresses this important issue by updating the statute to ensure that violations will be adequately deterred.

I recall a particular example of a respondent's flagrant pattern of flouting the NLRA in light of the NLRB's inadequate remedies was the 2014 case *Pacific Beach Hotel*.[1] In that case, the Respondents had engaged in egregious unfair labor practices over the span of 10 years. The Board found that the Respondents had violated multiple provisions of the Act and engaged in objectionable conduct that interfered with elections on two occasions. In addition, the Respondents were subject to two Section 10(j) injunctions and had been found to be in contempt of court for violating a Federal district court's injunction. Nevertheless, in 2014 the Board in faced Respondents which still had not complied with the remedial obligations imposed on them after the Board's prior decisions. Rather, the Respondents continued to engage in unlawful activity, some of which repeatedly targeted the same employees for their protected activity and detrimentally affected collective bargaining. For example, after the Board held that the Respondents unlawfully imposed unilateral increases to housekeepers' workloads in 2007, the Respondents briefly restored the lower workloads only to unilaterally raise them again. Similarly, the Respondents unlawfully disciplined, suspended, and then discharged an employee a second time for his protected activity, after he was reinstated pursuant to a Federal district court order of interim injunctive relief. Respondents continued making unilateral changes to work rules, taking adverse actions against employees for supporting the Union, placing employees under surveillance, undermining the Union, threatening and intimidating Union agents, and in many other manners interfering with employee rights under the Act—all contrary to the Board's prior orders.

[1] *HTH Corp., Pacific Beach Corp., and KOA Mgmt., LLC, a single employer, d/b/a Pacific Beach Hotel*, 361 NLRB 709 (2014).

Faced with a flagrant violator of the Act of such magnitude, the Board, cognizant of its limitations in terms of fashioning remedies, tried to do its best with the authority it had. Among other remedies specific to these violations, the Board ordered the Respondents to cease and desist from engaging in the recidivist behavior described previously and ordered reinstatement with back pay to the affected employees. It also ordered a 3-year notice-posting period and required mailing of the notice, the Decision and Order, and an additional Explanation of Rights to current and former employees and supervisors, as well as provision of the material to new employees and supervisors for a period of three years. These notices had to also be published in local media of general circulation. Because its past orders were not self-enforcing and required the General Counsel and the Charging Party to incur additional litigation costs by seeking federal court enforcement, the Board majority also ordered that the multiple years of litigation costs be awarded to the General Counsel and Union, as well as certain other costs incurred by the Union as a direct result of the Respondents' unfair labor practices. It should be noted that the remedy of litigation costs was, however, struck down by the Court of Appeals for the District of Columbia Circuit because the Board lacked the statutory authority to impose such sanctions.[2]

Given the Act's significant remedial limitations, employers are commonly willing to flout the law by intimidating, coercing, and firing workers because they engage in protected concerted activity or attempt to organize a union. As the Board's experience in *Pacific Beach Hotel* shows, when employers discover that the cost of noncompliance is so low, they sometimes violate the law frequently over the course of many years. It isn't difficult to understand why. Without a credible deterrent, employers weighing the consequences of violating the law face a choice that all but incentivizes such serious interferences with employees' rights. It is for this reason that one-third of employers fire workers during organizing campaigns,[3] and 15 to 20% of union organizers or activists may be fired as a result of their activities in union campaigns. And although the NLRB obtained 1,270 reinstatement orders for workers who were illegal fired for exercising their rights in fiscal year 2018 and collected $54 million in back pay for

[2] *HTH Corp. v. NLRB*, 823 F.3d 668, 678-81 (D.C. Cir. 2016).

[3] Josh Bivens et al., "How today's unions help working people."

workers,[4] even when the Board is able to timely intervene and order reinstatement and backpay, it is not always enough to prevent employer lawbreaking.

During my time as Chairman, the NLRB modified its approach to calculating backpay in an effort to better fulfill the agency's dual remedial mandate to ensure that discriminatees are actually made whole and to deter future unlawful conduct. In *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enf'd in relevant part, 859 F.3d 23 (D.C. Cir. 2017), the Board modified its standard make-whole remedy to require respondents to fully compensate discriminatees for their search-for-work expenses and expenses they incurred because they were victims of unlawful conduct. Previously, the Board had treated search-for-work and interim employment expenses as an offset that would reduce the amount of interim earnings deducted from gross backpay, an approach which I and the other members who joined the majority in *King Soopers* argued unfairly prevented discriminatees from being made whole and amounted to a subsidy of employers' violations of the law.

While *King Soopers* marked a significant improvement that has helped the Board come closer to making employees who suffer unlawful termination whole, even the prospect of paying a full back pay award is often not a sufficient deterrent for employers. The PRO Act comes even closer to accomplishing a full make-whole remedy by providing that backpay is not to be reduced by interim earnings. And by making including provisions for front pay, consequential damages, and liquidated damages, the PRO Act would help the Board more effectively deter violations by making compliance with the law more economically rational for employers. I see a particular need for the enhanced remedies the PRO Act would provide when employers violate Section 8(a)(4) of the Act, which makes it an unfair labor practice to discharge or discriminate against employees because they have "filed charges or given testimony" in a Board proceeding. 29 U.S.C. § 158(a)(4). Without the assurance that they will be fully protected when they file charges and participate in Board hearings, employees will be fearful about coming forward to tell their stories or testify on behalf of their unions or fellow employees, which threatens the viability of the whole remedial scheme the Act contemplates.

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[4] National Labor Relations Board, NLRB Performance Reports–Monetary Remedies/Reinstatement Offers, accessed February 2019.

Procedural Obstacles to Relief

As Chairman, I did my best to streamline and expedite Board processes, recognizing that in the context of workplace issues, as in so many areas of the law, justice delayed can be justice denied. However, I often ran up against the limitations of the statutory scheme. As I expressed before, when workers file charges with the NLRB, they are often left to wait for a significant period of time. Proving that an employer has unlawfully terminated an employee or otherwise significantly interfered with that employee's rights under the NLRA can be a very lengthy process. Ordinarily, such charges must be investigated by an NLRB regional office, after which there is a hearing before an administrative law judge. After the administrative law judge renders a decision, employers typically file appeals and await decisions by the National Labor Relations Board, after which they often refuse to comply with the Board's orders and appeal those orders to the federal Courts of Appeals. By the time the Board's order is enforced, several years may have elapsed, and a fired worker has frequently found a new job. For this reason, although 1,270 employees were offered reinstatement in fiscal year 2018, only 434 accepted such offers.[5] The PRO Act would reduce the likelihood of employers pursuing meritless appeals for the sake of delay by making the NLRB's orders self-enforcing, like the orders of many other comparable federal agencies.[6]

Even though Section 10(j) of the NLRA permits the Board to seek an injunction in Federal district court when an employer fires workers for organizing a union or engaging in protected concerted activity, the Board only uses this authority sparingly. In fiscal year 2018, the Board only authorized 22 injunctions, despite employers' frequent interference with employees' right to organize unions.[7] By contrast, during my years as Chairman, the Board authorized an average of 43 injunctions per year. In addition, the NLRA requires the Board to seek an injunction whenever a union engages in unlawful picketing or strike activity. See 29 U.S.C. § 160(l). I commend the PRO Act for

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[5] See https://www.nlrb.gov/news-outreach/graphs-data/remedies/reinstatement-offers (last accessed 4/30/19).

[6] See *Report of the Committee on Judicial Review in Support of Recommendation No. 10*, available at https://www.acus.gov/sites/default/files/documents/1969-02%20Judicial%20Enforcement%20of%20Orders%20of%20the%20NLRB.pdf (last accessed 5/2/19).

[7] See https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1674/nlrbpar2018508.pdf (last accessed 4/30/19).

attempting to create greater parity and predictability by making injunctive relief in the event of employer unfair labor practices mandatory in a greater number of cases.

Sadly, what I have just described often represents the best-case scenario for a worker who must go through the full process of litigating an unfair labor practice charge. In recent years, procedural infirmities have all too frequently compromised the Board's ability to act, further prolonging the delay workers must endure before finally enjoying the remedies they are due. Political gridlock has often prevented the NLRB from operating with the full five-member complement contemplated by the statute, with resulting paralysis due to a lack of quorum.[8] During such periods of disruption, workers who file charges with the NLRB are unable to rely on the agency that Congress authorized to safeguard their rights. By creating an avenue for workers to bring a civil action in Federal district court, the PRO Act would ameliorate the consequences of the procedural obstacles to justice employees sometimes face during tumultuous times at the NLRB.

Similarly, I am encouraged by the PRO Act's provisions to address the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 584 U.S. ___ (2018). During my time as Chairman, the NLRB issued *D. R. Horton, Inc.*, 357 NLRB 2277 (2012) and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014). In these cases, the Board found that an employer violates Section 8(a)(1) when it requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment claims. The many cases involving mandatory arbitration agreements that followed in the wake of *D. R. Horton* and *Murphy Oil* stood as a testament to the prevalence of employers' efforts to preemptively stifle concerted activity. And though the Seventh and Ninth Circuit Courts of Appeals agreed with the NLRB's view that arbitration agreements that require employees to forego their Section 7 rights are invalid under the Federal Arbitration Act's saving clause,[9] the Supreme Court read the Federal Arbitration Act differently. As dissenting Justice Ruth Bader Ginsburg recognized, the "inevitable result of [the majority's] decision will be the

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[8] *NLRB v. Noel Canning*, 573 U.S. 513 (2014); *New Process Steel, LP v. NLRB*, 560 U.S. 674 (2010).

[9] See *Ernst & Young LLP v. Morris*, 834 F.3d 975 (9th Cir. 2016); *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016).

underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers." By restoring employees' rights to pursue their employment claims on a class or collective basis, the PRO Act would empower workers to join together to protect themselves and each other and to seek vindication when they have been wronged at work.

Finally, the PRO Act addresses one of the NLRA's shortcomings by paving the way for employers to post notices in the workplace that set forth the rights and protections employees are afforded by the NLRA. Because the NLRB does not have the authority to begin investigations on its own initiative, it relies on members of the public who know their rights to file charges when violations of the law occur. During my time as a Board Member and as Chairman, the NLRB promulgated a rule that would have required employers to notify employees about their rights,[10] just as other statutes that protect workers require, but the rule was enjoined.[11] By clarifying that the Act allows the NLRB to ensure that employees are aware of their rights, the PRO Act would help the agency more effectively redress injustices in the workplace.

Strengthening Protections during the Bargaining Process

As the workers involved in the *New Process* and *Noel Canning* episodes learned through hard experience, employer unfair labor practices that aim to undermine employees' chosen bargaining representative can have corrosive effects in the workplace that linger for years. Even after the Board finds that an employer has unlawfully refused to bargain, the remedy is an order to return to the bargaining table and do what the law required in the first place. The challenges associated with protecting the integrity of the bargaining process are particularly acute when parties are negotiating a first contract. As Kate Bronfenbrenner's research has shown, within one year after an election, only 48% of newly organized units have obtained first collective-bargaining agreements. By two years, that number rises to 63%, and by three years to 70%. Even after three years,

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[10] *Notification of Employee Rights under the National Labor Relations Act*, 76 Fed. Reg. 54006 (Aug. 30, 2011).

[11] See *Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013).

only 75% of units have reached a first contract.[12] These delays can erode workers' support for their bargaining representative, sometimes culminating in decertification efforts. During my time at the NLRB, I frequently encountered stories that demonstrated an urgent need for better protection for workers during their first-contract negotiations. One representative example is a case called *1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center*, 357 NLRB 1866 (2011), enf'd sub nom. *1621 Route 22 West Operating Co., LLC v. NLRB*, 725 Fed. Appx. 129 (3d Cir. 2018). In that case, a union won an NLRB election in 2010 and was certified in 2011. The Respondent refused to bargain as a means of testing the certification of the union. The Board ordered bargaining in 2011, but because the Respondent filed a petition for review, the case continued for almost seven more years before the Third Circuit Court of Appeals finally enforced the Board's order. I welcome the PRO Act's proposal to strengthen protections for employees when they are in the vulnerable position of negotiating a first contract.

While the negotiation of a first contract presents unique difficulties for ensuring the process of collective bargaining envisioned by the Act operates as intended, parties' bargaining relationships can also be threatened when their efforts to negotiate collective-bargaining agreements break down. The Act protects employees' right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," including strikes. 29 U.S.C. § 157.[13] And although the Act provides that none of its provisions "shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right," 29 U.S.C. § 163, the reality has been more complicated. Notably, , the Supreme Court has taken the position that it is lawful to permanently replace economic strikers for the purpose of continuing operations during a strike, and[14] in *Hot Shoppes,*

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[12] See Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Economic Policy Institute Briefing Paper #235 (May 20, 2009), available at https://www.epi.org/files/page/-/pdf/bp235.pdf.

[13] As the Supreme Court has recognized, the Act is premised on both the "necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms," which "exist side by side." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 489 (1960).

[14] *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). Notably, the Court's initial statements about permanent replacement in *Mackay Radio* were dicta; the Court has never had occasion to squarely address the lawfulness of permanent

Inc., 146 NLRB 802, 805 (1964), the NLRB established a presumption, not present in the Supreme Court decisions, that an employer may permanently replace strikers to continue its business during a strike unless there is evidence that the employer had an "independent unlawful purpose" for doing so. This presumption has had the effect of whittling away the right to strike and preventing employees from relying on the protections of the Act.

During my time as Chairman, the Board was presented with a case that raised the issue of what constitutes an "independent unlawful purpose" as that term is used in *Hot Shoppes*. See *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13 (2016). In that case, the majority found evidence of an "independent unlawful purpose" in the Respondent's decision to permanently replace striking workers to punish them and to avoid future strikes. While the employees who struck in that case were therefore protected against replacement, *Hot Shoppes* requires a fact-intensive inquiry that can yield unpredictable results and has virtually nullified the Act's protection of the right to strike. By creating a uniform standard that assures workers that their right to strike will not be abridged, the PRO Act clarifies a notoriously complicated area of the law and would facilitate the process of collective bargaining.

Unfair Labor Practices against Undocumented Workers

Employers who hire undocumented workers and then fire them when they organize a union or protest unsafe or unfair working conditions should be accountable under federal labor law. Unfortunately, however, the Supreme Court has created a perverse incentive for unscrupulous employers to violate the NLRA by holding that the NLRB is prevented from awarding back pay to undocumented workers who are fired in violation of the law. The PRO Act fixes this egregious problem and thus provides an incentive to all employers to comply with both labor and immigration law.

In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984), the Supreme Court held that undocumented workers are "employees" within the scope of Section 2(3) of the Act. However, the United States Supreme Court in *Hoffman Plastic Compounds, Inc. v.*

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replacement. *See* Mark Kaltenbach, *All* Mackay *Says: Why the National Labor Relations Board Should Replace Its Hard-to-Justify Interpretation of the* "Mackay" *Rule*, ON LABOR Working Paper (April 2015), available at https://onlabor.org/wp-content/uploads/2015/04/kaltenbach_all-mackay-says_final-1.pdf.

NLRB, 535 U.S. 137 (2002), *also* made it clear that Board lacked "remedial discretion" to award backpay to an undocumented worker who, in contravention of the Immigration Reform and Control Act (IRCA), had presented invalid work-authorization documents to obtain employment. While a respondent may be found liable for such unlawful conduct, victimized undocumented employees are prohibited from receiving the make-whole remedies of back pay and/or reinstatement, which are commonly ordered as a remedy for such violations of the law. Consequently, because of the limitations in the statute, violators are merely obliged to post a notice committing to cease and desist from such conduct. This is tantamount to a slap on the wrist of flagrant violators of the law. I joined former NLRB Chairman Wilma Liebman in articulating the inadequacy of this remedy in *Mezonos Maven Bakery, Inc.* 357 NLRB No. 47 (2011), a post-*Hoffman Plastics* Board decision. Among the concerns former Chairman Liebman and I expressed are the following:

1. *Precluding backpay undermines enforcement of the Act.* Although the primary purpose of a backpay award is to make employee victims of unfair labor practice whole, the backpay remedy also serves a deterrent function by discouraging employers from violating the Act.
2. *Precluding backpay chills the exercise of Section 7 rights.* Provided it is severe enough, one labor law violation can be all it takes. The coercive message—that if you assert your rights, you will be discharged (and, perhaps, detained and deported)—will have been sent, and it will not be forgotten.
3. *Precluding backpay fragments the work force and upsets the balance of power between employers and employees.* Protecting collective action is the bedrock policy on which the Act rests, as was recognized by the Supreme Court when it upheld the Act's constitutionality. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) ("Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers

opportunity to deal on an equality with their employer.") (citing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921)).

4. *Precluding backpay removes a vital check on workplace abuses.* The very employers most likely to be emboldened by a backpay-free prospect to retaliate against undocumented workers for concertedly protesting their terms and conditions of employment are the ones most likely to impose the worst terms and conditions.

Both former Chairman Liebman and I recognized that an award of backpay to undocumented workers is beyond the scope of the Board's authority under the Court's decision in *Hoffman*. We nevertheless remained convinced that an order relieving the employer of economic responsibility for its unlawful conduct can serve only to frustrate the policies of both the Act and our nation's immigration laws.

Although untested, we suggested in *Mezonos* that a remedy requiring payment by the employer of backpay equivalent to what it would have owed to an undocumented worker would not only be consistent with *Hoffman* but would advance federal labor and immigration policy objectives. Such backpay could be paid, for example, into a fund to make whole victimized workers whose backpay the Board had been unable to collect. The novelty of such a remedy would likely cause it to be tied up in court challenges, thereby delaying justice for an untold period. However, the PRO Act would bring forth a clear and expedient resolution to the consequential inequities presented by the current state of the law.

Conclusion

Thank you very much for giving me the opportunity to testify before the Committee today. I applaud you for thinking carefully about how best to ensure that working people in this country can enjoy full freedom of association. The PRO Act would significantly improve the effectiveness of our nation's labor law by:

- Creating stronger, more complete remedies for violations of the National Labor Relations Act.
- Eliminating procedural obstacles to the vindication of employees' rights.

- Strengthening the bargaining process by creating new mechanisms to facilitate good-faith negotiations.
- Preventing unscrupulous employers from avoiding their obligations under labor and immigration law.

Chairwoman WILSON. Under committee rule 8A we will now question witnesses under the 5 minute rule.

Thank you so much for your testimony—riveting testimony. And we appreciate it.

I will now yield myself 5 minutes.

Mr. Trumka, the right to join a union is an internationally recognized human right and protected by Federal labor laws, but in the United States it is frequently violated in practice.

Why do workers need unions? How can civil monetary penalties and damages for severe economic harm deter employers from retaliating against workers engaged in union organizing with near impunity?

It is a two pronged question.

Mr. TRUMKA. Madam Chairman, workers need unions because the power imbalance between employers and individuals is vast. An employer is not required to talk to an individual employee or even a group of employees to ask them what they want. Only whenever they come together as a union in concerted activity do they have the power and ability to talk for a union. And what happens is evident, they make more money, a benefit of roughly 13 percent more. Women, Latino women, make $11,000 more for being in a union. African Americans make $9,000 a year more for being in a union. Women in general make $9,000 more for being in a union. Only by being in a union can they talk collectively and actually bargain for a fairer deal.

We have seen what has happened since the union density has fallen in this country. Wages have stagnated or gone backwards. There was recently a study that said that the lack of union density has also hurt non-union workers to the tune of $2,700 a year. If unions had been the same density as they were in the '90's and '80's, non-union workers would be making $2,700 a year more.

So it is to balance the scale, to balance the power of employers and employees. Workers have to come together and speak with one voice and then they can come to the table and negotiate as equals, not as supplicants. That is why it is so important. It is for dignity, it is for respect, and it is for the ability to raise their standard of living and get a fair share of what they produce.

Chairwoman WILSON. Thank you.

I understand, Mr. Staus, that UPMC fired you for union organizing in 2013. Five years later, the National Labor Relations Board ordered that they reinstate you with back pay, and they have not done so.

Mr. STAUS. No, ma'am.

Chairwoman WILSON. Why were you fighting so hard, and why are you still fighting?

Mr. STAUS. Well, I am fighting so hard not only for myself and my family but for the region, the Pittsburgh region. What they are doing at UPMC is wrong, and they need to be held accountable for their actions.

Chairwoman WILSON. What needs to change in the laws to safeguard your rights and your fellow workers' rights?

Mr. STAUS. Well, we need the PRO Act to take effect because right now the laws as they are today have no teeth. UPMC and the

like are able to get away with whatever they want and there is no repercussion for them.

Chairwoman WILSON. Thank you. Mr. Pearce, your career embodies the best in public service. In your testimony you described how, despite your best efforts, the NLRA fails to deter or fully remedy violations. What are some of the obstacles workers face when they seek to vindicate their rights, and how would the PRO Act address those obstacles?

Mr. PEARCE. Well, one major obstacle is that an employee does not even know what their rights are because they are not permitted the opportunity to see notices, just like with the Department of Labor and with OSHA—they can have notices on the wall. The National Labor Relations Act is not placed on the wall. Efforts have been made for us to be able to do that and it was struck down by the courts by the opposition of forces that were led by my esteemed colleague here, while he was in private practice.

But then there is the protracted nature of the process. The investigations take about 30 days, the trial takes almost a year to culminate, and then afterwards it is appealed to the Board where the Board can take a significant amount of time before a decision gets issued. That decision is not self-enforcing. So the parties can appeal that to the courts and have it tied up for a significant period of time.

Meanwhile, people are losing homes, people are getting divorced, people are not able to meet their rent or pay for their children's education, people lose hope.

Chairwoman WILSON. Thank you so much for your testimony.

I now recognize the distinguished Ranking Member Walberg for his round of questions.

Mr. WALBERG. Thank you, Madam Chairwoman. And thanks to the panel for being here.

Mr. Miscimarra, H.R. 2474 requires business owners to turn over reams of personal information about workers to unions, including home addresses, home phone numbers, cell phone numbers, personal emails, and much more. If this legislation is enacted, would workers have any say in whether their personal information is shared with the union? And, second, what risks might this scheme create for workers?

Mr. MISCIMARRA. Representative Walberg, thanks for that question.

When the NLRB was engaged in rulemaking, which led up to the adoption of a new election rule in 2014, significant concerns were expressed about the lack of consent or any opt-out procedures or any safeguards associated with what would be the new requirement that employers would provide personal information to unions in connection with NLRB conducted elections. And the personal information includes personal telephone numbers, work telephone numbers, cell phone numbers, when they are available, work email addresses, and when they are available, home email account addresses as well.

There were concerns that were expressed. We had a 2-day hearing in connection with that rule and the board ultimately adopted a requirement that these disclosures take place without any safeguards associated with this personal information, and also without

any provisions for consent or opt in or opt out. H.R. 2474 codifies exactly the same disclosure requirements and there really are not safeguards in the bill, nor are there in the regulations adopted by the board and it is currently still in effect.

Mr. WALBERG. Far different than getting approval, voluntary status from workers saying yes, sure, this is information I want to know about, so here is the information that you need to get a hold of me.

Mr. Miscimarra, union corruption remains an unfortunate problem. It is not every case, but as seen recently in my home state of Michigan with UAW, where union leaders spend hard-earned worker dues on excesses like $1,100 pairs of shoes, two $37,000 gold pens. Fortunately, Michigan is an employee free choice state, so workers cannot be forced to fund such extravagant and likely illegal spending against their will. However, H.R. 2474 prohibits states from enacting right-to-work protections. Would banning right-to-work laws make union leaders like those at UAW more or less accountable to workers?

Mr. MISCIMARRA. Well, Representative Walberg, the bill would override the state right-to-work laws passed in 27 states that protect employees from being forced to make mandatory union agency fee payments. And one of the points that I made in my oral testimony, as well as my written testimony, is that the bill really does not continue the balance between competing interests among employers and employees and unions and the public. And with respect to obligations and requirements under the law, the bill would impose significantly greater requirements on employers and there are no additional requirements on unions.

Mr. WALBERG. Okay. Mr. Miscimarra, according to polling from Opinion Research Corporation, 81 percent of union households and 81 percent of Democrats support the right to a secret ballot in union elections. H.R. 2474 allows unions to automatically be approved under certain circumstances, even after they lose a secret ballot vote.

What risks does it create for workers to allow unions to be certified without winning a secret ballot?

