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PROTECTING THE RIGHT TO ORGANIZE ACT: MODERNIZING AMERICA'S LABOR LAWS

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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PROTECTING THE RIGHT TO ORGANIZE ACT: MODERNIZING AMERICA'S LABOR LAWS

Thursday, July 25, 2019
House of Representatives,
Subcommittee on Health,
Employment, Labor, and Pensions,
Committee on Education and Labor,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:15 a.m., in Room 2175, Rayburn House Office Building, Hon. Frederica Wilson [chairwoman of the subcommittee] presiding.

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

Also Present: Representatives Foxx and Kennedy

Staff Present: Tylease Alli, Chief Clerk; Jordan Barab, Senior Labor Policy Advisor; Ilana Brunner, General Counsel; Kyle deCant, Labor Policy Counsel; Emma Eatman, Press Assistant; Mishawn Freeman, Staff Assistant; Eli Hovland, Staff Assistant; Eunice Ikene, Labor Policy Advisor; Stephanie Lalle, Deputy Communications Director; Andre Lindsay, Staff Assistant; Jaria Martin, Clerk/Assistant to the Staff Director; Kevin McDermott, Senior Labor Policy Advisor; Richard Miller, Director of Labor Policy; Max Moore, Office Aide; Veronique Pluviose, Staff Director; 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; Cate Dillon, Minority Staff Assistant; Rob Green Minority Director of Workforce Policy; Bridget Handy, Minority Communications Assistant; John Martin, Minority Workforce Policy Counsel; Hannah Matesic, Minority Director of Operations; Audra McGeorge, Minority Communications Director; Carlton Norwood, Minority Press Secretary; Brandon Renz, Minority Staff Director; and Ben Ridder, Minority Professional Staff Member.

Also Present: Representatives Kennedy and Keller.

Chairwoman WILSON. Good morning.

The Subcommittee on Health, Employment, Labor, and Pensions will now come to order. Welcome, everyone. I note that a quorum is present. I note for the subcommittee that Representative Fred Keller of Pennsylvania be permitted to participate in today's hearing. I also note for the subcommittee that Representative Joseph Kennedy of Massachusetts will be participating in today's hearing

with the understanding that his questions will come only after all members of the HELP Subcommittee, and any members of the full committee on both sides of the aisle who are present have had an opportunity to question the witnesses.

Thank you for joining us.

The subcommittee is meeting today in a legislative hearing to receive testimony on Protecting the Right to Organize Act: Modernizing America's Labor Laws. We call it the PRO Act.

Pursuant to Committee Rule 7(c), 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 gathered for a legislative hearing on how the Protecting the Right to Organize Act, or PRO Act, would protect workers' rights to organize unions in the modern economy.

We had a hearing on the PRO Act just a few months ago. It is rare to have a second hearing so soon. But here we are today, making this issue, that is so important. This is a fight that we must engage in together on behalf of our hard-working Americans. They are our constituents, and they are counting on us to fight for them so that they can, in turn, fight for themselves and their families; fight to earn decent wages and benefits that enable them to care for their families, extended families, and for themselves.

And I want to implore all of my colleagues on the committee to become co-sponsors of this legislation, and then encourage all of the members of their respective delegations to sign on so that we can get this bill to the floor.

Talk about this legislation during the August recess. I recently made a presentation before the Teamsters so we can get the word out to workers that we are on their side. This is a fight that we must fight in a consistent manner; and if we have to hold a third hearing on why the PRO Act is so urgently needed, we will do that.

So, let's do everything we can to keep the public, our congressional colleagues, the National Labor Relations Board, and others, informed until everyone understands just how important this legislation is.

Unions are essential for there to be dignity in and on the job. Protecting the right to organize is critical for reversing decades of wage stagnation and income inequality. Yet, the rapidly changing relationship between employers and employees is undermining workers' ability to negotiate for better wages, benefits, and working conditions. Today's workers are increasingly hired not as full-time employees with middle-class jobs, but as independent contractors and permatemps.

As our witnesses will testify today, employers exploit ambiguities and loopholes in the NLRA to prevent their employees from organizing unions, even though those employers control the terms and conditions of employment for their subcontracted employers. Rather than working to strengthen the right to organize in this changing economy, corporate interests and their allies in the Trump administration are exploiting weaknesses in this outdated law to aid their assault on workers' rights.

For example, under the Trump administration, the National Labor Relations Board has further enabled employers to misclassify their employees. Earlier this year, the NLRB denied SuperShuttle drivers employee status because of their alleged entrepreneurial opportunity, even though SuperShuttle prohibited workers from using their vehicles to work for any competitor.

And what if a worker has multiple employers? As our witnesses will testify, for many workers, the name on the door of the building where they work is not the name of the company that signs their paycheck. Thanks to the 2015 NLRB decision, known as Browning-Ferris, both the user of permatemps and the supplier of permatemps can have a responsibility to collectively bargain with employees, since they jointly control directly and through contractual provisions. These terms and conditions of employment for permatemps, that joint control, makes them joint employers.

However, despite an appeals court ruling that affirming this decision on the definition of a joint employer, the Trump administration is continuing its efforts to obliterate the court's direction through rulemaking.

As the workplace becomes increasingly splintered, we must protect employees' First Amendment rights to free speech and protests, in addition to preventing employers from invading their legal obligations. The NLRA currently impairs workers' First Amendment rights by barring them from protesting for their right to unionize, and from standing in solidarity with workers from other employers, which would be otherwise constitutionally protected. These laws prevent workers from peacefully protesting companies that do business with unscrupulous employers.

As work relationships become more complicated, the First Amendment becomes even more essential for those workers to advocate for better pay and better conditions. But the Trump administration is seizing upon current law to further undermine workers' rights. The Republican General Counsel of the NLRB recently argued that workers break the law when they use balloon animals while peacefully protesting. This makes a mockery of our First Amendment.

The organization of the workplace becomes even more splintered, and employers are able to exploit these arrangements to eviscerate workers' rights. The Federal government has a responsibility to ensure that labor law continues to protect workers. The PRO Act would help achieve this goal by modernizing labor law to meet the challenges facing today's workers.

The PRO Act would prevent the misclassification of employees by codifying a clear standard for when a worker is an employee or an independent contractor. The PRO Act also clarifies the standard for determining joint employment so that employers cannot evade their obligations under labor law. By codifying the NLRB's current standard, workers can hold each of their employees accountable under the law, and the PRO Act protects workers' First Amendment rights by repealing prohibitions on peaceful union picketing to guarantee organizing workers the same freedom of speech to which all Americans have a right.

By passing the PRO Act, Congress and this committee would modernize our Nation's foundational labor law to ensure that all

workers can join together and bargain with employers for better pay and working conditions. I look forward to hearing from our witnesses and the discussion that will ensue.

I now recognize the Ranking Member, Mr. Walberg, for an opening statement, the esteemed Mr. Walberg.

[The statement of Ms. Wilson follows:]

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

Today, we are gathered for a legislative hearing on how the Protecting the Right to Organize Act, or PRO Act, would protect workers' rights to organize unions in the modern economy.

Unions are essential for there to be dignity in the on the job. Protecting the right to organize is critical for reversing decades of wage stagnation and income inequality.

Yet, the rapidly changing relationship between employers and employees is undermining workers' ability to negotiate for better wages, benefits, and working conditions. Today's workers are increasingly hired—not as full-time employees with middle class jobs—but as independent contractors and permatemps.

As our witnesses will testify, employers exploit ambiguities and loopholes in the N–L-R–A to prevent their employees from organizing unions—even though those employers control the terms and conditions of employment for their subcontracted employees.

Rather than working to strengthen the right to organize in this changing economy, corporate interests and their allies in the Trump administration are exploiting weaknesses in this outdated law to aid their assault on workers' rights.

For example, under the Trump Administration, the National Labor Relations Board, or N–L-R–B, has further enabled employers to misclassify their employees. Earlier this year, the N–L-R–B denied SuperShuttle drivers employee status because of their alleged "entrepreneurial opportunity," even though SuperShuttle prohibited workers from using their vehicles to work for any competitor.

And what if a worker has multiple employers? As our witnesses will testify, for many workers, the name on the door of the building where they work is not the name of the company that signs their paycheck.

Thanks to a 2015 N–L-R–B decision, known as Browning-Ferris, both the user of permatemps and the supplier of permatemps would have a responsibility to collectively bargain with employees, since they jointly control— directly and through contractual provisions—the terms and conditions of employment for permatemps. That joint control makes them "joint employers."

However, despite an Appeals Court ruling that affirming this decision on the definition of a joint employer, the Trump administration is continuing its efforts to obliterate the court's direction through a rulemaking.

As the workplace becomes increasingly fissured, we must protect employees' First Amendment rights to free speech and protest, in addition to preventing employers from evading their legal obligations.

The N–L-R–A currently impairs workers' First Amendment rights by barring them from protesting for their right to unionize and from standing in solidarity with workers from other employers, which would be otherwise constitutionally protected.

These laws prevent workers from peacefully protesting companies that do business with unscrupulous employers. As work relationships become more complicated, the First Amendment becomes even more essential for those workers to advocate for better pay and conditions.

But the Trump administration is seizing upon current law to further undermine workers' rights. The Republican General Counsel of the N–L-R–B recently argued that workers break the law when they use balloon animals while peacefully protesting. This makes a mockery of our First Amendment.

The organization of the workplace becomes even more fissured and employers are able to exploit these arrangements to eviscerate workers' rights. The federal government has a responsibility to ensure that labor law continues to protect workers.

The PRO Act would help achieve this goal by modernizing labor law to meet the challenges facing today's workers.

The PRO Act would prevent the misclassification of employees by codifying a clear standard for when a worker is an employer or an independent contractor.

The PRO Act also clarifies the standard for determining joint employment so that employers cannot evade their obligations under labor law. By codifying the N–L-R–

B's current standard, workers can hold each of their employers accountable under the law.

And, the PRO Act protects workers' First Amendment rights by repealing prohibitions on peaceful union picketing, to guarantee organizing workers the same freedom of speech to which all Americans have a right.

By passing the PRO Act, Congress and this Committee would modernize our nation's foundational labor law to ensure that all workers can join together and bargain with employers for better pay and working conditions.

I look forward to hearing from out witnesses today and the discussion that will ensue. I now recognize the Ranking Member, Mr. Walberg, for an opening statement.

Mr. WALBERG. I thank the gentlelady.

And I thank you for this hearing. I think this is going to be a good hearing, and I appreciate the opportunity for the give and take that will go on.

Thanks to a skyrocketing economy -- and I think that is evident all across the board -- propelled by recent tax cuts, innovation, regulatory reform, and American enterprise with great workers throughout the country doing the jobs that only they can do, workers throughout this country are experiencing record-breaking success and opportunity.

While workers' lives are improving, union membership rates have steadily plummeted, suggesting what Democrats refused to acknowledge, that strong workers, strong union workers, as well, and not strong union bosses lead to economic prosperity. Workers' disenchantment with union representation has created a real crisis for union leaders who, instead of increasing transparency and accountability to serve their members better, continued to exert their political influence by demanding radical national labor laws.

Union bosses and the Democrats who have their support want to use the power of government to further consolidate control, coerce workers, and bolster their personal agendas; and as evidenced by steadily declining union membership rates, that doesn't sit well with American workers.

The bill we are here to discuss today, H.R. 2474, the Protecting the Right to Organize Act, or the PRO Act, is a sweeping labor union boss wish list designed to appeal to liberal Democrat primary voters, rather than American workers in a modern workplace. This legislation is based not on the innovative 21st century economy we are fortunate enough to enjoy today, but on the economic and workplace realities of the 1930s when my father was helping to organize labor at steel mills in Chicago. It increases the coercive power of big labor at the expense of workers and business owners.

Among the list of dangerous one-sided provisions, the bill contains a card check scheme, the same undemocratic concept that was rejected by Congress the last time Democrats were in power. If a union loses an election, the legislation requires employers to prove they did not interfere in the election's results, a nearly-impossible standard to demonstrate, which defies our nation's long-held principle that you are innocent until proven guilty.

If an employer is unable to prove that it didn't interfere, a union is automatically ushered into the workplace without ever winning a secret ballot election. Americans select their representation in Congress by secret ballot, and congressional Democrats select their own leadership by secret ballot. But today, they seek to deny the

same right to Americans in the workplace. Where is the logic in that?

Remarkably, the bill also requires employers to turn over workers' personal information. I wouldn't want that. The workers I know don't want that. They don't want me to know their personal information, or call their personal phone cells. This information includes their home addresses, cell phone and land line numbers, personal email addresses, and more without workers ever having a say in the matter. It also bans state right-to-work laws, enacted by state legislators and/or citizens to 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 since being enacted in 27 states, including my home state of Michigan.

The radical and coercive policies in this legislation are blatantly anti-worker and blatantly pro-union boss. Democrats are claiming that this bill will modernize labor law. In reality, H.R. 2474 amounts to little more than forcing more workers into one-size-fits-all union contracts, and returning to a stale and old-fashioned 1930s-era view of the American economy and workforce.

Unlike this antiquated, anti-growth special interest viewpoint, Republicans believe that true modernization means expanding entrepreneurial opportunity and embracing flexible work arrangements and ensuring that union bosses are truly accountable to the workers they claim to represent.

There is nothing progressive or modern about what Democrats are proposing in this bill. History has shown us that individual opportunity, innovation, and economic growth are what lead to real progress and prosperity for American workers. Americans are benefiting from the strong economy ushered in by Republican-led tax and regulatory reform. Wages are rising, unemployment is at near-record lows, and millions of jobs have been created since President Trump took office.

But the anti-worker freedom bill being discussed today would threaten this progress. Instead of more freedom and opportunity, it promises more coercion and red tape. Republicans on this committee will continue to stand with workers and promote individual freedom and pro-growth economic policies as the best path forward for workers, the best workers in the world, and job seekers for increased jobs throughout this country.

As I said, Madam Chairwoman, I appreciate this hearing. It will be good discussion, even with disagreement; but we have to recognize the reality of what we are doing.

And I yield back.

[The statement of Mr. Walberg follows:]

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

Thanks to a skyrocketing economy propelled by recent tax cuts, innovation, and American enterprise, great workers throughout the country are experiencing record-breaking success. While workers' lives are improving, union membership rates have steadily plummeted, suggesting what Democrats refuse to acknowledge: that strong workers- strong union workers as well- and not strong union bosses, lead to economic prosperity. Workers' disenchantment with union representation has created a real crisis for union leaders, who instead of increasing transparency and accountability to serve their members better, continue to exert their political influence by demanding radical national labor laws. Union bosses—and the Democrats who have

their support—want to use the power of government to further consolidate control, coerce workers, and bolster their personal agendas. And as evidenced by steadily declining union membership rates, that doesn't sit well with American workers.

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Among a list of dangerous one-sided provisions, the bill contains a "card-check" scheme, the same undemocratic concept that was rejected by Congress the last time Democrats were in power. If a union loses an election, the legislation requires employers to prove they did not interfere in the election's results—a nearly impossible standard to demonstrate, which defies our nation's long-held principle that you are innocent until proven guilty. If an employer is unable to prove that it didn't interfere, a union is automatically ushered into the workplace, without ever winning a secret ballot election. Americans select their representation in Congress by secret ballot, and Congressional Democrats select their own leadership by secret ballot, but today they seek to deny that same right to Americans in the workplace. Where is the logic in that?

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There is nothing "progressive" or "modern" about what the Democrats are proposing in this bill. History has shown us that individual opportunity, innovation, and economic growth are what lead to real progress and prosperity for American workers.

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Chairwoman WILSON. Thank you, Mr. Walberg.

Without objection, all other members who wish to insert written statements into the record may do so by submitting them to the committee clerk electronically in Microsoft Word format by 5:00 p.m. on August 7, 2019.

I will now introduce our witnesses. Welcome to you, and thank you so much for coming.

Ms. Charlotte Garden is a Professor of Labor and Constitutional Law at Seattle University School of Law. Welcome.

Mr. Josue Alvarez is a truck driver for XPO Logistics from Bell Gardens, California. Thanks for traveling so far.

Mr. Roger King is a Senior Labor and Employment Counsel with the HR Policy Association. Thank you.

Mr. Richard F. Griffin, Jr., is of counsel at the law firm of Bredhoff & Kaiser, PLLC. He also served as a Board Member and as General Counsel for the National Labor Relations Board. Welcome.

We appreciate all of the witnesses for being here today, and we all look forward to your testimony. 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 7(d) and committee practice, each of you is asked to limit your oral presentation to a five-minute summary of your written statement.

Let me also remind the witnesses that pursuant to Title 18 of the U.S. Code, Section 101, 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 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 one minute remaining. When the light turns red, your five minutes have expired; and we ask that you please wrap it up so I will not have to gavel you.

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

I will first recognize Ms. Garden.

STATEMENT OF CHARLOTTE GARDEN, J.D., LL.M, CO-ASSOCIATE DEAN FOR RESEARCH & FACULTY DEVELOPMENT AND ASSOCIATE PROFESSOR, SEATTLE UNIVERSITY SCHOOL OF LAW

Ms. GARDEN. Thank you.

Madam Chair Wilson, Ranking Member Walberg, and members of the subcommittee, thank you for the opportunity to testify today about the need to expand the protections of labor law, and to ensure that workers and unions can robustly exercise their First Amendment rights to engage in collective action.

My name is Charlotte Garden. I am an associate professor at Seattle University School of Law, where I teach labor law and constitutional law.

My testimony today focuses on two reasons that the NLRA falls short of its promise to restore to workers equality of bargaining power and full freedom of association. First, the NLRA curtails workers' and unions' rights of free speech, association, and assembly, by prohibiting certain secondary protests. Second, it doesn't do enough to respond to workplace fissuring, including through subcontracting and misclassification.

I want to make two points regarding the NLRA's ban on certain secondary activity, which generally covers strikes and picketing, aimed at persuading businesses or consumers not to do business with an employer with whom a union has a labor dispute.

First, in fissured workplaces, this restriction can force workers to act irrationally, focusing their attention on the small entities that are technically their employers, rather than the larger entities that exercise the most effective control over their working conditions. Second, this restriction on how workers and unions can protest is in tension with modern First Amendment case law.

Both points are illustrated by a recent NLRB decision in Preferred Building Services. In Preferred, a group of janitors supported by a labor union picketed and passed out literature detailing bad treatment they had faced at work including, sexual harassment by their supervisor.

Naturally, they did this outside the place they went to work every day. That was an office building managed by a company called Harvest, but Harvest didn't employ the janitors directly. Instead, it contracted with Preferred Building Services, which, in turn, contracted with a smaller janitorial company called OJS. It was OJS that signed the workers' paychecks, and it was OJS that fired the workers shortly after they sought to draw attention to harassment and the other problems they faced at work.

An administrative law judge found that the workers should get their jobs back and other relief; but the NLRB disagreed, concluding that the workers picketing lost NLRA protection because it sought to coerce Harvest or building tenants.

To say the least, it is counterintuitive that labor law would not protect workers picketing at their job site to improve fundamental working conditions, such as the right to work free of sexual harassment. But in the modern economy, large companies often contract out parts of their operations, including their janitorial services, sometimes to small firms that work for a small number of clients or maybe just one client.

In this scenario, the large companies maintain effective control over wages and working conditions. So, if you imagine a small janitorial firm that squeezed between workers demanding higher pay, and a main client demanding lower overhead, I know which side will win every time. Yet, labor law expects workers to keep their picketing focused on their small employer, and not the large company that employer contracts with.

In short, law allows employers to strategically manage their operations through interconnected contractual relationships. It shouldn't then limit how workers respond to the effects of those relationships.

Second, the NLRA's prohibition on secondary activity raises serious First Amendment problems. Those problems are especially apparent in recent cases. For example, the Board's General Counsel's office has recently argued that unions' use of inflatable rats and other animals either qualifies as picketing or is otherwise coercive, and that these balloons violate the NLRA when used for a secondary purpose.

In one recent case, the General Counsel's office argued that a, quote, "huge, menacing inflatable rat placed near a business entrance . . . inherently conveys a threatening and coercive message that will restrain a person." But even more restrained interpretations of the NLRA's secondary activity ban raised serious First Amendment problems that have only deepened in recent years. The

Supreme Court has struck down limits on other forms of protest, including civil rights boycotts, picketing at funerals, and anti-abortion sidewalk counseling. It has increasingly found that legal restrictions on the speech of corporate entities are suspect. Yet, the secondary activity ban limits what unions can say on picket signs, ignoring the reality that today, union pickets rely on moral persuasion rather than coercion.

The PRO Act appropriately responds to these problems by excising limits on secondary and recognitional protests under the NLRA, and it blunts some forms of workplace fissuring by adopting a more straightforward and predictable method of distinguishing employees from independent contractors and retaining the current definition of joint employer.

Thank you for the opportunity to testify.

[The statement of Ms. Garden follows:]

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

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The Protecting the Right to Organize Act: Modernizing America's Labor Laws

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Madame Chair Wilson, Ranking Member Walberg, and Members of the subcommittee, thank you for the opportunity to testify today about the need to expand the protections of labor law, and to ensure that workers and unions can robustly exercise their First Amendment rights to engage in peaceful collective action.

My name is Charlotte Garden, and I am an Associate Professor at Seattle University School of Law, where I teach labor law and constitutional law. My research focuses mainly on labor law, including the treatment of unions' and of workers' collective action under the First Amendment.[1]

I. Introduction

As this subcommittee has already heard during previous hearings on the PRO Act, the National Labor Relations Act has fallen short of its promise to restore to workers equality of bargaining power and full freedom of association. My testimony today focuses on two reasons the NLRA falls short of those ideals. First, the NLRA curtails workers' and unions' rights of free speech, association, and assembly by prohibiting certain "secondary" protests – that is, picketing, boycotts, and strikes aimed at pressuring businesses and individuals not to do business with an employer with whom the union has a labor dispute.[2] Second, it allows businesses that exercise meaningful control over employees' wages and working conditions to escape responsibility for bargaining over those conditions by defining too broadly who is an independent contractor, and too narrowly who is a joint employer.

These two problems are illustrated by a single case recently decided by the National Labor Relations Board – *Preferred Building Services.*[3] The events that gave rise

[1] *See* Charlotte Garden & Joseph Slater, *Comments on Restatement of Employment Law (Third), Chapter 1*, 21 EMPLOYEE RTS. & EMP. POL'Y J. 265 (2017); Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205 (2017); Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323 (2016); Charlotte Garden *Meta Rights*, 83 FORDHAM L. REV. 855 (2014); Charlotte Garden, *Citizens, United and* Citizens United*: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1 (2011); Charlotte Garden, *Labor Values are First Amendment Values: Why Union Comprehensive Campaigns are Protected Speech*, 79 FORDHAM L. REV. 2617 (2011).
[2] *See* Howard Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962).
[3] 366 NLRB No. 159 (Aug. 28, 2018). The facts in this section are drawn from the decision of the NLRB, and the decision of the Administrative Law Judge, which the NLRB ultimately reversed. This case is currently pending review in the United States Court of Appeals for the Ninth Circuit, Case No. 19-70334.

to *Preferred* began when a small group of janitors who worked cleaning office buildings in San Francisco sought to improve their working conditions. They began by meeting with leaders of a workers' advocacy group, and then with a labor union. During those meetings, they disclosed that the owner of the company they worked for, Rafael Ortiz, had made sexually explicit comments, including suggesting to one employee that he would pay her more if she would have sex with him.[4] The workers also explained that while their work was very physically demanding, they were paid the minimum wage.

Ortiz's company, OJS, was the entity that issued the workers' paychecks. But all of OJS's work was subcontracted from Preferred Building Services, a larger janitorial company that had significant involvement in and influence over OJS's operations. The employees involved in this case were assigned to clean an office building that was managed by a third company, Harvest.

To call attention to their situation, the OJS employees picketed outside the building where they worked. They held signs with slogans such as "We Prefer No More Sexual Harassment." They also distributed handbills that explained their situation in more detail, and called on a building tenant "to take corporate responsibility in ensuring that their janitors receive higher wages, dignity on the job, respect, their rights to sick pay and workers compensation, and full legal protections against sexual harassment and retaliation for asserting their rights."[5]

Unsurprisingly, the building manager (Harvest) and some of the tenants were concerned or upset about the workers' allegations, and later testimony before an administrative law judge reflected that Harvest asked Preferred to investigate the allegations, and to exclude Ortiz from the building while the investigation was ongoing. In response, Preferred cancelled its contracts with both Harvest and OJS. Soon thereafter, Ortiz fired the workers who had protested their treatment by him.