Mr. MISCIMARRA. Well, the challenge in those cases is to the extent that employees have not had the opportunity to vote in the secret ballot election, it is not clear what the employee sentiments are with respect to union representation. And the preferred method for decades under the National Labor Relations Act has been for union sentiments to be tested in the context of an NLRB-conducted secret ballot election, which the board conducts in a very efficient and very effective manner that instills confidence in all the parties.

To the extent that, as the bill would require, to the extent that in particular cases bargaining orders would require union recognition and negotiations without any secret ballot election in those instances, once the union is in there are significant challenges associated with the ability of employees to ever vote on the possibility of decertifying the union or continuing union representation. Of course, if you don't have an election, you don't know how the election is going to turn out.

So once a union is in, there are certain bar rules. The existence of a 3-year contract, for example, would prevent employees from

even having an NLRB election until the last 90 days prior to the expiration of that contract.

So bypassing a secret ballot election, at least with respect to current law and the Board's practice for 83 years, is a very significant issue. And one never knows what employee sentiments would be expressed if they had the opportunity merely to express those sentiments in a board conducted election.

Mr. WALBERG. I thank the gentleman.

Chairwoman WILSON. Thank you so much, Mr. Walberg.

We will now go to the member's questions. Mr. Norcross, of New Jersey.

Mr. NORCROSS. Thank you, Madam Chairwoman, and appreciate you putting together this hearing and certainly to my colleagues on the other side of the isle. We have many similar views, but on this one I think we are going to diverge, just a little bit.

Isn't it ironic that we are hearing about corruption and we are being challenged by members of Congress talking about this? Or is it more ironic that we are talking about preserving elections when Russians just hacked ours and we are trying to shut that down?

Can we get back to the point here that if we look at the density of unions over the course of the last 25 years, and it has declined, the middle class is doing worse, and the fact of the matter we are having more challenges at the NLRB.

Now, for 37 years I was an electrician. I was a union representative. I filed probably more elections at the NLRB than this entire group combined. I understand firsthand how it works on both ends. And I will start off by saying not every employer is a bad employer. We have some very good employers that we work with. But when we have the bad ones, they can abuse this system to the nth degree, really crushing people like you.

So when we have a conversation—I want to remind, we have 213 attorneys in Congress and there is only 1 electrician. What is my point? It is I understand this, I have lived it from both sides.

So, Mr. Trumka, thank you for coming in. And you understand, you have heard, you have lived, coming out of the mines, how tough it is sometimes. When we look at finally as the process goes, you file for elections, and let us just assume that the union wins it, then you have to sustain that recognition. And let us say you make it through that second step and then you try to bargain for your first contract. What happens then typically when there is an adversarial relationship? Is this something that they can force their way and say let us get a contract, let us go to arbitration and figure this out? Or what typically happens?

Chairwoman WILSON. Turn on your microphone.

Mr. TRUMKA. Let me start with a general statement and work down to what you said. The law as currently written gives the employer to decide whether or not workers will have a union. It was never intended that way.

Since 1935 the law has allowed and accepted the fact that when a worker and an employer don't disagree, you can have recognition without an election. They do it most of the time in the country. So that has been since 1935, been the law. Only recently has it been questioned.

Now, one of the colleagues here wanted to make this seem like this was almost like a governmental election. Well, when you all get elected, you are getting elected to govern. When a union gets elected, it is to represent the workers there. It is like their lawyer. That is all that they are getting at that point.

And I might add that whenever a majority of people or a minority of people don't vote for you, they are still governed by what you do afterwards forever. In this election, with 14(b), they get a chance to say we vote no, we also won't get in, but we want all the benefits that a union has to bring, and we don't have to pay a cent for it. That is what you are sanctioning here, that is what comes out.

What happens is normally the employer will surface bargain. They will not bargain with you, they will not give you proposals, it doesn't go back and forth. The first thing will happen is you will ask for information and it will take them several months to get you the information, and then it is not all there. So you ask for it again. And if they don't give it to you, then you go to the Board and you go through a bunch of charges that take 3 or 4 years. Finally, if you get the information, they sit down, they are not required to agree, all they do is mouth empty words at you. And you can tell pretty quickly if they are trying to get to an agreement or whether they are trying to get to impasse so that they can declare things and go on their merry way.

Mr. NORCROSS. So what typically happens to the person of the workers who have organized this? Are they targeted? What usually happens to the—

Mr. TRUMKA. Absolutely. Take the—they always get targeted. They always get targeted, they get fired, and as you heard from my friend next to me, it will take months, years for them to get back. And when they do get back all the money that was spent defending them is tax deductible. Any money that the worker gets or earns in that interim period is deducted from what the employer pays. It virtually costs them nothing.

In the case of Kumho Tire, we had a guy that was fired. He got fired at a non-union shop and he went to a union shop and actually had better wages. So when he gets put back in 3 years, they will owe nothing, which—

Mr. NORCROSS. Thank you. We are out of time, but I want to thank you for your testimony.

Mr. TRUMKA. Thank you.

Chairwoman WILSON. Thank you so much. Thank you so much.

Dr. FOXX. Distinguished Dr. Foxx.

Mrs. FOXX. Thank you, Madam Chairman.

Mr. Miscimarra, last time Democrats held the majority in the House they voted to deny workers the right to a secret ballot for union elections. This is a right guaranteed to all Americans when they vote for representation in Congress, and the same right guaranteed to congressional Democrats when they vote for their own caucus leadership.

Under H.R. 2472, could some unions be automatically certified even though they lose in a secret ballot vote? And why might union bosses prefer this scheme?

Mr. MISCIMARRA. Thank you for the question, Dr. Foxx.

The H.R. 2474 specifically provides if a union loses an election and if there are unfair labor practice charges that are filed, if the employer does not sustain the burden of proving that any unfair labor practice charges would not have altered the outcome of the election, the union is then automatically recognized as the exclusive bargaining representative without conducting another election.

And as I explained previously, that prevents employees from being able to express their sentiments in the confines of the voting booth, which the board has always said is the preferred course for testing employee sentiments regarding union representation.

Mrs. FOXX. Thank you.

Mr. Miscimarra, despite Democrat claims that the decline of unions has harmed workers, Americans are inarguably better off today than they were decades ago when the union participation was higher. And by the way, we have the figures to prove that, despite what others may say here today.

A significant provision in H.R. 2474 repeals the ban on secondary boycotts, subjecting even more employers, workers, and customers to union harassment. In your view, does this provision, not to mention the bill overall, threaten economic growth? And what impacts would secondary boycotts have on business owners, workers, and the overall health of the U.S. economy?

Mr. MISCIMARRA. Well, Dr. Foxx, the term secondary boycotts is an important one when it comes to labor law. And what a secondary boycott means is if a union has a dispute with you, under current law the union can move forward and can use picketing and other means, other economic weapons against you, but the union can't spread that dispute to everybody in our complicated economy merely because they do business with you.

In the United States we had that state of affairs for 12 years. The Act was passed in 1935 and then there were amendments that were made in 1947 that, among other things, barred secondary boycotts because they were having too debilitating an effect on the U.S. economy. The next amendments to the Act occurred in 1959 and Congress strengthened the prohibitions against secondary boycotts because there were loopholes during the original restrictions that still permitted labor disputes to have widespread, debilitating effects throughout the economy.

What H.R. 2474 does is repeal in their entirety the provisions that bar secondary boycotts. So we would have, under this bill, not only the type of conflict and dissention that as I indicated is part and parcel of our collective bargaining motto under the statute, but we would return to a state of affairs that has not existed in this country for more than 70 years, which would be a very, very significant change in the law.

Mrs. FOXX. Thank you, Mr. Miscimarra.

In the event of a collective bargaining impasse, H.R. 2474 requires employers and unions to enter arbitration, allowing the unelected bureaucrats to write a binding union contract. The bill states that the contract "shall be based on the wages and benefits other employers in the same business provide their employees." Does that mean that under this standard a mom and pop retail small business would have to accept the same union contract terms

as a mega corporation like Walmart or Amazon? What effect would this mandate have on small businesses and their employees?

Mr. MISCIMARRA. Well, Dr. Foxx, there are two potential effects. One is, we don't know what an arbitrator would do in that circumstance where the arbitrator inherits—these are initial contract negotiations where an arbitrator inherits a small business, a union, and various competing demands that may be very, very far apart. And there is a risk, since we are talking here about contract terms that are imposed and not agreed upon. There is no certainty regarding what the employer could confront, and it is possible that imposed terms would actually be not only injurious to the employer, but injurious to the employer, the employees, the union itself, even though the union was seeking those terms.

The one other point I will make is that current law has been very clear that the NLRB regulates the process of collective bargaining, but the NLRB does not have the authority to impose substantive contract terms on parties. That has worked very well for the Act's 83-year history. This law, for the first time in the Act's history, would change that.

Chairwoman WILSON. Thank you. Let us wrap it up.

Mrs. FOXX. Thank you. Thank you, Mr. Miscimarra. And thank you, Madam Chairman.

I would like to enter into the record an article called "Big Labor's Big Shrink", which was in the Wall Street Journal on April 30.

Chairwoman WILSON. So ordered.

Mrs. FOXX. Thank you.

Chairwoman WILSON. Now, Mr. Morelle.

Mr. MORELLE. Thank you, Madam Chair, for holding this hearing, which is so important, and to all of our witnesses who are testifying today, and in particular, Mr. Trumka. Thank you for your lifetime of efforts on behalf of America's working families.

Over the past 4 decades there has been a concerted effort to diminish the right of workers to organize and collectively bargain. And we have seen the impact of that in my district in upstate New York and throughout our country. These concerted efforts have had a serious impact on union density in Rochester, where I represent, and surrounding communities, resulting in suppressed wages for union and non-union workers. Something that is not often talked about is the impact on non-union workers because the impact on union organizing.

As the proud son of a pipefitter and a member of Plumbers and Steamfitters Local 13, United Association, I am glad to have the opportunity to focus on what can and should be done to deter unfair labor practice.

And I want to start, if I might, Mr. Staus, if I can ask you, Federal law states that it is the policy of the U.S. Government to "protect your freedom of association, promote collective bargaining". The National Labor Relations Board decided in 2018 that you were unlawfully terminated, but your employer has not yet given you a cent of back pay, as I understand from your testimony.

Mr. STAUS. That is true.

Mr. MORELLE. I gather that is because the NLRB is weaker than other Federal agencies in that it cannot enforce its own orders.

With that in mind, do you feel the law as stated is living up to its stated purpose?

Mr. STAUS. No, it is not. We need something like the PRO Act to give the law some teeth, because, you know, it has been 6 years and I haven't got penny one or reinstated.

Mr. MORELLE. Thank you. Obviously a law failing to meet its stated goal needs to be changed and updated, the purpose of our conversation here.

I wanted to just, if I could, Mr. Pearce, because of that lack of the ability for the NLRB to have sanctions or be able to implement sanctions, how do employers abuse that deficiency in the law? Could you just describe that a little bit?

Mr. PEARCE. Well, employers are able to—if they want to snuff out a union's organizing drive, the employer can take full advantage of violating the law with minimum repercussions. You terminate an individual, like Ron Oakes, and kill the organizing drive. You could possibly put the back pay owed to that individual in a low interest savings account and by the time there is a determination that you have to pay and you subtract the interim earnings from that, you have made money on your wrongdoing.

Mr. MORELLE. Obviously something the law is not intended to provide an opportunity for that.

Mr. PEARCE. Not at all.

Mr. MORELLE. One just followup, in Mr. Miscimarra's testimony, and this is for Mr. Pearce—I am just curious—he cites 2014 case Pacific Beach Hotel as an example of the NLRB having sufficient teeth to defer unfair labor practices. I notice that you cite the same case in your testimony. Sort of unusual that you both point to the same thing.

Were the remedies that Mr. Miscimarra listed actually significant, were they enough to deter the employer from violating the NLRA over a period of years? Because deterrence is obviously a big part of what we hope to do with sanctions.

Mr. PEARCE. We were talking about recidivists that engaged in bad doings over the span of 10 years. And repeated violations of the Act were brought forth and pursued in court. We ultimately, as a unanimous body, concluded that these egregious violations needed to be remedied. We went through every possible effort to fit the remedy with the crime within the limitations of the statute. And a lot of that was upheld by the court, even though it was dissented to by some of our colleagues.

The one remedy that was significant is the court costs of having to go to court each time in order to rectify these circumstances, and we ordered costs to the general counsel and to the charging parties because of the abuse of the process that was being subjected to.

Well, the DC Circuit, while they upheld our other efforts, struck that down because there was no statutory authority for us to impose those things.

So otherwise, resources that were utilized to try to enforce this were denied this agency so it could not effectively investigate cases and apply its resources in order to protect the working people.

Mr. MORELLE. Very good. Well, thank you, sir.

Thank you, Madam Chair.

Chairwoman WILSON. Thank you.

The renowned Dr. Roe.

Mr. ROE. Thank you, Madam Chairwoman. I appreciate that.

First of all, welcome back, Mr. Miscimarra and Chairman Pearce, to the Committee. It is good to see both of you again.

Mr. MISCIMARRA. Thank you.

Mr. ROE. I grew up in a union household, as Mr. Walberg did. My dad worked almost 40 years in the United States Workers Union. I think it is Steelworkers' now.

Forty-five years ago I put on a uniform, left this country, and served 11 miles south of the DMZ in Korea to ensure that you had the basic rights given to you by the Constitution of this country, which is a secret ballot. I say this jokingly, but my wife claims she votes for me. I don't know for sure that she does because it is a secret ballot, and that is the way it should be. And I bet Mr. Trumka was also elected by the secret ballot. I know everybody on this dais was. I think that is one of the most fundamental basic rights we have as an American citizen, is a secret ballot. And we should protect that above almost anything. It is what helps guarantee our democracy.

I can say I appreciate what the unions do and in many cases—and apprenticeships. I have worked with you on that and certainly we have had legislation here. In Tennessee, in my state, we have 3.2 percent unemployment. And the union penetration there is about 5.5 percent I think. And I don't believe the problem is a decline in not too few unions, I think the problem in my state is too few skilled workers. We are looking to find workers. Everywhere you look there is a help wanted sign in the state of Tennessee.

So the second thing I want to bring up is the personal information. Look, I think that is yours and you should decide as an individual. You have the freedom to do that. If you want to share that information you should be able to do that, but it shouldn't be required of you.

And last, before I ask some questions, I want to enter, Madam Chairman, into the record a letter that 82 House Democrats, including Chairman Scott, and 11 other members of this committee, wrote to Ambassador Lighthizer. Some of the members serve on the HELP Subcommittee. In it they say this, that they express concerns in the USMCA agreement that the ability of a Mexican worker to exercise a free secret and personal vote on a collecting bargaining agreement.

So while my colleague is advocating the basic right for a Mexican worker, but denying that right for an American worker. And right here it is and I would like to submit that for the record.

And I would assume given that, that members would vote against their own bill because I do believe that the PRO Act is a solution looking for a problem, not the other way around.

Mr. Miscimarra, I want to ask you a couple of questions.

And 2474 requires employers to turn over reams of personal information to the union about every worker, such as their home address, phone number, cell phone, personal email, and other things. In your experience, how have you seen this information used?

Mr. MISCIMARRA. Well, you know, I can't address, Dr. Roe, how the information is used, but as I indicated before, there were not—the bill does not provide for safeguards regarding the use of

this information. And that was the source of significant concern during the public hearing that was held when the NLRB was considering the adoption of the 2014 election rule.

One thing, though, that I would like to address, is my colleague, Mr. Pearce, made reference to the Pacific Beach case, and that was a case unquestionably it dealt with a recalcitrant employer and the Board imposed extraordinary remedies on that employer. But as I indicated previously, the Board's experience shows that in 95 percent of the cases that are filed, there are not recalcitrant employers. We are talking about cases that get resolved 95 percent of the time within the first four to 6 months. And so these recalcitrant employer examples are the tail of a dog. And what this legislation I think effectively does is it takes a problem with the tail and then dismembers the dog. And, you know, I think that operates to the detriment of not only employees and employers, but also the unions too.

Mr. ROE. I think one of the problems with declining union membership has been we lost—my dad was in manufacturing and he lost his job to Mexico many, many years ago, and I think you are beginning to see those come back, and that is a very good thing under the current policies of this administration.

My colleagues claim that the employers must hand over workers' personal information, otherwise unions have insufficient access to employees. Is that true?

Mr. MISCIMARRA. Well, I don't think so, Dr. Roe. And, you know, we had a case that dealt with union organizing efforts or employee organizing efforts, it is called Purple Communications. And the question there was whether there were adequate means by which employees could organize or communicate with one another. And in connection with that case, one of the points that I made in a separate opinion was that we've seen entire national uprisings that have resulted from the use of social media. And so the notion that there has to be specific employer provided information for effective organizing to occur I don't believe has support.

Mr. ROE. Thank you, Madam Chairman. I yield back.

Chairwoman WILSON. Thank you.

Ms. Wild?

Ms. WILD. Thank you, Madam Chairwoman.

I am proud to be a co-sponsor of the PRO Act and I thank you, Madam Chairwoman, for holding this subcommittee hearing.

I am deeply troubled by the different standards for the actions of employers and the actions of employees or labor. I believe it has a chilling effect on workers' right and ability to organize.

Mr. Trumka, I would like to address the mandatory captive audience meetings that are held. It is my understanding, and correct me if I am wrong, that under current law an employer can hold a mandatory captive audience meeting to dissuade employees from unionizing, so long as it is not held 24 hours prior to an election and so long as the meeting does not overtly threaten reprisal. Correct?

Mr. TRUMKA. That is correct.

Ms. WILD. On the other hand, if an employee leaves the meeting without permission, that employee is subject to penalty up to the point of termination. Is that fair to say?

Mr. TRUMKA. Not only that, if an employee speaks up in a meeting and tries to rebut an untruthful statement that is made, they can be fired.

Ms. WILD. Thank you. And yet it is, as I understand it, not permitted for a union or workers to campaign during work time. Correct?

Mr. TRUMKA. That is correct.

Ms. WILD. And they have to campaign during breaks or offsite or after working hours. Is that true?

Mr. TRUMKA. Correct.

Ms. WILD. And yet there is no limit under the law to the number of mandatory captive audience meetings that an employer can hold. Is that true?

Mr. TRUMKA. That is correct. In fact, Kumho Tires, they had 2 hour sweat sessions every day for 25 consecutive days, stopped the day before the election.

Ms. WILD. And these are held throughout the workday, on work time, on the work site? True?

Mr. TRUMKA. On work site, and they are mandatory. You don't have the choice to go or not to go.

Ms. WILD. It seems to me that creates a rigged system, one that is almost destined to ensure that organized labor fails at its efforts. Is that a fair statement?

Mr. TRUMKA. Just the fact that they can make you go to a meeting demonstrates to workers how much power they have. And then the fact that you can't speak demonstrates the power again. The message is, I have the power, you don't. I will use it, you can't.

Ms. WILD. And we have heard from Mr. Staus, who lost his job. Is it your belief that workers who want to organize would be subject to the same kind of fear of losing their jobs? Mr. Trumka?

Mr. TRUMKA. Would you repeat that, ma'am? I thought you were talking—

Ms. WILD. Yes, my question is whether these policies that we have just talked about lead employees potentially to believe that they will be terminated if they try to organize?

Mr. TRUMKA. Absolutely. They are threatened with it. And not only that, they actually fire people. They fire people like my friend here and they put the head up on the wall and they say to people if you exercise your rights, the same thing will happen to you. And, yes, maybe 4, 5, 6 years down the road I may have to pay you back pay, but I get to deduct everything in the process, all the expenses, and I get to deduct from any back pay I may owe you any earnings you may have had in the interim. So it becomes virtually a cost of doing business. And these things occur in more and more and more frequency these days.

Captive audience meetings are held in over 90 percent of organizing drives right now, and the number is growing. Before long it will be 100 percent.

Ms. WILD. Not only is it a cost of doing business, but in fact it is often economically more beneficial to the employer to do exactly that. Isn't that true?

Mr. TRUMKA. Absolutely.

Ms. WILD. Okay.

I have a question for any of you, but let me address it to Mr. Pearce. Under Federal law, workplace notices have to be conspicuously posted, advising employees of their rights under Title VII, the ADEA, FMLA, and OSHA. Why is it that there are no mandatory workplace notices advising employees of their rights under the NLRA?

Mr. PEARCE. Because it is not specifically set forth in the statute. As I said in my opening statement, this is a car with three wheels with an under powered engine. This is an Act that is not self-enforcing. We have to wait for complaints from individuals if they are subjected to unfair labor practices. Clearly we are not going to get those complaints if those individuals don't know their rights.

Ms. WILD. Thank you, Mr. Pearce.

Madam Chairwoman, I ask recognition and unanimous consent to introduce into the record a letter dated May 8, 2019 from the International Brotherhood of Teamsters.

Chairwoman WILSON. So ordered.

Ms. WILD. Thank you. I yield back.

Chairwoman WILSON. Thank you.

Mr. ALLEN.

Mr. ALLEN. Yes, and thank you very much.

You know, Mr. Staus, it is sad that you or anyone was mistreated in the work force in this new economy, the best economy in the world. And I get out among the businesses because I come from the business community, and the people I talk to are growing wages and benefits to really keep their key people. In fact, in this—we have the best economy in the world and, you know, when I talk to folks, particularly about just Federal Government interference with things, we don't need more laws to deal with, you know, labor shortages, we need more skilled workers.

And my experience is initially as a union contractor back in the early '70's. The biggest problem we had was a shortage of skilled workers. And so we had no choice but as companies to recruit and train workers to assist us, to get the work completed, and so did our subcontractors. And as a result, the unions—you know, most companies now are open shop or dual shop or whatever, to allow for that flexibility. But the bottom line is in this new economy companies are partnering with workers, particularly as it relates to 401Ks and ESOPs, which for whatever reason—and Mr. Miscimarra, you might can shed some light on this—be my first question—is I understand that the unions fight for ESOPs and 401K or anything that rewards employees beyond their abilities in a company, and these companies are, like I said, fighting to keep their workers. And so they are doing this. And, like I said, a lot of them are going to ESOPs and they are working out very well for their employees.

Do you have any comment about, you know, how the two work together?

Mr. MISCIMARRA. Representative Allen, thank you very much for the question.

The one thing I will say is probably one of the most important, and the most challenging for all sides question that comes up in collective bargaining, and certainly this has been true for the past

20 years, involves methods of compensation and various arrangements that are much more complicated than they are today than they were 10–20–30 years ago. And so with respect to various types of especially retirement plans and other types of fringe benefits, it is from soup to nuts, it is all over the map. And I think that those present challenges for everybody.

The one other thing, if I may, Representative Wild raised a question, why is there no notice requirement in the National Labor Relations Act. In point of fact, the original version of the Wagner Act legislation in 1934 had a proposed notice requirement and it had a separate unfair labor practice that targeted employers that failed to comply with the notice requirement. During the legislative debates it was discussed. Senator Wagner himself expressed opposition for that requirement. It was removed from the bill.

Mr. ALLEN. Well, certainly my suggestions to our friends with the unions is to if they can recruit skilled workers—in this economy, you are going to find work. I can assure you of that.

Let me ask you, Georgia is the sixth best state in the country to do business—or the best state to do business with 6 years in a row. We are a right-to-work state. You know, I was at a union project, a nuclear power plant, met all the workers, going well, and we have your companies that are ESOP owned. And, like I said, it is what the people want, the right to choose.

As far as this legislation, H.R. 2474, how does it deal with right to work states? And to give us the flexibility to do what we do and to be the best state to locate business, that produce jobs, by the way.

Mr. MISCIMARRA. Well, I mean what the bill does, the principle effect on right-to-work states that the legislation has is to eliminate the protection that exists in more than half of the country for employees that object to paying mandatory union agency fee payments. And this legislation would override that employee protection.

Mr. ALLEN. For example, if I choose to do a job in Washington, DC, I have no choice, I have to work union? So you are telling me this law is going to affect us like this in Georgia as well?

Mr. MISCIMARRA. Well, to the extent that employees end up being represented by a union in Georgia, this law would prevent the Georgia right-to-work law from being given effect and those employees that have union representation could be required to make mandatory union agency fee payments, notwithstanding provisions in Georgia law to the contrary.

Mr. ALLEN. Thank you, sir.