The workers filed a complaint with the NLRB, alleging that they were fired because of their protected concerted activity. The Administrative Law Judge agreed; her recommendation was that the Board should find that Preferred and OJS were joint employers of the workers, that both had violated the NLRA, and that at least two of the workers should be immediately reinstated, among other remedies.

The NLRB disagreed. It concluded that even though it did not "condone the abhorrent conduct in which the picketers alleged Ortiz engaged," the employees lost the NLRA's protection because their picketing violated the NLRB's bar on secondary conduct. That is, the Board thought the employees' goal "was to pressure Harvest, a neutral employer, to cease doing business with Preferred, unless it increased wages for janitorial employees working in that building and removed Ortiz."[6]

To say the least, it is counterintuitive that labor law would not protect workers' picketing to improve fundamental working conditions, such as the right to work free from sexual harassment. But it is generally an unfair labor practice for a union to picket or use other tactics that the Board deems to be "coercive" where the union's goal is "forcing or

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[4] Ortiz denied making these comments, but the Administrative Law Judge who heard the case credited the employee's allegations, and did not credit Ortiz's denial. 366 NLRB No. 159 at *16 notes 31 & 33.
[5] Id. at *2.
[6] Id. at *5 note 21.

requiring" any person to stop dealing with an employer with which the union has a labor dispute. And while statutory language like "coerce," "force," and "require" may sound like high bars, those terms are sometimes interpreted to cover even persuasive union speech that should be at the core of First Amendment protections for picketing and protest.

That interpretation of the statutory language, to reach picketing that the Board thought would merely "pressure" Harvest to end its contractual relationship with Preferred,[7] drove the Board's analysis in that case. But the NLRA's secondary activity ban impedes effective union organizing and protest, and it is in tension with the First Amendment even when it is interpreted to cover a smaller range of union activity. Further, while *Preferred* involved an employer's affirmative defense to an unfair labor practice charge, engaging in unlawful secondary activity is also a union unfair labor practice that carries the risk of fines and injunctions.[8]

The *Preferred* case also illustrates how workplace "fissuring"[9] stymies labor organizing.[10] Consider a counterfactual scenario in which Harvest employed its janitors directly – a practice that was more common in the past than it is now – and one of those janitors was harassed by a supervisor. In that scenario, the employees could have decided to picket in front of the building where they worked without any suggestion that they were engaged in unlawful secondary activity; in that case, the NLRA would have protected them from employer retaliation. In other words, it is only because Harvest decided to contract for janitorial services instead of hiring janitors directly that the NLRA's secondary activity provision was implicated in *Preferred Building Services* at all.

Over recent decades, it has become more common for large companies to divest themselves of employment relationships with workers who provide services that are crucially important, but that are not the core of the enterprise's business – janitorial and transportation services are often fissured, but they are far from the only examples.[11] This trend has a host of bad consequences for workers (and especially for low-wage workers), including that labor law often does not recognize as the employer of a group of employees the entity with the most power over their wages and working conditions. In my remaining testimony, I discuss these issues in more detail.

II. Workers' Collective Action & Secondary Activity

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[7] Id. at *5 ("[t]he fact remains that an object of the picketers was to pressure Harvest, a neutral employer, to cease doing business with Preferred unless it increased wages for janitorial employees working in that building and removed Ortiz").

[8] 29 U.S.C. § 160(l).

[9] This term was coined by former Department of Labor Wage & Hour Administrator David Weil in his book, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

[10] The workers who were eventually fired for protesting sexual harassment and low pay were employed by OJS, but Preferred exercised enough control over their day-to-day working conditions for the ALJ to conclude that Preferred qualified as a "joint employer" that could be held responsible for remedying unfair labor practices. The NLRB declined to decide whether OJS and Preferred were joint employers of these workers, but it has attempted to cut back on the scope of joint employer liability in other cases. *See* Hy-Brand Industrial Contractors, 362 NLRB No. 186 (2015).

[11] David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 ECON. & LAB. RELATIONS REV. 33 (discussing fissuring in different industries).

Since 1947, the National Labor Relations Act has placed significant constraints on workers' and unions' abilities to engage in collective action in solidarity with each other – so-called "secondary" activity. The NLRA's current prohibition on secondary activity is contained in section § 8(b)(4).[12] This statutory language is not a model of clarity – the NLRB's own website calls it "mind-numbing" – but it contains two main prohibitions. First, it is an unfair labor practice for a labor union to "engage in, or to induce or encourage" anyone to strike in support of a prohibited goal. Second, it is also an unfair labor practice for a union to "threaten, coerce, or restrain any person engaged in commerce" in support of a prohibited goal. Prohibited goals include "forcing or requiring any person to . . . cease doing business with any other person."[13]

It is possible to read § 8(b)(4) as restricting a significant amount of union speech. Some of the most restrictive possible readings are foreclosed by three "provisos" contained within the Act itself – these state that § 8(b)(4) does not "make unlawful, where not otherwise unlawful, any primary strike or primary picketing," nor does it "make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved [by a certified union]," nor does it cover "publicity, other than picketing" that is aimed at "truthfully advising the public" of a primary labor dispute.

In general, then, one can think of § 8(b)(4) as covering two types of union protest. First, it prohibits secondary strikes – those in which employees strike to pressure their employer to stop doing business with another employer with whom a union has a labor dispute – plus speech that could be construed as inducing or encouraging a secondary strike. Second, it prohibits unions from calling for secondary boycotts using tactics that qualify as "coercion" or "restraint." The Act does not define either of these words, but its text and legislative history indicate that Congress viewed at least some picketing as coercive. As a result, whether a particular union protest tactic qualifies as "picketing" continues to take on outsize importance in NLRB and court cases.

A. Section 8(b)(4) Raises Serious First Amendment Questions

The Supreme Court has recognized that § 8(b)(4) implicates unions' First Amendment rights. For that reason, the Court has on multiple occasions construed the statute narrowly to avoid having to decide whether it is unconstitutional, either on its face or as to particular applications.[14] But even with these limiting interpretations, § 8(b)(4) is

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[12] 29 U.S.C. § 158(b)(4).

[13] Other prohibited goals include "forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into [a hot cargo agreement]"; and "forcing or requiring any other employer to recognize or bargain with a labor organization . . . unless such labor organization has been certified as the representative" of the employer's employees.

[14] Portions of the discussion on this page and the next are drawn from my forthcoming law review article. Charlotte Garden, *Avoidance Creep*,– PENN. L. REV. – (forthcoming 2019). Many other law review articles have also analyzed and called into question the constitutionality of § 8(b)(4). *See, e.g.*, Michael J. Hayes, *It's Now Persuasion, Not Coercion: Why Current Law on Labor Protest Violates Twenty-First Century First Amendment Law*, 47 HOFSTRA L. REV. 563 (2018); Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845 (2018); Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277 (2015); Kate L. Rakoczy, *On Mock Funerals, Banners, and Giant Rat Balloons: Why Current Interpretation of Section 8(B)(4)(II)(B) of the National Labor Relations Act Unconstitutionally Burdens Union Speech*, 56 AMERICAN U. L. REV. 1621 (2007); James G.

in tension with more recent First Amendment cases in which the Supreme Court has made clear that speaker- and content-based restrictions on speech are presumptively invalid.[15]

In the 1964 case *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760* ("*Tree Fruits*"),[16] the Court considered whether § 8(b)(4) prohibited union picketing in support of a call for consumers not to buy a specific product (apples grown in Washington state) when shopping at the grocery store, where the union was clear that it was not calling for a boycott of the store as a whole.[17] The Court concluded that while the picketing may have fallen "literally within the statutory prohibition,"[18] the statute should be read to allow the union's picketing in order to avoid First Amendment concerns.

More than twenty years later, the Court held that the statute did not prohibit a union's secondary handbilling for much the same reason. In *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,[19] the Court decided § 8(b)(4) did not prohibit a building trades union from distributing handbills to mall customers, asking them to boycott the entire mall in reaction to a department store's decision to employ non-union contractors.

However, between *Tree Fruits* and *DeBartolo*, the Court upheld the basic constitutionality of § 8(b)(4). In 1980, the Court held in *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*,[20] that the *Tree Fruits* exception for picketing in support of a consumer boycott of a struck product did not apply when the product constituted "substantially all" of the picketed store's business. Although there was not a majority opinion in the case, six justices agreed that § 8(b)(4) was constitutional.[21] In a later case, a unanimous Court agreed that the statute was constitutional because the "labor laws reflect a careful balancing of interests"[22]

Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189 (1982).

[15] Sorrell v. IMS Health Inc., 564 U.S. 552, 571 (2011) ("[i]n the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint discriminatory").

[16] 377 U.S. 58 (1964) (holding that "[t]he prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(i) carries no unconstitutional abridgment of free speech").

[17] Id. at 59. The Court treated the sandwich boards, worn by union members at Safeway stores in Seattle, WA, as pickets. They read "TO THE CONSUMER: NON-UNION WASHINGTON STATE APPLES ARE BEING SOLD AT THIS STORE. PLEASE DO NOT PURCHASE SUCH APPLES. THANK YOU. TEAMSTERS LOCAL 760, YAKIMA, WASHINGTON." *Id.* at 60 n.3.

[18] Id. at 71.

[19] 485 U.S. 568 (1988).

[20] 447 U.S. 607 (1980).

[21] In an opinion joined by Chief Justice Burger and Justices Stewart and Rehnquist, Justice Powell wrote that there was a "well-established understanding" that § 8(b)(4) was constitutional, relying in part on *Tree Fruits* and writing that secondary picketing "spreads labor discord by coercing a neutral party to join the fray." 447 U.S. at 616. Justice Blackmun concurred, writing that he was "reluctant to hold unconstitutional Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." Id. at 617-18. Justice Stevens also concurred, stating that § 8(b)(4) was a restriction on "the conduct element [of picketing] rather than the particular idea being expressed." Id. at 619.

[22] *International Longshoremen's Ass'n v. Allied International, Inc.*, 456 U.S. 212, 226 (1982) (citing *Safeco*, 447 U.S. at 617 (Blackmun, J., concurring)).

However, the Court has also held that secondary consumer boycotts are protected by the First Amendment. *NAACP v. Claiborne Hardware Co.*[23] involved a civil rights group rather than a labor union: a group of African Americans living in and around Claiborne County, Mississippi, backed by the NAACP, voted to maintain a boycott of local businesses in order to pressure local government to proceed with desegregation of schools and other public facilities, among other demands. In response, merchants sued the NAACP and several individuals, alleging violations of state statutory and common law, including a state prohibition against secondary boycotts. The Supreme Court held that "the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments."[24] And, the Court continued, "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[25]

The *Claiborne Hardware* Court distinguished § 8(b)(4), citing the "delicate balance" rationale.[26] But that rationale is increasingly out-of-step with the Court's approach to the First Amendment. While the Supreme Court has not addressed the constitutionality of § 8(b)(4) in the three decades since *DeBartolo*, it has repeatedly affirmed that picketing is at the core of the First Amendment's protection, striking down restrictions on picketing and public protest in other contexts. In *Snyder v. Phelps*,[27] eight justices agreed that the Westboro Baptist Church's highly offensive picketing at a soldier's funeral was pure speech at the very heart of the First Amendment, writing that "picketing peacefully on matters of public concern . . . occupies a 'special position in terms of First Amendment protection.'"[28] Later, in *McCullen v. Coakley*,[29] the Court emphasized that the government's authority to regulate protests in traditional public fora, including sidewalks, was "very limited," and that laws that regulated protest based on its content or viewpoint should be subject to strict scrutiny.[30] And in *Virginia v. Black*, the Court wrote that even cross-burning could qualify as "core political speech," although it also allowed that states could criminalize cross burning with an intent to intimidate.[31]

In addition, the Supreme Court has recently emphasized that speech restrictions are suspect when they turn on the identity of the speaker. For example, in *Sorrell v. IMS Health*, the Court struck down a Vermont law prohibiting the use of information about physicians' prescribing practices by pharmaceutical marketers, but not by other speakers.[32] The Court in *Citizens United v. FEC* also condemned "categorical distinctions based on the corporate identity of the speaker and the content of the political speech."[33]

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[23] 458 U.S. 886 (1982).
[24] Id. at 907.
[25] Id. at 910.
[26] Id. at 912 (quoting Safeco, 447 U.S. at 617-18 (Blackmun, J., concurring in part)).
[27] 562 U.S. 443 (2011).
[28] *Id.* at 456 (quoting US v. Grace, 461 U.S. 171 (1983)).
[29] 573 U.S. 464 (2014).
[30] *Id.* at 477.
[31] 538 U.S. 343, 365 (2003).
[32] 564 U.S. 552, 564 (observing that "the statute disfavors specific speakers, namely pharmaceutical manufacturers").
[33] 558 U.S. 310, 364 (2010).

Yet § 8(b)(4) discriminates based on the identity of the speaker, as well as the content or viewpoint of the message being expressed. A hypothetical, constructed by Professor James Pope, illustrates why this is true.[34] In this hypothetical, there are three people holding picket signs outside a store. The first two signs bear nearly identical messages, asking customers to boycott the store because it sells a toy produced by non-union labor in exploitative working conditions – but one sign is held by a union organizer, and the other by a human rights activist. The third sign, carried by a store employee, urges customers to buy the toy by advertising its low price – a price that is likely possible because of the exploitative working conditions. In this situation, only the unionist risks liability under § 8(b)(4); the human rights activist has engaged in core First Amendment activity similar to that in *Claiborne Hardware*, and the store employee's sign is protected under the Court's commercial speech doctrine.

As the *IMS Health* Court indicated, speaker- and content-based speech restrictions must at least survive "heightened" scrutiny, which requires that "the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest."[35] Viewpoint-based discrimination requires even more rigorous review.[36]

But the legislative justification for § 8(b)(4) that was advanced when it was enacted in 1947 is anachronistic today. As the Supreme Court has described, § 8(b)(4) was enacted "to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusal to handle goods."[37] As Professor Catherine Fisk has explained, Congress might reasonably have viewed unions' calls for secondary strikes as coercive when it was true that "[c]rossing a picket line could result in a worker losing union membership and, consequently, the ability to work in a densely unionized industry."[38] But today (and for the last several decades), union density is considerably lower than it was when Congress adopted § 8(b)(4), and in any event, "[n]o worker can lawfully be prevented from working for crossing a picket line or refusing to serve picket duty."[39] Instead, today's labor protest is exemplified by the OJS workers, who relied on the persuasiveness of their message about fair treatment and respect at work.

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[34] James Gray Pope, *the First Amendment, The Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 950-50 (1999).

[35] 564 U.S. at 572; *see also* Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015) "Content-based laws – those that target speech based on its own communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

[36] Town of Gilbert, 135 S.Ct. at 2230 ("Government discrimination among viewpoints . . . is a 'more blatant' and 'egregious form of content discrimination'") (citation omitted).

[37] Local 1976, United Bhd. of Carpenters & Joiners of America v. NLRB, 357 U.S. 93, 100 (1958).

[38] Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2080-81 (2018).

[39] Id. at 2081.

Moreover, the Taft-Hartley Congress's description of neutral employers as "the helpless victims of quarrels that do not concern them at all"[40] is inapt in today's world of interconnected supply chains and contracting arrangements.[41] Instead, as *Preferred Building Services* illustrates, secondary employers can wield significant control over working conditions of their contractors' employees. For example, consider a janitorial contractor that has one large contract with a hotel chain. If the hotel chain threatens to find a new janitorial service unless it can renegotiate its contract at a lower price, the service may acquiesce – and then in turn cut its workers' pay, or lay some workers off and demand that others pick up the slack by working faster. In this situation, it is the hotel chain that has the most power to improve the workers' situations. Yet as *Preferred Building Services* shows, the hotel could be deemed a secondary target, restricting the janitorial workers' abilities to engage in peaceful picketing aimed at hotel guests or employees.

B. Recent NLRB Decisions Interpreting § 8(b)(4) Exacerbate the Statute's Fundamental Problems

As the Supreme Court has become increasingly protective of First Amendment rights, including those of corporations and unions, the constitutionality of § 8(b)(4) is even more doubtful than it was when the Court decided *DeBartolo* more than thirty years ago. Given that reality, some recent NLRB cases have proceeded carefully when deciding whether particular instances of union conduct violate § 8(b)(4). For example, in cases decided in 2010 and 2011, the NLRB held that stationary banners and large inflatable rats were not equivalent to "pickets," nor were they inherently coercive.[42] Similarly, in *Sheet Metal Workers' International Association v. NLRB*,[43] the DC Circuit relied on recent First Amendment cases to hold that a mock funeral procession was not coercive.

More recently, however, the NLRB and General Counsel have taken the opposite approach, relying on the statute's capacious language to assert that a broader range of union activity violates § 8(b)(4). For example, in recent months the Board's General Counsel has pursued several cases arguing that unions' use of inflatable rats and other animals either qualifies as picketing or is otherwise coercive, and that these balloons violate § 8(b)(4) when used for a secondary purpose.[44] In one recent case the General Counsel's office argued that a "huge, menacing inflatable rat placed near a business entrance thus inherently conveys a threatening and coercive message that will restrain a person."[45] To be clear, this effort is unlikely to succeed in the long term; multiple courts

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[40] H.R. Rep. No. 245 (1947) (quoted in *Allied Int'l*, 456 U.S. at 225).

[41] *See generally*, Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845 (2018).

[42] United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 & Eliason & Knuth of AZ, Inc., 355 NLRB 797, 798 (2010) (stationary banners did not violate § 8(b)(4)); Sheet Metal Workers Int'l Ass'n, Local 15, 356 NLRB 1290 (2011) ("Brandon II").

[43] 491 F.3d 429, 439 (D.C. Cir. 2007).

[44] See *King v. Construction & General Building Laborers' Local 79*, Case No. 1:19-cv-03496, 2019 WL 2743839 (E.D.N.Y. July 1, 2019); *IUOE Local 150*, Case 25-CC-228342, 2019 WL 30739999 (NLRB Div. of Judges, July 15, 2019); *IBEW, Local 98 (Shree Sai Siddhi Spruce)*, Case 04-CC-223346, 2019 WL 2296952 (NLRB Div. of Judges, May 28, 2019). *See also* NLRB Office of the General Counsel, Advice Memorandum, Case 13-CC-225655 (Dec. 20, 2018).

[45] Counsel for the General Counsel, National Labor Relations Board, Fourth Region, *IBEW Local 98 & Shree Sai Siddhi Spruce LLC*, Case 04-CC-223346 (July 16, 2019), available at http://src.bna.com/JZG.

have already held that the use of inflatable rats is not in itself coercive, and is protected by the First Amendment.[46] But even an unsuccessful § 8(b)(4) charge can be disruptive, redirecting union resources away from supporting workers and towards defensive litigation.

Similarly, the Board has held that workers' protest violates § 8(b)(4) in cases that are marginal at best – in other words, in cases that should call for the Board to exercise restraint in light of the constitutional values at stake. *Preferred Building Services* is one such case, though it is not the only example.[47] First, the *Preferred* Board rejected the employees' argument that their picketing was protected because it was consisted with a case called *Moore Dry Dock*.[48] Under *Moore Dry Dock*, unions are entitled to a rebuttable presumption that their picketing at a job site where both primary and secondary employers are present does not have an unlawful secondary purpose, as long as the picketing satisfies four criteria.[49] The disputed criteria in *Preferred* was whether the employees' picketing disclosed that their dispute was with Preferred, and not the either the office building's property manager (Harvest), or its tenants. Although the employees' picket signs did state that Preferred was the target of the labor dispute, the Board concluded that the employees' disclosure was not clear because their handbills requested that a building tenant "ensure 'their' janitors obtain better working conditions."[50] Then, the Board wrote that it would still find a prohibited secondary goal even if the employees had satisfied the *Moore Dry Dock* criteria, because the picketers told a Harvest representative that they wanted Ortiz to stop working in the building for which Harvest was the property manager, and that they would keep picketing until their wages were improved. (This message was conveyed during a meeting; there was no suggestion that the employees or anyone else at the meeting threatened violence.) Finally, the Board's last reason for finding that the employees had a prohibited secondary goal was that "neutral tenants were 'upset'" by the picketing.

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[46] *Tucker v. City of Fairfield, OH*, 398 F.3d 457, 462 (6th Cir. 2005) ("[i]n our view, there is no question that the use of a rat balloon to publicize a labor protest is constitutionally protected expression within the parameters of the First Amendment, especially given the symbol's close nexus to the Union's message."); Constr. & Gen. Laborers' Local Union No. 33 v. Town of Grand Chute, 834 F.3d 745 (7th Cir. 2016) (Posner, J., concurring and dissenting) ("[t]here is no doubt that the large inflated rubber rats widely used by labor unions to dramatize their struggles with employers are forms of expression protected by the First Amendment").

[47] Another example arose in *IBEW Local 357 & Desert Sun Enterprises Ltd.*, 367 NLRB No. 61 at *2 (Dec. 27, 2018). In this case, the Board applied a line of cases to hold that a union violated § 8(b)(4) simply by notifying a neutral employer that it intended to picket a worksite that the neutral shared with an employer with whom the union had a labor dispute. The Board wrote that "such a notice is ambiguous about whether the threatened picketing will lawfully target only the primary employer or will unlawfully enmesh the neutral employer," because "[t]he neutral would understandably question why the union is ending a strike notice to an employer with no role in the dispute." As Member McFerran pointed out in her dissent, this rule "flies in the face of common sense," not least because it can render unlawful a union's advance warning of picketing that itself does not violate the NLRA.

[48] *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950).

[49] The criteria are: "(a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer." Id. at 549-51.

[50] Preferred Building Services, 366 NLRB No. 159 at *4.

In other words, the Board interpreted § 8(b)(4) in a way that raises serious First Amendment and other questions. First, whether or not the OJS employees were entitled to the *Moore Dry Dock* presumption apparently turned on their use of the pronoun "their"; perhaps if they had requested that the building tenant take steps to ensure that "Preferred's" janitors received higher wages, the Board would have found the presumption applied. But workers' and unions' collective action is chilled when their rights turn on this kind of post-hoc flyspecking. The Board's second reason is tantamount to forcing workers and unions into a choice between two permissible tactics – either they can engage in "common situs" picketing as contemplated in *Moore Dry Dock*, or they can non-coercively ask a secondary employer to stop doing business with a struck employer.[51] But under *Preferred*'s reasoning they cannot do both, because then the second tactic will be used as evidence that the common situs picketing actually had an impermissible goal. And the Board's third reason – that some building tenants who saw the picketing then felt upset – is inconsistent with the recent Supreme Court's recent observation that "the fear that speech might persuade provides no lawful basis for quieting it."[52]

While I believe the Board's decision in *Preferred Building Services* is incorrect even under current law, it also reflects at least three fundamental and intractable problems with the statute itself:

1. The NLRA's bar on secondary activity places workers and unions at a profound disadvantage, and that disadvantage is exacerbated when employers divest themselves of labor law obligations to groups of employees through subcontracting arrangements.
2. Even a narrow interpretation of § 8(b)(4) raises serious First Amendment problems, and those problems have only deepened in recent years.
3. Decades of court decisions interpreting the statute – including cases narrowing § 8(b)(4)'s application in an attempt to avoid constitutional problems – mean that workers or unions cannot reliably discern what they may and may not do simply by reading the statute. It is difficult for anyone who is not a labor lawyer to know what is allowed and what is not under § 8(b)(4) – a state of affairs that itself chills workers' collective action.

Section 8(b)(4)'s problems are too fundamental to be resolved through tinkering with the statutory language. The PRO Act's approach – excising this provision as well as the restriction on "recognitional" picketing in NLRB § 8(b)(7) – is the correct one.

III. Workplace Fissuring

Companies have available a list of mechanisms that allow them to avoid the legal obligations they would otherwise owe their workforces under laws including the NLRA. These include classifying workers as independent contractors and subcontracting. As David Weil has detailed in his book *The Fissured Workplace*, the fact that a company has engaged in one of these practices does not lessen its former employees' interests in bargaining collectively with their former employer. To the contrary, fissured companies

[51] NLRB v. Servette, 377 U.S. 46 (1964).
[52] IMS v. Sorrell, 564 U.S. 552, 576 (2011).

often maintain effective control over the wages and day-to-day working conditions of their former employees.