I yield back.

Chairwoman WILSON. Thank you very much.

Mr. COURTNEY.

Mr. COURTNEY. Thank you, Madam Chairwoman, and thank you to all the witnesses for being here today.

I just wanted to followup actually on the Chairwoman's opening comments about the value of unions in terms of the standard of living of workers.

Up in New England we actually witnessed the value of collective bargaining when 31,000 workers were organized with the United Food and Commercial Workers Union and employed by Stop and

Shop, a grocery chain owned Ahold Delhaize, a Danish company, successfully exercised their rights to strike over proposed cuts to their pay and benefits.

It was an 11 day strike and the company obviously calculated that they could outlast the union. What was at stake was almost existential for the middle class way of life for the people who work there. The employer proposed increasing health plan deductibles from $300 a year to $5,000 a year. They had proposed more than doubling health insurance premiums, they had proposed removing spousal coverage for health insurance, they proposed eliminating time and a half on Sundays, and they also proposed slashing pension contributions for full-time employees by half.

What the company miscalculated was that in fact the public would support the picket lines that stood up in those grocery stores, again, in all the New England states, and after 11 days the strike ended and the UFCW was successful in restoring all of those out-of-pocket hits that workers would have taken and were not even close to being offset by any sort of modest wage increases, which were proposed.

So, again, from the standpoint of the people who stock the shelves and work the cashier lines, who I met with afterwards, who, again, felt that they had taken their own economic destiny into their own hands by exercising their right to strike, it obviously paid off big time for them.

So I know today, in Mr. Miscimarra's testimony, he has pointed to what he believes the employer's ability to permanently replace economic strikers, carefully balances competing interests. The PRO Act obviously would change that to not allow replacement strikers.

Just looking at the experience of what just happened up in New England, where again 31,000 workers stood up for their way of life and their standard of living, can you, Mr. Trumka, just talk about how the PRO Act would clarify that employers not being able to retaliate against striking workers and how that would actually facilitate collective bargaining and bring some of these job actions to a swifter conclusion, like we just saw?

Mr. TRUMKA. If in fact you can permanently replace workers, you take away their major leverage. They have no leverage left at that point. And so it encourages people, employers, to facilitate the dispute, escalate the dispute, and to replace the worker.

And I would like to give him a hypothetical. I would like to offer him a job and say you can get—I am going to give you a job that pays $1 million a year and you have 360 days of vacation. And so you come in, you take your—you work a day or two and you go I have 360 days of vacation, I will just take a week. So you take a week and when you come back somebody is sitting in your chair and you go, what is this. And I say, well, I have replaced you. And he goes, but I was on vacation. Yes, that is correct, but you are now replaced, so you are gone.

Does anybody believe that you really have 360 days of vacation? Does anybody believe you have the right to strike when they can replace you for actually exercising that right? Not having that right would force employers to come together with employees to work and actually negotiate a settlement. And so would the arbitration

procedure. Because no one wants to have something imposed on them, so both sides would have an incentive.

First, the employer would have an incentive to give you information quickly because there is a 90 day limit that you get to do that. Second of all, it would help you come to an agreement, because you don't want somebody else to take the chance that somebody will impose on you an agreement that you don't like. So it would actually encourage, it would level the playing field that is now terribly, terribly, terribly skewed in favor of the employer.

Mr. COURTNEY. So basically your experience is that replacement workers basically kind of enable employers to just drag out job actions and delay actually resolutions of these kinds of disputes?

Mr. TRUMKA. Absolutely.

Mr. COURTNEY. Thank you.

I yield back, Madam Chairwoman.

Chairwoman WILSON. Thank you, Mr. Courtney.

And now, Mr. Banks.

Mr. BANKS. Thank you, Madam Chair.

Mr. Miscimarra, in your testimony you say "the biggest problem with the PRO Act is the expansion of economic weapons and economic injury. Increasing the scope of these economic weapons and making them more destructive will have a destabilizing impact on U.S. employees, employers, the general public, and unions." I believe you are entirely correct in that statement, especially in this complex global economy that we find ourselves in today.

So can you elaborate on why it is so dangerous to weaponize labor relations in the global economy and how it is especially reckless to do so when working Americans are benefiting more than they have in decades in this substantially strong economy?

Mr. MISCIMARRA. Thank you very much for the question, Representative Banks.

There are many instances in my career—I say in my written testimony that I am a supporter and proponent of collective bargaining. It is to the credit of so many unions and so many employers that they have maintained and fostered constructive relationships throughout years and often decades of successful collective bargaining resulting in agreements. But, nonetheless, the engine that drives collective bargaining and the engine that has produced every collective bargaining agreement for 83 years under the National Labor Relations Act is either the infliction or the threatened infliction of economic injury. And for a union that is a strike, work stoppage, protest, or boycotts. For the employer, it is the possibility of a lock-out or the possibility of having temporary replacements or permanent replacements.

The National Labor Relations Act was passed during the Great Depression. At that time there was barely a national economy. At the present we have a global economy, and as I indicated previously, that we have also made massive advances in terms of automation, technological change, artificial intelligence, and self-driving vehicles, for example. So the parties have done well under existing law with respect to a bargaining model that still has as its centerpiece the potential or actual infliction of economic injury.

In a global economy that is very, very different. And I think one of the reasons why many employees have resisted the idea of union representation is it is counterintuitive for many employees to understand that it is in their interests to buy into a model that centers on potential economic injury to the place that employs them.

Mr. BANKS. You mentioned automation again. You also did in your written testimony. And the danger that this poses to existing jobs, especially in production companies. I represent the state of Indiana, home to 544,000 manufacturing jobs, so this is particularly important to me. And while I share your concerns about the effective automation of jobs, would you agree that technological advancements also make workers more productive, an increase of available job opportunities, if we avoid bad policy choices like the PRO Act that force employers to cut jobs?

Mr. MISCIMARRA. I completely agree with that. And as I indicate in my written testimony, you know, the American workplace has proved to be extraordinarily resilient with respect to its ability to adapt to changing conditions. So I think that there are many opportunities associated with technological advancements.

But, to the extent that we adopt a national labor policy that exacerbates the type of conflict or the cost or the penalties or the efficiency of the workplace itself, I think that will be counterproductive.

Mr. BANKS. Thank you very much.

I yield back.

Chairwoman WILSON. Thank you.

And now our former Secretary of Health and Human Services, Dr. Shalala.

Ms. SHALALA. Thank you very much.

I sat through this whole hearing in large part because I found Mr. Staus' testimony so compelling.

So, Mr. Miscimarra, you have made it very clear that you don't favor the bill that we have before us. You have heard his testimony, you were a member of the National Labor Relations Board the first time the NLRB ordered him to be reinstated by the University of Pittsburgh Medical Center, and then they ordered him again to be reinstated. And they didn't do it.

Can you really look him in the eye and say that you don't need—that we don't need to put more teeth into the law to make sure that when the Board makes a decision it is actually enforceable?

Mr. MISCIMARRA. Dr. Shalala, thank you very much for that question.

In fact, I looked Mr. Staus in the eye and I told him, I am from Pittsburgh, I grew up in Pittsburgh. I am from the same community where he currently lives. And one of the things I will say is former Chairman Pearce and I worked together for my entire tenure at the NLRB to address one weakness that certainly exists in the law, and I believe Mark and I are in agreement with this, in the 5 percent of cases that are not addressed and resolved in the first 60 or 90 or 120 days after the filing of the charge, the Board needs to do a better job getting cases decided more quickly. And I agree with that, I believe former Chairman Pearce agrees with that.

Throughout my tenure at the board we worked very hard to try to make improvements. It is very challenging. The current Board has announced as an objective, both on the Board's side and the General Counsel's side, to diminish the amount of time associated with the board's disposition of cases, taking 20 percent less time over a 4-year period. Frankly, I still think that is not fast enough.

And our current labor laws are not perfect. But I don't believe that H.R. 2474 is the solution.

Ms. SHALALA. Well, but let me push you, because what you did was answer the question about the time it took as opposed to the enforcement. Twice the National Labor Relations Board ordered the University of Pittsburgh Medical Center to reinstate him. It wasn't just the time it took for you to make the decision, it was the fact that it couldn't be enforced, that the National Labor Relations Board couldn't either penalize the University of Pittsburgh Medical Center and make sure he got reinstated. That is my question.

Mr. MISCIMARRA. Well, with respect, Dr. Shalala, I don't think that H.R. 2474 would produce the quicker resolution of these cases. And there has already been testimony to the effect that in certain types of cases not only would there be NLRB proceedings, but there could be NLRB proceedings as well as Federal Court proceedings. And we all know in the panoply of various types of Federal laws, the Federal Courts don't have that great a track record in terms of resolving their pending court cases as well. And of course, a District Court case is subject to appeal to the Court of Appeals and potentially to the Supreme Court.

So, again, I think speed is a problem. We tried to address it while I was at the NLRB, the current board is trying to address it, but I don't think speed is resolved in the current legislation that has been proposed.

Ms. SHALALA. And I don't think speed is the issue, I think enforcement is the issue. And that was my point.

Mr. Trumka, if I might ask you a quick question. This year marks the 100th anniversary of the International Labor Organization, the ILO, and it has—does the U.S. law comply with the basic standards of the ILO conventions? And how does noncompliance diminish our standing in the world? And how would the PRO Act help promote compliance with international human rights standards?

Mr. TRUMKA. It does not comply. Our laws don't comply with ILO conventions. There are eight laid out conventions. Freedom of association and effective recognition of the right to collective bargaining. That is conventions 87 and 98. We have not adopted those. The elimination of all forms of force and compulsory labor, we have adopted one, that is compulsory labor, but not number 29. Effective abolition of child labor, two resolutions, we have only adopted one. The elimination of discrimination in respect to employment and occupation, we have adopted neither one of those.

There was just a study done by the World Justice Project—it is here. The United States ranks 20th in the world for enforcement of those things. And the way that it affects us the most is, because we don't do the things that we ask others to do, we look like hypocrites. We ask them to do something and we haven't done it. We

do not protect the right to strike. That is one of the things that the international community specifically addresses and looks at and says the right to strike cannot exist when you can permanently replace anybody who exercises the right to strike.

So what it does is, it lessens our standing in the world and it makes it more difficult for us to help people in other parts of the world correct the outrageous labor standards and lack of labor laws that they have.

Ms. SHALALA. Thank you.

Chairwoman WILSON. Thank you.

Mr. WRIGHT.

Mr. WRIGHT. Thank you, Madam Chairman.

Mr. Miscimarra, I have a lot of union families that live in my district. I have a number of building trade unions that operate there. Dallas Fort Worth International Airport is just outside my district, but I have a lot of families that work there. And the largest nongovernment employer in my district is a General Motors plant, and it is their most profitable plant, makes their large SUVs. So unions are important to my district.

But Texas is real big on individual freedom and opportunity, and that is why so many people are flocking to Texas, for that freedom and opportunities, and why so many businesses are relocating there from other states. And I will tell you that this is one of the most anti-individual freedom bills I have ever seen.

My question to you is if this were to pass, the upheaval would be enormous, particularly in right-to-work states. And I can tell you that just from district that unions thrive and do well in right to work states. So to do away with that just strikes me as incredibly ridiculous.

But can you project what you think this upheaval would do to us in terms of our national economy, but also, more importantly, in terms of our competitive edge internationally in the global economy?

Mr. MISCIMARRA. Thank you for the question, Representative Wright.

I think that on many levels this legislation is ill advised, particularly as it relates to the competitive position of the United States and in the world economy. No. 1, as I indicated, current law, which parties have worked with for many, many, many years, itself represents an incongruity between this model developed in the 1930's, where economic conflict plays such a central role, and the current economy that was barely imaginable in the 1930's when the National Labor Relations Act was first adopted.

The second thing that Congress has done over time with our current law is made modifications in order to sculpt or tailor the type of economic conflict that is available under the law. And, for example, the ban on secondary boycotts, as I indicated before, was adopted in 1947, it was strengthened in 1959, and it has been the law now for more than 70 years.

Not to the extent that this bill would become law, if a union has a strike or a boycott with any particular company it would then be permissible for the union to effectuate a strike or engage in picketing or boycotts with every single other entity that does business with that company. That is what a secondary boycott is. That type

of widespread turmoil in the economy, especially given the complicated economy that exists today, I think would be debilitating just for the people that are exposed to that conflict in the United States, but it certainly would be even more harmful if you consider the ramifications in the world economy.

Mr. WRIGHT. Okay. Thank you, sir.

I yield back.

Chairwoman WILSON. Thank you, Mr. Wright.

And now, Mr. Levin.

Mr. LEVIN. Thank you, Madam Chairwoman. And I have a couple of slides that I would like to put up there when the staff get a chance to put them up.

And the point of these slides is to show how we have been going in the wrong direction on workers' freedom to form unions and how the law is completely failing and has been for decades.

I started organizing nursing home workers for SEIU in 1983, so I picked this as a start date. And the number of elections held every year back then was about 4,500. The number of NLRB union elections declined by more than half from the days when I started through the late aughts, which is the latest date we have available. And this is 0.02 percent of private sector employers had any kind of election.

If you look at the next slide, the number of workers who cast ballots declined significantly from 1983—in the early '80's it was in the low 200,000's, in the late aughts it was 100,000+/-. In 2009 the number of private sector workers who cast a ballot was 0.009 percent. I don't even know how to say—9 hundredths or thousandths—whatever that is. This is when 62 percent of people say that they are in favor of unions. And if we had a perfect free market for unions, 30 percent of workers would be in unions. The system is completely failing the workers of the United States.

Mr. Miscimarra—is that how you pronounce your name?

Mr. MISCIMARRA. Miscimarra.

Mr. LEVIN. Miscimarra. Thank you so much. Your testimony states that requiring injunctions for temporary reinstatement upsets what the Supreme Court calls "the delicate task" of "weighing the interests of employees in concerted activity and the interest of the employer in operating his business in a particular manner".

At the end of your term as chairman in 2017, you issued five decisions overturning prior precedent, including in Hy-Brand Industrial Contractors. Is that correct?

Mr. MISCIMARRA. I believe that is right.

Mr. LEVIN. And so that case, the Hy-Brand case, involved seven employees who were fired for protected activity. And there was also a question of whether those employers were a single employer or joint employers. And if they were joint employers, then that would have been governed by the Browning-Ferris decision.

In your October 18, 2017 email circulating a draft decision in Hy-Brand, isn't it the case that you told the other members of the NLRB that your draft decision was lifted from your dissent in Browning-Ferris and that members should resist the desire to improve the language in order to keep the focus on overturning Browning-Ferris. Is that correct? Yes or no?

Mr. MISCIMARRA. In fact, my—

Mr. LEVIN. Is that what the email said? I just need—I—because I am going onto another question, so I just need to know whether you said that. I mean we have the emails, so I know the answer.

Mr. MISCIMARRA. Then, I am asking why would you ask me the question?

Mr. LEVIN. Oh, well, so let me continue.

Mr. MISCIMARRA. I will respond. What I told my fellow members was that the dissenting opinion in Browning-Ferris Industries was so insightful I didn't believe it could be improved upon.

Mr. LEVIN. That is modest of you. And so because member Emanuel's former law firm represented a party in Browning-Ferris, didn't the Inspector General and the ethics official find that he violated his ethics pledge? Did that occur?

Mr. MISCIMARRA. The—

Mr. LEVIN. I only have 5 minutes, so I need a yes or no answer.

Mr. MISCIMARRA. Well, you asked me two—there is compound—

Mr. LEVIN. I asked you if it occurred or not.

Mr. MISCIMARRA. The Inspector General issued a report that I believe is publicly available with redactions and I don't—I have never seen it. I don't believe it has been released what the designed ethics officer concluded in the case.

Mr. LEVIN. Well, it doesn't really sound delicate or evenhanded to me, sir.

Mr. Trumka, none of the NLRB members in that case disagreed that those seven employees were wrongly terminated, but the ethics scandal caused by Mr. Miscimarra's ramming through that decision delayed their reinstatement order by 6 months. People have been wrongly terminated, and as we know that kills a union election if they are gone for 6 months.

If the law required injunctions for temporary reinstatement, like our PRO Act would have, wouldn't those employees have been protected from these hijinks?

Mr. TRUMKA. Absolutely. And if the law had required that, what happens is when an employer illegally fires employees there is a tremendous chilling effect. It says to everybody else out there, support the union and I will fire you as well.

Going in immediately and getting an injunction would have showed two things, it would have showed, one, the employer had acted illegally, and, two, the government was willing to stand up and protect workers and their rights. It would have encouraged them to go forward with the drive so that they had a voice on the job.

As it currently stands, they can drag things out and dissuade people from unionizing by picking out a couple of scapegoats and illegally firing them.

Mr. LEVIN. Thank you very much.

My time has expired; I yield back, Madam Chairwoman.

Chairwoman WILSON. Thank you, Mr. Levin. Thank you so much.

Mr. JOHNSON. You see, they got all these names on here, and they don't have yours. That is my friend, Mr. Taylor.

Mr. TAYLOR. Thank you, Madam Chair. Appreciate that.

Mr. Miscimarra, did you want to respond to Mr. Levin? I know time ran short. It wasn't his fault, but just want to give you an opportunity to respond if you would like to.

Mr. MISCIMARRA. Yes. No, I have no further response in relation to what he was asking questions about.

Mr. TAYLOR. Okay, great. Thank you so much.

So, you know, I happen to represent a very affluent district that is, you know, burgeoning, growing, lots of jobs coming. And as companies come to Texas, over and over again I hear how important it is that Texas is a right-to-work state. And certainly in my 8 years in the legislature it was really very important to us that we were a right-to-work state. It seemed to certainly attract a lot of jobs, high end and low end. Texas has certainly created a tremendous number of jobs.

I think DFW recently reported they added a million people over the last decade and a lot of them have come to my county, to Collin County.

So you have a JD-MBA from Wharton, is that right?

Mr. MISCIMARRA. I do.

Mr. TAYLOR. Okay. So you have me at a disadvantage.

Mr. MISCIMARRA. And law school.

Mr. TAYLOR. Okay. Well, the JD I think would be the law degree, right?

Mr. MISCIMARRA. Yes.

Mr. TAYLOR. So you are an attorney. I am not. But I have read the Constitution and in the Bill of Rights there are five protected rights, freedom of speech, freedom of press, freedom of religion, freedom to assemble, and freedom to petition. And I am just concerned about this particular piece of legislation, H.R. 2474. It seems to have some things that might go contrary to our First Amendment rights, specifically the right to assemble and the right to speech.

Can you speak to those two?

Mr. MISCIMARRA. Well, you know, there are two things I think that create issues in relation to the First Amendment. One thing is that the bill prohibits an employer—or would prohibit an employer from conducting workplace meetings in which the employer expresses, you know, its views with respect to union related issues. And, of course, you know, an employer in relation to its employees has access to its employees when they are at work. A union attempting to organize has potential access to employees at every other time. And of course employers have First Amendment rights just like anybody else, corporations have First Amendment rights. So from that perspective the bill implicates the First Amendment rights of employers.

Secondly, the bill, as we have talked about, also would override the state laws that protect employees from being required in right-to-work states from being required to make mandatory union agency fee payments. And the Supreme Court in the Janus case decided last year held that the First Amendment also protects compelled speech, or a requirement that employees subsidize an organization with which they lack agreement. And so the Janus case of course dealt with First Amendment issues that arose in the context of public employment. Those same First Amendment issues have not

been specifically addressed since Janus in the context of private sector employment, but this issue about compelled subsidizing an organization with which some employees do not agree certainly implicates potentially significant First Amendment concerns.

Mr. TAYLOR. I appreciate that. Obviously I would submit that Congress should not attempt to pass laws that are unconstitutional on their face, and certainly you only have to go to the Bill of Rights to see those rights, and only the First Amendment to see those rights.

Shifting over to something that I am sure is important to you as an attorney, you know, in your practicing law firm, attorney-client privilege.

So attorney-client privilege is something we understand as being very important, particularly within the context of the Seventh Amendment, the right to a trial by jury. And so as we think about that, does 2474, I mean in your mind, violate some pieces of attorney-client privilege, which is so important to our judicial system?

Mr. MISCIMARRA. Well, the bill would codify what was known as the Persuader Rule adopted by the Department of Labor several years ago, which has since been rescinded. But what the bill does, consistent with what the Department of Labor formerly required, was—or it was in the process of being implemented and then it was abandoned by DOL—is that to the extent that employers consult legal counsel in relation to various union related issues, that would then be subject to mandatory reporting for purposes of the Labor Management Reporting and Disclosure Act, which is a significant change from current law and significant change from the way that the legal advice exception to the LMRDA has been interpreted.

Mr. TAYLOR. And so that would really interfere with the attorney-client privilege. I mean the ability for an attorney and a client to have free communication to discuss things, you know, knowing that they are going to have to report that, right?

Mr. MISCIMARRA. Well, and I think it would effectively limit access to counsel—

Mr. TAYLOR. Wow.

Mr. MISCIMARRA [continuing]. in many instances with respect to union related issues.

Mr. TAYLOR. Well, certainly limiting access to counsel strikes me as an un-American concept. I mean it is just not right. I think we value that ability to have a functioning legal system.

Mr. MISCIMARRA. Most lawyers would agree with you on that.

Mr. TAYLOR. Well, I hope most on the dais do.

Madam Chair, I yield back.

Chairwoman WILSON. Thank you, Mr. Taylor.

And now our distinguished Chair Attorney Scott.

Mr. SCOTT. Thank you.

Mr. Trumka, did you have a comment you wanted to make?

Mr. TRUMKA. I most definitely did. I trust that Texas also wants to protect the free speech of employees, other than just employers, because they can be made to go into these meetings and not say a word. If they do say a word they get fired. That is not free speech.

And he just erroneously told you it would prevent employers from having sessions like this. It would not. The difference it would

be is they would have to do it voluntarily. The workers would get to come if they wanted to and not come if they don't want to.

The law as it currently stands, and as he proposes it stay, is that they must go, whether they want to go or not. They don't get a say in all of that.

And I would like to correct a number of those erroneous things in written testimony after the hearing, Madam Chair, if that is permissible.

Chairwoman WILSON. So ordered.

Mr. SCOTT. Thank you.

Mr. Trumka, could you tell me what the problem is that the fair share agreement would solve?

Mr. TRUMKA. Well, what happens with fair share is that you have an election and the union wins. And then they get a second bite at the apple, the ones that don't want to be in the union say, okay, the union won, majority rules, but you don't get to be—I don't have to be in the union and you have to give me all the services that you give everybody else and I don't have to pay. This bill would allow employers and employees to come together and say that is not fair. If they want all the services, they also ought to have to pay a little bit of the tab.

So it is like if you have a general election, an election for House of Representatives, and you got 52 percent of the vote, the other 48 percent could say I don't recognize you, I get to be a different rule. And if you have any governance, I don't have to apply to it, I don't have to listen to it, and you have to give me all the services you give the other people.

Mr. SCOTT. And what kind of taxes under that scenario would you be paying?

Mr. TRUMKA. What kind of taxes?

Mr. SCOTT. Yes. You wouldn't pay taxes.

Mr. TRUMKA. Well, you wouldn't under that scenario. I would opt out by saying I don't recognize your new tax law.

Mr. SCOTT. Now, the fair share would cover just those services required by law. Would it cover things like annual cookouts and political activities?

Mr. TRUMKA. No, it would not. We cannot charge for that. Never have. Political activities are completely separate. And even if you don't have a right to work law, employees can opt out of the part of their dues that is used for political activity.

Mr. SCOTT. Now, let me ask another question. What is wrong with misclassifying employees as independent contractors?

Mr. TRUMKA. Well, it takes away their ability to ever have a voice on the job. What an employer does is—there is one example where you had a trash company and they classified the people that came in to pick the trash off of the belt, they classified them as independent contractors, even though their employer, the original employer, determined the speed that the belt went. So they would never be able to have a voice with that employer and get the level of the speed of the conveyor belt. They couldn't negotiate to slow it down or to make the place more safe because they were "the employees of not the employer, but an independent contractor". So it prevents them from coming together, organizing a union, and getting a voice on the job.

Mr. SCOTT. Would independent contractors be eligible for minimum wage?

Mr. TRUMKA. For minimum wage?

Mr. SCOTT. Right.

Mr. TRUMKA. Yes.