The PRO Act protects workers' abilities to bargain with the entities that effectively determine their wages and working conditions in at least two ways. First, it prevents worker misclassification by adopting a clear test – the "ABC test"[53] – that is aligned with the NLRA's purpose. Second, it codifies a definition of "joint employer" that asks whether a given company has retained control over employees' wages and working conditions, irrespective of whether the putative joint employer has already exercised that control, and of whether they exercise control directly or indirectly.

A. Distinguishing Employees From Independent Contractors

The NLRA has explicitly excluded independent contractors from coverage since the 1947 Taft-Hartley Act, but it does not define that term.[54] In 1968, the Supreme Court held that common-law agency principles – originally developed to assess when a "master" should be held responsible for torts committed by their "servant" – should apply.[55] This approach calls for the Board to weigh the following non-exhaustive list of factors set out in the Restatement (Second) of Agency § 220:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business

The Restatement does not specify how much weight each factor should receive, and the NLRB and the courts have adopted different (and sometimes contradictory) views

[53] Under this test, "[a]n individual performing any service shall be considered an employee . . . and not an independent contractor, unless – (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of the service and in fact; (B) the service is performed outside the usual course of the business of the employer; and (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed."
[54] 29 U.S.C. § 152(3).
[55] NLRB v. United Ins. Co. of America, 390 U.S. 254 (1968).

about whether one factor is first among equals since the Supreme Court's decision in *United Insurance*. However, in its 1998 decision, *Roadway Package System, Inc.*, the NLRB held that no single factor predominated over others; in particular, the Board rejected the contention that the most important issue in distinguishing an employee from an independent contractor was the degree of control that the putative employer exercises over how the putative employee does their work.[56]

The DC Circuit took a different view in its 2-1 decision in *FedEx Home Delivery v. NLRB* ("*FedEx I*"), writing that "while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors . . . is whether the position presents the opportunities and risks inherent in entrepreneurialism."[57] Applying this entrepreneurialism lens, the DC Circuit then rejected the NLRB's conclusion that FedEx drivers were employees. This was in part because drivers could use the trucks they used for FedEx deliveries for other deliveries, "so long as they remove or mask all FedEx Home logos and markings," and because drivers could hire employees to service multiple routes or help with a single route, or contract their routes to another person. But the dissent in *FedEx Home Delivery* observed that for most drivers, these opportunities were only theoretical because of contractual and practical constraints imposed by the company.[58]

In a later case involving a different set of FedEx drivers (*FedEx II*), the NLRB disagreed with the DC Circuit's view of Board precedent in *FedEx I*, writing that "the Board should give weight to actual, but not merely theoretical, entrepreneurial opportunity, and it should necessarily evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity."[59] Then, considering the Restatement of Agency factors and drivers' actual entrepreneurial opportunities, it again concluded that the drivers were employees, and not independent contractors. The DC Circuit denied enforcement, relying on its decision in *FedEx I*.[60]

Earlier this year, the NLRB overruled its earlier decision in *FedEx II*. In *SuperShuttle DFW, Inc.*, the Board adopted the DC Circuit's reasoning in *FedEx I*, and held that "the Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate."[61] The Board then held that SuperShuttle drivers were independent contractors, largely because "SuperShuttle has little control over the means and manner of the franchisees' performance while they are actually driving and that SuperShuttle's compensation is not related at all to the amounts of fares collected by the franchisees, and conversely, that these facts provide franchisees with significant entrepreneurial opportunity."[62] Dissenting, Board Member McFerran emphasized the disconnect between the factors listed in the Restatement of Agency and the Board's

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[56] 326 NLRB No. 72 (1998).
[57] 563 F.3d 492, 497 (D.C. Cir. 2009) (*FedEx I*) (citing *Corporate Express Delivery Sys.*, 292 F.3d 777 (D.C. Cir. 2002).
[58] Id. at 513-16 (Garland, J., dissenting).
[59] FedEx Home Delivery, 361 NLRB No. 55 (2014) (*FedEx II*).
[60] *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (2017).
[61] 367 NLRB No. 75 (2019).
[62] Id. at *14.

reliance on entrepreneurial opportunity – a concept that is not listed among the Restatement factors.

Even if one disregards this disagreement about whether "entrepreneurial opportunity" is somehow contained within the Restatement of Agency factors, the Board's experience over the last several decades has proven that those factors are an inadequate method of determining which workers will be protected by labor law. The factors are simply too indeterminate, and that reality in turn allows gamesmanship by employers.

The Supreme Court observed in 1944 that "[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing."[63] The ensuing decades have not yielded more clarity, as the multi-year tug-of-war about whether FedEx drivers are employees reflects. This is in part because businesses face competing incentives: to avoid incurring obligations under the NLRA and other statutes; and to control how their workers do their jobs. The result is that even some law-abiding employers will structure workers' jobs so that they will fall close to the line between independent contractor and employee status. (Unscrupulous employers will deliberately misclassify workers, knowing that a combination of weak NLRB remedies and individual arbitration clauses mean that they will be unlikely to face serious consequences.)

The growth of the "sharing" or "platform" economy reflects these dynamics, as well as other difficulties associated with applying the Restatement factors in new contexts. For example, a recent advice memorandum by the NLRB's General Counsel concludes that UberX drivers are independent contractors.[64] The General Counsel relied primarily on a determination that "[o]n any given day, at any free moment, drivers could decide how best to serve their economic objectives: by fulfilling ride requests through the [Uber] App, working for a competing ride-share service, or pursuing a different venture altogether." But while it is true that Uber and similar platforms do not require drivers to drive in particular locations or during set shifts, their fare incentives can make it considerably more profitable for drivers to drive at certain times and in certain areas.[65] Transportation network companies like Uber also exercise control over drivers in other ways, such as unilaterally setting and adjusting their pay rates, and terminating drivers for reasons including that their average passenger rating has fallen below a certain threshold. Thus, while the General Counsel saw these incentives as opportunities for entrepreneurial judgment, one could also view them as an indirect way of asserting control over drivers, including where and when they work. Other disagreements of this sort abound; judges,

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[63] NLRB v. Hearst Publications, 322 U.S. 111, 121 (1944).

[64] NLRB Office of the General Counsel, Advice Memorandum, Cases 13-CA-163062 et al. (Apr. 16, 2019).

[65] *See* Noam Scheiber, *How Uber Uses Psychological Tricks to Push its Drivers' Buttons*, NY TIMES (April 2, 2017) (quoting law professor Ryan Calo's observation that Uber is "using what they know about drivers, their control over the interface and the terms of transaction to channel the behavior of the driver in the direction they want it to go").

administrative tribunals, and other commentators have filled hundreds of pages debating drivers' status since Uber and its competitors began operations.[66]

The difficulty of applying the Restatement factors in close cases (and their attendant unpredictability) is not the only problem with the NLRA's current approach to employee classification. There is also the substance of those factors to consider: for example, some factors focus on how much agency workers have, and others on how much risk workers bear. This gives companies an incentive to try to thread the needle by shifting risk onto workers while retaining control for themselves; for example, ride-hail companies like Uber may attempt to offset the fact that they set customer fares with the fact that they require drivers to buy their own vehicles and indemnify the company.[67]

Finally, the NLRA consequences to employers who misclassify workers are minimal, and companies can respond to a conclusion that their workers have been misclassified by adjusting their operations and restarting the litigation cycle. But the risks to potentially misclassified workers are much greater. Workers who wrongly believe that they are misclassified employees will not have access to NLRA reinstatement remedies if they are fired or disciplined for union organizing. Moreover, independent contractors face the possibility of liability under federal antitrust laws if they engage in collective action.[68]

The PRO Act would end the NLRB's reliance on the indeterminate list of factors from the Restatement of Agency, and instead adopt what is commonly known as the "ABC test." There are three main advantages of this test. First, it consists of three relatively clear and easy-to-apply factors, and workers qualify as an independent contractors rather than employees only if each factor applies. This approach is self-evidently more straightforward and predictable than one that calls on the NLRB to balance (at least) ten factors as it sees fit. Second, for similar reasons, the ABC test is less amenable to manipulation by employers than the Restatement factors. Third, the ABC test is better aligned than the Restatement factors with the purpose of the NLRA: ensuring that workers who lack individual bargaining power – "actual liberty of contract"[69] – can bargain collectively.

B. Joint Employer

Two or more entities that together determine an employee's working conditions are "joint employers" of that employee. Temporary employment is the archetypical example; these workers are jointly employed by the temp agency that issues their paychecks and tells them where to report for work each morning, and the business that has contracted to receive their services and that directs and supervises their work. Joint employer status matters because only employers are required to bargain collectively with the union representative of a group of employees.

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[66] *See, e.g.*, Charlotte Garden & Joseph Slater, *Comments on Restatement of Employment Law (Third), Chapter 1*, 21 EMPLOYEE RTS. & EMP. POL'Y J. 265, 295-96 (2017) (accumulating citations).
[67] Id. at 6 ("Drivers' entrepreneurial independence is also apparent in contractual requirements that they indemnify Uber and hold it harmless for liability based on their own conduct.")
[68] *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); Chamber of Commerce of the United States of America v. City of Seattle, 890 F.3d 769 (9th Cir. 2018).
[69] 29 U.S.C. § 151.

Whether an enterprise qualifies as a joint employer of a group of employees depends on whether the enterprise exercises sufficient control over the employees' working conditions. But there is disagreement over whether an entity should qualify as a joint employer if it exercises only indirect control over a group of employees – for example, by acting through an intermediary. A similar dispute concerns the status of entities that have reserved (but not actually exercised) the right to control aspects of employees' jobs.[70]

The NLRB held in *Browning-Ferris Industries of California* that both indirect and reserved control are relevant to whether an entity is a joint employer,[71] and that conclusion was affirmed by the DC Circuit. More recently, however, the NLRB has signaled its interest in reversing *Browning-Ferris*; in fact, the Board already reversed *Browning-Ferris*, but later withdrew the decision that did so.[72] Second, the Board issued a Notice of Proposed Rulemaking; the proposed rule states that to be considered a joint employer, an entity must "possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment . . . in a manner that is not limited and routine."

The PRO Act codifies the heart of *Browning-Ferris Industries of California* by stating that two or more entities can qualify as "joint employers" if "each such person codetermines or shares control over the employee's essential terms and conditions of employment. In determining whether such control exists, the Board . . . shall consider as relevant direct control and indirect control over such terms and conditions, reserved authority to control such terms and conditions, and control over such terms and conditions exercised by a person in fact."

This approach is the right one for at least two reasons. First, it ensures that the "economic employer" – the entity that has practical control over wages and working conditions – is at the bargaining table. Second, if joint employer status were to turn on whether an entity has or has not exercised reserved control, then that entity's joint employer status could change depending on whether it happened to be exercising its control in a given time period, leaving workers to contend with substantial uncertainty.

Browning-Ferris Industries of California itself offers a good illustration of what is at stake for workers. The case involved a group of workers who were hired by a staffing company called Leadpoint Business Services, and assigned to work at a recycling center operated by BFI. Leadpoint signed the workers' paychecks, and hired and fired them, though it was required by its contract with BFI to ensure that the workers met certain qualifications. Leadpoint also scheduled workers, and handled discipline. But BFI determined which recycling conveyor belts would run each day and at what speed, and whether any would run overtime – which in turn determined how many Leadpoint workers would work on a given day. BFI also dictated that no Leadpoint worker should earn more than any BFI worker performing a similar task, and sometimes indicated that Leadpoint should discipline or fire particular workers.

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[70] *See* Browning-Ferris Industries of CA, Inc. v. NLRB, 911 F.3d 1195, 1210 (DC Cir. 2018).
[71] 362 NLRB 1599 (2015).
[72] *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017).

In other words, Leadpoint and BFI shared control over many aspects of workers' wages and working conditions; even on issues over which Leadpoint had significant control, such as pay, BFI also exerted influence through how much it paid its own workers. Having both Leadpoint and BFI at the bargaining table meant that the workers could meaningfully bargain over issues of immediate concern to them, such as line speed. Had the Board instead concluded that BFI was not a joint employer of Leadpoint's workers, then bargaining on this point would have been futile: even if Leadpoint were willing to make concessions, it could not guarantee that BFI would agree. The result would have been, at best, a collective bargaining agreement that covered only some of workers' concerns, though the more likely result may have been no agreement at all.

IV. Conclusion

The PRO Act corrects a list of longstanding problems that have prevented workers from exercising their rights under the NLRA. Among them, it responds to modern workplace fissuring, ensuring that workers can meaningfully exercise their rights to engage in collective action both at and away from the bargaining table.

Thank you for the opportunity to testify.

Chairwoman WILSON. Thank you, Ms. Garden.

We will now recognize Mr. Alvarez.

Welcome, Mr. Alvarez.

STATEMENT OF JOSUE ISRAEL ALVAREZ, MISCLASSIFIED TRUCK DRIVER FOR XPO LOGISTICS

Mr. ALVAREZ. Thank you, Chairwoman Wilson and Ranking Member Walberg.

My name is Josue Alvarez from Bell Gardens, California. I am 26 years old, and I am a misclassified truck driver at XPO Logistics.

I am honored to speak with you today about the Protecting the Right to Organize Act. My parents came to the United States from El Salvador in search of a better future. Growing up, my father had many jobs, but struggled to make ends meet. We lived in a cramped one-bedroom apartment shared with other families. It was difficult. My dad and I worked for a $15 billion global corporation called XPO Logistics.

We know that these companies have scams to hide their responsibilities to the workers. One scam is calling drivers who own or lease trucks independent contractors, but then controlling them just like any employee. This is known as misclassification. The other scam is completely avoiding any responsibility to a driver who works for them and drive someone else's trucks, usually at the nightshift. They call this driver a second sheet driver. Whatever they call us, at the end of the day, we are all experienced employees, while XPO gets away with wage theft and union busting.

I didn't always want to be a truck driver. I tried to finish my degree in aviation administration, and have a dream of becoming a pilot, but those dreams are becoming more difficult. I became my dad's second seat driver in hope that my extra income would not only help my family, but also further my education. That has not been the case. With the income I bring home, I cover costs like cell phone and Internet, so my two younger brothers can focus on their education. I am slowly trying to finish my degree, but it is hard when you have to work 14 hours a day and at the company's mercy.

I cannot say now just how much misclassification has badly impacted not just my life, but also the thousands of other misclassified drivers and their families. As a second seat driver, you are paying cash per load. You have no access to benefits, work nights often, and receive the worst dispatches. Whenever an issue arises, we bring them to XPO management. They turn us away and tell us that the truck owner is our boss but XPO controls our work. They dispatch us. They tell us when to go and where, and they decide how much we get paid. Controls all relations with customers, including the type of service provided, how much the customer is charged, and the appointments when to pick up the container.

My truck says XPO on it. I wear an XPO vest every day. It is clear who the boss is here. It is XPO. If something happens while we are on the road, we immediately have to report it to dispatch and wait for instructions.

One time I was passing through a scale for an inspection. I was issued a citation from DOT and given a report to return to dis-

patch. This citation falls into XPO since it is XPO's DOT member, but XPO has their own internal point system used to discipline us. For this instance, I received 55 points. Once you hit 75 points, you are terminated.

Last year, I purchased my own truck. You may be wondering why, knowing the struggle involved. The answer is that XPO misled me. They told me that they were going to get a bunch of new accounts and work was going to pick up significantly. That ended up not being the case. We haven't seen these new accounts, and work has not picked up. Now I am stuck with this truck. XPO does what it can to fool workers into buying into this business. They try to sell you a dream. My paycheck comes with a statement attached, telling me how much I make per load, and then a list of deduction of insurance and miscellaneous administration fees. I have no idea what some of these administration costs really are, or if they are legitimate.

And because I am misclassified, XPO is able to push operation costs like taxes, diesel, tags, and more onto me. My dad and his coworkers tried to organize back in 2015, but XPO's misclassification made it impossible to organize. Workers were met with intimidation and retaliation against and were told that they were independent contractors. An administrative law judge issued her decision, finding us to be employees in 2018, but XPO filed an appeal in the case and still it is still unresolved.

The law needs to be changed so it will be easier to be recognized as an employee. My dad tried to bring me around organizing meetings at first. I wanted no part of it. I believed XPO and their antiunion messaging. I was wrong. XPO is wrong. I realize that things at XPO need to be changed. I don't have health insurance. We don't have sick days or vacation days. We should be able to go to a bargaining table and negotiate higher pay and benefits, sick days, vacation days, and agreement procedures. We are not asking for a lot. We are asking for what is just and fair.

Being properly classified at XPO will mean that we can finally form our union and bargain for the employee benefits and protections that we have been denied. Our community, which has long been exploited by this industry, could finally live the middle-class life they came to this country for. My family could finally make ends meet and even thrive. I could finally go back to school and fulfill my dream of becoming a pilot. We could finally achieve the American dream.

Thank you, and I am looking forward to your questions.

[The statement of Mr. Alvarez follows:]

July 25,2019

Written Testimony of Josue Alvarez, Misclassified Truck Driver for XPO Logistics, House Education and Labor Committee, Health, Employment, Labor and Pensions Subcommittee "The Protecting the Right to Organize Act: Modernizing America's Labor Laws"

Thank you, Chairwoman Wilson and Ranking Member Walberg.

My name is Josue Alvarez from Bell Gardens, California. I'm 26 years old and I am a misclassified truck driver at XPO Logistics.

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

My parents came to the United States from El Salvador in search of a better future. Growing up, my father had many jobs but struggled to make ends meet, so when my dad's friends, who said they were doing well as truck drivers, encouraged him to join, he jumped at the chance. My dad has been a truck driver now for 15 years, starting out at a company called Pacer Cartage, which is now owned by a $15 billion-dollar global corporation called XPO Logistics.

We know that these companies have scams to hide their responsibilities towards their workers. One scam is calling drivers who own or lease trucks "independent contractors," but then controlling them just like any employee. This is known as "misclassification". The other scam is completely avoiding any responsibility to the drivers who work for them and drive someone else's truck (the "truck owner"), usually on the night shift. They call these drivers "second seat drivers." I have been exploited by XPO both as a second seat driver and more recently as a truck owner, but whatever they call us, at the end of the day, we're all XPO's employees, while XPO gets away with wage theft and union busting.

I didn't always want to be a truck driver. In fact, I've been working hard for years to try and get myself through school. I am trying to finish a degree in aviation administration and I dream of becoming a pilot for a major U.S. airline; but those dreams are becoming more difficult. My family has struggled to make ends meet. I want to get my pilot's license but it's just too out of reach right now. I've taken out loans to help with my education but it's still not enough. I became my dad's second seat driver in hopes that my extra income would not only help my family but also cover my education. That has not been the case. With the extra income I bring home I cover costs like cellphones and internet so my two younger brothers can focus on their education. I'm slowly trying to finish my degree but it's hard when you work 14 hours a day and are at the company's mercy.

I cannot say enough just how much misclassification has badly impacted not just my life and my family's, but also that of the thousands of other misclassified drivers and their families. In my three years of being in this industry, it didn't take too long to discover that things are not as advertised. As a second seat driver you're paid by the load, in cash, by the truck owner, a portion of what the truck owner is paid by XPO. While a truck owner receives a settlement check and a corresponding statement at the end of a pay period, second seat drivers do not receive any documentation from XPO. XPO reports the total number of loads hauled by the truck whether by a truck owner (often referred to as 'first seat") or the second seat driver and then the truck owner calculates what the second seat driver is owed. As a second seat, you often work nights and receive the worst dispatches. Whenever personal or health issues arise

that necessitate accommodation at work and you bring them to XPO management, they turn the second seat drivers away and tell us that the truck owner is our boss so we should deal with them. That doesn't make any sense to me because I had to apply directly to XPO to be a second seat driver. Even though my Dad owns his truck, he couldn't just hire me on as his second seat. XPO had to hire me and XPO controls our work.

The XPO dispatcher passes out work. The dispatcher contacts the drivers either by phone or on the tablet computer that XPO requires us to buy and asks the driver "yes" or "no" on an available job? Both as a second seat and as a truck owner, I don't get to select my customers or my deliveries from all available options. I take what I am offered by the dispatcher or I don't get paid. XPO determines what I pick up and when there is a problem on the road, I have to call the XPO dispatcher to find out what to do. One time I was passing through scales for an inspection and was issued a citation from DOT and given a report to return to dispatch. These citations fall onto XPO since it's their DOT number, but XPO has their own internal point system used to discipline us. For that instance, I received 55 points, once you hit 75 points XPO terminates you.

I have no say over what I am paid. XPO controls all relations with the customer. XPO obtains the customer, determines the service provided, negotiates how much the customer is charged and sets the appointments for me to pick up the container. My truck says XPO on it and I wear an XPO vest every day. My sole interaction with the customer is as an XPO representative doing business in XPO's name. And once that truck has XPO painted on the side, a truck owner can't use his truck for any load that XPO doesn't solicit or to make additional money from another company if work at XPO slows. In theory, I can choose the number of loads that I pick up, but as I said we are paid by the load and I need every load dispatch hands my way, over 14 hours straight just to make ends meet. So, that supposed flexibility doesn't really mean anything. I am fully dependent on XPO for my income. XPO wants to say that the truck owner is the boss, but It's clear who the boss is here – it's XPO.

Last year, I purchased my own truck. You may be wondering why I would take that step, seeing what my Dad goes through and knowing the struggle involved. The answer is that XPO misled me. They told me that they were going to be getting a bunch of new accounts and that work was going to pick up significantly. They said that with my Hazmat Endorsement and as a truck owner I'd make a lot more money. As I just described, I have no interaction with the customers, so I took XPO at their word, but we haven't seen these new accounts and work has not picked up. Now I'm stuck with this truck and as I just described, I can't use my truck to go make money elsewhere. XPO does what it can to fool workers into buying in to this business. They try to sell us a dream but they don't tell you that what they are really doing is pushing their operational costs onto you. Now that I'm a truck owner, my XPO paycheck comes with a statement attached – much like any employee's paycheck stub – it tells me how much I made per load and then lists deductions for insurance and miscellaneous administrative fees. Not only do I have no control over my pay, I have no control over much of these costs. For example, XPO deducts from my pay the cost of the insurance that they shop for and select. I have no idea what some of the administrative costs really are or if they are legitimate. And because I am misclassified, XPO is able to push operational costs like taxes, diesel, parking, tags and more onto me. I pay all of those costs, but see none of the benefits…and I view my "settlement check" statement on a tablet that XPO required me to purchase in order to work for them!

My dad and his coworkers started trying to organize a union back in 2015. They were met with intimidation and retaliated against and were told that they're independent contractors. XPO's misclassification made it impossible to organize. My dad tried to bring me around organizing meetings

and at first, I wanted no part in it. I believed XPO and their anti-union rhetoric. I was wrong. XPO is wrong.

I've seen my coworkers get sick or injured and lose everything because they couldn't get help at work and didn't have health insurance. Seeing that happen, I realized that things at XPO need to change. I'm 26 years old and I don't have health insurance. I simply can't afford it. Every day I pray that I do not get sick or injured. If I weren't misclassified, I could have access to health insurance and not live in fear every day. We don't have sick days or vacation days. Taking a vacation or sick leave could mean falling behind and losing the truck. We should be able to go to the bargaining table and negotiate higher pay and benefits, sick days, vacation days, a grievance procedure. Truck driving is a professional job, it takes a great deal of skill and we bear a lot of responsibility on our community's roads. That shirt you're wearing, the phone in your hands and the shoes on your feet have all been in the trailers of our trucks. We're not asking for a lot. We're asking for what's just and fair.

My Dad and co-workers filed charges with the NLRB in 2015 to try and exercise our right to organize. Because we are misclassified as independent contractors, we had to first prove to the NLRB that we were, in fact, employees. It took until 2017 just to have a hearing before an Administrative Law Judge. The hearing lasted twelve (12) days, most of it devoted to proving we were employees. The judge issued her decision over a year after that hearing ended and agreed that we were employees, not independent contractors and that XPO had violated national labor laws by misclassifying us, but the NLRB changed the definition and now the case has been sent back to the judge to reconsider her decision on our employee status.

Even though we had strong evidence of employee status, the multi-factor test used by the Board means that workers without the support and resources of a Union like the Teamsters will be hard pressed to establish employee status. Plus, some of the factors that the multifactor test focuses on are things that aren't very important, like whether I can choose what route to take in making a delivery. The law needs to be changed to make it easier to stop employers from misclassifying their employees. The current law allows XPO to say that it's a delivery business that doesn't actually employ any delivery drivers. That doesn't make any sense.

Employers like XPO count on the weaknesses in the law and the complexity of the judicial system to maintain the status quo and make money. If the PRO Act were law everything would change for us and so many other misclassified workers. Being properly classified as an employee would mean that we could finally form our union and bargain for the employee benefits and protections we've long been denied. It would also mean that XPO would have to start paying their own operational costs and not push then off onto their employees. Our community, that has long been exploited by this industry, could live the middle-class life they came to this country for, instead of being working poor. My family would finally be able to make ends meet and even thrive. I could go back to school and finally finish my education and fulfil my dream of becoming an airline pilot. We would finally be able to achieve the American Dream.

Thank you very much and I look forward to your questions.

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

We will now recognize Mr. King.

STATEMENT OF G. ROGER KING, SENIOR LABOR AND EMPLOYMENT COUNSEL, HR POLICY ASSOCIATION

Mr. KING. Thank you, Chair Wilson, Ranking Member Walberg, members of the Subcommittee. Thank you for having me back.

Mr. Roe, nice to see you again.

Ms. Foxx, nice to see you.

And Committee Chair Scott, nice to see you also.

I am testifying here today on behalf of the Coalition for Democratic Workplace. I am the Senior Labor Employment Counsel for the HR Policy Association, and the association is a member of CDW. CDW represents literally hundreds of thousands of employers throughout the country, and millions of workers. The HR Policy Association represents a good number of the major companies in this country and their chief human resource officers.

We are opposed to this bill. When I went through it the other evening, I counted at least 30-plus negative provisions that are biased, as mentioned by Mr. Walberg, toward not only employers, but also employees. Also at least four Supreme Court cases are overruled by this legislation. After reading the professor's testimony the other day, I added another one because, as she suggests, secondary boycotts would now be illegal and would be overruled by the Supreme Court decision in question.

This is a disturbing act. It amends the National Labor Relations Act to radically change the definition of joint employers. This body recently took the opposite direction. It passed, on a bipartisan basis, a bill that went exactly the other way and protected small business entities, particularly franchisors and franchisees. I think many people in this country will remember that vote, and this bill clearly is repugnant to what this body did in that legislation.

Second, the bill radically changes the definition of employee status under our Nation's labor laws, and blindly accepts a perhaps California approach known as the ABC test. I would note in passing, even California now is having trouble with this proposal. The General Assembly in Sacramento is not sure how to go. The courts are not sure how to go. They just accepted another remand on this case. This is a bad proposal that will hurt American workers.

The bill also mandates that arbitrators decide in initial negotiations, if the parties can't agree, the terms of the agreement if, in fact, a majority of employees in the unit have signed cards. This is backdoor card check. This is something this body, as Mr. Walberg mentioned, rejected. This is very controversial, not a good idea, not favored by the public, not favored by workers. Under this provision, the workers don't even get a chance to vote on whether they would accept or reject what the arbitrators come up with. Not a good idea.

Further, the bill without any premise or predicate whatsoever would permit intermittent strikes. Why that is a good idea, I have yet to hear anybody give me a good explanation. Intermittent strikes cripple companies and businesses. They are not good for workers.

The bill also would overrule, as mentioned, the right-to-work legislation that has been enacted, Michigan, been mentioned by Mr. Walberg, and other states. Let me give you a practical consequence of that. An employee in one of those states that refuses because of her or his very solid thinking that they do not want to pay fees or dues to a union could be ousted from employment because in that state now, a condition of employment could be made to pay fees or dues.

The premise for this bill is wrong. The nation's labor laws are not broken. The National Labor Relations Board is functioning quite well.

If you look at the stats I have in my testimony, unions have failed to organize. We are at a 75-year low for petitions being filed in this country by unions, and the stats and the papers speak for themselves. What really is interesting, when you compare the number of potential workers in this country for unionization in the private sector to the number of petitions filed by unions in this country, it is less than one tenth of one percent.

Let me emphasize it again. Unions are not devoting any material resources to organizing. Before they come to this body and ask for a lifeline, they should do their own work. They are simply not doing that. That is a startling statistic, and even labor union leaders are criticizing that fact. The AFL-CIO's budget is devoting less and less resources to organizing, but yet, they want you to bail them out. Not a good idea.

We oppose this bill and we think it is a very bad proposal, not only for employers, but for employees and for our nation's economy, because it is going to be a formula for disruption.

Thank you.

[The statement of Mr. King follows:]

COALITION FOR A
DEMOCRATIC WORKPLACE

Testimony of

G. Roger King*
Senior Labor and Employment Counsel
HR POLICY ASSOCIATION
on behalf of the COALITION FOR A DEMOCRATIC WORKPLACE

For the

House Education and Labor Committee
Subcommittee on Health, Employment, Labor, and Pensions

Hearing on

Protecting the Right to Organize Act: Modernizing America's Labor Laws

July 25, 2019

*Mr. King acknowledges the assistance of his colleague Gregory Hoff at the HR Policy Association in preparing this testimony.

Introduction and Statement of Interest

Chairperson Wilson, Ranking Member Walberg, and distinguished members of the Subcommittee:

Thank you for this opportunity to again appear before the Committee. I am the Senior Labor and Employment Counsel at HR Policy Association, and I am testifying here today on behalf of the Coalition for a Democratic Workplace ("CDW"), a broad-based coalition of employers and associations who have a continuing active interest in our nation's labor laws, and of which HR Policy Association is a member. My biographical information is attached to my written testimony. I request that my written testimony and the exhibits thereto, in their entirety, be entered into the record of this hearing.

The Coalition for a Democratic Workplace 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.

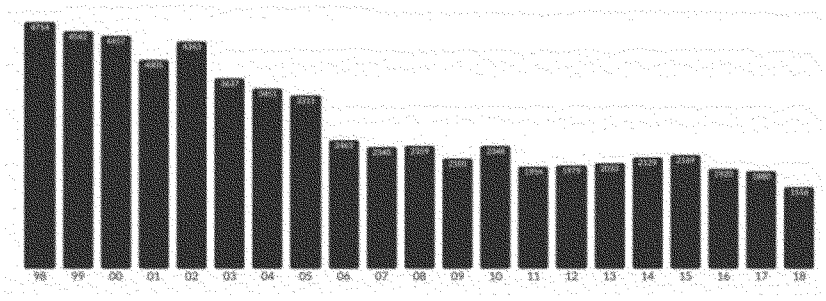
The HR Policy Association is a public policy advocacy organization representing chief human resource officers of major employers. Recently, the HR Policy Association published *Workplace 2020: Making the Workplace Work*, a report representing the general views and experiences of the Association's membership on the trends shaping the workforce, the outdated policies that govern it, and the way forward.

Summary of Opposition to H.R. 2474

The Protecting the Right to Organize Act of 2019, H.R. 2474 is an unprecedented attempt to radically change our nation's labor laws to assist labor organizations without any regard to any negative impact the provisions of the bill would have on workers, consumers, employers, and the American economy. Such provisions include (1) amendments to the National Labor Relations Act ("NLRA" or "the Act") to change the definition of joint employer status under the NLRA – a position directly opposite the bipartisan position the House of Representatives took in passing the Save Local Business Act, passed in November of 2017; (2) an expansive definition of employee status under the NLRA that blindly follows a controversial California court decision which substantially narrowed the definition of independent contractor status (the California "ABC" test); (3) authorization for unions to obtain personal employee information including employee personal cell phone numbers and personal email addresses, among other information; (4) a complete undermining of the secondary boycott laws that protect neutral employers and employees – especially small and medium-sized business entities – from being brought into labor disputes of

other parties; (5) a government-mandated procedure for third party arbitrators to dictate employment terms in first negotiations, and eliminate an opportunity for employees to vote on ratification; and (6) a resurrection of the "card check" process whereby employees can be forced into union representation without having the benefit of a secret ballot vote. H.R. 2474 would also overrule three Supreme Court decisions,[1] and make extreme changes to the procedures of the National Labor Relations Board ("NLRB" or "Board"). H.R. 2474 upsets in many important areas the delicate balance in our labor laws between employers and labor interests – indeed, many of the laws amended by this legislative proposal have been in effect for decades, including numerous state right-to-work laws, and have not been altered in the manner suggested in this legislation by either Democrat or Republican controlled congresses.

Finally, the underlying premise of this comprehensive labor organization wish list is the incorrect assumption that our labor laws are broken and severely disadvantage union interests. The NLRB and the NLRA are not broken – the Board is one of the most efficient and productive agencies in the federal government and the NLRA has greatly contributed to the maintenance of labor-management stability in this country for decades. Labor organizations have simply not devoted the necessary resources to organizing activity and have not adapted to a changing workplace. As the charts below clearly show, union organizing and the number of petitions filed by unions with the National Labor Relations Board have fallen nearly 63% from 5,000 in 1997 to 1,854 in 2017.



Source: Labor Relations Institute

In FY 2018, the number of petitions filed dropped even further to 1,597, the fewest number in over 75 years.[2] Perhaps most telling, as the rate of private sector employment has increased, the number of NLRB elections has decreased precipitously.

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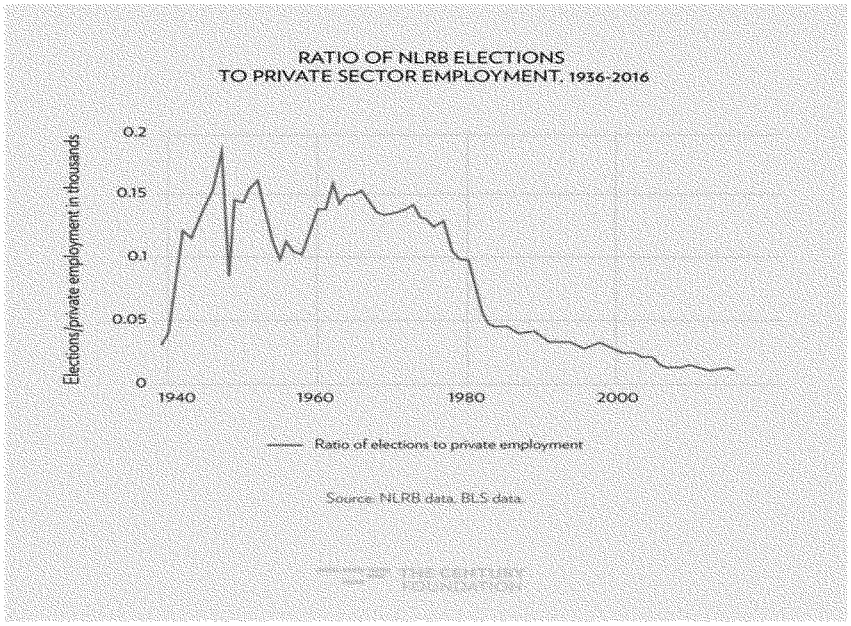
[1] *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018); *Hoffman Plastic Compounds, Inc., v. NRLB*, 533 U.S. 137 (2002); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

[2] *See also* Exhibit 1, which shows similar data from the National Labor Relations Board.



Further, when examining data from the U.S. Department of Labor Bureau of Labor Statistics, the lack of union attention to union organizing is even more evident. In FY 2018, there were 110.5 million potential private sector employees available for organizing in the country under the National Labor Relations Act.[3] The number of employees petitioned-for, in that same year, according to NLRB statistics, was only 73,109.[4] Accordingly, unions only sought to represent .066% of potential new members in this country. An examination of data from other years also establishes the same exceedingly low union organizing rate.

This lack of attention by the union movement to traditional organizing also was recently outlined in an article entitled "AFL-CIO Budget is a Stark Illustration of the Decline of Organizing"[5] According to this article, the AFL-CIO's internal budget for 2018-2019 dedicates less than one-tenth of its budget to organizing – down from nearly 30% a decade ago. This article states "the percentage of the budget dedicated to all organizing activities is about the same as the

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[3] *Union Membership Annual News Release*, BUREAU OF LABOR STATISTICS (Jan. 18, 2019), https://www.bls.gov/news.release/archives/union2_01182019.htm.
[4] *Election Reports – FY 2018*, NLRB, https://www.nlrb.gov/reports/nlrb-performance-reports/election-reports/election-reports-fy-2018.
[5] Hamilton Nolan, *AFL-CIO Budget is a Stark Illustration of the Decline of Organizing*, SPLINTER (May 16, 2019), https://splinternews.com/afl-cio-budget-is-a-stark-illustration-of-the-decline-o-1834793722.

portion dedicated to funding the Offices of the President, Secretary-Treasurer, Executive Vice President, and associated committees [under the AFL-CIO] the largest portion of the budget – more than 35% – is dedicated to funding political activities." The statistics are clear. Unions have, for whatever reason, lost their desire and commitment to organize workers and they are increasingly relying on Congress to relieve them of the burdens of organizing with proposals such as the PRO Act that we are discussing today. Further, the labor movement is increasingly relying upon assistance from pro-union regulations promulgated by the regulatory agencies and decisions of the NLRB.[6]

Labor law leaders themselves have acknowledged the failure of the union movement to commit sufficient resources and attention to organizing. For example, the late Hector Figueroa, the influential former leader of SEIU Local 32BJ, in an op-ed published in the New York Times earlier this month, argued that "you will find that with only a few exceptions, most unions are not committing significant resources to organizing nonunion workers."[7] Figueroa further noted:

> For too long, too many unions have avoided the tough work that needs to be done to organize nonunion workers, to convince our own members that it's in their interest to expand our ranks, and to retool our organizations by putting resources into building power. We have let ourselves be backed into a corner, by trying to just hold on to what we have and fighting only for workers who are already union members."[8]

Labor advocates have further taken union leadership to task for failing to adapt and incorporate new technologies and social media opportunities into their organizing efforts. In particular, Mark Zuckerman, former Deputy Director of the Domestic Policy Council in the Obama White House and President of the Century Foundation, observed:

> It is surprising that one of the most successful and powerful social movements in the nation's history – the labor movement – has not launched a coherent, large-scale digital organizing strategy to recruit a new generation of workers.[9]

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[6]Notwithstanding the Obama Board's substantial change in labor policy in favor of unions, and the Obama Board's adoption of expedited or ambush election rules, union density still has declined. *See, e.g.*, Michael J. Lotito et al., *Was the Obama NLRB the Most Partisan Board in History?*, WORKPLACE POL'Y INST. (Dec. 6, 2016), https://www.littler.com/publication-press/press/was-obama-nlrb-most-partisan-board-history (noting that the Obama Board overturned nearly 4,600 years of established law).

[7] Hector Figueroa, "The Labor Movement Can Rise Again" N.Y. TIMES (Jul. 12, 2019), https://www.nytimes.com/2019/07/12/opinion/hector-figueroa.html.

[8] *Id.*

[9] Mark Zuckerman, *Finding Workers Where They Are: A New Business Model to Rebuild the Labor Movement*, THE CENTURY FOUNDATION (Feb. 6, 2019), https://tcf.org/content/report/finding-workers-new-business-model-rebuild-labor-movement/?agreed=1. *See also,* "Unions aren't exactly early adopters, and many still haven't embraced digital" Jack Milroy, *Why Unions Need a Digital Strategy*, MEDIUM (Apr. 29, 2016), https://medium.com/@jack_milroy/the-list-makes-us-strong-why-unions-need-a-digital-strategy-42291213298a; "It is heartbreaking to witness our movement risk near-irrelevance when workers are ready to take action" Figueroa, supra note 5.

Congress should not be misled regarding the reasons for the decline in union membership. Further, Congress should not respond to requests to continually rescue the labor movement from its own shortcomings. H.R. 2474, unfortunately, is a prime example of exactly this type of rescue attempt. H.R. 2474 is an unprecedented attempt to radically change our nation's labor laws in a manner harmful not only to employers and employees but also ultimately to the nation's economy. CDW, and its hundreds of members, including the HR Policy Association, strongly oppose its enactment.[10]

Specific Objections to H.R. 2474

- **Section 2 – The Policy Statements**

This Section of the PRO Act is largely political policy rhetoric and contains inaccurate statements in a number of areas, including the statement on page 4 that "employers routinely fire workers for trying to form a union at their workplace" and the statement at page 4 that "many employers maintain policies that restrict the ability of workers to discuss workplace issues with each other directly contravening [NLRA]… rights." These activities are unlawful, and the Board provides mechanisms for addressing these problems. Statements at page 6 of the bill are also incorrect that state that Congress disapproves of the right of employers to permanently replace economic strikers; and that "…employers have abused the representation process of the NLRB to impede workers from freely choosing their own representatives and exercising their rights under the Act."

- **Section 4 – Establishment of a New Joint Employer Standard**

This Section of H.R. 2474 adopts the widely criticized standard established in *Browning-Ferris Indus.*, 362 NLRB No. 186 (2015) to determine joint employer status under the NLRA.[11] Indeed, this provision is directly opposite of the bipartisan position the House of Representation took on this issue in a floor vote on the Save Local Business Act in November of 2017. Further, this provision of the legislation arguably goes even beyond the holding in the *Browning-Ferris* case, by stating that joint employer status can be established under the NLRA based solely on "indirect or reserved control." This proposal inappropriately expands the definition of joint employer status, which would result in unnecessary protracted litigation and potential liability for many business entities. This legislative proposal has the potential to destroy the franchisor and franchisee model that has led to the creation of millions of jobs in this country and the development of hundreds of thousands of successful small business entities.[12] CDW does, however, support the initiatives

[10] CDW fully endorses the previous opposition testimony presented by attorney Philip Miscimarra of the Morgan Lewis law firm, who also previously served as both a member and chairman of the National Labor Relations Board.
[11] *Browning-Ferris Indus.*, 352 NLRB No. 186 (2015)
[12] For a comprehensive analysis detailing the negative economic consequences of an overly expansive joint employer standard, *see* International Franchise Association, Comment Letter on Proposed Rule on the Standard for Determining Joint Employer Status (Jan. 28, 2019); *see also* Brief of Amicus Curiae The International Franchise Association in Support of Defendant, *Roman et al. v. Jan-Pro Franchising Int'l, Inc.*, No. 3:16-cv-05961 (9th Cir. 2019).

currently being undertaken by the NLRB to better define when a joint employer status is established under the NLRA. CDW also supports the notice of proposed rulemaking initiative being undertaken by the United States Department of Labor to clarify when joint employer status is established under the Fair Labor Standards Act.

- **Section 4 - Definition of Employee Status**

This Section of the legislation essentially adopts the "ABC" test developed by the California Supreme Court.[13] If adopted, it would invalidate decades of legal precedent regarding the definition of independent contractor status and make it far more difficult for workers to establish independent status, evidenced by California's struggle to codify the standard into law without creating multiple carve outs. The fact that an individual performs a service for a business that is within the scope of the services customarily provided by such entity should not – and has not – automatically make such an individual an employee of the entity in question. This proposal clearly is directed at the evolving nature of the type of work that many individuals do on an independent basis in the evolving "gig" economy, and would have a devastating impact on such workers. The issue of when an individual is an employee or an independent contractor should be addressed in separate legislation, and then only after a thorough study of the many complex issues associated with this area. The blind approach taken in H.R. 2474 to this issue should be clearly rejected.

- **Section 4 - Alteration of the Definition of a Supervisor Under the NLRA**

While CDW agrees that it would be helpful to clarify the definition of supervisory status under the NLRA, the approach being taken in H.R. 2474 is clearly a one-sided and biased approach to make more individuals employees under the Act and therefore, become eligible for union representation. There is no factual or legal basis to support the proposed amendments to Section 2(11) of the NLRA contained in this bill. It is critical that employers have the ability to rely upon the requisite number of supervisors and managers to run their business. Finally, this proposal would unnecessarily, and improperly overrule decades of NLRB case law established under both Democrat and Republican Boards regarding the definition of supervisory status under the NLRA.

- **Section 4 – Establish Authority for the National Labor Relations Act to Engage in Economic Analysis**

While credible arguments can be made that the NLRB should be provided with the authority to engage in certain economic analysis, particularly in the rulemaking area, more study and thought should be given to when and how the Board should engage in this type of analysis. The simple one-line provision in H.R. 2474 that would provide authority for the Board to engage in economic analysis is not the correct way to proceed on this issue.

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[13] *Dynamex Operations W. v. Superior Court*, 232 Cal.Rptr.3d 1 (2018).

- **Section 4 – Prohibition on Employer Hiring Permanent Replacements in Economic Strike Situations**

The PRO Act, as stated above, erroneously stated in its preamble that Congress has previously concluded that employers are prohibited from hiring permanent replacements in economic strike situations. This provision of H.R. 2474 is yet another example of the one-sided and incorrect approach taken in this legislation. The case law, including U.S. Supreme Court decisions, clearly permits employers to continue their operations during economic strikes by hiring replacement workers.[14] The right of unions to strike and the right of employers to hire permanent replacements is an important balance of interests under our Nation's labor laws and permits both unions and employers to engage in "economic warfare" if disputes cannot otherwise be resolved. While the CDW believes that the option for employers to use permanent replacements should only be carefully and thoughtfully utilized, such right nonetheless needs to be maintained as it is critical to achieve the necessary balance of interests when strikes occur.

- **Section 4 - Employer Presentations to Employees**

H.R. 2474 makes it an unfair labor practice for an employer to hold mandatory employee meetings in the workplace in union campaign settings ("i.e., so-called captive audience speeches"). To our knowledge, there is no evidence to support the conclusion that employers can unduly influence employees to oppose unionization in such meetings. Further, an employer is considerably restricted in what it can say in such meetings. For example, election objections can be successfully pursued by a union or unfair labor practices charges could be successfully filed against an employer if, in such meetings, the employer threatens employees who support unionization, or the employer promises better benefits to employees if they oppose unionization. Further, the faulty premise that such meetings seriously impede a union's ability to win an election is specious at best, particularly due to the ability of employees to communicate through social media with unions and also among themselves using a wide array of options. Indeed, an employee's ability today to go online to obtain facts and information about the issues of union representation is greater than ever. In summary, these meetings have virtually no bearing on the success or lack thereof of the union movement and should not be made unlawful. Finally, it needs to be noted that unions, unlike employers, have the right to visit employees at their homes and engage in campaign activity in such settings.

- **Section 4 – Government Controlled Collective Bargaining – Arbitrator Imposed Terms (Interest Arbitration) in Initial Bargaining Situations**

H.R. 2474 establishes for the first time in the NLRA, government control of collective bargaining. In negotiations, the legislation establishes minimum time frames for parties to negotiate. If an agreement cannot be reached within such timeframe, panels of arbitrators are mandated to impose employment terms on the parties. This is an exceedingly poor policy decision

[14] *Hoffman Plastic Compounds, Inc., v. NRLB*, 533 U.S. 137 (2002).

by the drafters of the PRO Act. Third party arbitrators may know virtually nothing about the employer's business and have no economic interest or stake in the future of the business entity in question. The ultimate terms that such arbitrators impose upon the parties may lead to the closure of the business entity and the loss of jobs of its employees.

- **Section 4 - Restriction on Employer Prohibitions on Employee Class or Collective Action Filings**

This provision would invalidate the U.S. Supreme Court's decision in *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018), which held that employers can place restrictions on employees' class or collective action filings.[15] The approach of this legislation ignores the sound reasoning of the Supreme Court's majority in *Epic Systems* and also undermines substantial legal precedent regarding the Federal Arbitration Act that encourages nonjudicial resolution of workplace disputes. Class and collective action litigation have literally "spun out of control" in the last decade, and legitimate attempts by employers to resolve workplace disputes through alternative procedures other than protracted, expensive class and collective action litigation should be encouraged by the Committee, not discouraged.

- **Section 4 – NLRB Election Rules – Requirement that Employees Furnish Personal, Private Information to Petitioning Unions**

This subsection of H.R. 2474 is a substantial invasion of the privacy rights of employees. The legislation would require employers to provide to petitioning unions their employees' "personal landline and mobile telephone numbers and work and personal email addresses," along with other information, if the employee is in a voting unit being proposed by the petitioning union. The legislation does not permit the employee to opt-out of providing this personal information and provides absolutely no protection that such personal information would be kept confidential and not shared with others.