Mr. SCOTT. Independent contractors?

Mr. TRUMKA. Well, no, they wouldn't have a minimum wage because they don't have an employer.

Mr. SCOTT. Right.

Mr. TRUMKA. They are an independent contractor. So you are right, they would not be covered by it.

Mr. SCOTT. If there is an unfair labor practice, does the victim have to wait for—let me ask Mr. Pearce. If there is an unfair labor practice, does the victim have to wait for the NLRB to act or can they act on their own?

Mr. TRUMKA. They cannot act on their own. First, they have to wait for the NLRB to issue a charge. And then after the charge it goes before an Administrative Law Judge. And then after an Administrative Law Judge, then it goes to the full National Labor Relations Board. After the full National Labor Relations Board it can go to the circuit court of appeals. After the circuit court of appeals, they still have to go through an enforcement process then. So they say yes, you must bargain, and then the employer doesn't bargain, so they have to go through much of the same thing again.

Mr. SCOTT. And let me ask Mr. Pearce one final question. What is the difference between a self-enforcing order and one issued by the NLRB under present law?

Mr. PEARCE. Under the present law—and thank you, Mr. Chairman, for asking the question. If a law is self-enforcing, then that—you don't have to go to Federal court to get it enforced. It is immediately effective on the wrongdoer. Several other statutes provide that for wrongdoings and violations. The NLRA essentially is a car driving with a boot on it because it has to go and get to Federal court each time it wants to enforce its remedies. So automatically it slows down the process and victims are further damaged by the passage of time.

Chairwoman WILSON. Is that it, Mr. Chair? Finished?

Mr. SCOTT. I yield back.

Chairwoman WILSON. As there are no more subcommittee members present, I now recognize the gentlewoman from Connecticut, Ms. Hayes, who was a former National Teacher of the Year.

Ms. HAYES. Thank you, Madam Chair.

I want to start off first by saying that I have spent my entire adult life as a proud union member, as a member of SEIU 1199, the Waterbury Teachers Association, the Connecticut Teachers Association, and ultimately, the National Education Association. So I know both the power and the sense of empowerment that labor unions bring. In fact, in my year as National Teacher of the Year, there were four finalists celebrated at the top of their profession. Three of those four finalists walked out of their classrooms with their union brothers and sisters to negotiate wages, benefits, and most importantly, supports and resources for the kids in their classrooms. All of those things are worth fighting for.

And above all, unions give workers a seat at the table. So I get it. That is why I am so frustrated when I hear stories around the country, and even in my home district, of workers who are actively being discriminated against or retaliated against for exercising their rights to organize.

I have heard from Social Security Administration union representatives in Connecticut. They allege that the critical centers were closed in many states because they had high numbers of union employees. They allege that the Social Security Administration makes it more difficult for union reps to do their jobs and often targeted and retaliated against workers aligned with the union during personnel reviews, or when those workers requested leave or reasonable accommodations, they were denied. Meanwhile, their complaints to the National Labor Relations Board had gone unheard during this Administration.

Mr. Trumka, my question is for you. Are these complaints of employers' retaliation common for workers who are union members or are looking to unionize? And have they increased in the most recent years?

Mr. TRUMKA. We have seen that attacks, the number of things that they do—they have new threats now. They have the threat to move overseas, they have the threat to close down. They use the sweat sessions or the closed meetings, mandatory audiences, more often now than they did before, they are longer, more intense, and they have a greater effect on workers.

So we are seeing the law be violated more and more, and the ability to enforce it becomes less and less as it increases in intensity.

Ms. HAYES. Thank you. In your testimony you mentioned that workers who wanted to form a union often cannot talk with or meet with union representatives at their job. As I have mentioned, we have heard about this happening in my own district. However, employers are free to talk with employees. We heard a lot about those mandatory captive audience meetings. In fact, employers can require employees to attend these meetings.

We also heard from my Republican colleagues on the other side of this committee that the PRO Act requires employers to provide private information to unions, which they claim unions could abuse or sell to third parties.

Madam Chair, I would like to submit a document that contradicts that argument. It is information—

Chairwoman WILSON. So ordered.

Ms. HAYES. Thank you. It is information that the NLRB submitted to this committee in 2018 and it reveals that no employer has charged that a union has abused the voter information list since this procedure was updated in 2014. In fact, this document states that these lists—well, this document shows that these lists are necessary to create parity during election campaigns as employers already have this information to use with employees.

Mr. Trumka, again to you, how do these rules, which require that an employee share information and contact information with the union before an election, eliminate this double standard, and make this process more fair?

Mr. TRUMKA. Well, most of the time only the employer knows who all of the employees are and where they work. So the new rule would codify an existing rule of the NLRB, and it would require them to provide promptly a voter list when an election is directed, including the name, the position, the shift, the work location, phone number, email, and physical address. That wasn't required under the old rules, but the NLRB now requires it. It is essential in order to be able to communicate with them, because remember, we are not allowed on the property. We can't go on, we can't talk to people. You may have to meet with them at a grocery store, anyplace else where you can get them. The most efficient place and the best place for them to be able to talk is in their home setting at their home, so that you can have a real conversation with them.

Ms. HAYES. Thank you.

Mr. Pearce, I have 10 seconds. Do you think—we have heard a lot especially from Mr. Miscimarra about banning captive audiences undermines employees' free speech right. How would this be protected do you think under this Act?

Mr. PEARCE. Well, under this Act employees will have the freedom to freely discuss and choose not to participate in an employer's campaign. Employers with new technology have all the cell phones of employees or supply cell phones to employees and they can send anti-union texts to employees. Employee drivers—we have the cases where drivers have ride alongs where the ride along is giving propaganda to the employee continuously without the employee having the ability to say, you know, I don't want to hear this.

And then the second piece of that is, if the employee does say I don't want to hear this, then they could be subject to retaliation.

The technology and the control that the employers have creates an imbalance with respect to employee access and a fair understanding of the election process.

Chairwoman WILSON. Thank you. Mm-hmm.

Ms. HAYES. Thank you, Madam Chairwoman.

And I yield back.

Chairwoman WILSON. I remind my colleagues that pursuant to committee practices, materials for submission for the hearing record must be submitted to the committee clerk within 14 days following the last day of the hearing, preferably in Microsoft Word format. The material submitted must address the subject matter of the hearing. Only a member of the committee or an invited witness may submit material for inclusion in the hearing record. Documents are limited to 50 pages each. Documents longer than 50 pages will be incorporated into the record by way of an internet link that you must provide to the committee clerk within the required timeframe. But please recognize that years from now that link may no longer work.

Again, I want to thank the witnesses for their participation today; a very lively, energetic group of witnesses. We learned a lot and we certainly appreciate your time. What we heard today is very valuable.

Members of the committee may have some additional questions for you, so look out for them. And we ask the witnesses to please respond to those questions in writing.

The hearing record will be held open for 14 days in order to receive those responses.

I remind my colleagues that pursuant to committee practice, witness questions for the hearing record must be submitted to the majority committee staff or committee clerk within 7 days. The questions submitted must address the subject matter of the hearing.

Before recognizing the ranking member for his closing statement, I ask unanimous consent to enter the following materials into the record in support of the PRO Act. I have letters from the United Steelworkers, the International Union of Painters and Allied Trades, the AFL–CIO, the SEIU, and the UFCW, the BlueGreen Alliance.

Without objection.

I now recognize the distinguished ranking member, Mr. Walberg, for his closing statement.

Mr. WALBERG. Thank you, Madam Chairwoman, and thanks to the panel for being here. It has indeed been a lively discussion. It is a worthy discussion. This is America. America is back, Michigan is back. I am delighted about that. I am delighted to see corporate entities coming back, building cars, products in Michigan again. It is a manufacturing state, it needs workers, it needs businesses in order to make it work together.

My concern is that for anything that would stand in the way of continued expansion, that purports to help workers or businesses, and in the end costs jobs. We saw that happen in the downturn of economy. I was here in 2007–2008 and watched what took place in Michigan as it was decimated, as businesses left, and unions could not come up with what they promised to their employees. And we saw large corporations, specifically two of the big three, go bankrupt, and we had to bail them out.

Don't want that to happen again, because like Mr. Staus, that touches lives and families. What he has lived through, many, many people in Michigan lived through as well.

So while there needs to be reforms, there needs to be upgrades on the legislation as well as the agencies we put together to make sure they are working right and they are mobile, loose on their feet, we cannot walk away from the underpinning principles to undermine those principles that talk about the freedom that we have in this country.

And so to take a bill like we are looking at today that eliminates right to work laws nationwide, regardless of whether the people of Michigan voted for that or not, is wrong. I say the unions earn it, earn it back. To stifle work of independent contractors, which limits workplace flexibility and opportunity, is wrong.

Violate workers' privacy rights without them volunteering those pieces of information that could allow, yes, a union organizer to get their information and make those contacts. Voluntarily, great. Involuntarily, a violation of the right to privacy.

So we need to get it right. And, Madam Chairwoman, I think this side of the aisle is willing to work on those issues, we are willing to work toward a solution that is indeed a compromise, that protects some of these key things that make America great and, more importantly, make our workers, our work force, and our businesses great as well.

So I commit to doing that and I think this was a good start, talking about it. I hope it doesn't end here, we continue in working toward solution.

And before I end, Madam Chairwoman, I ask unanimous consent to submit letters in opposition to H.R. 2472 into the record from the following organizations: Associated Builders and Contractors, Coalition for a Democratic Workplace, Independent Electrical Contractors, International Franchise Association, National Association of Home Builders, National Restaurant Association, and National Retail Federation.

I also ask to submit a letter from the Coalition for Workforce Innovation expressing concerns with the bill.

Chairwoman WILSON. So ordered.

Mr. WALBERG. Thank you.

Chairwoman WILSON. I now recognize myself for the purpose of making my closing statement. And, as always, Mr. Walberg, the distinguished ranking member, is willing to work with me and with our committee, so this has been a great session today. We have heard your witness. I don't think that—we heard you, we heard you. We are going to try to connect the dots there. Right now they are not connecting.

I now recognize myself for the purpose of making my closing statement.

Thank you again to all of our witnesses for your testimoneys today. Today, we heard how the Protecting the Right to Organize Act can safeguard the fundamental human rights to organize a union, stopping employers from coercing and retaliating against their workers. Routine violations of workers' rights to organize suppresses wages and denies workers the opportunity to negotiate for their fair share of the wealth they create.

We heard from Mr. Trumka how the PRO Act can prevent abuse of workers' rights through penalties and holding coercive captive audience meetings, making people sit and not move. We heard from Mr. Staus on how difficult it is to organize a union in the face of vicious attacks. Mr. Staus is one of many courageous Americans who stood up for their rights to organize a union and he deserves justice under the law.

Some of the stories I have heard and witnessed are deplorable. We heard from Mr. Pearce how the PRO Act would strengthen the National Labor Relations Board by reducing procedural obstacles and ensure that workers like Mr. Staus receive swift remedies.

As our witnesses have made clear, Congress must enact the PRO Act to deter violations of workers' rights and reverse decades of wage stagnation and income inequality.

I thank my colleagues for constructive HELP Subcommittee hearing and I yield back my time.

If there is no further business, without objection, the committee stands adjourned.

Thank you so much.

[Additional submission by Mrs. Foxx follows:]

The Wall Street Journal

Big Labor's Big Shrink

Union membership continues to decline—thanks to unions.

By
The Editorial Board
Updated April 30, 2019 8:19 a.m. ET

Joe Biden gave his first speech of the 2020 campaign to a union crowd in Pennsylvania Monday, and the International Association of Fire Fighters endorsed him. Mr. Biden wants to be seen as the champion of workers, which makes it a good moment to examine why fewer workers want to join unions.

Union membership as a share of the labor force has fallen by nearly half since 1983 and last year dipped 0.2 percentage points to 10.5%. Private unionization has fallen to 6.4% from 16.8% in 25 years as union labor agreements have made manufacturers less competitive and the U.S. economy has become more service-oriented. See the U.S. steel industry.

Public-union participation has held up better due to laws that mandate collective bargaining and require non-members to subsidize it. But public-union membership has also been slipping and last year fell from 34.4% to 33.9%, the lowest since the Bureau of Labor Statistics first published the data in 1983.

After the Democratic Congress in 2009 failed to pass card-check to ease union organizing, the Obama Administration turned to regulation. The National Labor Relations Board made it harder for employers to counter union organizing while its joint-employer rule gave labor groups more leverage over corporations and a foothold at fast-food and other franchises.

Yet private union membership continued to slide. The drop over the last decade has spanned most industries including transportation (22% decline), manufacturing (21%), construction (18%) and health care (15%). Even as manufacturing employment has increased by 1.4 million since 2010, the number of union workers has fallen by 78,000.

One reason is right-to-work laws in states like Indiana, Michigan and Wisconsin that let workers opt out of unions. After Wisconsin enacted right to work in 2015, the union share of the state workforce fell 30%. Jobs have been shifting to southern and western states with right-to-work laws, and foreign automakers have dodged unions by locating new plants in the South.

Unions also aren't delivering better wages. Earnings growth for union workers was generally stronger prior to the recession, but non-union workers have since done better. Median weekly earnings for union construction workers increased annually on average 0.2% faster than for non-union counterparts from 2000 to 2008, but they have since grown 0.3% slower.

Union health and social care workers averaged 1.1% faster earnings growth in the eight years before the recession, but their pay increases have trailed by 0.3% each year since 2008. Annual earnings for an average union health-care worker would be $1,180 higher today if his pay had grown at the same rate as non-union counterparts over the last decade.

Union workers often receive more generous health and pension benefits, which may account for some of the discrepancy. According to the Labor Department, benefits as a share of compensation have grown 1.7 percentage-points more for union workers than non-unionized employees since 2008.

But union workers may not be reaping the benefits. That's because employers have had to funnel more of worker compensation to insolvent union-run multi-employer pension plans. Many companies have gone bankrupt, which has shifted the funding burden to others.

According to the federal Pension Benefit Guaranty Corporation, 130 plans are projected to go broke over the next 20 years. Workers would then receive a maximum pension of $12,870. The federal insurer also forecasts it will run out of money by 2025, which would result in even bigger pension cuts. In other words, instead of raising wages, unionized employers are paying more to finance pension benefits that workers may never receive.

Government unions have also planted the seeds of their decline by bargaining for rich benefits that are fiscally unsustainable. States and municipalities have cut government services and workforces as they've had to divert more revenue to retirement benefits. The largest government reductions have occurred in states with heavily unionized public workforces.

New York's state and local workforce—nearly 70% of public workers are unionized—has shrunk by 21,000 over the last decade. Connecticut has shed 19,800 public employees since 2009 while New Jersey has reduced its government headcount by 33,300. But rather than live within their means, these states have raised taxes again and again.

As a result, taxpayers flee to lower-tax states that don't mandate government collective bargaining. Economic growth has generated more tax revenue for states like Florida and Utah, which have in turn expanded public services and workforces. Utah has added 36,000 government workers over the last decade, but only about 18% of its public workers belong to a union.

Liberals blame capitalism for weaker unions, which they say has depressed wages. But public unions like those in private industry are shrinking because they have extracted pay and benefits that have made their employers less competitive. Growth by political coercion is not a sustainable business model.

[Additional submission by Ms. Hayes follows:]

UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

February 15, 2018

The Honorable Patty Murray
Ranking Member
Committee on Health, Education, Labor, and Pensions
U.S. Senate
428 Dirksen Senator Office Building
Washington, DC 20510

The Honorable Robert C. "Bobby" Scott
Ranking Member
Committee on Education and the Workforce
U.S. House of Representatives
2101 Rayburn House Office Building
Washington, DC 20515

The Honorable Gregorio Kilili Camacho Sablan
U.S. House of Representatives
2411 Rayburn House Office Building
Washington, DC 20515

The Honorable Donald Norcross
U.S. House of Representatives
1531 Longworth House Office Building
Washington, DC 20515

Dear Senator Murray and Representatives Scott, Sablan, and Norcross:

Thank you for your December 21, 2017 letter requesting information regarding the National Labor Relations Board's (NLRB) 2014 Election Rule, which modified the Board's representation-election procedures located at 29 CFR parts 101 and 102.

Your request seeks data from representation (RC) petitions, decertification (RD) petitions, and employer-filed (RM) petitions from April 14, 2015, to the most recent date for which data is available, and for a period of equal length going back from April 14, 2015, with each of the two periods organized into one-year increments. It should be noted that April 14, 2015, is the date that the 2014 Election Rule took effect; petitions filed on and after April 14, 2015, are processed under the 2014 Election Rule.

The time period for the included data is July 26, 2012, through December 31, 2017. To accommodate your request for one-year increments, the time periods are broken down as follows:

Cases Processed prior to the Revised Rule:
7/26/2012 – 4/13/2013 (261 days)
4/14/2013 – 4/13/2014
4/14/2014 – 4/13/2015

Cases Processed under the Revised Rule:
4/14/2015 – 4/13/2016
4/14/2016 – 4/13/2017
4/14/2017 – 12/31/2017 (261 days)

For your convenience, we arranged most of your request into summary tables. The underlying data is compiled in an Excel spreadsheet that includes the Case Number, Case Name, and all relevant data points.

1. The number and percentage of elections where the parties stipulated to the terms of the election.

   Please see the attached Summary Table, Lines 4 and 5.

2. The number and percentage of elections where the parties have not stipulated to the terms of the election, and a hearing was ordered. Please identify each such case by name and case number.

   Please see the attached Summary Table, Lines 6 and 7.

3. The number and percentage of cases in which the employer requested a continuance of the originally-scheduled pre-election hearing date. Please identify each such case by name and case number.

   We do not have data elements that track requests for the continuance of a hearing in a matter that can be responsive. The attached Excel spreadsheet lists the number of petitions filed during each time period, the date a Pre-Election hearing was originally scheduled, and the date the hearing was held. We do not track the reason for a difference in the scheduled and held dates.

4. The number and percentage of cases in which the employer's request described in Request No. 3 was granted. Please identify each such case by name and case number.

   As stated above in the response to Request No. 3, we do not have data elements that track requests for continuance of a hearing in a matter that can be responsive.

5. The range, mean, and median number of additional days granted by each continuance described in Request No. 4.

   As stated above in response to Request No. 3, we do not have data elements that track the underlying information, we cannot produce this calculation.

6. The number and percentage of cases where the labor organization requested a continuance of the originally scheduled hearing date. Please identify each such case by name and case number.

   For the reasons set forth above in the response to Request No. 3, we do not have data elements that track this information.

7. The number and percentage of cases in which the labor organization's request described in Request No. 6 was granted. Please identify each such case by name and case number.

   For the reasons set forth above in the response to Request No. 3, we do not have data elements that track requests for continuance of a hearing in a matter that can be responsive.

8. The range, mean, and median number of additional days granted by the each continuance described in Request No. 7.

   As we do not have data elements that track the underlying information, we cannot produce this calculation.

9. The number and percentage of cases in which a pre-election hearing was held. Please identify each such case by name and case number.

   Please see the attached Summary Table, Line 8.

10. The number and percentage of cases in which the only issues that were not agreed to by the parties were the election date or details regarding the conduct of the election.

    We do not have data elements that track this information.

11. The range, mean, and median number of days for the duration of pre-election hearings.

    Please see the attached Summary Table, Lines 9, 10, and 11.

12. The number and percentage of cases in which the parties stipulated that some employees should vote subject to challenge (a) as part of an overall election agreement and (b) in a case that resulted in a decision and direction of election. Please identify each such case by name and case number.

The information provided is for cases where elections were held and the results were certified.

Part (a) –Cases that resulted in Election agreements

Election Agreements – Prior to the Revised Rule
7/26/2012 – 4/13/2013: 27 cases (all RC representation petitions)
4/14/2013 – 4/13/2014: 25 cases (all RC representation petitions)
4/14/2014 – 4/13/2015: 22 cases (all RC representation petitions)

Election Agreements - Revised Rule:
4/14/2015 – 4/13/2016: 133 cases (all RC representation petitions)
4/14/2016 – 4/13/2017: 58 cases (all RC representation petitions)
4/14/2017 – 12/31/2017: Five cases (all RC representation petitions)

Part (b) – Cases that resulted in a Decision and Direction of Election

RD Decisions – Prior to the Revised Rule:
7/26/2012 – 4/13/2013: One case (RC representation petition)
4/14/2013 – 4/13/2014: Three cases (all RC representation petitions)
4/14/2014 – 4/13/2015: Two cases (all RC representation petitions)

RD Decisions - Revised Rule
4/14/2015 – 4/13/2016: Two cases (All RC representation petitions)
4/14/2016 – 4/13/2017: Two cases (all RC representation petitions)
4/14/2017 – 12/31/2017: Zero cases

13. The number and percentage of cases in which the Regional Director or Board directed that some employees should vote subject to challenge over the objection of a party. Please identify each such case by name and case number.

The information provided is for cases where elections were held and the results were certified.

RD Decisions – Prior to the Revised Rule:
7/26/2012 – 4/13/2013: Five cases (all RC representation petitions)
4/14/2013 – 4/13/2014: 11 cases (all RC representation petitions)
4/14/2014 – 4/13/2015: Six cases (all RC representation petitions)

RD Decisions - Revised Rule
4/14/2015 – 4/13/2016: 14 cases (13 RC representation petitions, one RM employer-filed petition)
4/14/2016 – 4/13/2017: Seven cases (all RC representation petitions)
4/14/2017 – 12/31/2017: Two cases (RC representation petition)

14. The number and percentage of cases in which the Regional Director or Board refused to permit a party to litigate an issue on the grounds that it was not identified or contested in its position statement. Please identify each such case by name and case number.

We do not have data elements that track this information.

15. The number and percentage of cases in which a dispute that was deferred by permitting employees to vote subject to challenge was mooted by the election results. Please identify each such case by name and case number.

    Data responsive to #12 and #13 list cases where people were allowed to vote subject to challenge. The challenge information below is specific to those particular cases. The spreadsheets prepared for #12 and #13 contain determinative challenge information. We do not have data elements that track whether the parties' underlying dispute regarding status of the employees in question was resolved by the results of the election.

Time Frame	Election Agreements-vote subject to challenge	RD Decision-stipulated vote subject to challenge	RD Decision – RD Directed to vote subject to challenge	# of cases where challenges were filed	# of cases where challenges were determinative
7/26/2012 – 4/13/2013 (prior to revised rule)	27	1	5	24	3
4/14/2013 – 4/13/2014 (prior to revised rule)	25	3	11	29	5
4/14/2014 – 4/13/2015 (prior to revised rule)	22	2	6	22	1
4/14/2015 – 4/13/2016 (revised rule)	133	2	16	115	15
4/14/2016 – 4/13/2017 (revised rule)	58	2	7	51	6
4/14/2017 – 12/31/2017 (revised rule)	5	0	2	4	2

16. The number and percentage of cases in which the employer requested an extension of time to file and serve the voter eligibility list. Please identify each such case by name and case number.

    We do not have data elements that track this information. The attached Excel spreadsheet lists the "original" and "current" due date for the voter eligibility list and the

date the list was provided ("completed due date"). We do not track the reason for any difference in the original and completed due dates.

17. The number and percentage of cases described in Request No. 16 in which the request was granted, and the number and percentage of cases described in Request No. 16 in which the request was denied.

    As explained above in the response to Request No. 16, we do not have data elements that track an extension request.

18. The range, mean, and median number of additional days granted by each extension described in Request No. 17.

    As explained above in the response to Request No. 16, we do not have data elements that track an extension request.

19. The number and percentage of cases in which a decision and direction of election was issued.

    Please see the attached Summary Table – Line 6.

20. The range, mean, and median number of days between the close of a pre-election hearing and the issuance of a decision and direction of election.

    Please see the attached Summary Table – Line 12, 13, and 14.

21. The range, mean, and median number of days between the filing of post-hearing briefs following a pre-election hearing, when such filing was permitted, and the issuance of a decision and direction of election.

    Please see the attached Summary Table – Line 17.

22. The number and percentage of certifications of a representative that were followed by a technical refusal to bargain that resulted in a Board decision finding a violation of section 8(a)(5) of the National Labor Relations Act. Please identify each such case by name and case number.

    Please see the attached spreadsheet Technical 8(a)(5) Violation Statistics FYs 2014-2017.

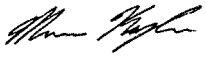
23. The number of charges, objections, or complaints of any kind concerning a labor organization's misuse of any form of list of employees provided pursuant to the NLRB's election procedures, together with co pies of all such charges, objections, or complaints.

    We conducted a document search of our electronic case file records for charges, complaints, or objections to the conduct of election that contained language referring to "misuse" or "abuse" of voter lists. In addition, we also inquired among the 26 Regional

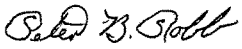
Offices to see if they recalled any such cases. No charges, objections, or complaints relating to misuse of the list of voters have been received by any office since April 15, 2015.

If you or a member of your staffs have any questions or need additional assistance, please do not hesitate to contact the Office of Congressional and Public Affairs at (202) 273-1991.

Sincerely,



Marvin E. Kaplan
Chairman



Peter B. Robb
General Counsel

[Additional submission by Mr. Roe follows:]

Congress of the United States
Washington, DC 20515

April 12, 2019

The Honorable Robert Lighthizer
United States Trade Representative
600 17th St. NW
Washington, DC 20006

Dear Ambassador Lighthizer:

We write to share our concerns about Mexico's labor practices and need for meaningful reforms in light of the prospect of a Congressional vote on the renegotiated North American Free Trade Agreement (NAFTA), also known as the United States-Mexico-Canada Agreement (USMCA).

As you know, the original NAFTA was not the boon to workers that its supporters promised, but has harmed working people in communities across the United States. Working families need sweeping reform in North American trade policies. This reform must begin by eliminating the so-called "protection contract" system used in Mexico for more than 70 years to keep wages low and deny rights and protections to working people. Under this system, employers sign "collective bargaining agreements" with employer-dominated unions, generally without the workers' knowledge and even before they are hired.

In January 2018, many of us wrote to you urging you to prioritize this critical issue in your negotiations with Mexico, as suppressed, low wages in Mexico have been a chief driver of outsourcing of U.S. jobs.[1]

We commend you for negotiating Annex 23 in the USMCA, which holds potential to address some key concerns if properly monitored and enforced. However, Mexico has not yet enacted, much less implemented, its labor law reform as required by Article 3 of Annex 23-A of the USMCA. Moreover, the government's legislation must meet the requirements of Annex 23-A. Critically, previous versions of the bill failed to ensure that workers will be able to exercise a free, secret, and personal vote on the collective bargaining agreement that will cover their terms and conditions of work, as required by Article 2(e) and (f) of the Annex. This provision is of paramount importance in complying with the heart of the Annex. The draft's language also previously did not ensure that workers receive a copy of the agreement before they vote on it, as required by Article 2(e)(ii)(B). The legislation must also create an autonomous National Board for Labor Conciliation and Registration that will abandon the failed, government and employer-dominated model of the past and function as a truly independent and impartial body, as required by Article 2(b). Finally, it must guarantee that union representation challenges will not be subject

[1] https://delauro.house.gov/sites/delauro.house.gov/files/USTR%20NAFTA%20Letter%201.23.2018.pdf

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to procedural delays, as stipulated in Article 2(d) of the Annex. Improvements to the draft legislation that have strengthened these provisions must not be weakened in a final bill.

While the draft meets and even exceeds the obligations of Annex 23-A in some respects, the Annex must not be allowed to become a game of multiple choice, in which the Parties can pick and choose which obligations they want to enforce. Labor law reform that meets or exceeds Annex 23-A in every respect must be a prerequisite to both a vote in the House of Representative and entry into force of the revised agreement. If not, the renegotiation will not be able to help lift standards and wages for workers in the United States, Mexico, and Canada.

The promise of a changed labor law regime is spurring workers in Mexico to fight for the right to join a union of their choice. But even as these struggles continue, the government of Mexico has failed to investigate and address alleged illegal firings and black-listings in Matamoros, the murders of striking workers in Guerrero, or the six-year delay of a representation election in Ciudad Acuña. We want to work with you and our counterparts across the border to ensure that, this time, the promise that a North American trade deal can raise standards for workers in Mexico delivers on the ground. Such work will require not only ensuring that the Parties work together to pass comprehensive labor law reform, including implementation, in Mexico, but also additional monitoring and enforcement mechanisms that will ensure that the labor obligations, after entry into force, are not undermined via neglect, delay, or inaction.

Without swift and certain enforcement mechanisms--which the deal currently lacks--the new labor and environmental protections in the deal will have ***no effect***. We know this because we have 25 years of experience of trying to enforce promises made in trade deals that lacked swift and certain enforcement mechanisms. Without such mechanisms, the revised deal cannot and will not accomplish our shared goal to reshape trade rules to help rebuild the U.S. manufacturing base, create jobs, raise wages, and address inequality.

We hope that you will work with us and all people of good will across the United States, Canada and Mexico to ensure that all three parties live up to their obligations for workers.

Sincerely,

Bill Pascrell, Jr.
Member of Congress

Rosa DeLauro
Member of Congress

Eleanor Holmes Norton
Member of Congress

James P. McGovern
Member of Congress

Katie Hill
Member of Congress

Peter A. DeFazio
Member of Congress

Adriano Espaillat
Member of Congress

Alan Lowenthal
Member of Congress

Ilhan Omar
Member of Congress

Grace Napolitano
Member of Congress

Tim Ryan
Member of Congress

Marcy Kaptur
Member of Congress

Bobby L. Rush
Member of Congress

Frank Pallone, Jr.
Member of Congress

Mark Pocan
Member of Congress

Alcee Hastings
Member of Congress

Grace Meng
Member of Congress

Jan Schakowsky
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Linda Sanchez
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Adam Smith
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Jamie Raskin
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Anna G. Eshoo
Member of Congress

John Yarmuth
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Member of Congress

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Member of Congress

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Charlie Crist
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Bobby Scott
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Tony Cárdenas
Member of Congress

Andy Levin
Member of Congress

Eric Swalwell
Member of Congress

Haley M. Stevens
Member of Congress

Charlie Crist
Member of Congress

Tom Suozzi
Member of Congress

Gwen Moore
Member of Congress

Raul Ruiz, M.D.
Member of Congress

Donald M. Payne, Jr.
Member of Congress

[Additional submission by Mr. Trumka follows:]

AFL-CIO

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May 22, 2019

The Honorable Frederica Smith Wilson, Chair
Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and Labor
United States House of Representatives
Washington, D.C. 20515

Re: Protect the Right to Organize (PRO) Act

Dear Representative Wilson:

Thank you for the opportunity to submit materials for the record supplementing my oral and written testimony and responding to statements from witness Philp Miscimarra and several of the Republican members of the Committee.

The PRO Act Fully Respects the Right to Free Speech

Witness Miscimarra mistakenly asserted that the PRO Act would limit employers' freedom of speech. He so stated in his oral and written testimony, asserting in the latter, "The bill would eliminate the right of employers . . . to express opinions and provide other information to employees in the workplace regarding union representation issues." Statement of Philip A. Miscimarra at 7. That is simply not true.

The Act provides:

> it shall be an unfair labor practice under subsection (a)(1) for any employer to require or coerce an employee to attend or participate in such employer's campaign activities unrelated to the employee's job duties, including activities that are subject to the requirements under section 203(b) of the Labor-Management Reporting and Disclosure Act, 1959 (29 U.S.C. 433(b)).

In considering possible First Amendment objections to the bill, it is critical to recognize the narrow category of conduct it proscribes. The bill in no way prevents employers or anyone else from expressing their views on unions or an upcoming vote on union representation. The only thing the bill prohibits is firing (or otherwise disciplining) employees who do not wish to listen to such speech.

The First Amendment does not protect such economic compulsion.

As the United States Supreme Court has recognized, "It is . . . important . . . to recognize the significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication." *Hill v. Colorado*, 530 U.S. 703, 715–16 (2000). Here, as in *Hill*, "[t]he statute deals only with the latter." *Id.*

Surely, witness Miscimmara would not argue that the First Amendment gives an employer the right to order employees to leave their work or even come in from home in order to be told why they should be Catholics instead of Protestants or Democrats instead of Republicans and further to fire any employee who declines to attend such a meeting. But that is all the bill would prohibit in respect to similar speech about joining a union.

The United States Supreme Court has made clear that the First Amendment permits regulation of captive audiences. "The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (resident inside home). *See also Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (children in school); *Lehman v. Shaker Heights*, 418 U.S. 298, 305–08 (1974) (Douglas, J., concurring) (passengers on a bus). This is because "[w]hile [a person] clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it." *Id.* at 307. The Court has clearly recognized that "no one has a right to press even 'good' ideas on an unwilling recipient." *Rowan v. United States Postal Office Dept.*, 397 U.S. 728, 738 (1970).

The Court has held that the First Amendment permits "protection of the unwilling listener." In *Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975), the Court explained, "restrictions have been upheld only when the speaker intrudes on the privacy of the home . . . or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." In fact, the Court has stated that "[t]he unwilling listener's interest in avoiding unwanted communications has been repeatedly identified in our cases" as a proper basis for narrowly tailored government regulation. *Hill*, 530 U.S. at 716. "States can choose to protect [this right to be let alone] in certain situations." *Id.* at 717 n. 24. *See also Frisby*, 487 U.S. at 484 ("the State may legislate to protect" unwilling listener).

Employees ordered to attend a meeting or listen to a speech on pain of discharge are clearly a "captive audience" as that term is used in the Supreme Court's First Amendment jurisprudence. The Court has "repeatedly recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'" *Hill*, 530 U.S. at 718 (quoting *Erznoznik*, 422 U.S. at 209). Surely it is "impractical" for employees to give up their jobs in order to avoid unwanted communication.[1]

---

[1] Indeed, the Court has cited the passage to and from work as a place where "an offer . . . to communicate and discuss information" is protected but, "[i]f . . . the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation." *Hill*, 530 U.S. at 717 (quoting *American Steel Foundries v. Tri-City Central Trades Council*, 257

When the government regulates speech to protect such a captive audience, the Court has considered whether the regulation is "narrowly tailored to protect only unwilling recipients of the communications." *Frisby*, 487 U.S. at 484. This is clearly the case here where the bill protects only unwilling recipients and leaves employers completely free to communicate with willing recipients of their communications inside and outside the workplace. The proposed bill would create a protection similar to that upheld in *Rowan*, protecting only those individuals who affirmatively choose not to be exposed to unwanted speech. In *Rowan*, the Court upheld a federal statute that required mailers to remove an individual's name from its mailing list and stop all mailings to that individual upon the individual's request. In *Rowan*, mailers remained free to send mail to individuals until they requested otherwise. Similarly under the proposed bill, employers will remain free to communicate with employees on all subjects until an employee refuses to listen. After the request to be left alone in *Rowan*, the mailer was barred from ignoring the request and continuing to communicate with the unwilling recipient. Similarly under the proposed bill, after an employee refuses to listen, the employer will be barred from coercing attendance by threatening to or actually firing or otherwise disciplining the employee. Only unwilling listeners are protected and, thus, the limit on speech is narrowly tailored to its proper purpose.

Finally, the First Amendment clearly permits regulation of conduct that is separable from speech. It is a bedrock First Amendment principle that "expression may be limited when it merges into conduct." *R.A.V. v. St. Paul*, 505 U.S. 377, 414 (1992) (White, J., concurring). Firing an employee for declining to attend a meeting concerning how he or she should vote in an upcoming union election is conduct, not speech. The First Amendment protects neither that conduct nor a threat to engage in such conduct.

The PRO Act is not only consistent with the First Amendment, it affirmatively protects the *free* discussion envisioned by the First Amendment and the framers of federal labor law. As Justice William O. Douglas recognized in *Public Utilities Commission v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting), it is "a form of coercion to make people listen." The PRO Act prevents only that coercion.

The PRO Act Will Bolster the Skills of the U.S. Workforce

Several Republican members asserted that the PRO Act is not necessary because U.S. workers do not need representation, rather U.S. employers need more skilled workers.[2] But those members fail to understand that unions, through collectively bargained training programs, are the second largest source of training in the U.S. after the armed forces.

U.S. 184, 204 (1921)). This is even more so in the workplace itself.

[2] While refuting those statements is beyond the scope of this submission, the assertion that there is a "skills gap" in the U.S., *i.e.*, a gap between the skills employers are seeking and those possessed by available U.S. workers, is not supported by any credible academic evidence, but relies instead on anecdotal complaints from employers not willing to offer the wages and benefits needed to attract skilled workers. *See, e.g.*, Peter Cappelli, "Skills Gaps, Skill Shortages and Skill Mismatches: Evidence for the US," *ILR Review* vol. 68(2), 251-290 (2015); Andrew Weaver and Paul Osterman, "Skill Demands and Mismatch in U.S. Manufacturing," *ILR Review* vol. 70(2), 275-303 (2016).

The building trades unions provide an exemplary model of collectively bargained training programs that address the concern asserted by the Republican members. The building trades unions together with their signatory contractors invest almost $1.9 billion annually in apprentice and journey-level training delivered at 1,900 training centers across the U.S. and Canada. They invest another $10 billion in apprentice wages and benefits. If the building trades training system was a degree-granting university, it would be the largest in the U.S. The training programs employ state-of-the-art technology. In fact, developers of new construction technology often vie with one another to have their product used in a training center as a means of breaking into the market.

The building trades have also expanded their training, in partnership with community organizations, to create the largest apprenticeship readiness program in the U.S., teaching the Multi-Craft Core Curriculum. 150 such programs are in operation. In 2016, nearly 1,000 people completed the program, over 80% people of color and 25% women.

In addition, unions in other sectors have collectively bargained for the creation and funding of joint labor-management training and apprenticeship programs. These programs are significant in the manufacturing, hospitality, healthcare, property management, and telecommunications sectors, having trained hundreds of thousands of employees since their creation. All depend on a healthy and functioning collective bargaining relationship, and benefit from having worker voices contribute to developing the content and form of the training.

Joint labor-management programs in these sectors have been at the forefront in developing cutting-edge training programs that prepare workers for new technology, often in conjunction with contract language that mandates employers provide notice of technology changes that affect employment or job content, or that give workers the right to bargain over the effects of new technology.

For many decades, unions have consistently bargained for more training and skills acquisition, and for adequate private funding of skills programs. By making it possible for U.S. workers to obtain union representation, the PRO Act will expand the skills of the U.S. workforce.

Right-to-Work is Not Good for Workers

A number of Republican members of the Committee from states with so-called "right-to-work" laws expressed opposition to the PRO Act on the grounds that it would preempt those laws in so far as they prevent employers and unions from entering into agreements requiring all represented employees to pay their fair share of the cost of that representation. Those members suggested that right-to-work laws benefit workers in their states. That is simply not true.

Clear empirical evidence demonstrates that right-to-work laws are correlated with lower wages and poorer benefits. Economists at the Economic Policy Institute (EPI) concluded that workers' wages in right-to-work states are 3.1 percent lower than those in non-right-to-work states.[3] The study

[3] Ross Eisenbrey, *New Study Confirms that Right-To-Work Laws Are Associated with Significantly Lower Wages*, ECONOMIC POLICY INSTITUTE (April 22, 2015, 3:24 PM), https://www.epi.org/blog/new-study-confirms-that-right-to-work-laws-are-associated-with-significantly-lower-wages/.

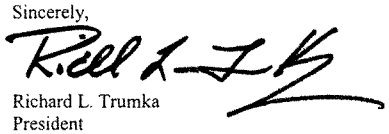
accounted for a "full complement of individual demographic and socioeconomic factors as well as state macroeconomic indicators," and found that average full-time workers earn $1,558 less per year in right-to-work states.[4] Furthermore, the association between non-right-to-work states and lower rates of unionization means that fewer workers in right-to-work states have access to critical fringe benefits. For example, the EPI found that 94 percent of unionized workers have access to employer-sponsored health plans, compared to just 67 percent of nonunion workers.[5]

In addition, right-to-work laws are correlated with poor outcomes using other measures of social well-being, such as high rates of crime and low rates of high school graduation and life expectancies.[6]

Finally, the claim that right-to-work laws attract employers and thus jobs has no empirical support. Based on several years of studies and reports, the EPI has concluded "there is no causal pattern of [right-to-work] states growing faster or slower" than other states.[7]

Thank you for your support of this critical legislation.

Sincerely,



Richard L. Trumka
President

RLT/CB/rs

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[4] Elise Gould and Will Kimball, *"Right-to-Work" States Still Have Lower Wages*, ECONOMIC POLICY INSTITUTE (April 22, 2015), https://www.epi.org/publication/right-to-work-states-have-lower-wages/.
[5] Josh Bivens, et al., *How today's unions help working people*, ECONOMIC POLICY INSTITUTE (August 24, 2017), https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/.
[6] Ross Eisenbrey, *Life is Worse in Right-To-Work States*, ECONOMIC POLICY INSTITUTE (January 27, 2014), https://www.epi.org/blog/life-worse-work-states/.
[7] Janelle Jones and Heidi Shierholz, *Right-to-work is wrong for Missouri*, ECONOMIC POLICY INSTITUTE (July 10, 2018), https://www.epi.org/publication/right-to-work-is-wrong-for-missouri-a-breadth-of-national-evidence-shows-why-missouri-voters-should-reject-rtw-law/.

[Additional submission by Mr. Walberg follows:]

May 8, 2019

The Honorable Frederica Wilson
Chair, Subcommittee on Health, Employment,
Labor and Pensions
U.S. House of Representatives
Washington, DC 20515

The Honorable Tim Walberg
Ranking Member, Subcommittee on Health,
Employment, Labor and Pensions
U.S. House of Representatives
Washington, DC 20515

Dear Chair Wilson, Ranking Member Walberg, and Members of the Subcommittee,

On behalf of Associated Builders and Contractors, a national construction industry trade association with 69 chapters representing more than 21,000 members, I write today regarding the subcommittee hearing "The Protecting the Right to Organize Act: Deterring Unfair Labor Practices." ABC has strong concerns about many of the provisions in the *Protecting the Right to Organize (PRO) Act* (H.R. 2474) and we encourage all members of the Education and Labor Committee to oppose it. H.R. 2474 would drastically reshape the construction industry and America's workplaces by stripping employees and employers of their constitutionally protected rights and hand power over to politically powerful union bosses.

The PRO Act represents the decades-long attempt by labor activists to increase dues-paying union members at the expense of employees through backdoor means, such as Card Check. Under the bill, a union could be certified if it claims there was election interference and they present authorization cards from the majority of the proposed unit. This form of Card Check closely resembles the Employee Free Choice Act, which sought to strip workers of their right to keep their votes private. The secret ballot is a hallmark of American democracy, and without it, employees could be subject to intimidation and unwanted pressure from a union.

The PRO Act would also codify the *Browning-Ferris* "joint-employer" standard, which expands the definition of joint employer under the National Labor Relations Act to include those employers who have "indirect" control and "unexercised potential" control of their subcontractors. The construction industry is built around the contractor/subcontractor model: small businesses that specialize in particular trades partner with other specialty contractors under the umbrella of a larger general contractor. This business format allows small businesses to thrive and expand and helps to ensure the most safe and qualified craftspeople are performing work on projects. If the new joint-employer standard were to go into effect, general contractors would face unprecedented levels of potential liability and compliance costs and therefore discontinue their work with many smaller contractors. This would have a devastating impact on ABC members, the majority of which are small businesses.

H.R. 2474 also seeks to rob employers of their right to counsel in a provision similar to the U.S. Department of Labor's failed and unconstitutional 2016 "persuader" rule. Under this rule, employers would be penalized for seeking legal advice if they learned that their employees intended to vote for a union. The federally protected unionization process is a complicated legal procedure that is governed by decades of labor law and court precedent. As such, all employers should seek the advice of legal counsel

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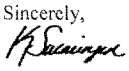
to ensure they protect their employees' rights if they are facing a union election. The persuader rule does not recognize this, however, and attempts to punish employers who speak to their attorneys. Not only does it increase liability for employers, but it will cause attorneys not to provide their services for fear of retaliation from union bosses.

Additionally, the PRO Act seeks to codify the following disastrous ideas:

- Eliminate right-to-work laws nationwide, including in the 27 states that have passed it into law, forcing workers to join unions they did not ask for;
- Stifle work of independent contractors, which limits workplace flexibility and opportunity;
- Violate worker privacy rights by forcing employers to hand over personal employee information to union bosses; and
- Increase the likelihood of coercion, boycotts and picketing by eliminating secondary coercion restricting

For these reasons we encourage all members of the Committee on Education and Labor to oppose H.R. 2474. The PRO Act would be harmful to employees, employers and the American economy as a whole.

Sincerely,



Kristen Swearingen
Vice President of Legislative & Political Affairs

COALITION FOR A
DEMOCRATIC WORKPLACE

May 8, 2019

Dear Members of the Subcommittee on Health, Employment, Labor and Pensions:

The Coalition for a Democratic Workplace (CDW) urges subcommittee members to reject the Protecting the Right to Organize (PRO) Act, H.R. 2474. In an attempt to increase union membership at any cost, the bill would make radical changes to well-established law, diminish employees' rights to privacy and association, destroy businesses, and threaten entire industries that have fueled innovation, entrepreneurship and job creation. CDW strongly opposes this bill.

CDW is a broad-based coalition of hundreds of organizations representing hundreds of thousands of employers and millions of employees in various industries across the country concerned with a long-standing effort by some in the labor movement to make radical changes to the National Labor Relations Act without regard to the severely negative impact they would have on employees, employers and the economy. CDW was originally formed in 2005 in opposition to the so-called Employee Free Choice Act (EFCA)—a bill similar to the PRO Act—that would have stripped employees of the right to secret ballots in union representation elections and allowed arbitrators to set contract terms regardless of the consequence to workers or businesses.

Like EFCA, the PRO Act contains provisions that would allow arbitrators with no business experience and no accountability to set contract terms. The arbitrator's decision would be compulsory, regardless of whether the parties find the terms unacceptable or the arbitrator miscalculated what the company can actually afford. In fact, this type of binding arbitration in the public sector has been blamed for multiple municipal bankruptcies and for fueling the public sector pension crisis. Many states and municipalities have taken steps to eliminate or curb arbitrator authority in the wake of fiscally irresponsible arbitrator decisions. Unlike the public sector, private employers go out of business, and the PRO Act does not provide any recourse to employers and employees if the arbitrator's forced contract terms result in job loss or business closure.

The bill would also codify into law the controversial *Browning-Ferris Industries* joint-employer standard, exposing nearly every business relationship to liability for unlawful behavior committed by any entity with which they do business, such as contractors, suppliers, and franchisees. Out of fear of this increased responsibility, larger corporations will either hold back on assisting their franchisees, contractors, or suppliers, impose far more control over them, abandon the franchise model, or cease outsourcing work to smaller, more specialized businesses; in any of these circumstances, small business owners will feel the negative repercussions of this policy change, and the American dream will be far more difficult to achieve.

Similarly, the PRO Act would greatly narrow the circumstances under which an individual can work as an independent contractor, thus substantially diminishing opportunities for Americans to find flexible ways to earn money on their schedule or start their own business. The provision

threatens many opportunities in the gig economy and more traditional independent contractor roles.

Unfortunately, the bill also contains many provisions that strip workers of essential rights. Most importantly, the PRO Act limits employees' ability to choose or reject union representation through secret ballots, which was also a key provision in EFCA. Secret ballots are a vital component of a functioning democracy, but the PRO Act vastly increases the circumstances under which the government could impose union representation despite employees voting against such representation in a secret ballot election. The bill attempts to justify disregarding the election results by making the government-imposed union representation contingent on the fact that at some point in the past a majority of employees signed "authorization cards." This is known as "card check," a concept that was rightly rejected by Congress during the debate on EFCA. As members of Congress understood then, card check is no substitution for a secret ballot election. The process of collecting cards is a public one that is innately susceptible to coercion—where union organizers present employees with cards to sign in front of coworkers. Organizers are then free to share with employees who has or has not signed cards, needlessly exposing workers to intimidation and possibly harassment.

The PRO Act also violates employees' rights to privacy and association. The bill mandates employers provide the contact information for all employees without prior approval from the employees themselves to union organizers. Employees would not be able to opt out of this requirement and would not have a say in what, if any, contact information is provided, again exposing workers to potential harassment. The bill also eliminates Right-to-Work protections nationwide, including in the twenty-seven states that have passed Right-to-Work laws, forcing workers to fund union activity they do not support.