- **Section 4 – Prohibition on Employer Party Status in NLRB Representation Proceedings**

This subsection is a substantial violation of employer due process rights as employers have compelling interests to protect in such proceedings, including the important interest as to which job classifications are to be included in a voting unit. Further, employers have critical interests in which employees are to be classified as supervisors, managers, and confidential employees as such individuals are vitally important for an employer to successfully operate its business. Finally, employers have substantial interests in the procedure to be utilized in any NLRB conducted election as employers must necessarily protect against inappropriate interference with their operations during an NLRB election. There is no evidence to support the need to prohibit an

[15] *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018).

employer from being a party to an NLRB election proceeding. To completely eviscerate an employer's party status in representation election proceedings is not only a violation of employer's due process rights, but will result in a completely unworkable NLRB election procedure.

- **Section 4 – Imposition of Bargaining Orders Through Card Checks**

This subsection of the legislation brings back "card checks" and memories of the failed Employee Free Choice Act that was strongly supported by organized labor. Under the new iteration, virtually any type of proven irregularities in an NLRB election that a union loses would result in a bargaining order if, in the year proceeding the election, the petitioning union had obtained signatures on authorization cards for a majority of the employees in the voting unit. There is no compelling evidence whatsoever to support such a radical change in federal labor law. Indeed, this approach is simply a "backdoor card check" approach to determine union representational status. *Gissel* bargaining orders[16] are available today to unions if they can establish that employers have committed numerous and severe unfair labor practices or objectionable conduct during the critical pre-election period. Finally, a very small percentage of unfair labor practice cases ever reach the Board or courts for decision. In FY 2018, nearly 80% of unfair labor practice charges were either resolved by way of settlement, at the regional board level, or at the administrative law judge stage, or withdrawn, with Board Orders comprising only 2% of the disposition of such charges.[17] Stated alternatively, representatives of organized labor have continually, incorrectly overstated both the number of cases where severe election misconduct occurs and misrepresented the type of alleged employer conduct that is at issue in such cases.

- **Section 4 – NLRB Election Rules and Timelines**

The PRO Act codifies certain Obama NLRB era election timelines (also known as "ambush" or "quickie" election regulations). These timelines were very controversial at the time they were adopted and are being reviewed by the Board at present. Any change in Board election procedures should be done by examining all aspects of the election process.

- **Section 4 – Making Decisions of the NLRB Self-enforcing**

The PRO Act changes the current procedure of how Board decisions are enforced by making such decisions effective upon their issuance. The current procedure is that the Board must seek enforcement of its orders in the courts. If the procedure in this area is going to change, other NLRA procedural changes also should be addressed, including a change that would permit employers to directly appeal NLRB decisions in representation cases to the courts without having to first go through the internal Board process of being charged with a technical Section 8(a)(5) violation of failure to bargain in good faith. This current elongated prerequisite for employers to appeal

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[16] *See NLRB v. Gissel Packing Co.*, 89 S.Ct. 1918 (1969).
[17] *Disposition of Unfair Labor Practice Charges in FY18*, NLRB, https://www.nlrb.gov/news-outreach/graphs-data/charges-and-complaints/disposition-unfair-labor-practice-charges.

representation decisions is not an appropriate use of resources for any party, including the Board and unions, and results in unnecessary delays in resolving the issues in question.

- **Section 4 - Establishment of NLRB Civil Fine Remedies and Increased NLRB Injunction Authority**

H.R. 2474 contains numerous subsections that establish civil fines for employer violations of the NLRA and permits NLRB representatives to obtain expedited injunctive relief in federal district courts. There are numerous problems with this approach. First, in the 84-year history of the NLRA and its predecessor, there has never been a procedure that imposed fines and penalties on parties to Board proceedings. If the NLRA is to be restructured in this way, rogue unions that violate the NLRA should also be subject to the same type of civil fines and injunctive procedures. The PRO Act, in its one-sided approach, ignores union misconduct altogether and excludes labor organizations from any type of civil fines and expedited injunctive relief. More fundamentally, this legislative approach is based on the false premise that there are a large number of NLRA violations that merit this type of remedy. As noted above, very few unfair labor practice cases ever reach the Board level and the courts for resolution. Of the cases that do require full NLRB and judicial attention, a very small number involve serious and repeated alleged violations of the Act. Cases that do reach the Board and court level often involve policy issues and close call factual situations as to whether the NLRA has been violated. Civil fines simply are not necessary as a remedy to such a small percentage of cases. In any event, if civil fines are to be included in the NLRA, both rogue employer and rogue unions should be equally subject to such sanctions.

- **Section 4 - Directors and Officers Liability for NLRA Violations**

This subsection of H.R. 2474 extends potential civil penalties to directors and officers of an employer "based on the particular facts and circumstance presented" and "civil liability could be …assessed against any director or officer of the employer who directed or committed the violation, had established a policy that led to such violation, or had actual or constructive knowledge of and the authority to prevent the violation and failed to prevent the violation." Again, our nation's labor laws have never been written as civil penalties statutes, and there is no basis to begin to proceed in that direction at present, particularly when there are exceedingly few instances to compel such a remedy. Additionally, there is great ambiguity on how and when such liability might be assessed. Civil fines in this area and other areas discussed above are also a particular concern given the ever-increasing "policy oscillation" by Boards under different administrations. Stated alternatively, given the frequently changing direction of the Board in important labor policy areas, it would be exceedingly unfair to employer officers and directors to be assessed liability based on unknown changes in the law. Finally, even if the NLRA were to be so amended, as noted above, union officers and officials also should be included in such civil liability.

- **Section 4 - Assessment of Attorneys' Fees and Punitive Damages**

This legislation would also provide for the potential recovery by employees and unions of their attorneys fees and provide for the potential of punitive damages for violation of the NLRA. Again, the legislation does not provide that unions who also violate the NLRA would have any such legal exposure. In any event, for reasons stated above, these non-traditional remedies are not appropriate to be included in the NLRA, and there has been no case made that the NLRA should be amended to include them.

- **Section 4 – Approval of Intermittent Work Stoppage**

H.R. 2474 would permit unions and employees acting in concert to engage in frequent work stoppages and strikes. This unprecedented permission to engage in protected activity presumably would also include worker slowdowns, "work to rule" employee actions, frequent filing of 10-day strike notices directed against healthcare employers under Section 8(g) of the NLRA, and other union tactics intended to disrupt an employer's operations. There is no objective rationale to support this radical change of our labor laws. Indeed, this provision is especially harmful to employers when it is coupled with an earlier proposal in the PRO Act to prohibit employers from permanently replacing economic strikers.

- **Section 4 - Fair Share Agreements Permitted**

This provision of the PRO Act would invalidate state right-to-work laws and permit unions to negotiate agreements with employers that require bargaining unit employees to either become a member of the union or make a financial contribution to the union for representation expenses (i.e., become a "fee payer") as a condition of continued employment. This subsection would overturn 26 state laws that currently prohibit such clauses in collective bargaining agreements. This part of the NLRA should not be changed. States should continue to determine their position on this issue without interference from the federal government.

- **Section 4 - Right of an Employee to File a Private Right of Action in Federal District Court for Alleged Violations of the NLRA**

The PRO Act for the first time in the history of the NLRA would provide employees with a private right of action to pursue claims of unfair labor practices in federal district court if the NLRB failed to proceed with the individual's charge within 60 days. While the CDW agrees that the NLRB should expeditiously process cases at the Board level, the solution to this issue is not the creation of a new private right of action. This approach will likely flood already overworked federal district courts and unnecessarily clog their dockets. Although there may be a certain appeal to creating a "labor court" system in the country, our federal district courts at present do not have expertise in this area of the law. Additionally, having a dual track for employees to pursue a private right of action while concurrently having the NLRB proceed in addressing the same case could unnecessarily complicate the resolution of unfair labor practice charges. Again, as stated a number of times previously, the Board has an excellent track record in expeditiously resolving a high percentage of its cases at the regional and administrative law judge level, and there is no need,

therefore, for a private right of action. Finally, the NLRB at present is reviewing how it processes cases at the Board level and is exploring procedures to expedite its decisional cases processing. The Board should be permitted to complete its important work in this area without legislative interference.

- **Section 4 - Reinstatement of the Persuader Rule and Expanded Consultant Reporting**

H.R. 2474 also includes a reinstatement of the Obama era Department of Labor expanded reporting requirement rule for entities that provide assistance for employers and entities in union campaign situations. This rule was revoked by the present Administration on July 18, 2018. The Committee has not developed any record to support this proposed change in the law. Indeed, there are already in place substantial reporting requirements for employers and entities that provide financial assistance to employers in campaign situations. Finally, if the Committee is going to pursue this area, it should review the activities of worker centers, employee committees, and like organizations to determine whether they should also be required to report their activities to the United States Department of Labor on the same basis as traditional labor unions.

- **Section 4 – Removal of Secondary Boycott Restrictions on Unions**

The PRO Act, in one of its most radical proposals, removes the ability of employers to obtain relief in court for illegal secondary boycott activities of unions. Secondary boycott protection for business entities, including in particular smaller entities that can be subject to boycott pressure and coercion, is often essential for their survival. Removal of such a deterrent from our nation's labor laws should not occur. Indeed, employers at present already face substantial obstacles in prohibiting illegal secondary activity.[18] The PRO Act takes absolutely the wrong approach in this area – restrictions against secondary boycott activities should be strengthened and neutral employers and employees should not be subject to such coercive activities. Indeed, the very survival of some business entities depends on the appropriate enforcement of laws in this area.

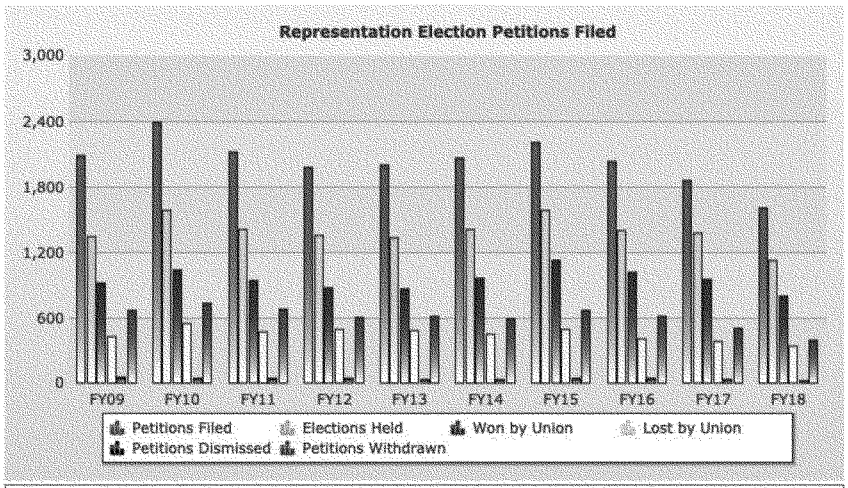
Conclusion

H.R. 2474 is a "wish list" serving only the interests of labor organizations that represent at most approximately 6% of the nation's private sector workforce. The argument that the lack of success of the union movement can be attributed to our nation's labor laws is not correct. Unions, to their detriment, have devoted increasingly smaller portions of their resources to union organizing, but yet are increasing the amount of resources devoted to political activity. Their apparent "gameplan" is to have Congress and federal regulatory agencies assist them in increasing union density in the country without regard to the impact on employees, consumers, and others. Our nation's labor laws are not broken, and Congress should not make radical changes as suggested in H.R. 2474. The numerous proposals in this legislation are not well thought out, are not supported

[18] *See, e.g.*, *Wartman v. UFCW*, 871 F.3d 638 (4th Cir. 2017); *Int'l Union of Operating Engineers* et al., 2019 WL 3073999 (N.L.R.B. Div. of Judges) (Jul. 15, 2019); *Laborers' Int'l Union of North America* et al. 2015 WL 5000792 (N.L.R.B. Div. of Judges) (Aug. 21, 2015).

by record evidence, and are unnecessarily biased against employers and employees. CDW, therefore, opposes the enactment the legislation.

EXHIBIT 1[19]



	Petitions Filed	Elections Held	Won by Union	Lost by Union	Petitions Dismissed	Petitions Withdrawn
FY09	2082	1335	915	420	46	657
FY10	2380	1571	1036	535	37	725
FY11	2108	1398	935	463	43	667
FY12	1974	1348	868	480	38	597
FY13	1986	1330	852	478	27	607
FY14	2053	1407	952	440	24	586
FY15	2198	1574	1120	480	39	663
FY16	2029	1396	1014	401	38	610
FY17	1854	1366	940	375	29	493
FY18	1597	1120	790	330	17	386

[19] *Representation Petitions,* NLRB, https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc.

Chairwoman WILSON. Thank you, Mr. King.

We will now recognize Mr. Griffin.

STATEMENT OF RICHARD F. GRIFFIN, JR., J.D. OF COUNSEL, BREDHOFF & KAISER, P.L.L.C.

Mr. GRIFFIN. Madam Chair Wilson, Ranking Member Walberg, and members of the committee, my name is Richard F. Griffin, Jr. I was the General Counsel of the National Labor Relations Board from November 2013 until the end of October 2017.

I want to state at the outset the central importance of workers' rights to join together to form unions, and to engage in collective bargaining to any fair economic system. Section 7 of the National Labor Relations Act beautifully articulates these rights, but the rest of the Act does not fulfill Section 7's promise. Reform is needed. I will thus discuss here the standards for determining independent contractors and joint employers and injunctive relief.

Only employees as statutorily defined have the right to engage in Section 7 activities. Thus, independent contractors are not protected when they form a union and seek to engage in collective bargaining. When I was General Counsel, the employee status issue and the misclassification of employees occupied a large amount of time and resources for the agency. The status determination requires the application of a complicated 10-part test. The Board in the D.C. Circuit disagreed over how to view workers' potential entrepreneurial opportunity when applying that test, with the Board focusing much more on whether entrepreneurial opportunity was actually exercised.

Recently, the current Board in the SuperShuttle case determined that all 10 common-law factors have to be examined through the prism of potential economic opportunity. This decision complicates the application of a difficult test, expands the number of workers excluded from the Act's coverage, and opens up the potential for employer manipulation. Employer manipulation resulting in rampant misclassification of employees as independent contractors is a real concern.

As an example, we had one case where an employer settled an unfair labor practice charge by agreeing to post a notice, advising its truck driver employees of their rights under the Act, only to turn around and advise those same truck drivers that the notice didn't apply to them because they were independent contractors.

The PRO Act's three-part test is easy to apply and will make such misclassification obvious and easily addressable.

On the joint employer question, everyone agrees that common law applies. The fight is over what the common law requires. Lost in the rhetoric is the changing nature of the workplace and the need to put employees' representatives at the bargaining table with the entities that have a right to control the employees' conditions of employment. In the modern workplace, the responsibility formerly performed by one employer are now done by multiple entities. This calls for a particularized application of all the common-law factors. The prior Board did this in its Browning-Ferris decision. On the other hand, the current Board is proposing a rule that would limit the factors considered to possession and actual exercise of substantial, direct, immediate control over the essential terms

and conditions of employment of another employer's employees in a manner that is not limited and routine.

As an example of why this is a bad test, in a supplier/employer, user/employer situation, where a temporary agency supplies permatemps to a workplace, the user's supervisors routinely mandate overtime for supplied employees. In contemporary society where people hold multiple jobs, both spouses are working, commuting distances are great, and child and elder care responsibilities paramount, there are few more essential determinations than whether a worker has to work longer hours on a particular day than she or he planned.

In this context, the union representative seeking to bargain voluntary overtime provisions, set schedules, the equitable rotation of overtime, or advanced notice of schedule changes has an impossible task if she is limited to seeking such provisions from the supplier employer.

In this example, effective collective bargaining requires the user employer to be represented at the bargaining table. The Board's Browning-Ferris decision requires consideration of routine repetitive control, along with indirect control and reserved control. The PRO Act wisely would codify that standard.

Finally, on injunctive relief, the Act's critics frequently point to the inadequacy of its remedies. When combined with the requirement to enforce Board orders in the courts of appeals, final enforcement comes too late to be effective. The typical worker will think twice about supporting a union if the potential consequence is that she will be fired and have to wait a long time to obtain legal redress.

Injunctive relief under sections 10(l) and 10(j) is a powerful way to obtain quick relief. Section 10(l) requires that relief be sought mandatorily, 10(j) is discretionary. Section 10(l) has been very successful in essentially eliminating the union unfair labor practices, the 8(b)s, that it is addressed to eliminate. Virtually the only time that Section 10(l) injunctions are sought these days is when general counsels advance novel theories infringing on union First Amendment rights, such as the current initiative seeking injunctions against union's symbolic speech using inflatable rats. The PRO Act incorporates mandatory language in Section 10(j), making the Board more capable of addressing violations quickly and effectively.

Thank you for this opportunity to testify, Madam Chair.

[The statement of Mr. Griffin:]

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

July 25, 2019

The Protecting the Right to Organize Act: Modernizing America's Labor Laws

Richard F. Griffin, Jr.
Of Counsel, Bredhoff & Kaiser, P.L.L.C.
Former General Counsel and former Board Member, National Labor Relations Board

Madame Chair Wilson, Ranking Member Walberg, and Members of the Committee, thank you very much for the opportunity to testify today concerning the Protecting the Right to Organize Act of 2019, the PRO Act.

My name is Richard F. Griffin, Jr. I have practiced labor law for almost 38 years and am currently Of Counsel at the Washington, DC law firm of Bredhoff & Kaiser, where I represent unions, benefit funds, and employees, as well as serving as a mediator. The subject of today's hearing—reform of the nation's fundamental private sector labor law, the National Labor Relations Act—is near and dear to my heart, as I began my career at the NLRB in 1981 as a staff counsel to then-Board Member John Fanning. Mr. Fanning was appointed to the NLRB by President Eisenhower in 1957 and served continuously until December 1982—his 25-year tenure as a Board Member is unmatched in the Agency's history. On Mr. Fanning's staff, I learned the deep respect for the fundamental purposes and policies of the Act—protecting and encouraging the right of workers to join together to form unions and bargain collectively—that has guided my entire career.

Leaving the Board in 1983 I went to work in the in-house legal department of the International Union of Operating Engineers, where I stayed for the next 28 years, the last 18 of which I served as the International Union's General Counsel. Founded in 1896, the Operating Engineers represent heavy equipment operators on construction sites and stationary engineers that maintain heating, ventilating and air conditioning systems in buildings. The union is large, with 400,000 members and affiliated Local Unions in every state in the United States and every province in Canada. During my time with the union I

traveled widely and saw the difference that union representation and collective bargaining made in the lives and working conditions of men and women throughout North America. My exposure to Canadian provincial labor laws also brought me in contact with models that shared much with the NLRA but differed in important respects.

In December 2011, President Obama nominated me to be a Board Member of the National Labor Relations Board—a great honor which I certainly did not anticipate—and then in January 2012 he recess appointed me, Sharon Block, and Terry Flynn—two Democrats and a Republican—to the then-open seats on the Board. For the next 20 months I served as a Board Member—deciding cases with my colleagues with the able assistance of the knowledgeable and learned Board career staff attorneys—while the fight over the President's authority to recess appoint us made its way through the courts. While that legal fight was still ongoing, my nomination was withdrawn and my tenure as a Board Member ended. However, I was subsequently nominated to be the Board's General Counsel, was confirmed by the Senate, and took office on November 4, 2013. My four-year term concluded at the end of October 2017.

While my testimony today draws upon my varied experiences throughout my career as a labor lawyer, it is specifically informed by my tenure as the NLRB's General Counsel. The General Counsel's job is unique among federal government agency legal positions. The NLRB General Counsel has three responsibilities. First, he or she is the Agency's chief prosecutor, determining whether there is merit to the almost 20,000 unfair labor practice charges filed with the Agency annually, and then, if merit is found, issuing complaint and prosecuting the case through the Board's administrative adjudicative process. This prosecutorial responsibility is a heavy one, for there is no private right of action under the National Labor Relations Act, the General Counsel's exercise of discretion is final and unreviewable, and, while the Charging Party may participate in the proceeding, the General Counsel's theory of the case controls its litigation.

Second, once the administrative adjudicative process is complete and the Board has rendered a final decision, the General Counsel takes off his or her prosecutor's hat and becomes the Board's lawyer

in the courts, defending the Board's decision and seeking its enforcement even if the decision rests on a theory other than one advanced by the General Counsel in the administrative proceeding. And third, and in many ways most importantly for the day-to-day running of the Agency, the General Counsel is the Board's chief administrative officer, responsible for overseeing the operations of the Agency's headquarters and its numerous regional, subregional, and resident offices throughout the country.

While all three responsibilities of the General Counsel are largely carried out by the tremendously talented Agency career staff under the oversight of the General Counsel, on certain occasions the General Counsel must step up to the plate in person. Thus, I testified in both the House and the Senate in support of the Agency's budget with my colleague Chairman Mark Gaston Pearce, and when the Solicitor General's office decided to abandon the side of working people and the Agency in the *Epic Systems* case,[1] I ended up arguing on behalf of both in the Supreme Court. The 5-4 loss in that case is a significant blow to workers' rights and will inform my discussion today on the PRO Act's provisions.

Having reviewed my background, I will discuss now five of the many necessary labor law reforms contained in the PRO Act. Before I get into specifics, however, I want to reiterate the central importance of workers' right to join together to form unions and act together for their mutual aid and protection, and the central importance to any fair economic system of collective bargaining to distribute the proceeds of an enterprise fairly among those responsible for the enterprise's success. These rights—to form a union and to bargain collectively—are fundamental but often go unexercised out of fear or ignorance of the rights. The consequence of that failure is manifest throughout our economic system, where workers' wages have stagnated and the gap between what workers earn and what management takes home grows ever wider. Section 7 of the current Act articulates beautifully these rights, but the Act's other provisions, and those provisions cramped interpretation by the Board and the courts, do not

[1] *Epic Systems Corp. v. Lewis*, 584 U.S. ___ (2018).

fulfill Section 7's promise. Reform is needed so that workers will be able to exercise their rights effectively, free from retaliation—the nation's economic health demands no less.[2]

Turning to the agenda for reform, five aspects of the PRO Act are among those changes long overdue and necessary. First, workers must be informed of their rights and the legislation's requirement that notices describing those rights be posted in every workplace is the minimum necessary to fulfill that obligation. Second, too many workers are disqualified from exercising their rights because they are independent contractors—whether this results from a purposeful misclassification or not, the deprivation of rights is fundamentally unfair and the legislation's provisions simplifying the test for independent contractors go a long way toward solving the problem. Third, as the employer's responsibilities in the workplace are fissured between and among different entities—whether they be temporary agencies, payroll services companies, labor brokers, subcontractors or other entities—from the workers' standpoint they need to be able to bargain with the entities that have a right to control their terms and conditions of employment. Thus, the PRO Act's provisions addressing the joint employer question are welcome.

Fourth, the NLRA has been criticized for years for having inadequate remedies. Yet, the Act contains an effective remedy—Section 10(l) providing for the mandatory seeking of interim injunctive relief to address certain union unfair labor practices—that has virtually eliminated the type of conduct it was designed to address. Similar provisions that authorize injunctions to be sought in response to employer unfair labor practices—essentially making it mandatory to seek Section 10(j) injunctions for certain unfair labor practices—would greatly strengthen the Board's hand in obtaining appropriate relief.

And finally, whatever virtues the arbitration process has when parties genuinely agree to have their disputes resolved in that forum, the type of unilateral adhesive employment requirement to proceed individually condoned by the Supreme Court in *Epic Systems* is not worthy of being called arbitration.

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[2] The advantages of unionization, in higher wages and better benefits for all workers but particularly for workers of color and women, are highlighted in the PRO Act's FINDINGS at Section 2, paragraph 1.

The provisions of the PRO Act that make clear that workers are protected when they jointly or collectively seek legal redress for their concerns are necessary reforms.

I turn now to a more detailed discussion of each of the needed reforms mentioned above, noting that I think the proposed bill contains a number of other necessary provisions.