Finally, employers' due process rights are entirely disregarded by the bill. Under the PRO Act employers would not be able to challenge union misconduct during union elections, their right to counsel on complex labor laws would be practically eliminated, and secondary boycotts would be permitted, allowing unions to target neutral third parties and cause them economic injury even if those entities have no underlying labor dispute with the union.

This letter outlines only some of the precarious provisions the PRO Act imposes on the American workforce. This bill tramples on rights and ignores the consequences of dangerous policies on our economy. CDW urges congress to emphatically and unequivocally reject this bill.

Sincerely,

The Coalition for a Democratic Workplace

May 7, 2019

Dear Members of the House Education and Labor Committee,

This week, the House Education and Labor Subcommittee on Health, Education, Labor, and Pensions will hold a legislative hearing on *the Protecting the Right to Organize Act*. We are writing to express concern with certain provisions of the legislation that would constrict and undermine the ability for American workers to choose when, where and how they wish to work.

The Coalition for Workforce Innovation (CWI) was formed to bring together a broad, diverse group of stakeholders like the service sectors, technology companies as well as worker advocates to modernize federal workforce policy to enhance choice, flexibility and economic opportunity for all workers. CWI believes that:

- Individuals should have the freedom to determine how, when and where they work;
- Those choosing independent work should be treated fairly under the law in terms of access to training, benefits, and certain protections, and;
- Individuals should be able to work independently across all positions, platforms and industries.

Specifically, CWI is concerned with the new amended definition of employee in Section 101 that would dramatically narrow the opportunities for independent workers. By adopting this restrictive definition, the legislation would do more harm than good by reducing choice and flexibility for individuals such as students, parents, small entrepreneurs and retirees who prioritize those work benefits. In addition, it would increase barriers to entry for work and entrepreneurship for communities that have traditionally struggled in the job market including immigrants, caregivers, veterans and individuals with criminal backgrounds.

Independent work is widely popular because it allows individuals to organize their work on their own terms. Technological advancements have greatly increased opportunities for all people to find well-paying and satisfying work that fits around their lives, rather than having to fit their lives around their work. As technology continues to improve, and connects people with opportunities to work independently, allowing them to leverage their own capital, expertise, and other resources, a fresh look at public policy will be needed to fully realize the macroeconomic benefits of these trends.

The Coalition seeks to collaborate with policymakers on the advantages of independent work as well as highlight the opportunities to enhance this positive trend by modernizing existing federal workforce policy for the benefit of workers, consumers, businesses and the overall economy. We look forward to working with the Committee to ensure workers are afforded the opportunities to define their own path to prosperity and satisfaction through work.

Sincerely,

The Coalition for Workforce Innovation (CWI)

May 8, 2019

The Honorable Bobby Scott
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

The Honorable Virginia Foxx
Ranking Member
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Scott and Ranking Member Foxx:

On behalf of the International Franchise Association (IFA), the world's oldest and largest organization representing franchising worldwide, I write to express our strong concerns and opposition to the *Protecting the Right to Organize (PRO) Act* (H.R. 2474). Plainly stated, this legislation would eradicate the franchise business model, which is comprised over 733,000 establishments that employ over 7 million individuals and contribute $674.4 billion of economic output to the U.S. economy.

Franchising is based on the principle that every franchisee owns and operates his or her own business and is independently responsible for their decisions, including the opportunity to retain business-related profits. Each franchise brand involves both a franchisor and a network of franchisees. Franchisees – the individual business owners – must secure a license from the franchisor, or parent brand, to own and operate a business using that brand's identity. The franchisor provides support for the brand, including standards regarding quality and uniformity, as well as brand-related investments such as national advertising, but the business owner is responsible for his or her own business, particularly hiring, firing, scheduling, and maintenance.

Specifically, the PRO Act seeks to codify the vague and unlimited standard for joint employment that was adopted in 2015 by the National Labor Relations Board in *Browning-Ferris Industries*. As IFA's members have testified numerous times, the legal uncertainty created by the expanded joint employment standard has had a chilling effect on the franchise business model. Our members have sought expensive counsel to determine if simple decisions – like compiling a brand-wide employee handbook or offering franchisees software to track job applications – might put them in legal jeopardy. Notably, the vague joint employer standard also puts at risk workforce development and apprenticeship training programs that make franchised-companies attractive to entrepreneurs. Many businesses will step away from offering these crucial benefits rather than take the risk of such an action triggering a joint employer lawsuit.

We also note our strong concerns with the PRO Act's codification of California's new "ABC" test for determining independent contractor status which was adopted in *Dynamex Operations West v. Superior Court*. Under prong "B" of the ABC test, an entity must perform work that is "outside the usual course of the hiring entity's business" to be considered an independent

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business. Because brand owners license the trademark of the franchisor to operate their own business, they are undeniably in the same line of business as the franchisor and would fail the ABC test. The application of *Dynamex* to the franchise business model would have the detrimental impact of making every franchise owner an employee of the franchisor.

For these reasons, IFA urges strong opposition to H.R. 2474. If enacted, the PRO Act will have a negative impact on entrepreneurship, small business growth, and wealth accumulation for families. Thank you for considering our views.

Sincerely,

Matthew A. Haller
Senior Vice President
Government Relations & Public Affairs

cc: Members, Committee on Education and Labor, U.S. House of Representatives

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Independent Electrical Contractors

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May 8, 2019

The Honorable Robert C. "Bobby" Scott
Chairman
Committee on Education & Labor
United States House of Representatives
1201 Longworth House Office Building
Washington, DC 20515

The Honorable Virginia Foxx
Ranking Member
Committee on Education & Labor
United States House of Representatives
2462 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Scott, Ranking Member Foxx, and Members of the Committee on Education & Labor:

The Independent Electrical Contractors (IEC) voices it strong opposition to the Protecting the Right to Organize (PRO) Act, H.R. 2474, and would urge the committee to reject this misguided piece of legislation. The purpose of this legislation is simply to increase union membership through drastic changes to well-established labor law at the expense of the rights of employees and employers, like those of the merit shop electrical contracting industry.

Established in 1957, the Independent Electrical Contractors is a trade association representing 3,300 members with more than 50 chapters and training centers nationwide. Headquartered in Alexandria, Va., IEC is the nation's premier trade association representing America's independent electrical and systems contractors. IEC National aggressively works with the industry to establish a competitive environment for the merit shop—a philosophy that promotes the concept of free enterprise, open competition, and economic opportunity for all.

The PRO Act contains many radical proposals. One of the most damaging would limit employees' ability to choose or reject union representation through secret ballots. Secret ballots are a vital component of a functioning democracy, but the PRO Act vastly increases the circumstances under which the government could impose union representation despite employees voting against such representation in a secret ballot election. The bill attempts to justify disregarding the election results by making the government-imposed union representation contingent on the fact that at some point in the past a majority of employees signed "authorization cards." This is known as "card check," a concept that was rightly rejected by Congress over ten years ago during the debate on the Employee Free Choice Act (EFCA). As members of Congress understood then, card check is no substitution for a secret ballot election. The process of collecting cards is a public one that is innately susceptible to coercion—where union organizers present employees with cards to sign in front of coworkers. Organizers are then free to share with employees who has or has not signed cards, needlessly exposing workers to intimidation and possibly harassment.

The bill would also codify into law the controversial Browning-Ferris Industries joint-employer standard, exposing merit shop electrical contractors to liability in nearly every contractual relationship for unlawful behavior committed by another contractor with which they do business. This standard inserts unnecessary and additional risks into the traditional contractor-subcontractor relationship, which could eventually lead to the larger contractor imposing far more control over the smaller subcontractor, or possibly refusing to do business with a small contractor altogether and choosing to bring the function in-house. Ultimately, the small contractors seeking to grow and expand would feel the negative repercussions of this policy change.

In addition, the PRO Act contains policies that would infringe on employees' rights to privacy and association. The bill mandates employers to provide to union organizers the contact information for all employees without prior approval from the employees themselves. Employees would not be able to opt out of this requirement and would not have a say in which contact information is provided, again exposing workers to potential harassment. The bill also rejects the rights of states to implement Right-to-Work laws by eliminating Right-to-Work protections nationwide. This legislation would go against the twenty-seven states with Right-to-Work laws in place, which give employees the option not to fund union activities they do not support.

Finally, there are additional provisions in the PRO Act that completely disregard employers' due process rights, which include:

- The inability for employers to challenge union misconduct during union elections.
- Fundamentally eliminating an employer's right to outside counsel on complex labor laws.
- Allowing for secondary boycotts, which would permit unions to target neutral third parties and cause them economic injury even if those entities have no underlying labor dispute with the union.

While this letter does not outline every provision of the PRO Act, it does outline many of its radical proposals that would amend the nation's labor laws for the sole purpose of increasing union membership without regard to the rights of employees, employers, or the impact to the overall economy. IEC urges the committee to completely reject this ill-conceived legislation.

Sincerely,

Jason E. Todd
Vice President, Government Affairs
Independent Electrical Contractors

Motor & Equipment Manufacturers Association
1030 15th Street, NW Suite 500 East Washington, DC 20005
Tel 202.393.6362 Fax 202.737.3742 www.mema.org

May 8, 2019

The Honorable Federica S. Wilson
Chairwoman
Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Tim Walberg
Ranking Member
Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairwoman Wilson and Ranking Member Walberg:

MEMA is the leading trade association representing U.S. motor vehicle parts suppliers. These companies manufacture and remanufacture components, technologies, and systems for use in passenger vehicles and heavy trucks. In total, vehicle parts manufacturers represent the largest sector of manufacturing jobs in the United States, directly employing over 871,000 Americans in all 50 states and generating 2.4 percent of U.S. GDP.

The motor vehicle supplier industry has long had a balanced and productive relationship between employers and employees with respect to labor and workforce rules. However, the Protecting the Right to Organize (PRO) Act (H.R. 2474) would shift that balance, resulting in greater costs imposed on suppliers, impacting their ability to manage their workforce and provide jobs.

MEMA strongly opposes H.R. 2474, which includes many sweeping provisions that will harm employers and their ability to sustain and create jobs. Some of the problematic provisions in the legislation include:

- Removal of a secret ballot for union elections, stripping employees of their rights to vote privately and in secret when choosing whether to unionize.
- Elimination of Right-to-Work provisions across the country, including in states that have passed Right-to-Work laws.
- Interference with attorney-client confidentiality, increasing reporting requirements for employers and their legal counsel retained for labor and workforce issues. This requirement is unnecessary and ignores the long-standing nature of confidentiality between a company and its legal counsel.
- Language codifying the National Labor Relations Board (NLRB) joint employment standard that strips workers of their right to private voting and secret ballots in union elections. This standard maintains that any two (or more) companies are joint employers if the primary employer has "indirect or potential control" of contract employees. This vague and uncertain standard increases employer liability for subcontractors and vendors.

For the reasons outlined above, MEMA urges the Subcommittee not to move forward on this legislation. Instead, MEMA encourages Congress to work with all relevant stakeholders – including employers, unions, and other stakeholders – to implement reforms that protect employee and employer rights while encouraging economic growth.

Thank you for your attention to the concerns raised. If you have questions or need more information, please contact Catherine Boland, vice president, legislative affairs at cboland@mema.org.

Sincerely,

Bill Long
President & CEO

National Association of Home Builders

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Government Affairs

James W. Tobin III
Executive Vice President & Chief Lobbyist
Government Affairs and Communications Group

May 8, 2019

The Honorable Frederica Wilson
Chairwoman
Subcommittee on Health, Employment,
Labor and Pensions
U.S. House of Representatives
Washington, DC 20515

The Honorable Tim Walberg
Ranking Member
Subcommittee on Health, Employment,
Labor and Pensions
U.S. House of Representatives
Washington, DC 20515

Dear Chairwoman Wilson and Ranking Member Walberg:

On behalf of the approximately 140,000 members of the National Association of Home Builders (NAHB), I write to express NAHB's strong opposition to the Protecting the Right to Organize (PRO) Act, which would negatively impact the construction labor market at a time of widespread worker shortages and exacerbate the housing affordability crisis. Implementation of this legislation would come at the cost of small businesses and their workers – stifling communications, infringing on privacy, and stripping the balance from labor-management relations.

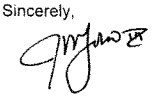
Of greatest concern to NAHB is the PRO Act's proposed codification of a broad joint employer standard and adoption of a rigid test for determining whether a worker is an employee or independent contractor. Together, they threaten to upend the contracting business model that is the very bedrock of the residential construction sector.

The building industry is made up of a network of general contractors, subcontractors, and entrepreneurs that perform a range of specialized services. Builders rely on an average of twenty-five subcontracting firms to build a home, including framers, roofers, drywallers, electricians and other types of specialty trades. For most builders, there is simply insufficient internal demand to justify hiring an employee for the numerous specialized tasks required to complete a home. Without these subcontractors and independent contractors, many family-owned small businesses would simply cease to be viable operations. Combined, the joint employer and independent contractor provisions of the bill would hamper entrepreneurship, expose small businesses to unlimited and unpredictable employment liability, and reduce labor market flexibility.

The PRO Act also directly undermines the privacy and free choice of workers. It deprives employees of their right to choose whether to participate in a union by stripping away right-to-work protections and forces disclosure of their detailed personal contact information to union organizers that jeopardizes their and their families' safety and privacy. It will make it difficult for employees to make informed decisions about their representation and for employers to retain counsel, investigate the issues raised in the petition, and intelligently negotiate an election agreement. Codifying obstructive election rules that have already been rejected by the judicial system and previously received bipartisan opposition in Congress is simply bad policy.

NAHB urges the Subcommittee to reject the misguided policies of the PRO Act, and instead pursue reforms that uphold employee and employer rights and promote economic growth.

Sincerely,



James W. Tobin III

May 8, 2019

The Honorable Bobby Scott
Chairman
U.S. House Education and Labor Committee
Washington, D.C.

The Honorable Virginia Foxx
Ranking Member
U.S. House Education and Labor Committee
Washington, D.C.

Dear Chairman Scott and Ranking Member Foxx:

The National Restaurant Association submits this letter in opposition to the "Protecting the Right to Organize (PRO) Act." This legislation attempts to resurrect failed overreaching policies from the previous administration in an aggressive partisan power-grab that would bolster the power of unions over the interests of employees and their employers.

As the leading business association for the restaurant and foodservice industry, the National Restaurant Association represents more than 15.1 million employees, nearly 10 percent of the nation's workforce. With over one million locations across the country, the $825 billion in sales from the restaurant industry makes up four percent of the U.S. GDP.

The PRO Act would repeal labor law reforms that have fostered certainty, predictability, economic stability and job growth. The most egregious provisions would do the following:

- Codify the vague, confusing Browning-Ferris decision, which created expanded joint employment liability under the National Labor Relations Act.
- Eliminate the attorney-client privilege, making it difficult for employers to secure legal representation and advice on complex labor law matters.
- Abolish states' right-to-work laws, effectively denying employees' free choice.
- Strip away secondary boycott protections, exposing neutral third parties to coercion, pocketing, boycotts and similar tactics, regardless of whether they are involved in that labor dispute.
- Compel employers to divulge employee private contact information including home addresses and personal phone numbers and email addresses.

For the reasons stated above, we urge you to oppose the PRO Act. This overreaching and misguided legislation would set back critical labor law reforms and inflict serious harm to the

American workplace. Thank you for your attention to this matter. We look forward to working with the Committee in a bipartisan manner.

Sincerely,

Shannon L. Meade
Vice President, Public Policy and Legal Advocacy
National Restaurant Association

May 6, 2019

The Honorable Frederica Wilson
Chairman
Health, Employment, Labor, and
Pensions Subcommittee
House Education and Labor Committee
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Tim Walberg
Ranking Member
Health, Employment, Labor, and
Pensions Subcommittee
House Education and Labor Committee
2176 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Wilson and Ranking Member Walberg:

I write to share the National Retail Federation's (NRF) opposition to H.R. 2474, the Protecting the Right to Organize (PRO) Act, in advance of the Subcommittee's legislative hearing. NRF has significant concerns with this sweeping legislation and its infringement on both employee and employer rights.

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy.

The PRO Act seeks to fundamentally redefine labor relations by codifying radical proposals that have been rejected by the courts, the agencies charged with administering them, and/or Congress. H.R. 2474 would eliminate workers' free choice in union elections, critical privacy rights, and right-to-work protections. In addition, the bill would interfere with employers' ability to secure legal advice on complex labor matters, infringe on employers' due process rights, codify the controversial *Browning Ferris* joint employer standard, prohibit the use of arbitration for employment matters, reduce individuals' access to flexible work opportunities as independent contractors, and strip away "secondary boycott" protections that prevent unions from targeting businesses that are not a party to underlying labor disputes.

If enacted, these extreme provisions would have serious consequences for employees, employers, and the economy as a whole. NRF urges members to oppose the PRO Act and stands ready to work with members of the Committee on reforms that bolster employer and employee rights and support economic growth.

Sincerely,

David French
Senior Vice President
Government Relations

NATIONAL RETAIL FEDERATION
1101 New York Avenue, NW, Suite 1200
Washington, DC 20005
www.nrf.com

[Additional submission by Ms. Wild follows:]

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

JAMES P. HOFFA
General President

25 Louisiana Avenue, NW
Washington, DC 20001

KEN HALL
General Secretary-Treasurer

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www.teamster.org

The Honorable Frederica Wilson, Chair
U.S. House Committee on Education and Labor
Subcommittee on Health, Education, Labor and Pensions
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Tim Walberg, Ranking Member
U.S. House Committee on Education and Labor
Subcommittee on Health, Education, Labor and Pensions
2176 Rayburn House Office Building
Washington, DC 20515

Statement for the Record
U.S. House Committee on Education and Labor
Subcommittee on Health, Education, Labor and Pensions
Hearing on: *The Protecting the Right to Organize Act: Deterring Unfair Labor* Practices.

May 8, 2019

Dear Chairwoman Wilson and Ranking Member Walberg:

On behalf of the 1.4 million members of the International Brotherhood of Teamsters, I want to thank you for holding today's hearing to examine the state of collective bargaining law in the United States. For generations, it has been well known that our nation's labor laws are weak and inadequate to protect the rights of millions of workers. Under current laws, unscrupulous employers can block workers' ability to exercise their right to bargain for better wages and better working conditions.

The Teamsters Union is proud to support the Protect Workers Rights to Organize Unions Act (PRO Act). This legislation could not be more timely. Recent

decisions by the NLRB, as well as recent administrative and congressional actions have rolled back important policy changes enacted to strengthen our labor laws.

Over the Teamsters Unions' more than 100-year history, we have encountered our fair share of ruthless, greedy and anti-union employers. Even with that extensive history, our recent experience with XPO Logistics is noteworthy for the lengths to which this Company will go to obstruct its' workers' ability to organize and achieve a voice in the workplace. With comparative ease, this Company utilizes weaknesses in existing laws to accomplish its anti-worker objectives. With largely unlimited resources it can and does run roughshod over the rights of its employees in order to secure its goal of a union free workplace.

The Teamsters Unions' most recent experience with XPO began when drivers hauling port drayage containers for a company called Pacer approached the Teamsters Union about forming a union. Those drivers, improperly classified as independent contractors, needed assistance in understanding their paychecks and lease arrangements. XPO purchased Pacer in 2014 and continued the practice of misclassifying the drivers as independent contractors despite California state rulings declaring them to be employees.

Also, around the same time, drivers and dock workers at various facilities of the former Conway Freight in 2014 began trying to form a union with different Teamster Local Unions around the country. In 2015 Conway was bought by XPO Logistics and since then, workers at terminals across the country have attempted to form unions through the traditional NLRB process. At every step, XPO has fought to deny its workers the ability to freely select to have workplace representation including challenging NLRB decisions all the way to the Supreme Court. XPO not only adopted the anti-union animus of its predecessor companies but expanded and codified it in its employee handbook. XPO logistics states the following as the company's "Philosophy on Labor Unions":

> "...Excessive costs are incurred by unionized companies due to restrictive work practices and administrative expenses...Today, the Company's employees have an absolute legal right **not** (emphasis added) to belong to the union. The Company will take whatever legal means are available to help protect that right. It is the Company's position that it can best achieve a competitive position in the transportation and logistics industries by remaining union free. ***XPO will do everything legally possible to remain in that position and to convince the Company's employees that they have no need for representation by an outside party.***"

In 2018, the Teamsters Union asked Lafe Solomon, a 40-year labor law attorney and former General Counsel for the National Labor Relations Board (NLRB), to conduct an independent analysis and provide his thoughts on unlawful anti-union practices of XPO since 2014. The rest of this statement summarizes much of his findings. Mr. Solomon's full report is also included as an attachment to this statement.

Between 2014 and 2018, the Teamsters and/or individual XPO workers filed a total of 114 unfair labor practice charges with the NLRB against XPO/ Conway Freight. During that time, NLRB Regional Directors issued 33 complaints, consolidating numerous charges in each complaint. An additional 11 charges ended in settlement agreements before Regional Directors decided whether to issue complaints and XPO paid out over $500,000 in backpay. Note that in the year that has passed since Mr. Solomon's report was finalized, the number of ULP's filed, complaints issued and dollars paid out by XPO has more than doubled. In fact, a recent article by the National Employment Law Project estimates that XPO has amassed nearly $33 million in penalties for safety and health violations, wage theft, employment discrimination, labor relations violations and other regulatory violations. This is clearly, for XPO, simply a "cost of doing business," and to keep its workforce "union-free." It is part of a cynical calculation that making back pay payments is preferable to respecting its employees' choice of union representation.

Since 2014, XPO has thwarted its employees' desire to choose the Teamsters as their bargaining agent in an effort to remain "union-free." It has interfered in the NLRB election process by threatening employees with the futility of choosing the Teamsters, promising them benefits if they did not choose the Teamsters, discharging or suspending union activists, and withholding raises and bonuses to employees for choosing the Teamsters. In addition, XPO has taken advantage of the delays afforded it under the legal process to circumvent its bargaining obligation with the Teamsters.

Between 2014 and 2018, during organizing campaigns in seven facilities, high-level XPO managers and supervisors, including terminal managers, told employees that it would be futile for them to select a union, that the employer would never agree to a contract, and that the employer would remain non-union. In addition, managers and supervisors threatened employees that they would not receive annual wage increases, solicited grievances from employees and impliedly promised to remedy them, interrogated employees, and created the impression of surveillance of their union activities.

Between 2014 and 2018, in the six facilities in which the Teamsters had been certified as the employees' bargaining representative, XPO followed through on its threats and unlawfully withheld annual wage increases while giving them to non-union employees in other facilities and made additional unilateral changes in terms and conditions of employment. In addition, in four facilities, XPO suspended and/or discharged employees because of their union activities. To date, XPO has continued to drag out the collective bargaining process and none of the NLRB certified units has achieved a collective bargaining agreement despite hundreds of hours and years at the bargaining table.

In many cases, XPO utilized union busting consultants to deliver threatening messages to employees. Indeed, after spending potentially millions on union busting consultants charging $300-$440 and hour, in 2018 XPO determined that it would be more advantageous to move their persuader activities in house. The company posted a job listing stating that the position(s) of *"Sr. Director Labor Relations"* would, among other, things be responsible for *"inoculating business units from organizing activity, maintaining programmatic approaches to union avoidance."*

This is despite the fact that a linchpin of our nation's labor laws is that the right to join or not to join a union belongs to employees, not employers.

XPO has also taken full advantage of the inevitable delays afforded under the National Labor Relations Act to postpone its bargaining obligations. Between 2014 and 2018, XPO filed objections to elections in four facilities. The Regional Directors and the Board overruled those objections in all four cases.

In one case, XPO, after issuance by the Board of a certification of representative, still refused to bargain with the Teamsters while it appealed the certification to the US Court of Appeals. The Court ultimately enforced the Board's order, but then XPO filed a petition for rehearing. When the Court denied the petition, XPO petitioned for certiorari to the United States Supreme Court, which was denied on October 2, 2017. As the election was conducted on September 12, 2014, XPO's appeals resulted in a 3-year delay in enforcement of the employees' choice of the Teamsters as their bargaining representative.