Notice Posting. Many workers, and many employers as well, do not know their rights and responsibilities under the National Labor Relations Act. Because the National Labor Relations Board does not have independent investigative authority, it cannot go out and initiate enforcement actions on its own. It relies on individuals, unions, and employers to understand their rights and responsibilities, and file charges with the Board when they believe those rights have been violated. Employees who are unaware of their rights are not in a position to exercise or enforce them, and employers who are ignorant of employee rights are not in a position to conform their conduct to what the law requires.

Employer ignorance on this score is perhaps best demonstrated by the continued presence, in employee handbooks employers promulgate to state workplace policies, of rules labelling employee compensation information "confidential" and threatening employees with discipline if they talk about or disclose this type of "confidential" information. For a long time, it has been the law that employees have a protected right to talk about their wages and compensation and that employer restrictions on employees talking about their wages are unlawful and violate Section 8(a)(1). As the Fifth Circuit stated in *Flex Frac Logistics, L.L.C. v. NLRB*, 746 F.3d 205, 208 (5th Cir. 2014), quoting its own opinion from almost 30 years ago in *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990), a "workplace rule that forb[ids] the discussion of confidential wage information between employees . . . patently violate[s] section 8(a)(1)." Despite this black letter law, studies demonstrate that as many as half of all workers

work in workplaces where discussion of wage and salary information is either discouraged or prohibited and/or could lead to punishment.[3]

This type of ignorance of the law could easily be dispelled by a requirement that employers post in the workplace a notice of employee and employer rights and responsibilities under the statute. Notice-of-rights posting is required under other federal employment laws, such as the Fair Labor Standards Act (at 29 CFR §516.4), Title VII of the Civil Rights Act of 1964 (at 42 U.S.C. §2000e-10), the Age Discrimination in Employment Act (at 29 U.S.C. §627), the Occupational Safety and Health Act (at 29 U.S.C. §657(c)(1)), the Americans with Disabilities Act (at 42 U.S.C. §12115), and the Family and Medical Leave Act (at 29 U.S.C. §2619). However, the NLRA does not have a specific posting provision. The Board's prior effort at rulemaking in this area met with opposition in the courts of appeals,[4] thus giving rise to the need for a legislative solution. The PRO Act addresses this problem, by explicitly amending the law to add a Section 8(h)(1) requiring that employers post a notice setting forth the rights and protections afforded employees under the Act. I strongly support this needed provision.

Independent contractors. Only statutory "employees" as that term is defined at Section 2(3) of the NLRA have the right to engage in the activities protected by Section 7. Thus, under the current law, front line supervisors, independent contractors,[5] agricultural laborers, domestic workers, and other non-employees—a significant percentage of the workforce—do not have a protected right to form a union and engage in collective bargaining. While the Act's definition of "employee" is broad "for it says 'the term

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[3] See "Pay Secrecy and Wage Discrimination," Institute for Women's Policy Research, January 2014, https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Q016%20(1).pdf (last visited July 16, 2019).

[4] 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).

[5] The exclusion for "any individual having the status of an independent contractor" was added to the NLRA's definition of "employee" in 1947, in response to the Supreme Court's decision in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), where the Court had applied legal and policy considerations rather than the common law of agency to determine that "newsboys" were employees covered by the Act. In subsequently excluding independent contractors, Congress made clear that common law agency principles were to govern. See *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968).

'employee' shall include *any* employee," *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 90 (1995)(quoting the statute and adding emphasis), the list of exceptions significantly limits the Act's effectiveness.

During my tenure as General Counsel, the issue of who was and who was not an independent contractor was one that occupied a large amount of Agency time and resources. The standard for whether a worker was an independent contractor—which requires the application of a ten part multi-factor common law test—was the subject of considerable back and forth between the Board and the DC Circuit.[6] Because, under Section 10(f), an employer who disagrees with an NLRB decision can always seek review of that decision in the D.C. Circuit, any Board cases involving the application of the independent contractor standard were reviewable in the DC Circuit and the NLRB's Appellate Court branch (part of the General Counsel's office) was regularly briefing and arguing independent contractor cases in that court.

In these cases, the DC Circuit required an emphasis on whether the workers in question have significant entrepreneurial *opportunity* for gain or loss. The Board, while acknowledging the importance of entrepreneurial opportunity, focused much more on weighing all the common law factors and on whether entrepreneurial opportunity was actually exercised. The current Board responded to the DC Circuit's latest criticism by issuing the decision in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), where the Board also adopted an expansive view of the role of potential entrepreneurial opportunity in the independent contractor analysis. This decision expands the number of workers who will be excluded from the Act's coverage, complicates the application of an already difficult multi-factor common law test, and opens up the potential for manipulation by employers who will draft "independent contractor agreements" that they require their workers to sign that include paper hypothetical entrepreneurial opportunities which will never come to fruition in the real world. The PRO Act's three-part test to

[6] See *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir 2009)(*FedEx 1*); *FedEx Home Delivery*, 361 NLRB 610 (2014), enf. denied 849 F.3d 1123 (D.C. Cir.2017).

determine independent contractor status is straightforward and transparent, and a significant improvement on the most recent Board and court law on this question.

The other aspect of the independent contractor question we regularly encountered was the purposeful misclassification of workers, particularly in the trucking industry and the gig economy. I want to briefly address this misclassification issue and describe one particular instance of how it works to deny employees their rights under the Act.

While I was General Counsel, we had several cases involving allegations of misclassification of workers who were port truckers in the Port of Los Angeles, California. The Teamsters Union has been engaged in an extended organizing effort among the port truckers and this effort resulted in a number of unfair labor practice charges. In one particular case, the employer had classified employees as independent contractors but treated them as employees "in virtually every respect." In response to the organizing campaign, the employer engaged in conduct resulting in the filing of an unfair labor practice charge. The regional office investigated, advised the employer that it had determined that the employer's drivers were statutory employees, and that it intended to issue complaint alleging a violation of Section 8(a)(1), absent settlement. The employer resolved the charge by entering into a settlement agreement that provided for the posting of the Board's standard "Notice to Employees" to remedy the Section 8(a)(1) violation.

The employer then turned around and advised its drivers, via a memorandum accompanying their paychecks, that the NLRB Notice applied only to employees not to the drivers because the drivers were independent contractors, the employer had no driver employees, and the independent contractors did not have the right to form a union, only the (nonexistent) employees did. The union filed another charge alleging that this misclassification of drivers as independent contractors in order to deny them their rights

as employees violated Section 8(a)(1), and a decision was made to issue a complaint on that theory.[7] The case subsequently settled.

The type of abuse that I just described is less likely to happen if the independent contractor test is simplified in a way that makes its application easier and efforts at misclassification more obvious. That is what the PRO Act does, to positive effect.

Joint employers. There has been no more controversial issue in labor law over the past 6 or 7 years than what entities constitute joint employers under the National Labor Relations Act. The issuance of the consolidated complaint and the subsequent litigation and attempted settlement in the *McDonald's* case, the Board decision in *Browning Ferris*, the Board's decision to reverse *Browning-Ferris* in *Hy-Brand* and its subsequent vacating of that decision, the Notice of a Proposed Joint Employer Rulemaking, and the DC Circuit's decision in *Browning Ferris* that agreed with the Board's articulation of the common law but nonetheless remanded the case[8]—all these developments occasioned much spilling of ink, furious lobbying activity, proposed legislation, and a number of congressional hearings and oversight requests.

All parties agree that, currently, the Board must apply the common law agency standard to determine whether or not the putative joint employer is an employer of a particular group of employees—what the fight is about is what the common law requires. What is sometimes lost in the overheated rhetoric around this issue is the underlying reason for the focus on joint employment—the changing nature of the workplace and the need for the Board, in fulfillment of its statutory responsibility to "encourag[e] the practice and procedure of collective bargaining," to interpret the Act in a way that puts

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[7] See Advice Memorandum in *Pacific 9 Transportation*, Case No. 21-CA-150875 (December 18, 2015).
[8] See the Administrative Law Judge's decision in *McDonald's USA, LLC*, Case No. 02-CA-093893 (July 17, 2018); *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015); *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017) vacated 366 NLRB No. 26 (2018); *The Standard for Determining Joint Employer Status, Notice of Proposed Rulemaking*, 83 Federal Register 46681 (September 14, 2018); *Browning-Ferris Industries of California v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

employees and their unions at the bargaining table with representatives of all of the entities that have a right to control the employees' terms and conditions of employment.

There is no question that the modern workplace has many examples of what the prior Administrator of the Labor Department's Wage and Hour Division, Dr. David Weil, has described as "fissuring"—the division among multiple entities of the responsibilities formerly performed by one employer.[9] These developments call for an individualized, particularized application of all of the factors of the common law test to determine whether the putative employer is co-determining the wages and working conditions of the employees in question. This type of analysis is what the Board did in *Browning-Ferris* and it is what the PRO Act would require. On the other hand, the rule the current Board is proposing in its rulemaking proceeding would truncate the review of the common law factors, and would require that "an employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another employer's employees in a manner that is not limited and routine." 83 Federal Register 46681. This is a bad mistake, in my view, because whether it is the use of temporary agencies to supply workers to user employers, whether it is payroll companies who "employ" workers in name only, or whether it is those franchisors who direct their franchisees in many aspects of their operations,[10] collective bargaining in these situations can only succeed if all the relevant entities are at the table.

To give but one simple example: in a supplier employer/user employer situation where a temporary agency supplies perma-temps to an industrial workplace, the "routine" mandating of overtime on a regular basis for supplied employees may be considered by some a minor aspect of the authority of the user entity's front-line supervisors. However, in today's workplace, where people hold multiple jobs,

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[9] See Dr. David Weil, *The Fissured Workplace: Why Work Became So Bad For So Many And What Can Be Done To Improve It*, Harvard University Press, 2014.

[10] Of course, all franchisors are not involved in their franchisees' operations in a manner that will result in a joint employer finding. See, for example, Advice Memorandum in *Nutritionality, Inc d/b/a Freshii*, Case No. 13-CA-134294 et al. (April 28, 2015).

spouses are frequently both working, commuting distances are often great, and child and elder care responsibilities paramount, there are few more disruptive or more essential determinations than whether a worker has to work longer hours on a particular day than she or he planned. In this factual context, a union representative seeking to bargain voluntary overtime provisions, set schedules, the equitable rotation of overtime, or advance notice of schedule changes has an impossible task if she is limited to seeking such provisions from the supplier employer.

Similarly, drug tests may be routinely and regularly administered by the user employer for anyone having access to its facility to work. If the union representative wants to negotiate a proper drug testing protocol including the disciplinary consequences for positive tests and time periods after which a subsequent negative test will allow renewed access to the premises, the union representative simply cannot do that by talking to the supplier employer. Or, if the user employer engages in systematic, daily, routinized discrimination with respect to work assignments, favoring one race or sex over the other for choice tasks on a regular basis, grievances challenging this discrimination are utterly useless if filed with the supplier employer. Likewise, one employer may routinely shield from effective scrutiny sexual or racial harassment regularly engaged in by its supervisors against the employees of another employer working on the first employer's premises.

As these examples make clear, in the supplier employer/user employer context, the user employer's routine, regular, repetitive determination of terms and conditions of employment means that, in order for collective bargaining on behalf of those employees sent from the supplier to the user to be effective, the user employer must be represented at the collective bargaining table. This makes it all the more important that such routine, repetitive control is considered when making the joint employer determination. The Board's *Browning-Ferris* decision revised the joint employer standard so that evidence of such routine, repetitive control, along with indirect control and potential control, of employees' terms and conditions of employment will be considered in the joint employer determination. As mentioned, in its pending joint employer rulemaking the current Board seeks to roll back *Browning-*

Ferris and do away with consideration of routine and regular control of terms and conditions of employment, and eliminate consideration of indirect control and unexercised control as well. This proposed standard will leave many small employers holding the bag while the large employers that co-determine many aspects of employees' working terms and conditions avoid responsibility. The PRO Act wisely would put an end to this policy oscillation by codifying the *Browning-Ferris* standard.

Injunctive relief. Critics of the effectiveness of the National Labor Relations Act frequently point to the inadequacy of the Board's remedies. The usual remedies of notice posting and reinstatement plus back pay minus interim earnings are insufficient disincentives to employers to commit unfair labor practices. When combined with statutory provisions that require the Board to go to the federal circuit courts of appeals to get its orders enforced, which can come years after the Board issues its decision, the potential length of the process means that final enforcement frequently comes too late to be truly effective. Particularly because so many workers are living paycheck to paycheck, the typical worker must think twice about sticking her neck out in support of a union if the potential consequence is that she will be fired and have to wait a long time to obtain legal redress.

The most powerful way currently available to obtain quick relief of unfair labor practices is to obtain an injunction from the federal courts to restore the status quo in place prior to the unlawful act. The NLRA has two provisions for seeking injunctive relief: Section 10(l) and Section 10(j). Section 10(l) applies to certain types of union unfair labor practices and provides that the Board "shall" seek such relief; Section 10(j) requires that a complaint already has issued and the seeking of the injunctive relief is discretionary with the Board. In practice, while all of the Board General Counsels in the recent past—Ronald Meisburg, Lafe Solomon, myself, Jennifer Abruzzo, and current General Counsel Peter Robb—have considered Section 10(j) a powerful weapon to obtain appropriate interim relief and a number of General Counsel memoranda have been published to this effect,[11] such discretionary relief is sought in

[11] See Memorandum GC 06-05, "First Contract Bargaining Cases," (April 19, 2006 General Counsel Meisburg); Memorandum GC 10-07, "Effective Section 10(j) Remedies for Unlawful Discharges in

only a handful of cases and the statutory requirement that a complaint already have been results in delay before the injunction is sought.

On the other hand, the mandatory use of Section 10(l) when the regional office has reasonable cause to believe the charge is true and that a complaint should issue (a lower threshold than that for 10(j)), along with the provisions of Section 303 allowing for damages for parties injured by this type of conduct, has essentially eliminated these types of unfair labor practices. Virtually the only time Section 10(l) injunctions are sought these days is when General Counsels seek to advance novel theories infringing on union First Amendment rights, along the lines of the current initiative seeking injunctions against union's symbolic speech using inflatable rats and banners.[12] The last time such an initiative was tried it was roundly rejected by the courts and ultimately by the Board itself. See *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199 (9th Cir. 2010). The current initiative seems to be meeting the same fate. See *King v. Construction & General Building Laborers' Local 79*, Case No. 1:19-cv-03496 (NGG)(VMS)(E.D.N.Y.) (July 1, 2019 decision denying preliminary injunction).

The PRO Act incorporates the overall lesson to be learned from the general experience with 10(l) (aside from the novel actions of General Counsels)—mandatory injunctions with the potential for damages actions work to deter unfair labor practices—and incorporates mandatory language in Section 10(j) along with more serious monetary remedies for unfair labor practices. These provisions will make

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Organizing Campaigns" (September 30, 2010 General Counsel Solomon); Memorandum GC 11-06, "First Contract Bargaining Cases: Regional Authorization to Seek Additional Remedies and Submissions to Division of Advice" (September 30, 2010 General Counsel Solomon); Memorandum GC 14-03, "Affirmation of 10(j) Program" (April 30, 2014 General Counsel Griffin); Memorandum GC 18-04, "Utilization of Section 10(j) Proceedings" (June 6, 2018 General Counsel Robb).

[12] See General Counsel Robb's initiative taking on inflatable rats, cats, and cockroaches as unlawful secondary activity, seeking to overturn, *inter alia*, *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010), *Sheet Metal Workers Local 15, (Brandon Medical Center)*, 356 NLRB 1290 (2011), and *Carpenters Southwest Regional Councils Locals 184 & 1498 (New Star)*, 356 NLRB 613 (2011), as described in the December 20, 2018 Advice Memorandum in *IBEW Local 134 (Summit Design & Build)*, Case 13-CC-225655.

the Board much more capable of addressing unfair labor practice violations quickly and effectively, and will strengthen the Board's hand in settlement negotiations as well.

Mandatory Arbitration. The central aspect of Section 7 is its protection for workers' right to act jointly, together—to engage in "concerted" activity in the language of the statute—to address workplace concerns. Thus, any employer requirement that an employee renounce her right—or waive the right through an individual contractual provision—to act together with other employees in seeking to address workplace issues has long been held to constitute an unfair labor practice. In 1940, in *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940), the Supreme Court endorsed the Board's statutory interpretation and held that an employer violated Section 8(a)(1) of the NLRA by requiring each of its employees to sign individual contracts prospectively restricting their Section 7 rights, stating: "Obviously, employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes…".

Similarly long-standing is the Board law that included joint or collective resort to administrative and legal remedies to resolve workplace disputes among the types of activity protected by Section 7. As early as 1942, the Board found that three employees engaged in Section 7 protected activity when they filed a Fair Labor Standards Act lawsuit for overtime wages against their employer because the suit "bore directly on their wages and working conditions." *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 949 (1942).

Combining these two doctrines, it is clear that an employer requirement that an employee must proceed individually to resolve all employment law disputes through arbitration violates Section 8(a)(1) because it interferes with the employee's Section 7 right to act jointly or collectively to address such

matters. Thus, when the Board first faced this issue in the *D. R. Horton*[13] case, it straightforwardly found such agreements violate Section 8(a)(1) and later reiterated that judgement in *Murphy Oil*.[14]

In reaching that decision, the Board had to harmonize its holding with the requirements of another federal statute, the Federal Arbitration Act, that requires the enforcement of arbitration agreements as written, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 USC § 2. Originally enacted to combat judicial discrimination against arbitral awards in commercial disputes, the FAA was historically understood not to cover arbitration of employment disputes, since Section 1 of the FAA concludes: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." However, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001), the Supreme Court held that Section 1 did not exempt all employment agreements, stating rather: "Section 1 exempts from the FAA only contracts of employment of transportation workers." And the Court had previously held that arbitration was an adequate forum for the adjudication of statutory claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Thus, the Board dealt with the argument that its decision conflicted with the FAA's rule by focusing on the FAA's Section 2 savings clause language—determining that it was a legal defense to enforcement of a contractual arbitration clause that the clause was unlawful under another federal statute, and thus the NLRA and the FAA could both be effectuated..

Since mandatory arbitration clauses of the type found unlawful in *Murphy Oil* were becoming increasingly common, the Board ended up deciding quite a few of the cases, and the issue ended up in the Supreme Court. Unfortunately, the Court, in a 5-4 decision, disagreed with the Board on whether such agreements that require employees to resolve all employment disputes individually in arbitration violate Section 8(a)(1) because they limit the employees' right to engage in "concerted activities" for "mutual aid

[13] 357 NLRB 2277 (2012).
[14] 361 NLRB 774 (2014).

or protection" as protected by Section 7. *Epic Systems Corp v. Lewis*, 584 U.S. __ (2018).[15] In *Epic Systems*, Justice Gorsuch, writing for the majority, held that the FAA required the enforcement of such arbitration agreements. Justice Ginsberg, writing for the four dissenting justices, strongly disagreed. She agreed with the Board that, *inter alia*, the NLRA prohibition could be harmonized with the FAA's enforcement mandate by reading the FAA's saving clause—allowing courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract"—to not require the enforcement of an arbitration agreement violative of a federal law.

Since *Epic Systems* was decided, mandatory individual arbitration is on the rise. The Center for Popular Democracy and the Economic Policy Institute issued a report on May 21, 2019 finding that, if current trends continue, more than 80% of private sector, non-union workers will be covered by forced individual arbitration clauses by 2024.[16] This will have a devastating impact on workers' rights because, as pointed out by many of the amici who supported the Board in the Supreme Court in the *Epic Systems* case, individual employees unsupported by their fellow workers are unlikely to stick up for themselves in light of very real fears of retaliation, and thus many legitimate claims of wage and hour violations and discrimination will go unasserted and unaddressed. The PRO Act provisions that make clear that a) employees have a right to proceed jointly and collectively to assert their rights in the workplace, and b) employers cannot require waiver of these rights, will reverse *Epic Systems* and restore a proper understanding of the breadth of Section 7.

As I conclude this part of my remarks, I want to note that the NLRB's rule that was the subject of the *Epic Systems* decision was not anti-arbitration as a process, and did not prohibit individual arbitration

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[15] The *Epic Systems* decision involved three consolidated cases: *Epic Systems Corp. v. Lewis*, No. 16-285, on certiorari to the United States Court of Appeals for the Seventh Circuit, *Ernst & Young LLP et al. v. Morris et al.*, No. 16-300, on certiorari to the United States Court of Appeals for the Ninth Circuit, and *National Labor Relations Board v. Murphy Oil USA, Inc, et al.*, No. 16-307, on certiorari to the United States Court of Appeals for the Fifth Circuit.

[16] See "Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers Are Fighting Back," The Center for Popular Democracy and the Economic Policy Institute, 2019.

requirements for resolution of employment disputes—so long as the employee had an opportunity to proceed concertedly in another forum, an employer could require that an employee agree that any arbitration of disputes would proceed on an individual basis. The Board's focus was on employees' rights to proceed jointly, collectively or on a class basis in a forum, either arbitral or judicial.

Arbitration as a process has many virtues; those of labor arbitration are perhaps best articulated in the Steelworkers Trilogy line of Supreme Court decisions, *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Indeed, the Board has its own extensive body of doctrine governing the circumstances under which it will defer the resolution of unfair labor practice charges to the labor arbitration process, see *Collyer Insulated Wire*, 192 NLRB 837 (1971), *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), and most recently *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014).[17] The difference between labor arbitration and the forced individual arbitration of *Epic Systems* is that labor arbitration is the result of employees' joint exercise of their Section 7 rights: the workers have chosen a union to represent them, the union has negotiated a contract covering their terms and conditions of employment, the collective bargaining agreement includes an arbitration clause to resolve grievances filed on workers' behalf by the union as it polices the contract, and the union serves as the workers' experienced advocate in an informal dispute resolution process the union arrives at as an equal party with management. These crucial distinctions are why the PRO Act properly contains an exception for arbitration agreements contained in collective bargaining agreements.

Conclusion. The National Labor Relations Act has not been amended since the Health Care Amendments of 1974, and major portions of the statute have remained unchanged for a much longer time, subject to narrowing rulings by the Board and the courts, such that the Act's promise as the Magna Carta

[17] At any point in time, the Board has more than 1100 unfair labor practice charges that it has deferred to arbitration. See, i.e., Memorandum GC 17-02 (1,122 cases in pre-arbitral deferral status at the end of FY 2016).

of the American worker has gone unfulfilled. The PRO Act's provisions represent a much-needed update to this essential law. I appreciate the opportunity to testify here today and I look forward to your questions.

Chairwoman WILSON. Thank you, Mr. Griffin.

Under Committee Rule 8(a), we will now question witnesses under the 5-minute rule. I will now yield myself 5 minutes.

Mr. Alvarez, because XPO industries misclassified you and other drivers as independent contractors, you are not able to be bargained -- you are not able to bargain for basic worker protections like health insurance and sick pay. So, what happens now when you or a fellow driver becomes sick or needs time off?

Mr. ALVAREZ. We really have to think about it. It is just like anytime, just like any -- before I take vacation or a day off, XPO still pushes the operation, costing us, regardless we go to work or not.

Chairwoman WILSON. How would organizing a union solve this problem for and other drivers?

Mr. ALVAREZ. With the union help, we will be able to go to our bargaining table and bargain those benefits that we have been denied, for example, vacations and sick days. We should be able to go to vacation and not come back to a negative check every time.

Chairwoman WILSON. Okay. I want to thank you for your courage to testify here today before this committee, and know that we are going to fight for you. We will fight for you and all Americans who want to exercise their rights to negotiate for better pay and working conditions, and thank you for standing up and coming today.

Mr. Griffin, I want to thank you for your public service with the NLRB. During your time as General Counsel, you devoted yourself to the core purposes of the National Labor Relations Act, which are to protect workers' freedom of association and promote the practice and procedure of collective bargaining. In your testimony, you detailed the harm that misclassification has done to employees, like Mr. Alvarez.

What are some of the ways that misclassification independently violates workers' rights under the labor law, and how would the PRO Act address this problem?

Mr. GRIFFIN. Well, it is fundamental under the Act. If you are an employee, you have rights, they are protected. If you are an independent contractor, you don't have rights, you are not protected. And so, if an employer deliberately takes someone who has employee status and does not allow them to exercise their rights by advising them that they are an independent contractor, that they have no rights, it is a fundamental violation of people's ability to engage in the activities protected under Section 7.