In another case, XPO made an offer of proof that was found by the Regional Director and the Board lacking in sufficient specificity to warrant a hearing. Again, XPO refused to bargain purportedly on the basis that it wanted to "test" the NLRB's certification in Court. The Court ultimately denied XPO's petition for

review, finding that XPO's objections were "general and conclusory... devoid of factual specifics about who said or did what to whom...." The Court issued its decision on May 25, 2018, 18 months after the election in which the employees chose the Teamsters as their bargaining representative.

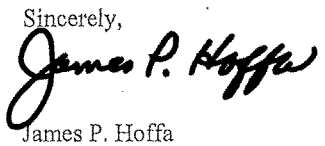
XPO's objections to the April 14, 2017 election at another facility were the subject of an NLRB hearing before an administrative law judge, which commenced on June 26, 2018. On July 9, 2018, XPO and the Teamsters signed an informal settlement agreement, in which XPO agreed, in relevant part, to withdraw its objections and commence bargaining with the Teamsters—15 months after the election.

XPO has demonstrated extreme hostility to its employees' right to choose a bargaining representative. It has engaged in an extensive, well-orchestrated campaign by high-level managers and its hired labor consultants to interfere with the NLRB election process. When, despite its efforts, the employees chose the Teamsters, XPO continues to engage in conduct designed to delay enforcement of its legal obligations in order to reduce support among the employees for the Teamsters and to frustrate the bargaining process.

Sadly, while XPO's unlawful actions are notably prolific, they are not uncommon. Today, when workers make the decision to stand together and bargain with their employer for improved working conditions, the deck is stacked against them from day one. This hearing, coupled with introduction of the PRO Act, are important steps toward addressing this inequity and demonstrating to working Americans that their elected representatives are on their side.

I thank you again for holding today's hearing and for demonstrating to the American people that workers and their rights will be a priority for this Committee and this Congress.

Sincerely,



James P. Hoffa
General President

[Additional submission by Chairwoman Wilson follows:]

May 8, 2019

Dear Representative:

On behalf of the 2 million members of the Service Employees International Union ("SEIU"), we write to endorse the Protecting the Right to Organize ("PRO") Act of 2019. This important bill would strengthen working Americans' rights to join together in unions and bargain for higher wages and better working conditions to help create balanced, inclusive growth.

In today's economy, too many people are working longer hours for lower wages, even as corporate profits soar. Unions are the best solution to leveling the playing field. But because of a concerted effort to undermine unions in America over the past forty years, just 6% of private sector working people have a say in the decisions that affect them at work, in their communities and in our economy. Too many unscrupulous employers take advantage of America's outdated labor laws to stifle the ability of working people to join together in unions to improve their jobs and build a better future for their families.

The PRO Act would reinvigorate labor law to help build an economy that works better for the millions of people who work for a living – not just those at the top. We applaud the bill's joint employer provision, which would ensure that workers can meaningfully bargain with all companies that actually control their employment. We also endorse the bill's new standard to stop employers from misclassifying their workers as independent contractors or supervisors to escape their responsibilities. These changes would make it harder for companies to circumvent basic worker protections through subcontracting arrangements or other evasions.

We also strongly support the PRO Act's reforms banning anti-worker state laws that supersede collective bargaining agreements. These so-called Right-to Work laws weaken workers' voice at the workplace, drive down wages, and threaten the economic security of all workers—union and nonunion alike. Working people subject to these laws earn $1,558 less per year than those who are not. The PRO Act permits companies and workers to decide for themselves whether to negotiate fair share agreements in collective bargaining.

In addition, we are pleased to see PRO Act provisions that would deter employer misconduct by making remedies meaningful, penalizing the most egregious violations, limiting interference in union elections, and facilitating first contracts with newly formed unions. The bill rightfully removes restraints on workers' solidarity actions across different workplaces.

Working people around the country urgently need new laws like the PRO Act to make it easier for people to join unions and hold companies accountable. The PRO Act's much-needed reforms will help level the playing field for people like Jim Staus who testified in support of the PRO Act before House Education and Labor Committee, Health, Employment,

MARY KAY HENRY
International President

GERRY HUDSON
International Secretary-Treasurer

NEAL BISNO
Executive Vice President

LUISA BLUE
Executive Vice President

HEATHER CONROY
Executive Vice President

LESLIE FRANE
Executive Vice President

VALARIE LONG
Executive Vice President

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SERVICE EMPLOYEES
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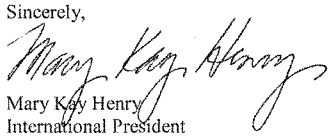
Labor and Pensions Subcommittee on May 8, 2019. Although the federal government twice found that University of Pittsburgh Medical Center (UPMC) illegally fired Jim for trying to form a union, six years later he still has not returned to work at UPMC, nor has he seen a penny of back-pay. If the PRO Act were law, Jim and so many other working people around the country would not have to risk everything to organize their unions to have a seat at the table in determining their families and community's future, the same way their bosses and corporations do.

SEIU members are proud to support the PRO Act. We will add any future votes on this legislation to our legislative scorecard. For more information, please contact SEIU Legislative Director John Gray at john.gray@seiu.org or (202)-730-7669.

Sincerely,



Mary Kay Henry
International President

MKH:JG:jf
opeiu#2
afl-cio, clc

AFL-CIO

LEGISLATIVE ALERT

April 29, 2019

Dear Representative:

I am writing to ask you to become an original co-sponsor of the Protect the Right to Organize (PRO) Act. For too long, employers have been able to violate the National Labor Relations Act (NLRA) with impunity, routinely denying workers our basic right to join with coworkers for fairness on the job. As a result, the collective strength of workers to negotiate for better pay and benefits has eroded and income inequality has reached levels that predate the Great Depression.

The PRO Act would modernize the NLRA by bringing its remedies in line with other workplace laws. In addition to imposing financial penalties on companies and individual corporate officers who violate the law, the bill would give workers the option of bringing our case to federal court. The bill would make elections fairer by prohibiting employers from requiring their employees to attend "captive audience" meetings whose sole purpose is to convince workers to vote against the union.

Under the bill, once workers vote to form a union, the National Labor Relations Board (NLRB) would be authorized to order that the employer commence bargaining a first contract. These orders would be enforced in district courts to ensure swift justice, avoiding the complex and drawn out process in the courts of appeals. In addition, the bill would ensure that employees are not deprived of our right to a union because an employer deliberately misclassifies us as supervisors or independent contractors.

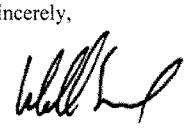
Too often, when workers choose to form a union, employers stall the bargaining process to avoid reaching an agreement. The PRO Act would establish a process for mediation and arbitration to help the parties achieve a first contract. This important change would make the freedom to negotiate a reality for countless workers who form unions but never get to enjoy the benefits of a collective bargaining agreement.

The PRO Act recognizes that employees need the freedom to picket or withhold our labor in order to push for the workplace changes we seek. The bill protects employees' right to strike by preventing employers from hiring permanent replacement workers. It also allows unrepresented employees to engage in collective action or class action lawsuits to enforce basic workplace rights, rather than being forced to arbitrate such claims alone.

Finally, the bill would eliminate right to work laws. These laws have been promoted by a network of billionaires and special interest groups to give more power to corporations at the expense of workers, and have had the effect of lowering wages and eroding pensions and health care coverage in states where they have been adopted.

Restoring our middle class is dependent on strengthening the collective power of workers to negotiate for better pay and working conditions. We urge you to co-sponsor the PRO Act and help us build an economy that works for all working families and not just the wealthy and well-connected.

Sincerely,



William Samuel, Director
Government Affairs

American Federation of Labor and Congress of Industrial Organizations
815 16th St., N.W. • Washington, D.C. 20006 • 202-637-5000 • www.aflcio.org

RICHARD L. TRUMKA
PRESIDENT

ELIZABETH H. SHULER
SECRETARY-TREASURER

TEFERE GEBRE
EXECUTIVE VICE PRESIDENT

CREATING GOOD JOBS, A CLEAN ENVIRONMENT, AND A FAIR AND THRIVING ECONOMY

May 8, 2019

Representative Bobby Scott
Chairman, Education & Labor Committee
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, D.C. 20515

Representative Virginia Foxx
Ranking Member, Education & Labor Committee
U.S. House of Representatives
2101 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Scott and Ranking Member Foxx:

As a coalition of the nation's largest labor unions and environmental groups, collectively representing millions of members and supporters, we write to express the BlueGreen Alliance's support for the Protecting the Right to Organize (PRO) Act of 2019.

In the United States, we face a critical juncture for the rights of employees to organize. As Supreme Court cases and anti-union legislators and their financial backers seek to strip workers of their rights, we need a strong law on the books to ensure that workers are not penalized for organizing and demanding collective bargaining for higher wages, safer working conditions, and better benefits.

Union membership has fallen dramatically from 33 percent in 1956 to ten percent in 2018, due in large part to exploitation by employers of labor laws that have been made toothless. As it stands, no meaningful penalties exist for corporations using illegal tactics to eliminate the option to organize.

Additionally, workers now are facing record wage inequality, and we know based on the National Bureau of Economic Research's statistics that unions consistently provide working Americans with ten to twenty percent higher wages than non-unionized workers. Empowering workers to band together to negotiate better wages and safer working conditions is the best path forward to protecting our workers and rebuilding America's middle class.

Organizing does not just affect job quality, though: unionized workers are better equipped to handle potentially hazardous workplace situations, and have more freedom to blow the whistle in dangerous situations. This can avert industrial accidents and result in safer communities, as well as cleaner air and water. Many unions also take firm positions on environmental issues because they understand the impact that clean air and water have on workers. Unions have supported the Clean Air Act, the Clean Water Act, and other actions designed to both reduce the carbon pollution driving climate change and grow good-paying jobs in the clean economy.

The PRO Act empowers employees by strengthening workers' rights to bargain and to organize. It does so by ending prohibitions on collective and class-action litigation, prohibiting employers from permanently replacing striking employees, amending how employees are defined so that no one is misclassified as an independent contractor, strengthening remedies and enforcement for employees who

1300 Godward Street NE, Suite 2625
Minneapolis, MN 55413
1020 19th Street NW, Suite 600
Washington, D.C. 20036
369 Pine Street, Suite 700
San Francisco, CA 94104

are exercising their rights, creating a mediation and arbitration process for new unions, protecting against coercive captive audience meetings, and streamlining the National Labor Relations Board's procedures.

The PRO Act would take tangible steps to stem the tide of continued violations of the rights of working people to organize and would provide real consequences for those who violate the rights of workers. We must restore fairness to our economy so that workers no longer get a raw deal, and strengthen the right of workers all over the country to unionize and bargain for better working conditions.

For these reasons, the BlueGreen Alliance urges the Education and Labor Committee to swiftly report the bill favorably.

Thank you for your consideration.

Sincerely,

Michael Williams
Interim Co-Executive Director
BlueGreen Alliance

1300 Godward Street NE, Suite 2025 | 1020 19th Street NW, Suite 600 | 269 Pine Street, Suite 700
Minneapolis, MN 55413 | Washington, D.C. 20036 | San Francisco, CA 94104

Testimony presented by Chris Sloan, Director of Government Affairs for the International Union of Painters and Allied Trades.

"The Protecting the Right to Organize Act: Deterring Unfair Labor Practices."

Subcommittee on Health, Employment, Labor, and Pensions Committee on Education and Labor)Subcommittee on Health, Employment, Labor, and Pensions (House Committee Education and Labor)

Wednesday, May 8, 2019 (2:00 PM) 2175 RHOB

Chairwoman Wilson and Ranking Member Walberg:

Wednesday, May 8, 2019 (2:00 PM) 2175 RHOB

Thank you for the opportunity to share our position as members of the International Union of Painters and Allied Trades. We represent a growing community of over 100,000 active and retired craftspeople in the United States and Canada. We represent all workers in the Finishing Trades Industries.

Thank you to Rep. Bobby Scott and Senator Patty Murray for the introduction of The Protecting the Right to Organize (PRO) Act of 2019. It is about time. The introduction of the bill will affect unions - in a positive way- but this bill is not about unions. We need to balance America's economic justice scales. Today we give away the resources of our state to corporations. We do not balance corporate power with more corporate power. Or more conservative policy.

We balance it with collective power. This is also called people power.

As we write today, the economic tilt heavily favors the wealthy over average income folks. This shows in our employment law. Wages are stagnant, enforcement lacks, jobs are outsourced and job safety is questionable.

Our workplaces must be run like democracies, not autocracies, with the employer having unilateral say in wages, benefits and workplace conditions. Workplaces work best and are most productive when there is collaboration, trust and respect between employees and employers.

Both conservatives and liberals deal with negative tax returns, reduced access to health care and growing economic inequality. Let us do something about this instead of wishing this away.

Congress should begin at once considering legislation to improve the lives, working conditions and workplaces of millions of American workers.

The PRO Act is a great start. This bill will strengthen protections for employees engaged in collective action and expand coverage of the NLRA to more employees to facilitate a process by which workers and employers can reach a first collective bargaining agreement.

It will also provide for stronger remedies for employees whose rights under the NLRA have been violated while providing for penalties against employers who violate those rights.

The PRO Act will safeguard the right to strike, repeal prohibitions on collective action, permit fair share fee arrangements, improve the purchasing power of wage earners in industry, and guarantee more effective enforcement of the NLRA.

These are all necessary policy changes to balance the uninhibited, corporate favorite conservative child unregulated business.

Today, there is a serious and destructive imbalance at too many workplaces, with employees not able to speak up, speak out and exercise their right to discuss employment conditions, wages and benefits with an employer or co-worker.

Congress must act to ensure a check and balance system in the workplace.

When Congress fails to protect the right to organize and the right to negotiate a contract, we see the results: employers have all the power and workers have little to none causing working conditions to deteriorate, and wages to decrease.

Legislation should correct this imbalance by restoring workers' uninhibited rights to organize and bargain for better wages, benefits and working conditions and give workers the opportunity to join the middle class. Unions' ability to bargain for a fair wage and working conditions has always been - and remains - one of the most effective tools Americans have to raise their standard of living.

The NLRA currently prohibits unions from engaging in "secondary" picketing, strikes, or boycotts, where workers of one company would picket, strike, or support a boycott in solidarity with another company's workers to improve wages or conditions.

Employees should have the right to speak out and organize through a fair process. Employers should accept the freedom of the majority of eligible workers to choose to bargain

collectively. Employers should never be able to sit on the results of an organizing victory and refuse to negotiate a first contract.

We should eliminate 'right to work for less' laws that have allowed 28 states to pass legislation prohibiting unions to collect fair-share fees. And legislation should ban employers from compelling workers to attend meetings that are basically used to scare them into not expressing their freedom in the workplace.

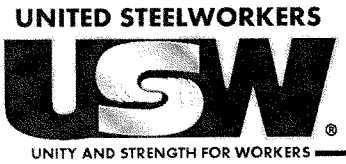
In far too many union organizing campaigns in the private sector, the employer spends millions of dollars in union-busting efforts -- money that otherwise could be used to improve workers' wages and other improvements in the workplace.

In fact, anti-worker, anti-union, scare tactics have worked to reduce union membership and has accelerated income inequality. The middle class is getting squeezed as the gap between the rich and the average worker widens.

Unions are good for workers and our society. Union workers earn an average of 26 percent more than non-union workers, resulting in more tax revenue. They are more likely to have health insurance and a retirement plan. And importantly, union members can speak up about health and safety violations and wage theft without the fear of retaliation.

Today, we have an opportunity to reform labor policy that has been under attack by the forces allied with big business. The rich have gotten richer while the wages and rights or workers have been restricted.

There should be no barrier for workers to exercise their right to discuss employment conditions, wages and benefits.



Leo W. Gerard
International President

May 6, 2019

U.S. House of Representatives
Washington, D.C. 20515

RE: The United Steelworkers (USW) urge co-sponsorship and passage of H.R. 2474: The Protecting the Right to Organize (PRO) Act

Dear Representative:

If you believe in reducing poverty, fighting pay disparity between men and women, increasing access to healthcare, combatting income inequality, and increasing social mobility for American workers, the 850,00 members of the United Steelworkers invite you to join our union and support H.R. 2474, the Protecting the Right to Organize (PRO) Act.

The PRO Act will empower workers to realize their economic potential with some of the most significant labor reforms in seventy-two years. The ability to form a union is one of the surest ways to improving economic outcomes. According to the Department of Labor, among full-time wage and salary workers, union members had median usual weekly earnings of $1,051 in 2018, while those who were not union members had median weekly earnings of $860.[1] African-American workers in a union make approximately 23 percent more than their non-union counterparts. Women organized by a union make approximately 24 percent more than their non-union counterparts.

In order to unlock the potential benefits of unionization, workers need Congress to address the ability of employers to flaunt current labor laws. The PRO Act tears down barriers that unscrupulous employers deploy to keep workers from realizing their economic potential. This has become essential as 92 percent of companies force employees to attend mandatory anti-union presentations.[2] Workers are routinely threatened with plant closure, job displacement, or economic harm. Workers cannot withhold their labor for economic reasons without threat of permanent replacement. States and corporate entities currently push down workers' wages with misnamed right

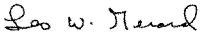
[1] https://www.bls.gov/news.release/union2.nr0.htm
[2] https://www.goiam.org/publications/Legislative_Issues/TheFreedomtoFormAUnion/Employers_Interfere_with_Workers.pdf

to work laws developed to disempower people of all colors and creeds from working together.[3]

The PRO Act would dismantle many of these injustices. The legislation increases penalties on employers who break the law and gives workers a private right of action if they've been terminated for union activity. It removes prohibitions on workers acting in solidarity with workers at other companies, it protects workers who engage in peaceful protest actions with their fellow workers, and it safeguards the right to strike, a tool workers rarely wish to use but are often left with no other option to protect their rights at work.

The PRO Act is a counterweight that will revolutionize labor relations and empower future generations of workers to act collectively. Recent statistics indicate that workers' desire to join a union is at a four-decade high.[4] Now is the time for Congress to act and provide millions of America's workers with the tools they need to secure a better future for themselves and their families. **I strongly urge you to co-sponsor and pass the H.R. 2474 the PRO Act.**

Sincerely,



Leo W. Gerard
International President

LWG/rdb

[3] https://www.afscme.org/now/the-racist-roots-of-right-to-work
[4] http://www.wfae.org/post/conversation-who-wants-join-union-growing-number-americans#stream/0

[Questions submitted for the record and their responses follow:]

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May 16, 2019

Mr. Philip A. Miscimarra, J.D.
Partner
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004

Dear Mr. Miscimarra:

I would like to thank you for testifying at the May 8, 2019, Subcommittee on Health, Education, Labor, and Pensions hearing on "*The Protecting the Right to Organize Act: Deterring Unfair Labor Practices*."

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Thursday, May 30, 2019, for inclusion in the official hearing record. Your responses should be sent to Kyle deCant of the Committee staff. He can be contacted at the main number 202-225-3725 should you have any questions.

We appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Committee on Education and Labor
Subcommittee on Health, Employment, Labor & Pensions Hearing
"Protecting the Right to Organize Act: Deterring Unfair Labor Practices"
Wednesday, May 8, 2019
2:00 p.m.

Rep. Russ Fulcher (ID)

1. Mr. Miscimarra, what assurances do we have in this bill that imposing H.R. 2474's definition of joint-employer won't lead to shutting out individuals who want to start a franchise because a company doesn't want to take on the liability of their future workers? Could the bill's definition of joint-employer make it more difficult to become a franchisee?

2. Mr. Miscimarra, could H.R. 2474's definition of joint-employer potentially lead to higher operational, labor, and compliance costs for franchisees?

3. Mr. Miscimarra, the Society for Human Resource Management (SHRM) has cited a 2015 Labor Institute study that showed the union win rate is nearly 90 percent if the election occurs over two weeks or less. SHRM calls for reforming union elections to provide more time and transparency for workers to hear both sides. H.R. 2474 would do the opposite, codifying the rule that reduces time between when a union election is called and when the vote occurs. Wouldn't having more time between when an election is called and when the vote occurs help workers obtain more information from both sides before making such a consequential decision affecting their work, their take-home pay, and their livelihood?

4. Mr. Miscimarra, given your testimony on the impact of automation, what suggested labor law or regulatory changes would you suggest to provide relief to those who want to be self-employed in the "gig" economy? In other words, what technical fixes can be made to labor laws that would offer more flexibility and opportunity for independent entrepreneurship?

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DUSTY JOHNSON, SOUTH DAKOTA

May 16, 2019

Mr. Mark Gaston Pearce, J.D.
Executive Director and Distinguished Lecturer
Georgetown University Law Center's Workers' Rights Institute
Georgetown University Law Center, 600 New Jersey Avenue, NW
Washington, D.C. 20001

Dear Mr. Pearce:

I would like to thank you for testifying at the May 8, 2019, Subcommittee on Health, Education, Labor, and Pensions hearing on "*The Protecting the Right to Organize Act: Deterring Unfair Labor Practices*."

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Thursday, May 30, 2019, for inclusion in the official hearing record. Your responses should be sent to Kyle deCant of the Committee staff. He can be contacted at the main number 202-225-3725 should you have any questions.

We appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Committee on Education and Labor
Subcommittee on Health, Employment, Labor & Pensions Hearing
"Protecting the Right to Organize Act: Deterring Unfair Labor Practices"
Wednesday, May 8, 2019
2:00 p.m.

Chairman Robert C. "Bobby" Scott (VA)

1. Mr. Pearce, as your testimony notes, the 2002 U.S. Supreme Court decision in *Hoffman Plastic Compounds v. NLRB* prevents the National Labor Relations Board (NLRB) from ordering back-pay and reinstatement for undocumented workers. This ruling prohibits the NLRB from effectively remedying illegal actions taken by corporations in violation of workers' rights under the Act.
    a. How does the *Hoffman Plastics* decision undermine documented and undocumented workers' ability to exercise their rights under the National Labor Relations Act (NLRA)?
    b. How does the current law creative an incentive for employers to violate the NLRA?
    c. How would the PRO Act address the problems caused by *Hoffman Plastic Compounds*?

Rep. Suzanne Bonamici (OR)

1. Mr. Pearce, the National Labor Relations Act also protects the right to engage in "other concerted activities," which previously included the right to pursue joint, class, or collective claims to seek recourse for employment disputes. In *Epic Systems v. Lewis*, the Supreme Court held that employers may use mandatory arbitration agreements to prevent workers from bringing joint, class, or collective claims against their employers for wage theft, discrimination, harassment, or other workplace violations.

   What was the intent of protecting "concerted activities" in the NLRA, and how would reversing the *Epic Systems v. Lewis* decision protect workers' ability to seek recourse for employment violations?

Rep. Haley M. Stevens (MI)

1. Mr. Pearce, as you know, when an employee gets fired for organizing activity, their case before the NLRB proceeds while the employee is out of a job. What problems does the NLRA foster when it provides that the NLRB must file for injunctive relief when the *union* violates the law, but does not require the NLRB to do so when an *employer* unlawfully fires an employee?

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WILLIAM R. TIMMONS, IV, SOUTH CAROLINA
DUSTY JOHNSON, SOUTH DAKOTA

May 16, 2019

Mr. Jim Staus
442 Parkwood Road
Pittsburgh, PA 15210

Dear Mr. Staus:

I would like to thank you for testifying at the May 8, 2019, Subcommittee on Health, Education, Labor, and Pensions hearing on "*The Protecting the Right to Organize Act: Deterring Unfair Labor Practices*."

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Thursday, May 30, 2019, for inclusion in the official hearing record. Your responses should be sent to Kyle deCant of the Committee staff. He can be contacted at the main number 202-225-3725 should you have any questions.

We appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Committee on Education and Labor
Subcommittee on Health, Employment, Labor & Pensions Hearing
"Protecting the Right to Organize Act: Deterring Unfair Labor Practices"
Wednesday, May 8, 2019
2:00 p.m.

Rep. Haley M. Stevens (MI)

1. Mr. Staus, we know that far too many workers are not aware of their rights in the workplace. In fact, current law does not require companies post any kind of notice informing employees about their rights under the National Labor Relations Act. How did you become aware of your workplace rights?

MAJORITY MEMBERS:

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May 16, 2019

Mr. Richard L. Trumka, J.D.
President
AFL-CIO
815 16th Street, NW
Washington, D.C. 20005

Dear Mr. Trumka:

I would like to thank you for testifying at the May 8, 2019, Subcommittee on Health, Education, Labor, and Pensions hearing on "*The Protecting the Right to Organize Act: Deterring Unfair Labor Practices*."