In addition, it has a chilling effect on people's ability to speak to each other, to engage in the type of concerted activity that the Act protects, because they think they don't have any rights. They are misinformed, misclassified, and it is probably an extremely -- it is an extremely effective way to deny people their rights.

And so what the PRO Act does, is it takes this 10-part test that is very complicated and confusing, and makes it simple and straightforward. And so if somebody misclassifies an employee, it is very obvious under that three-part test what they have done and so it makes it simpler to identify the misclassification.

Chairwoman WILSON. Thank you.

Your testimony -- this is for Professor Garden.

Your testimony details how provisions of the NLRA curtails workers' First Amendment free speech rights.

Do the reasons for those restrictions on workers' speech including the so-called secondary activity as part of the Taft-Hartley Act of 1947 hold up in today's workplace?

Ms. GARDEN. Thank you for that question.

I think there are two reasons that the reasons behind the secondary boycott provision don't hold up today: One has to do with law, and one has to do with the changing nature of work.

First, in 1959 when 8(b)(4) was adopted and then when it was modified in 1959 -- I'm sorry -- 1947 -- when it was adopted and modified in 1959, perhaps Congress could have reasonably seen picket lines as coercive. At the time, refusing to cross a picket line could mean the ability to -- could mean losing the ability to work in a heavily unionized industry. That is no longer the case as a matter of law. Workers' jobs can't be conditioned on their willingness to walk a picket line. That means today's picket lines depend on moral persuasion, not on coercion.

Second, work has changed. Fissuring situations like the one that gave rise to Preferred Building Services have become more common, and that means there is a greater need for employees to be able to picket outside of the larger entities that control their wages and working conditions as a practical matter.

Chairwoman WILSON. Okay. In your opinion, should First Amendment rights to free speech be restricted because of who is making the speech?

Ms. GARDEN. Absolutely not. And it is not just my opinion. It is the Supreme Court's opinion as well. In recent cases like Sorrell v. IMS Health, even like Citizens United, the Supreme Court has strongly criticized the idea that speech rights can turn on who is speaking at a given time. The Court has said that government has to justify speech rights that turn on who the speaker is, and, essentially, demands proof that the restriction is necessary to achieve an important government interest.

Chairwoman WILSON. I thank you. I thank you so much.

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

Mr. WALBERG. I thank you, Madam Chair.

I believe we will recognize the Chairwoman or the Ranking Member.

Chairwoman WILSON. Oh, the esteemed Dr. Foxx --

Ms. FOXX. Thank you.

Chairwoman WILSON. -- for her round of questioning.

Ms. FOXX. Thank you, esteemed Chairwoman.

I thank all of the witnesses for being here today.

Mr. King, the bill before us today undermines the right of American workers to a secret ballot election to decide union representation. But shockingly, 77 House Democrats who have cosponsored H.R. 2474, including 12 on this committee, also signed a letter to the Trump administration, urging strong enforcement of a new law in Mexico that guarantees Mexican workers that same right to a secret ballot union representation election.

Doesn't it seem remarkably inconsistent, even hypocritical, for Democrats to ensure the right to a secret ballot union representa-

tion election for Mexican workers, but undermine the same right for American workers; and why is the right to a secret ballot election so important for workers?

Mr. KING. Thank you, Dr. Foxx. It is nice to see you again.

I have been following the United States, Mexico, Canada negotiations quite closely. Our members, many have operations in Mexico and we are quite concerned about where that is going, but it looks like we have progress. But your point is well taken. Those negotiations guarantee Mexican workers the right to vote on whether they want union representation; and, further, it even goes beyond that. The workers in Mexico under the negotiation status of present will also have a right to approved collective bargaining. Their collective bargaining agreement will be subject to a vote. So, those rights are even further being articulated and pursued than what is available to American workers.

Ms. FOXX. Thank you, Mr. King.

Mr. King, in the first hearing on H.R. 2474, a union leader testifying for the Democrats admitted the reasons they need to force workers to turn over personal information such as home addresses and cell phone numbers is so that unions can target workers, quote, "at a grocery store," end quote, or, quote, "any place else where you can get them," end quote, including, quote, "at their home," end quote.

Under this bill would workers have any say regarding the privacy of their personal information and what personal information is shared with the union organizers? What risks, disruptions, or threats could that create for workers and their families?

Mr. KING. Well, it certainly could subject them to harassment at any location, as you mentioned, whether it be the grocery store or at their home; and, further, there is no ability under this bill for a worker to opt out, to say that she or he does not want to share such information.

Additionally, there is no protection whatsoever for this private information. We have all seen the data breaches that occur, particularly in government, but not just in government. So this is a very poor provision. I think members that support this bill will have a very difficult time explaining to their constituents why they authorized the release of personal cell phone numbers, personal home phone numbers, personal email addresses. Very bad idea.

Ms. FOXX. I think there is also some discrepancies in what our colleagues are saying about the Internet and agencies that control the Internet in this regard.

Mr. King, Democrats have made their intentions clear in H.R. 2474 regarding their goal of eliminating independent contractor status which has encouraged innovations like the sharing economy that millions of Americans embrace and use every day.

How exactly would this bill impact business owners, workers, and consumers in the sharing economy?

Mr. KING. Well, Dr. Foxx, it would eliminate for all intents and purposes, decades of jurisprudence as to who is and who is not an independent contractor; and as a practical matter, pursuant to your question, it would adversely affect millions of workers who prefer to have a job where they work when they want to work, and the independence they have associated with that job. So, it is going to

hurt that part of our growing economy tremendously, another very poorly thought-out proposal.

Ms. FOXX. Well, our whole country, the capitalist system, is based on the idea that somebody can start a business and get it going and work with other people who are independent contractors. I think it underlines capitalism, frankly. It is a much broader issue, I believe, than what is just in this bill.

Madam Chairwoman, I would like to submit for the record an article from the Wall Street Journal, April 30, 2019, called, Big Labor's Big Shrink.

Thank you.

[The information follows:]

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OPINION | REVIEW & OUTLOOK

Big Labor's Big Shrink

Union membership continues to decline—thanks to unions.

By The Editorial Board

Updated April 30, 2019 8:19 am ET

PRINT TEXT 292 COMMENTS

Democratic presidential candidate Joe Biden speaks during a campaign stop at a Teamsters union hall in Pittsburgh, April 29.
PHOTO: KEITH SRAKOCIC/ASSOCIATED PRESS

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.

Potomac Watch Podcast

Joe Biden's Campaign Rollout

0:00 / 18:40

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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.

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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.

Correction: An earlier version misstated public-union membership.

Appeared in the April 30, 2019, print edition.

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Chairwoman WILSON. Thank you.

And now Mr. Norcross from New Jersey.

Mr. NORCROSS. Thank you. First of all, thank you for holding this second hearing, because, remarkably, facts count, and when we look at the long history of employer/employee relationships in this country, we have had some valleys and some peaks. But the one I look at now is the gap between productivity of a typical worker's compensation, and that of their hourly compensation. So, as compensation went up pretty much even from the early 1960s to the mid 1970s, with productivity, they stayed pretty much aligned -- and I will enter this into the agreement -- but then a remarkable thing happened in the mid 1970s. Productivity continued to skyrocket, and hourly compensation stayed flat, to the point that they were even in the 1970s, there is now 130 percent gap over those 45 years.

Now you are asking yourself: Why? Well, what I heard is Americans are making it today. Absolutely right if you are that top 1 percent, which this is what shows, but that is what happened when the laws became outdated and changed for those who wanted to have representation. So now, today, we are left with a set of rules for those who want to collectively bargain that are chiefly stacked against them.

You cannot argue with the gap between those who are at the top 1 percent and those workers. It used to be, if you played by the rules in America and you worked hard, you grew with your company and they would treat you that way. But what you see today is something that is nothing short of remarkable.

Ritz, the Nabisco company in Philadelphia, closing down their shop, moving to Mexico. Why? We do have the greatest workers in the world, but apparently, we don't want to pay them. So, we ship them off to Mexico and say sorry to everybody else. This has happened time and time again.

And then the independent worker, the entrepreneurial spirit, so those Uber drivers are now their own accountant and bookkeeper. They are their tax advisor. They are talking about them as they are now their retirement. They are health advisors to make sure they get the right insurance. They now have to be their legal advisor, their insurance advisor, their safety in OSHA; and these are the same folks that are barely making minimum wage.

So, what you are seeing is the deferred responsibility, companies dumping it off and making them their own company. We know this isn't going to work. We are seeing evidence of this every day. It is a way of a company deferring their responsibility to making those employees, which, as you spoke, Mr. Griffin, is they have certain rights and responsibilities when you are an employee; but when you are a subcontractor, that all goes out the window. So, the company that hired them now defers all that.

Tell me what person you know driving an Uber is his own accountant, his tax advisor, his requirement advisor, health advisor, legal advisor, insurance, and now safety. Tell me how that works? It doesn't. It is not about entrepreneur. Those who want to start their own companies make that determination. Uber drivers don't want to start their own company. They just want to make a fair

living. I am just bringing out Uber. There are dozens and dozens of examples of this.

So, Mr. Griffin, in the PRO Act, does this change what would be considered an independent and entrepreneurial person and an employee? Could you explain that?

Mr. GRIFFIN. Yeah, I don't think that there is any issue about truly independent contractors who want to start their own business and get customers, as far as those people being limited in their ability to do that.

What this test does is it prevents the three-part test that is in the PRO Act. It prevents people who are actually employees who are not out, seeking other customers but who are handed a piece of paper when they come to work and ask to sign it, that is a paper document that the employer drafts and has a lot of provisions about potential entrepreneurial opportunity that are never actually going to come to fruition that is designed to misclassify those people.

What it does is, it puts a very straightforward three-part test to make sure that the person is genuinely an independent contractor. If they are not, they are an employee.

Mr. NORCROSS. Well, thank you for that answer, and to enter into the record the Economic Policy Institute, I ask that this be accepted into the record.

Chairwoman.

Chairwoman WILSON. Give you another minute?

Mr. NORCROSS. No.

Chairwoman WILSON. You are finished? Okay. Thank you.

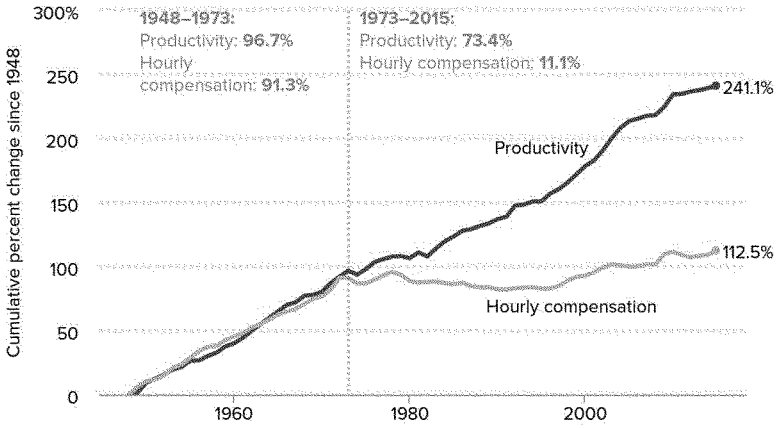
Mr. NORCROSS. Thank you.

Chairwoman WILSON. Without objection.

[The information follows:]

The gap between productivity and a typical worker's compensation has increased dramatically since 1973

Productivity growth and hourly compensation growth, 1948–2015



Note: Data are for average hourly compensation of production/nonsupervisory workers in the private sector and net productivity of the total economy. "Net productivity" is the growth of output of goods and services minus depreciation per hour worked.

Source: EPI analysis of data from the Bureau of Economic Analysis (BEA) and the Bureau of Labor Statistics (BLS) (see the technical appendix of Bivens and Mishel 2015 for more detailed information)

Economic Policy Institute

Chairwoman WILSON. Mr. Walberg, questions?

Mr. WALBERG. Thank you, Madam Chairwoman.

And thanks to the panel for being here and some of you coming many, many miles to be here. Thank you.

Mr. King, over the years, Congress, I believe, has struck a delicate balance in federal labor law with respect to the interest of employers and workers during this time, even as the union membership rate has fallen drastically; and we will certainly have, for the record, numbers that will be in stark contrast to some of the statements made about the lack of growth for the average employee during this time. But union membership has -- the rate has fallen drastically. The economy has grown enormously, inproving the lives of tens of millions of American workers, normal, everyday, blue-collar workers in my district and others. But rather than modernize a 70-year old law, laws back as I mentioned my father used to organize a steel mill in the 1940s, using those laws. The Democrats' current labor agenda would take us back to the volatile 1930s-era conflicts between labor and management.

Let me ask you this: Is H.R. 2474 consistent with the balance that Congress has sought with respect to labor management relations?

Mr. KING. Absolutely not, Mr. Walberg. It goes just in the opposite direction. It would prohibit an employer from hiring permanent replacements in a strike situation. Now, people say, Well, is that fair? The labor laws in this country permit the employer in a strike to continue its operations; not terminate strikers, but replace them so they can continue. Workers can withhold their services and strike. That is a perfect balance. The Supreme Court has approved that. That has been the law for decades. This bill wipes that out. It also, as I mentioned, would permit intermittent strikes. This bill is not well thought out, it is going to lead to instability. It is going to take us back, as you mentioned, decades.

Mr. WALBERG. Again, I would say, as I have tried to clearly state in my opening statement, we are talking about union boss control, not necessarily labor, employee, control of their lives and their opportunities. So Mr. King, the decision about whether to unionize is an enormously important question for workers and their families, a decision that they ought to have. But H.R. 2474 codifies the Obama administration's radical ambush election rule, which significantly shortens the amount of time -- I mean significantly -- the amount of time available to workers to consider the pros and cons of unionizing from an average of 38 days to as few as 11 days.

We don't do that in our efforts here in Congress. We have had more than those days for two hearings that we are involved with on this particular issue even. How does the ambush election rule in this bill tilt the playing field in favor of union bosses, but against workers?

Mr. KING. Unions can take as much time as they want to take to organize. There is no limit. They can engage in organizing activities for years, and then file a petition and per these ambush rules, insist upon an election. But then as you mentioned, 12, 14 days. There is not an opportunity for an intelligent dialogue. I remember Senator Kennedy when we had this discussion quite some time ago, saying at a minimum, there should be 30 days before an intelligent

thoughtful discussion, pros and cons. Workers in this country are bright, they will figure it out for themselves, but let us have an intelligent period for thoughtful discussion before we have this important vote.

Mr. WALBERG. Mr. King, the franchise model has created an accessible path to entrepreneurship for many, many Americans, from all walks of life, and cities, and towns across the country. However, H.R. 2474 codifies the Obama NLRB's joint employer standard, which would essentially turn independent franchises into middle managers. That is not what they got into the franchise for, they wanted their own business, and local small business employees, into employees of faraway corporations.

What impact would this have on entrepreneurial opportunity, and on the employees of the enterprise? And also, what might union leaders and trial lawyers prefer, or why might they prefer the Democrats' joint employer standard?

Mr. KING. This bill will have a very negative impact on franchisees. Small businesses entities. There are hundreds of thousands of these startup and successful business entities in every community, subjecting them to litigation, and uncertainty is going to chill the opportunity for them to continue, and certainly chill the opportunity for growth in this area. The only people that benefit from this proposal in H.R. 2474, with respect to the independent contractor and joint employer, are trial lawyers and some law professors that can write articles about the complexities, as Mr. Griffin mentioned as law. This is a terrible idea, as I mentioned in my opening statement. This body rejected that approach and passed a bipartisan proposal that is much fairer and much more even handed. That is where we should go.

Mr. WALBERG. Thank you. I am over time. I yield back.

Chairwoman WILSON. We will now hear from Ms. Wild of Pennsylvania.

Ms. WILD. Thank you, Madam Chairwoman. Thank you to all of you for being here to testify on this very important subject. And in particular, Mr. Alvarez, I would like to thank you for being here today. I assume you are missing a day of pay to be here. Is that correct?

Mr. ALVAREZ. Yes.

Ms. WILD. You are only paid when you are working, driving, is that fair to say?

Mr. ALVAREZ. Yes, that is correct.

Ms. WILD. I have grave concerns about the misclassification of your status with XPO Logistics, which happens to have a significant presence in my district in Pennsylvania.

And I also want to thank the Teamsters and the presence of labor here in our committee room. I am sure they would welcome you, Mr. Alvarez, as a member if you were able to collectively bargain, but you are not able to. Is that right?

Mr. ALVAREZ. That is correct.

Ms. WILD. You don't have that ability because you are classified as an independent contractor. And under the National Labor Relations Act, independent contractors have no rights to organize or collectively bargain. Isn't that right?

Mr. ALVAREZ. Yes.

Ms. WILD. And I don't have enough time here today to go through the criteria for an independent contractor, versus an employee, but I just want to highlight some of the things that you have presented in both your oral testimony and your written testimony, ways that you have told us that XPO dictates your manner of work. And let me just reinforce, XPO classifies you as an independent contractor, notwithstanding the fact that they control all the relations with the customer. Is that true?

Mr. ALVAREZ. Yes, that is correct.

Ms. WILD. They get the customer, they determine the service that is going to be provided, they negotiate the price, and they schedule the pick-up, true?

Mr. ALVAREZ. Yes.

Ms. WILD. The truck that you now own has XPO painted on it, true?

Mr. ALVAREZ. Yes.

Ms. WILD. And you wear a vest when you are driving that says XPO on it, true?

Mr. ALVAREZ. I have it right on me right now.

Ms. WILD. That is what you are wearing now?

Mr. ALVAREZ. Yes.

Ms. WILD. And it does not say Alvarez Trucking, nor could you wear a vest that said that. Could you?

Mr. ALVAREZ. It does not say Alvarez Trucking. It says XPO on it.

Ms. WILD. And if you were to call your business quote, unquote, "Alvarez Trucking," you would not be eligible to drive for XPO. Is that true?

Mr. ALVAREZ. That is correct.

Ms. WILD. And if you don't get enough work from XPO, you can't go solicit another load from some other company. Can you?

Mr. ALVAREZ. No. My contract would be terminated.

Ms. WILD. Thank you, Mr. Alvarez.

So let me ask all of the witnesses. Is there anybody here who disagrees that companies have an economic incentive to classify individuals as independent contractors rather than employees?

Mr. KING. I disagree with that.

Ms. WILD. You disagree with that, Mr. King.

Mr. KING. Yes.

Ms. WILD. I am not surprised that you do. And you believe that there is no economic incentive for an employer, or for a company, such as XPO, to classify their employees as independent contractors?

Mr. KING. We did a study of our members. Most of the largest businesses in this country, their number one reason for subcontracting, or outsourcing was efficiency, productivity, and quality. Only 2 percent mentioned any avoidance of the labor laws. This is a wrong premise.

Ms. WILD. And those members, Mr. King, are exactly the entities that are classifying their employees as independent contractors. Correct?

Mr. KING. Those 2 percent, perhaps. And are we going to write legislation to penalize the rest of the country for a few rogue employers? I think not.

Ms. WILD. So Mr. King, I assume that you agree with the recent NLRB decision in the SuperShuttle case that creates a situation where workers will be considered independent contractors if an analysis is done that says that the worker has an entrepreneurial opportunity?

Mr. KING. Not only do I agree, but the U.S. District Court for the District of Columbia agrees.

Ms. WILD. I am just asking you if you agree?

Mr. KING. Yes, I agree.

Ms. WILD. So you believe then that Mr. Alvarez here has an entrepreneurial opportunity in driving for XPO.

Mr. KING. Well, I looked at the facts of the case, and in all due respect to Mr. Alvarez, they are much more complicated than what you have been shared with this morning.

Ms. WILD. In fact, in the SuperShuttle case, many of those drivers for SuperShuttle were actually subject to noncompete clauses that prohibited them from pursuing entrepreneurial opportunities at other companies, correct?

Mr. KING. There was an element of that. The noncompete issue is a wholly different issue. I would be happy to discuss that with you.

Ms. WILD. Well, wouldn't you agree with me that an entrepreneur should have the opportunity to compete in any possible way? My colleague, Mrs. Foxx, talked about that being the American spirit of competition. And yet, the drivers in the SuperShuttle case aren't allowed to compete.

Mr. KING. They are not allowed to compete in certain areas. When we talk about competition, that is a wide-ranging word. So we need --

Ms. WILD. Thank you. My time is up.

Chairwoman WILSON. Go ahead.

Now we will hear from the esteemed Dr. Roe.

Mr. ROE. Thank you, Madam Chair. And thank all the panelists for being here today. And I want to say to start out, that this is the best economy in my lifetime. It is good to see Mr. Griffin and Mr. King again.

I do want to say just a couple of things before I get started. I think one of the most important things in this free society that we live in is a secret ballot. I put a uniform on and left this country 46 years ago to serve in southeast Asia, to be sure that you had a right to vote how you wanted to. And I say this as a joke. I think my wife votes for me every time I run, but it is a secret ballot, so I don't know for sure. She says she does, but I am not sure that she does. So why shouldn't -- that is how we are elected, how the President is elected, how every legislature is elected, and how union representatives are elected. People voting for the union should absolutely have a right to a secret ballot, period.

Number two, on the sharing of private personal information. As a physician, I tied myself in a knot with HIPPA being sure that I protected all of that information was very private, and patients could release whatever they wanted to. You should be able to do the same thing.

Thirdly, on right-to-work laws, look, it is a right. I grew up in a union household. My dad was in the United Rubber Workers

Union. He was a factory worker and he made shoe heels for BF Goodrich Company, until he lost his job to Mexico. Right now, fortunately those manufacturing jobs are coming back to the U.S. and that is a very good thing for union workers. And we should approve this USMCA. And I agree with my Democratic friends who insisted that Mexican workers can have a secret ballot protection. I agree with that. That was a right and proper thing that they did. I want to share with you just a very -- and by the way, there are 7.4 million unfilled jobs. I had a truck driver walk up to me in a Wendy's the other day in Dandridge, Tennessee. And he said, Listen, this is the best in my lifetime. I made $164,000 driving a truck last year. I have two trucking companies in my district, both of them are begging for truck drivers. And when the President said he was going to block the Mexican border, this trucking company went berserk, and not because of the lost business, they were afraid they would lose their drivers. They had 700-and-something drivers. The most valuable thing in that business was -- were their drivers, their personnel.

When I served as Chairman of the Health Subcommittee in 2015, we heard testimony about the effects of the Obama era, Browning-Ferris joint employer status for Mr. Ed Braddy, who owns a Burger King in inner city Baltimore. And all the men that Mr. Braddy had hired at that store had a run-in with a criminal justice system. All the women he hired had been on some form of government assistance. And he hired people to give them an opportunity at a better life, as he described it.

This ambiguous standard were implemented as the PRO Act would do, the Burger King corporation would be liable for many of the hiring decisions, or maybe Mr. Braddy. Why would we expect any corporation to know a community better than someone local, like Mr. Braddy? Wouldn't a corporate entity be more at risk, adverse, and less likely to give people a second chance, Mr. King?

Mr. KING. That is part of the problem. That is a major problem. How can a local business owner, Dr. Roe, like you described, go through this complex litigation scenario that could put them out of business? This bill is designed, from our perspective, to chill the rights of employers, particularly small employers, small business entities faced with potential fines through the first time in the history of the National Labor Relations Act, faced with the imposition of unionization. This is a back-door card check bill. It will have a potential devastating impact upon the small employers as a practical matter.

Mr. ROE. Mr. King, wouldn't codifying the ABC test and the Obama NLRB joint employer standard at the federal level essentially eliminate the entire franchise industry as we know it, which employs more than 7 million Americans nationwide, including 21,000 in Chairman Scott's district?

Mr. KING. I think the answer is yes. And the reason for that is look at what is happening in California, Dr. Roe. As I mentioned, the California legislature now is reconsidering this entire ABC test. The courts out there are reconsidering it. There is a considerable amount of tension back and forth. The legislative body in California has had to carve out exceptions already, just to have a discussion

about this approach. It is a very poor approach and it should be rejected.

Mr. ROE. I am going to finish, because my time is almost expired, has expired. And I want to thank those folks sitting out there that have their Teamsters shirts on. That is the community I grew up in. I appreciate the hard work you do. And as I said, every American has the right; if they want to organize, they should be able to do that. If they don't, they should also have that right.