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Thursday, May 30, 2019, for inclusion in the official hearing record. Your responses should be sent to Kyle deCant of the Committee staff. He can be contacted at the main number 202-225-3725 should you have any questions.

We appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Committee on Education and Labor
Subcommittee on Health, Employment, Labor & Pensions Hearing
"Protecting the Right to Organize Act: Deterring Unfair Labor Practices"
Wednesday, May 8, 2019
2:00 p.m.

Chairman Robert C. "Bobby" Scott (VA)

1. Mr. Trumka, when employees vote on union representation, the employer is not on the ballot. Despite this, National Labor Relations Board (NLRB) regulations currently designate the employer as a "party" to the election, which allows them to intervene and litigate in NLRB election proceedings.
   - How does this practice undermine workers' right to have a fair election?
   - What are some of the ways that employers use their standing in pre-election hearings to affect the outcome of the election?

2. Mr. Trumka, in 2016, the Department of Labor issued a final rule reinstating the requirement that employers and consultants must report both direct *and* indirect persuader activity under the Labor Management Reporting and Disclosure Act.
   - By codifying this rule, how does the PRO Act foster transparency during union organizing elections?
   - By codifying this rule, would the PRO Act interfere with attorney-client privilege?

Rep. Suzanne Bonamici (OR)

1. Mr. Trumka, more workers would join a union if given the choice, but many fear retaliation for supporting or engaging in organizing efforts. According to a study from the Economic Policy Institute, companies threaten to close shop in 57% of union representation elections. In 34% of representation elections, employers fire workers who are organizing during a union election. In 47% of representation elections, employers threaten to cut wages and benefits for workers if employees unionize. And in 54% of representation elections, employers use captive audience meetings to interrogate workers about their union support.

   Under the National Labor Relations Act, these unacceptable tactics to intimidate, coerce, or fire workers involved in union organizing are illegal, but the penalties are insufficient. The current law does not require companies to post notices informing workers about their rights under the NLRA, and many workers are not aware of their right to join a union.

   How does the PRO Act help workers access more information about their rights to union representation?

Rep. Haley M. Stevens (MI)

1. Mr. Trumka, according to Bloomberg Law, in 2018 the National Labor Relations Board oversaw the fewest number of union elections since Bloomberg began keeping track. However, when workers had the opportunity to have union elections during that year they voted for a union 70 percent of the time. Does this mean the system is adequately representing workers?

2. Mr. Trumka, you mentioned in your testimony that unions secure better wages for all types of working people. Can you describe how, and whether unions also raise wages for nonunion workers?

Philip A. Miscimarra Responses to Questions for the Record

May 30, 2019

Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and Labor
United States House of Representatives

Hearing on H.R. 2474 (May 8, 2019)
"The Protecting the Right to Organize Act: Deterring Unfair Labor Practices"

Questions Submitted by Representative Russ Fulcher (Idaho):

1. Mr. Miscimarra, what assurances do we have in this bill that imposing H.R. 2474's definition of joint-employer won't lead to shutting out individuals who want to start a franchise because a company doesn't want to take on the liability of their future workers? Could the bill's definition of joint-employer make it more difficult to become a franchisee?

RESPONSE: One provision in H.R. 2474 would modify the "employer" definition contained in Section 2(2) of the National Labor Relations Act ("NLRA") by providing that two or more entities would be a joint "employer" if they codetermine or share "control" over essential employment terms or conditions, with the further indication that "indirect" control, and "reserved" potential control (even if never exercised) could result in joint employer status. In this respect, the bill would codify much of the NLRB majority opinion in *Browning-Ferris Industries*, 362 NLRB 1599 (2015), *reversed and remanded in part*, 911 F.3d 1195 (D.C. Cir. 2018). This expansive definition of joint "employer" status would have a significant potential deterrent effect on franchise arrangements because, under H.R. 2474, (i) there would be significant uncertainty regarding whether the "employer" would be the franchisee, on the one hand, or the franchisee and franchisor together, on the other hand; (ii) based on findings that many franchisees and franchisors would be joint employers (consistent with H.R. 2474's expansion of joint employer status), many franchisees would be deprived of the type of independent decision-making that is normally associated with ownership of a franchise; and (iii) H.R. 2474 would create a risk that a franchisor would be considered a joint employer together with each of its franchisees, which would nullify the protection that existing law affords neutral employers, including franchisees, from secondary picketing and other secondary threats, coercion and restraint based on labor disputes that do not directly involve the franchisee.

2. Mr. Miscimarra, could H.R. 2474's definition of joint-employer potentially lead to higher operational, labor, and compliance costs for franchisees?

RESPONSE: Yes, it is likely that H.R. 2474's expanded definition of joint employer status would promote higher operational, labor, and compliance costs for franchisees. The uncertainty associated with H.R. 2474's joint employer definition – and questions regarding whether a particular franchisee is a separate employer, on the one hand, or a joint employer together with the franchisor, on the other hand – would hamper the ability of a franchisee to make employment-related decisions without significant involvement of the franchisor. Moreover, it is likely that disputes regarding the potential joint employer status of a franchisee and/or

franchisor would entail burdensome, expensive and time-consuming litigation. For example, one joint-employer case decided by the NLRB involving *CNN America, Inc.*, 361 NLRB 439 (2014), *enforcement denied in part*, 865 F.3d 740 (D.C. Cir. 2017), resulted in more than 10 years of litigation before the NLRB and the courts, including 82 hearing days, more than 1,300 exhibits, and a transcript exceeding 16,000 pages. *See CNN America, Inc.*, 361 NLRB at 468 (Member Miscimarra, concurring in part and dissenting in part). Similarly, joint employer litigation involving McDonald's USA, LLC and numerous McDonald's franchisees involved more than 150 days of hearing. *See McDonald's USA, LLC*, Case Nos. 02-CA-093893 et al. (July 17, 2018) (ALJ's opinion). Other higher operational, labor, and compliance costs for franchisees would be associated with the considerations referenced in my response to question 1 above.

3. Mr. Miscimarra, the Society for Human Resource Management (SHRM) has cited a 2015 Labor Institute study that showed the union win rate is nearly 90 percent if the election occurs over two weeks or less. SHRM calls for reforming union elections to provide more time and transparency for workers to hear both sides. H.R. 2474 would do the opposite, codifying the rule that reduces time between when a union election is called and when the vote occurs. Wouldn't having more time between when an election is called and when the vote occurs help workers obtain more information from both sides before making such a consequential decision affecting their work, their take-home pay, and their livelihood?

RESPONSE: H.R. 2474 would codify aspects of the Election Rule adopted by the National Labor Relations Board ("NLRB") in 2014, which significantly accelerated the timeframe within which the NLRB conducts union representation elections. For this reason, among others, former NLRB Member Harry I. Johnson III and I disagreed with the NLRB's 2014 Election Rule. *See* 79 Fed. Reg. 74308, 74430-74460 (2014) (dissenting views of Members Miscimarra and Johnson). In one case – *European Imports, Inc.*, 365 NLRB No. 41 (2017) – the timetable prescribed in the Election Rule provided for an NLRB Notice of Election that gave certain employees *only three days' notice* of their participation in a union representation election. *Id.*, slip op. at 1-4 (Acting Chairman Miscimarra, dissenting).

Union representation elections involve important issues, and the NLRB and the courts have consistently recognized the right of employees, unions and employers to engage in protected speech regarding election issues. When the Landrum-Griffin Act amendments to the NLRA were under consideration in 1959, then-Senator John F. Kennedy chaired the Conference Committee, and he stated that a period of at least 30 days was required between the filing of a representation petition and the resulting election to "safeguard against rushing employees into an election where they are unfamiliar with the issues." 105 Conf. Rec. 5361 (1959), *reprinted in* 2 NLRB, Legislative History of the Labor Management Reporting and Disclosure Act ("LMRDA Hist.") 1024. *See also* 105 Cong. Rec. 5770 (1959), *reprinted in* 2 LMRDA Hist. 1085 (statement of Sen. Kennedy); H.R. Rep. 86–741, at 25 (1959), *reprinted in* 1 LMRDA Hist. 783 (minimum 30-day pre-election period was designed to "guard[] against 'quickie' elections"). Accordingly, I believe it is important for employees to have a reasonable minimum period – involving at least 30 to 35 days from petition-filing to an election – in which employees can become familiar with union- and election-related issues before employees participate in a union representation election. *See* 79 Fed. Reg. at 74459 (2014) (dissenting views of Members Miscimarra and

Johnson) ("We believe it would be reasonable to have a minimum guideline time period between 30 and 35 days from petition-filing to election. This would be consistent with the indications that Congress intended that employees should have no fewer than 30 days between petition-filing and an election to become familiar with relevant issues.").

4. Mr. Miscimarra, given your testimony on the impact of automation, what suggested labor law or regulatory changes would you suggest to provide relief to those who want to be self-employed in the "gig" economy? In other words, what technical fixes can be made to labor laws that would offer more flexibility and opportunity for independent entrepreneurship?

RESPONSE: I believe two aspects of labor and employment regulation are important based on the impact of advances in robotics, self-driving vehicles, artificial intelligence and other types of automation and technological changes.

First, the prospect of ongoing dramatic technological changes creates a greater need than has previously existed for policymakers to focus on ways to increase the efficiency and decrease the costs associated with employment regulation in the U.S. In this respect, I believe H.R. 2474 will increase employment-related costs and conflict which, in turn, will inevitably tend to increase employer investment in new technology rather than people.

Second, in relation to flexibility and the opportunity for independent entrepreneurship, I believe it is important to preserve the traditional concept of "independent contractor" status, consistent with the existing exclusion of independent contractors from the NLRA's definition of "employee" set forth in Section 2(3) of the NLRA, and which the NLRB and Court of Appeals for the D.C. Cir. gave effect in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019) and *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017), respectively.

Committee on Education and Labor
Subcommittee on Health, Employment, Labor & Pensions Hearing
"Protecting the Right to Organize Act: Deterring Unfair Labor Practices"
Wednesday, May 8, 2019 2:00 p.m.
ANSWERS TO QUESTIONS FOR THE RECORD
MARK GASTON PEARCE

Chairman Robert C. "Bobby" Scott (VA)

1. Mr. Pearce, as your testimony notes, the 2002 U.S. Supreme Court decision in *Hoffman Plastic Compounds v. NLRB* prevents the National Labor Relations Board (NLRB) from ordering back-pay and reinstatement for undocumented workers. This ruling prohibits the NLRB from effectively remedying illegal actions taken by corporations in violation of workers' rights under the Act.
    a. How does the *Hoffman Plastics* decision undermine documented and undocumented workers' ability to exercise their rights under the National Labor Relations Act (NLRA)?
    b. How does the current law creative an incentive for employers to violate the NLRA?
    c. How would the PRO Act address the problems caused by *Hoffman Plastic Compounds*?

a. In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984), the Supreme Court held that undocumented workers are "employees" within the scope of Section 2(3) of the Act. However, in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), also made it clear that Board lacked "remedial discretion" to award backpay to an undocumented worker who, in contravention of the Immigration Reform and Control Act (IRCA), had presented invalid work-authorization documents to obtain employment. The Court's decision in *Hoffman Plastics* affects both documented and undocumented workers' ability to exercise their rights. By allowing employers to discriminate against undocumented workers who engage in protected concerted activity or try to organize unions without facing financial consequences, collective action becomes much riskier for all involved, as employers can pit one group of workers against the other.

b. In *Hoffman Plastics*, the Supreme Court has created a perverse incentive for unscrupulous employers to violate the NLRA by holding that the NLRB is prevented from awarding back pay to undocumented workers who are fired in violation of the law. While a respondent may be found liable for such unlawful conduct, victimized undocumented employees are prohibited from receiving the make-whole remedies of back pay and/or reinstatement, which are commonly ordered as a remedy for such violations of the law. Consequently, because of the

limitations in the statute, violators are merely obliged to post a notice committing to cease and desist from such conduct. This is tantamount to a slap on the wrist of flagrant violators of the law. It also punishes honest employers, whose efforts to pay a living wage give wrongdoers an unfair advantage.

c. *Hoffman Plastics* also creates a major disincentive to victimized workers and those with critical investigative information to file unfair labor practice charges and/or participate in the investigation of an unfair labor practice charge. The NLRA is not a self-enforcing statute. The NLRB can only act on unfair labor practice allegations presented in the form of a charge filing. Workers are not willing to come forward with such filings when they know that, under the best of circumstances, there will be minimal sanctions for their employer's wrongdoing, yet major consequences for the victim. Such consequences include no backpay award and a high likelihood of deportation. Accordingly, the NLRB's ability to enforce the Act is neutralized.

The PRO Act would restore equity in the workplace by making sure all workers enjoy the full protections of the NLRA when they are on the job. By ensuring that backpay awards are available to all workers who suffer unfair labor practices, the PRO Act also ensures that there is an appropriate deterrent that will provide a strong incentive to all employers to comply with both labor and immigration law.

Rep. Suzanne Bonamici (OR)

1. Mr. Pearce, the National Labor Relations Act also protects the right to engage in "other concerted activities," which previously included the right to pursue joint, class, or collective claims to seek recourse for employment disputes. In *Epic Systems v. Lewis*, the Supreme Court held that employers may use mandatory arbitration agreements to prevent workers from bringing joint, class, or collective claims against their employers for wage theft, discrimination, harassment, or other workplace violations.

   What was the intent of protecting "concerted activities" in the NLRA, and how would reversing the *Epic Systems v. Lewis* decision protect workers' ability to seek recourse for employment violations?

Section 7 of the National Labor Relations Act provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. By including "other concerted activities" in Section 7, Congress intended to ensure that whenever workers stand together to improve their working conditions, they are protected from retaliation. See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) ("The 74th Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context. It

recognized this fact by choosing, as the language of § 7 makes clear, to protect concerted activities for the somewhat broader purpose of 'mutual aid or protection' as well as for the narrower purposes of 'self-organization' and 'collective bargaining.'").

During my time as Chairman, the Board found that employers may not require employees to waive their rights to engage in class or collective actions to pursue employment claims as a condition of employment in the cases *D.R. Horton, Inc.*, 357 NLRB 2277 (2012) and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014). In *Epic Systems v. Lewis*, 138 S. Ct. 1612, 584 U.S. __ (2018), the Supreme Court reversed, opening the door to the underenforcement of many state and federal statutes designed to advance workers' interests. Moreover, the Supreme Court in *Epic Systems* seemingly limited the definition of concerted activity in a manner not intended by the framers of the NLRA. The PRO Act would restore workers' rights to pursue such claims and to stand together to protect themselves and each other when they have been wronged at work. By reversing the Court's decision in *Epic Systems*, the PRO Act would empower workers to join together to protect themselves and each other and to seek vindication when they have been wronged at work, just as Congress originally intended by including broad protective language in Section 7.

Rep. Haley E. Stevens (MI)

1. Mr. Pearce, as you know, when an employee gets fired for organizing activity, their case before the NLRB proceeds while the employee is out of a job. What problems does the NLRA foster when it provides that the NLRB must file for injunctive relief when the *union* violates the law, but does not require the NLRB to do so when an *employer* unlawfully fires an employee?

The Act currently gives the Board significant discretion in deciding whether to pursue Section 10(j) injunctions to put workers who are unlawfully fired back on the job. This discretion has consequences. During my years as Chairman, the Board authorized an average of 43 injunctions per year, but as of fiscal year 2018, the Board only authorized 22 injunctions—about half as many.

The Act authorizes mandatory injunctions for certain union unfair labor practices in Section 10(l) because the framers of the Taft-Hartley Amendments thought those practices were particularly severe and warranted swift action. In my experience, workers who are unlawfully fired experience significant hardship that cannot be adequately redressed later. Quick action to restore the status quo ante is much more effective than a remedy after the fact. When workers are fired for union activity, employers can cut organizing efforts short and can engage in delay tactics that effectively thwart the campaign because other workers see the consequences of supporting the union. Mandatory injunctions would create a better deterrent and help make others in the workplace feel empowered to exercise their rights. I commend the PRO Act for attempting to create greater parity and predictability by making injunctive relief in the event of employer unfair labor practices mandatory in a greater number of cases.

Question for the Record
Committee on Education and Labor Subcommittee on Health, Employment, Labor & Pensions Hearing "Protecting the Right to Organize Act: Deterring Unfair Labor Practices" Wednesday, May 8, 2019 2:00 p.m.

From Representative Haley E. Stevens (MI)

Mr. Staus, we know that far too many workers are not aware of their rights in the workplace. In fact, current law does not require companies post any kind of notice informing employees about their rights under the National Labor Relations Act. How did you become aware of your workplace rights?

I'm from Pittsburgh. In my region everyone knows that the way dangerous, low-paying steel jobs became middle class jobs was through the union. If workers came together, I knew that things could get better at my job at the hospital too.

But not everyone is from a town like Pittsburgh with a legacy of strong unions. Not everyone knows about their rights at work.

The PRO Act would help level the playing field for working people through common sense changes like requiring employers to post notices that inform workers of their rights under the National Labor Relations Act.

Right now union support is at a fifteen year high. More than 6 in 10 Americans view unions favorably.[1] But despite this strong support, less than 11% of working people have a voice in the decisions that affect them at work and in their communities through a union.[2]

Working people want union representation, but our workplace laws are stacked against us.

Too often big businesses like the University of Pittsburgh Medical Center (UPMC) get away with illegally firing people like me simply for speaking up at work about having a voice on the job.

We need bills like the PRO Act to become law. In addition to making working people more aware of their rights, this bill would authorize stronger penalties so profitable companies will think twice about illegally firing people like me, and help make sure companies make things right quickly when they break the law.

If the PRO Act had been in effect it would have made a real difference for me and my family and my co-workers too.

I urge the members of this Committee to support the PRO Act and act quickly to pass this bill.

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[1] https://news.gallup.com/poll/241679/labor-union-approval-steady-year-high.aspx
[2] https://www.bls.gov/news.release/union2.nr0.htm

AFL-CIO

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May 30, 2019

The Honorable Robert C. "Bobby" Scott, Chairman
Committee on Education and Labor
United States House of Representatives
Washington, D.C. 201515

Re: Protect the Right to Organize (PRO) Act

Dear Representative Scott:

Below please find my answers to the questions you posed to me by letter date May 23, 2019.

Chairman Robert C. "Bobby" Scott (VA)

Question: Mr. Trumka, when employees vote on union representation, the employer is not on the ballot. Despite this, National Labor Relations Board (NLRB) regulations currently designate the employer as a "party" to the election, which allows them to intervene and litigate in NLRB election proceedings. How does this practice undermine workers' right to have a fair election? What are some of the ways that employers use their standing in pre-election hearings to affect the outcome of the election?

Answer: A representation election determines whether employees wish to be represented in collective bargaining with their employer and, if so, by what labor organizations. If selected, that labor organization will sit across the table in bargain with the employer. While the employer may have an interest in whether employees are represented and by whom, just like Canada may have an interest in who represents U.S. citizens during trade negotiations, the interest is not a legally protected interest.

Employers who oppose employee representation have exploited their status as parties to the pre-election hearing to undermine workers' rights using two primary tactics. First, employers use the hearing to delay the election in order to gain time to campaign again representation. They do this by raising objections to the scope of the unit or eligibility of individual employees solely for purposes of delay. Second, employers use the hearing to challenge the bargaining unit described in the petition not because it is not an appropriate unit and not because

it will be difficult for the employer to bargain with employees in the unit, but in order to gerrymander the unit in a manner likely to make a vote for representation less likely. Combined, those tactics place employees between a rock and a hard place as they must either litigate the issues raised by the employer with the resulting lengthy delay in obtaining a vote or concede to the employer's demand for a gerrymandered unit.

Question: Mr. Trumka, in 2016, the Department of Labor issued a final rule reinstating the requirement that employers and consultants must report both direct and indirect persuader activity under the Labor Management Reporting and Disclosure Act. By codifying this rule, how does the PRO Act foster transparency during union organizing elections? By codifying this rule, would the PRO Act interfere with attorney-client privilege?

Answer: The modus operandi of the typical union buster was well described by Martin Jay Levitt in his *Confessions of a Union Buster* 10 (1993): "The entire campaign . . . will be run through your foremen. I'll be their mentor, their coach. I'll teach them what to say and make sure they say it. But I'll stay in the background." Section 202 of the Labor Management Reporting and Disclosure Act requires persons engaged in such persuader activity to file reports, but from time-to-time, the Department of Labor has interpreted the so-called advice exception to allow consultants, such as Levitt, to escape reporting simply by staying behind the scenes. It is obviously pertinent for employees to know whether the message they are hearing from their supervisors and managers is a canned presentation devised by an expert in defeating organizing campaigns. The PRO Act codifies an interpretation of the advice exception that requires consultants to report their behind the scenes scripting of antiunion campaigns. This interpretation of the advice exception does not require reporting privileged attorney-client communications.

Rep. Suzanne Bonamici (OR)

Question: Mr. Trumka, more workers would join a union if given the choice, but many fear retaliation for supporting or engaging in organizing efforts. According to a study from the Economic Policy Institute, companies threaten to close shop in 57% of union representation elections. In 34% of representation elections, employers fire workers who are organizing during a union election. In 47% of representation elections, employers threaten to cut wages and benefits for workers if employees unionize. And in 54% of representation elections, employers use captive audience meetings to interrogate workers about their union support. Under the National Labor Relations Act, these unacceptable tactics to intimidate, coerce, or fire workers involved in union organizing are illegal, but the penalties are insufficient. The current law does not require companies to post notices informing workers about their rights under the NLRA, and many workers are not aware of their right to join a union. How does the PRO Act help workers access more information about their rights to union representation?

Letter to The Honorable Robert C. "Bobby" Scott
May 30, 2019
Page three

Answer: Survey data demonstrates that people who have the most knowledge about unions and collective bargaining – union members and their families – have the most favorable view of unions. But increasingly people do not have any direct experience with unions and thus do not understand what unions do or that they have a right to join a union and engage in collective bargaining. People are afraid based on the statistics you cite. The PRO Act would remedy this lack of information by requiring employers to post a notice, both physically and electronically, describing employees' "rights and protections" under the Act. This would simply put labor law rights on par with rights under the Fair Labor Standards Act and other statutes that already impose such a notice posting requirement.

Rep. Haley E. Stevens (MI)

Question: Mr. Trumka, according to Bloomberg Law, in 2018 the National Labor Relations Board oversaw the fewest number of union elections since Bloomberg began keeping track. However, when workers had the opportunity to have union elections during that year they voted for a union 70 percent of the time. Does this mean the system is adequately representing workers?

Answer: Most definitely not. Survey data shows people are increasingly favorable toward unions and that more and more people say they would vote for union representation, yet the number of people achieving union representation through NLRB election is falling. The system is broken. Fewer and fewer petitions are being filed because employees fear being subjected to retaliation, captive audience meetings, and other unlawful and unfair tactics currently permitted in the election process.

Question: Mr. Trumka, you mentioned in your testimony that unions secure better wages for all types of working people. Can you describe how and whether unions also raise wages for nonunion workers?

Answer: That happens in three primary ways. First, when unions bargain for higher wages and better benefits for those they represent, there is a "spillover effect" on unrepresented workers. In order to compete for skilled workers in an effort to convince their employees not to unionize, non-union employers raise their wages and improve their benefits to match their union competitors. Professor Jake Rosenfeld of Washington University found that if union density had held steady between 1979 and 2013, nonunion men working in the private-sector would have earned $2,704 more per year. That represents the spillover effect. But, the weakening of that effect caused by the decline of union density cost $40.2 million nonunion private-sector men $2.1 billion dollars in lost wages or $109 billion per year.

Letter to The Honorable Robert C. "Bobby" Scott
May 30, 2019
Page four

Second, collective bargaining has produced innovative benefit plans, scheduling practices, and other humane personnel practices that have subsequently spread to non-union workplaces.

Finally, unions have historically been the primary backers of a range of employment laws that apply to all workers, from the minimum wage, to occupational safety and health, to equal employment opportunity. Without unions, no employees would enjoy those protections.

Thank you for the opportunity to provide further information about this critical legislation.

Sincerely,

Richard L. Trumka
President

RLT/CB/rs

[Whereupon, at 4:38 p.m., the subcommittee was adjourned.]

○