I yield back.

Chairwoman WILSON. Thank you. And now the distinguished Chair of the Ed and Labor Committee, Mr. Scott.

Mr. SCOTT. Thank you. Thank you, Madam Chair.

Mr. King, you indicated in your testimony that there are several provisions that would overturn Supreme Court decisions. Could you list those, and state whether or not the Supreme Court ruling was based on statute, and statutory interpretation, or constitutional right?

Mr. KING. I list them, Mr. Scott, in footnote one, the Epic Systems case, the Hoffman Plastic case, Mackay Radio case. And I have added, after reading this, I mentioned Professor Garden's testimony, the Retail Store Employees Union local case, that is the secondary boycott case. All of those cases, from my perspective, thoughtfully reviewed the statutes in question and arrived at the right decision.

Mr. SCOTT. So if it was based on constitutional right, you couldn't overturn it with a statute. If it is based on statutory interpretation, a new act would be okay, constitutionally okay?

Mr. KING. Certainly from a policy perspective, we wouldn't think it would be okay. But I understand your question.

Mr. SCOTT. Thank you. Ms. Garden, if a person was hired by a temp agency and placed at a work site, could you say what the implications of joint employer would be and secondary boycott if there was a picket?

Ms. GARDEN. Absolutely. The first question would be whether the National Labor Relations Board would agree that the work site was the joint employer of these employees. The Browning-Ferris test makes that determination more predictable by allowing reserved or indirect control to be part of the consideration.

So, if you instead required substantial direct/actual control, then you could have a scenario in which the job site has reserved, but not yet exercised control one week. Another week they start to exercise control, and you would have that entity shifting from being not a joint employer to a joint employer. So the Browning-Ferris test is sort of easier to tell at the outset and more stable in terms of whether or not somebody is jointly employed.

Mr. SCOTT. And if they are not a joint employer, you can't negotiate -- you don't have the right to negotiate with them, even though they effectively set the salary by virtue of the contract with the temp agency?

Ms. GARDEN. That is exactly right. And as the Preferred case shows, workers who attempt to influence what the work site pays them and how it treats them, face the sort of very dangerous waters of negotiating what they can and can't say, how they can and can't protest under section 8(b)(4).

Mr. SCOTT. And how does the secondary boycott issue apply to that case, to that situation?

Ms. GARDEN. So in Preferred Building Services, there were sort of two issues that the NLRB talked about. One was whether the workers were in what is known as the Moore Dry Dock set of presumptions. Moore Dry Dock provides a carve-out for workers to engage in some secondary activity, including picketing at a job site, as long as they meet some fairly detailed requirements. The Board found that the workers lost the benefit of that presumption, in part, because they distributed handbills that called on building tenants to try to influence the condition of "their janitors." That choice of pronoun, "their janitors," seems to me to say the janitors who clean your office. Apparently, the Board saw it differently as janitors you employ.

Whatever you think of those two possible interpretations, it is hard to tell in advance what a Board is going to do, and whether or not you are going to retain the protections of the National Labor Relations Act if you are fired as a result of your picketing.

Mr. SCOTT. Mr. Griffin, one of the provisions of the bill allows the imposition of meaningful sanctions. Can you say why the sanctions in present law are not sufficient, and why sanctions such as backpay without reduction based on interim earnings are insufficient?

Mr. GRIFFIN. Yes. Currently, the rule of -- the general rule, if someone is discharged, is that the remedy is backpay, minus interim earnings, and reinstatement. Generally speaking, because of the time that it takes to go through the process and because of the hostility that has been generated as a result of the discharge, the person is likely, or will be offered to waive reinstatement as part of the resolution, so they won't go back to work, number one.

Number two, they have an obligation to mitigate their damages, and because most people work for a living, work paycheck to paycheck, they have to do that. And that work for another employer is counted against the money that is owed to them, so that it is not a very serious deterrent to an employer who discharges someone unlawfully, that they have to pay that difference between what they make as they seek employment elsewhere. So making sure that people are actually paid for the result -- actually get paid and the employer has to pay for --

Ms. WILSON. Mr. Griffin, your time is up.

Mr. GRIFFIN. Oh. My apologies.

Chairwoman WILSON. Thank you very much.

Mr. Taylor.

Mr. TAYLOR. Thank you, Madam Chair. I appreciate this hearing. Thanks to the witnesses.

Mr. King, I just wanted to follow up with Dr. Roe's question earlier about ABC in California. As a state legislator in Texas, I certainly saw, over and over again, the number of new businesses coming to Texas that talked about -- one of the reasons they are relocating is because it is a right-to-work state. And we have certainly been very successful in our job creation in Texas, as companies leave union states to come to a right-to-work State. I am very blessed to wake up in a city, Plano, Texas, it is the highest per capita income city in North America with over a quarter of a million people.

So clearly, we have been successful in creating high income jobs in a right-to-work state. And it could be one of the benefits of America is we have got 50 states, we have a laboratory democracy, we are watching California, those are the ABC test. Would you mind and since H.R. 2474 has the ABC test word for word in it, and it has not yet been adopted as I understand by the state of California, could you take us through what that does and how it works?

Mr. KING. Certainly, I would be happy to do so. The second prong of the test is the one that you should focus on. It states that you cannot be an independent contractor if you provide services that are within the scope of the hiring company. That, by and large, makes virtually anyone that would perform a service for a hiring company, a user company, if you will, an employee, that is very controversial. The other two parts of the test would also have to be satisfied, but really the focus has been on prong two.

Let's just think about that for a minute. A hospital, for example, that brings in individuals that are at a nursing agency, because they have a high census of patients. Those agency nurses under the second prong of that test would be employees, not independent contractors. That has never been the law. That makes no sense. Then this whole premise that somehow employers are using independent contractors to evade the law, per the colloquy we just had, is incorrect. It is not based on fact. Yes, there may be some rogue employers out there. They should be brought to justice if they are misclassifying individuals. We don't support that.

But this economy we have, it is doing so well, it is based on so many different relationships every day. Even the smallest business brings in independent contractors to do a variety of things. They do so for efficiency reasons, productivity reasons. Yes, they do control costs. So the California legislature is starting to see this; we will see where that goes. But no matter what California does, I would submit to you that is not a good way to run our country. The laws in California are some of the absolute worst for employers. And many employers that I worked with over the years as a lawyer exit that State for that very reason.

Mr. TAYLOR. Just to build on that, in my time in Collin County, I have seen many employers using 1099 contractors to take on a particular project they want to develop, particularly with IT space. We have a lot of IT companies there. Hey, I want to build a website, want to build an MIS system. It is a six-month project, it is a one-year project. We are bringing in some 1099 contractors so we can have greater control over what we are actually doing, rather than bringing in a consulting firm, that is sort of doing it off site, they can do it on site with 1099 contractors. That has been very successful for them. We have a lot of extremely well-paid people who are 1099 contractors, who have a very good lifestyle in Collin County doing different MIS projects for different employers.

And it seems like what we are saying is that this would end that, that at least my community, if 2474 became law, that ability of the employers that I have in my district, they wouldn't be able to do that anymore. The ability to use 1099 contractors for specific projects, those people work as 1099 contractors, which is what they want to do, that goes away. Is that what you are saying?

Mr. KING. Absolutely. Either stop it, or lead to litigation and regulatory interference. And that is another dead end for that kind of economic growth.

Mr. TAYLOR. Yeah, this is unfortunate, because I think to have a successful economy, you need to have a sophisticated way to be able to organize. And clearly, we have that now. And this really takes away a whole series of tools that businesses are using, with great success, to the benefit of the businesses and to the employees who are working, and who I have the privilege to represent here in Congress.

Mr. KING. Absolutely. And many individuals prefer to be independent contractors, frankly.

Mr. TAYLOR. Absolutely. Thank you.

Madam Chair, I yield back.

Chairwoman WILSON. Thank you. Mrs. McBath of Georgia.

Mrs. MCBATH. Thank you, Madam Chair. And thank you for each and every one of you who are here giving your testimony today. I am committed to truly protecting the rights of workers throughout this country, while also being mindful of the effect of these laws on small businesses. I have a lot of small businesses within my district. I do not believe that the two are mutually exclusive. Workers' protections make for better, more productive employees, and better business. I do, however, have concerns with actions taken by this administration, and the adverse effects that they could leave on employees and small business owners.

Mr. Griffin, the question of whether a worker is an employee has historically been kind of governed by the common law of agency. The Trump NLRB issued the SuperShuttle decision on January 25, 2019, holding that they would apply the common-law test -- and I am quoting -- "through the prism of whether the worker has entrepreneurial opportunity."

Moreover, in that matter, the Board maintained the drivers in that case were independent contractors, even though they had been required to sign noncompete agreements. First, can you speak to an agreed-upon definition of entrepreneurial opportunity? How would you define it? What legal significance does it hold?

Mr. GRIFFIN. Well. If I may. The controversy over entrepreneurial opportunity between the former Board and the D.C. Circuit and the current Board's decision really turns on whether or not it is a speculative hypothetical opportunity that is never likely to come to fruition, or whether there is evidence that the entrepreneurial opportunity has actually been exercised. And so the Board, in its dispute with the D.C. Circuit in the FedEx cases, it did not say entrepreneurial opportunities shouldn't be considered. It said it should be real exercise, actual evidence, as opposed to hypothetical, speculative, paper documentation of potential opportunity, never to be realized. And one of reasons this is important is that most of these instances that result in these kind of cases are not instances where an independent contractor comes in and negotiates with the customer the terms of the provision of service.

Rather, somebody shows up to do a job, they are handed a document that is entirely drafted by the employer, that has a bunch of provisions that talk about potential entrepreneurial opportunity so they can paper up the independent contractor theory, when, in fact,

there is absolutely no evidence that opportunity is actually going to be exercised. And if the opportunity is going to be exercised, and has been exercised, and there is evidence of that, then that is a legitimate factor to be considered. But this kind of paper-speculative hypothetical business is not really worthy of consideration, in my opinion.

Mrs. MCBATH. Let me ask you also, how can a worker exercise meaningful entrepreneurial opportunity while being prohibited from engaging in competition?

Mr. GRIFFITH. I think the short answer to that is they can't. The notion that you are an entrepreneur, but you can't compete, you can't go out and get other jobs, you have to work for this employer would seem to demonstrate, at least fairly strongly, that you are actually an employee of that employer, not an independent contractor, not an independent business person, not capable of going out, bidding on other jobs, getting other work, seeking other customers.

Mrs. MCBATH. On June 28, 2019, The New York Times reported that within the 600-page-long disclosure document given to perspective Subway franchisees, that the franchisor reserves the right to revise its rules at any time during the term of franchise agreement, and that it can make changes under any condition and to any extent. Subway franchisees could face harm by the overwhelming control exercised by their franchisor.

If the Trump NLRB succeeds in narrowing the joint employer standard, wouldn't that risk giving the franchisor more control over franchisee's employees' terms and conditions of work, while leaving franchisees on the hook for any violations of law directed by the franchisor?

Mr. GRIFFIN. Yes. What the franchisors in this context want is to have their cake and eat it too. They want to be able to control terms and conditions of employment, but have no responsibility. The franchisee is always going to be the employer. The question is whether if the franchisor engages in certain codetermination of wages in terms in terms of conditions of employment, whether they also will be responsible for bargaining and for unfair labor practices.

So, to the extent that you narrow the joint employer definition you leave the small business, the franchisee, holding the bag entirely, and you allow the joint employer, franchisor, to escape liability.

Mrs. MCBATH. Thank you. I yield back the reminder of my time.

Chairwoman WILSON. Mr. Wright of Texas.

Mr. WRIGHT. Thank you. Thank all of you for being here. Mr. King, I represent most of Arlington, Texas. And as most people know, Texans love trucks and freedom, not necessarily in that order. And there is an abundance in Arlington because the largest employer is the General Motors assembly plant, employs over 4,000 people, good-paying union jobs. Fifteen minutes up the road is Dallas/Fort Worth International Airport, one of the largest in the country, again, with a lot of good-paying union jobs. So Arlington is an excellent example of a place where unions not only exist, but thrive in a right-to-work state.

Now, we hear from my friends on the other side that right-to-work laws giving workers the freedom to decide for themselves whether to join and pay a union somehow undermines the right to organize. That would not seem to be the case in Texas. But does giving workers this freedom a choice in any way change the process, the union-organizing process?

Mr. KING. Well, I think it certainly does, Mr. Wright. What this bill does, as you know, is prohibit states like Texas from having a right-to-work law. And that, in and of itself, is a major problem. Further, unions can continue to organize in right-to-work states as you mentioned, and have done so with success. Again, this approach in 2474 is simply a bailout for organized labor in other areas.

And let me just bear in on this right-to-work issue. If this bill passes in your state, an individual that right now has decided, for whatever reason, that she or he does not want to pay union dues or fees, could be subject to termination if the employer and the union insist that fee payment, reduced payment be a condition of employment. So what you will be doing with this legislation, if it passes, is putting people out of work that have strongly held convictions. And back to your point, shouldn't individuals have a right to choose for themselves?

Mr. WRIGHT. That, in fact, is one of reasons that Texas has one of the best economies in the country, and why it is one of the fastest growing states, why people from other states are moving there, companies from other states are moving there. That is one of the reasons. But in your experience, there is no evidence at all, is there, that right-to-work laws somehow undermine the right to organize?

Mr. KING. Not at all, Mr. Wright. In fact, you can make the argument just the opposite way, that when you have an organizing campaign, and the right-to-work option is available, some employees may say, Oh, I might even vote for the union because I won't have to pay fees or dues. It could be used against them for an organizing campaign, because I have seen it.

So there is no correlation whatsoever. The lack of union density in this country, as I pointed out in my testimony, is right back at the union movement. They have not invested the resources or the time. And the facts bear that out. We are at a 75-year low, I believe, regarding the number of petitions filed by unions in this country. And as the testimony points out, less than one-tenth of 1 percent of the eligible workers in this country will have petitioned for last year are organized labor. That is not a story that should be a predicate to support this legislation.

Mr. WRIGHT. Let me shift very quickly to franchises. You mentioned it in your opening statement, Mr. Griffin, just mentioned it a moment ago. Can you elaborate a little bit on the obstacles to even starting a franchise that are presented by this bill?

Mr. KING. Of course there is the capital, and then there is the support, whether it be in bookkeeping, legal structure, what have you. And it is interesting to hear this discussion, because small business owners don't want to be embroiled in this kind of litigation. They don't want to be brought into Fair Labor Standards Act or National Labor Relations Act litigation. They want to run their

business. And the franchisors that I know and work with, they want no part of the day-to-day operation of business, the direct control. I was interested in Mr. Griffin's comment. He's looking for some type of direct control in the independent contractor area, but I don't think that is where he goes on joint employer. What we are saying on joint employer is, there ought to be direct and immediate involvement in the day-to-day business before anyone is a joint employer. So these franchisees, that are small business people, are trying to start a business, they need help, obviously, from the franchisor.

But the reputation and integrity of the brand, training, and auxiliary things should be furnished. But with these kind of laws, you are going to chill that development and that is bad for our economy, bad for your community, bad for everybody involved in this discussion.

Mr. WRIGHT. I would agree. I yield back. Thank you.

Chairwoman WILSON. Thank you, Mr. Wright.

Mr. Levin of Michigan.

Mr. LEVIN. Thank you so much, Madam Chairwoman. And thanks for having this very important hearing.

I want to ask a question of Ms. Garden, but before I get into that, I want to say a couple of things. Mr. Alvarez, we will get justice for you. However long it takes, we will get justice for you and other workers who are denied their freedom of association because of these laws. I just want to tell you that.

Mr. ALVAREZ. Thank you very much.

Mr. LEVIN. And thanks for coming here.

Mr. King, I am just making a comment, but you can turn your mic on if you want. I am disappointed that you would mischaracterize the position of someone who is no longer with us. Mr. Kennedy was the original sponsor of the Employee Free Choice Act in the Senate, as you well know. A bill that would do away with the situation where workers have to have an election against their boss just to decide to have a union at work. And he was a champion of workers' freedom to form unions without that American innovation. And so, I don't really appreciate his name being used to oppose that policy.

Mr. KING. Well, I --

Mr. LEVIN. I am not asking you to respond.

Mr. KING. I worked with Senator Kennedy for many years on the Senate side.

Mr. LEVIN. Sir, I am not yielding you time.

And I want to remind my friend, Mr. Taylor from Texas, who spoke about high wages due to the right-to-freeload laws there. Texas is about in the middle, according to BLS data from 2016, $17.06 hourly wage for median wages. Not one of the top 10 States in these United States is a right-to-freeload State. They are all States with high levels of union representation, and none of them have right-to-freeload laws.

Ms. Garden, this committee has expressed a lot of interest in the future of work. And it is especially interesting to us how that relates to protecting workers' rights amid technological change, the rise of the gig economy, more complex contracting arrangements which have been used purposely by very smart people like Mr.

King to keep workers from forming unions. How does protecting workers' First Amendment rights, in particular, help them to adapt to the changes we are going through in the economy, and protect their right to secure better working conditions?

Ms. GARDEN. So as work evolves and the nature of works changes, we sometimes find ourselves in situations where the law has not yet caught up to those changes. And when that is true, workers are on their own. Sometimes they are best, most immediate recourse involves exercising their First Amendment rights, right: their First Amendment right to engage in picketing, their rights to engage in collective action in order to try to get better treatment from the organizations that are controlling their day-to-day lives and their ability to put food on the table.

Mr. LEVIN. So let me ask you about a particular case. In 2012, Walmart workers without a union and collective bargaining in 100 cities across 46 States participated in short strikes and peaceful protests to fight for better wages and working conditions. These protests did not prohibit anyone from entering a store, or did not interfere with the operation of facilities, and had really zero potential to force a union on reluctant employers or workers. Nonetheless, workers who participated were threatened with penalties under section 8(b)(7) of the NLRA, after Walmart alleged that they were picketing in an effort to force Walmart to recognize the union.

Unfortunately, modern legal doctrine prevents workers from peacefully picketing their employer to encourage recognition of their union. How has the current legal precedent interpreting section 8(b)(7) of the NLRA misconstrued congressional intent behind the Taft-Hartley amendment?

Ms. GARDEN. Thanks for that question. So 8(b)(7) was aimed at so-called blackmail picketing, prolonged shutdowns of workplaces aimed at forcing an employer to accept union representation for employees, regardless of what those employees wanted. That could not be further from a situation like the one you described, where unions picket a store that continues to operate, demanding better treatment for workers. That a complaint in a situation like that could gain a toehold, shows how far the law has drifted from the blackmail picketing that Congress was worried about.

Mr. LEVIN. Thank you so much.

You know, Madam Chairwoman, I just want to say to my dear friend, the Ranking Member from our great State of Michigan, he spoke about the delicate balance that has been created over the decades. The Wagner Act was passed in 1935. There has not been one sentence of federal law added by this Congress since then that helps workers be free to form unions and bargain collectively. The Taft-Hartley amendments in 1947 and the Landrum-Griffin amendments eroded workers' power through their own organizations. And it is high time that this Congress free up workers in this country just to have a union and a better say at work. We will not deal with income and wealth inequality in this country until we do that.

Thank you. And I yield back.

Chairwoman WILSON. Thank you. Mr. Meuser of Pennsylvania.

Mr. MEUSER. Thank you, Madam Chairwoman. Thank you all very much for being here with us.

I am a former business company president, a business owner. I, like many, have many, many good businesses, small businesses throughout my district. Many are union, some are, many are nonunion. I am entirely for, and my reason for being here is to help businesses grow, help family incomes grow, participate in actions to create environments for wage growth, for union and nonunion, low unemployment, and just a fight for people and represent their overall interests in our economy. But there are some concerning points within this bill.

I would like to talk about privacy a little bit and the bill requirement for access to employee's personal data without consent. I don't really necessarily understand the value there. So Mr. King, allow me to ask you: What are the dangers, what are the reasons for such a provision to be in this bill?

Mr. KING. Apparently, the rationale is for access of unions to contact potential voters in a union election. In reality, there is no ability for the employee to opt out, to say that she or he does not want personal information to be shared. There is no protection whatsoever, even if that information is furnished to not have that information be a data breach, or shared with third parties. In this day and age, the union movement has any number of opportunities through social media and other ways to contact potential voters. This is a desperation move, it would appear, on behalf of organized labor. There is no rationale for it. It is a bad idea.

Mr. MEUSER. Like many here, I was at the tail end of my business career, served as president of a company, but I was a driver, I was a builder, I was a credit collector, I was in sales, I was in marketing, I was in, you know, operations. So during the course of that, you become conditioned to appreciate the needs of all workers, everyone. Everyone has different titles and different responsibilities, but you are all part of the same team. That is why I also question why is it when we had the USMCA discussion, an issue arose where in Mexico, the management were the ones against the secret ballot, yet here, the union leadership is against the secret ballot. Mr. King, could you offer your opinion on that?

Mr. KING. It is hard to reconcile. The USMCA negotiations hopefully will result in an approval by this body, but contained in those discussions is the right of the Mexican worker to vote on whether she or he wants to be represented. And as I mentioned earlier, in addition, whether the contract that is being proposed by the Mexican labor union should be accepted. It is really very contradictory. We have this bill that will cut off rights of employees to vote and forced unionization, but just the opposite south of the border.

Mr. MEUSER. Thank you. I am going to yield the remainder of my time to Mr. Walberg.

Mr. WALBERG. I thank the gentleman.

And a lot of things I would like, Mr. King, to allow you to respond to, especially relative to Senator Kennedy and the assertions there. But let me ask you this one question: Under current law, union organizers can make death threats and commit acts of violence free of legal repercussions so long as these actions are taken in the pursuit of "legitimate union objectives." Why is this the case? And would H.R. 2474 change the law relative to this?

Mr. KING. Unfortunately not. That type of rogue activity would still be permitted. And Mr. Walberg, what is interesting, the fines that are suggested in this suggested, not suggested, proposed in this legislation, up to $100,000 only apply to the employer. Unions are not subject to any of the fines for misconduct that are articulated in this legislation. That makes no sense whatsoever. You talk about bias, that is one of the prime examples of this bill. It is only directed at employers, but that strike misconduct still could occur.

Mr. WALBERG. Which does not encourage unionization. I think the beauty of the fact of the numbers going down is a fact that unions have done some great things, and it has gotten better. So thanks.

Mr. KING. Mr. Walberg, I take personal offense of what was just said. I worked for Senator Kennedy when I was --

Chairwoman WILSON. The time is up, sir. You have no time.

Mr. WALBERG. I yield back.

Chairwoman WILSON. I recognize Mr. Courtney from Connecticut.

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

Mr. Griffin, on page 9 of your testimony, you, again, dove into what I think is accurately described as, there is no more controversial issue than the joint employer role, and the Browning-Ferris decision. We have had in numerous hearings over the years on this committee. And I would like to just spend a moment on that issue with you.

So, in 2015, Browning-Ferris decision found that a company can be a joint employer if it has contractual control, or exercises indirect control over another company's terms and conditions at work. This decision was essential to workers who are increasingly hired by staffing agencies and subcontractors performing work for a company that often controls working conditions while evading liability.

Browning-Ferris case was pending review at the D.C. Circuit when the Trump NLRB began its rulemaking to overturn Browning-Ferris. But the D.C. Circuit issued its decision last December. In that decision, it explicitly upheld the Browning-Ferris standard. And it also noted that the question is actually governed by common law, which is not again, confined to indicia of direct and immediate control as the NLRB under the Trump administration was seeking to do.

And it also urged the NLRB against taking the first bite of an apple that is outside of its orchard. So if the current rulemaking is likely at odds with the D.C. Circuit, isn't the Board wasting time and resources that could be better used elsewhere?

Mr. GRIFFIN. I think it is. I thank you for the question. First of all, as you noted, the joint employer question is a common -- the common law standard is applied. And typically, and historically, the common law is something that develops in the process of case-by-case adjudication, and rules emerge based on review of multiple cases. And it is very odd to decide to do a rulemaking proceeding where what you are trying to address is a common-law standard. It is just -- it doesn't comport with a notion of common law number one.

Number two, the D.C. Circuit said in its decision that the Board gets no deference. You know, administrative agencies under the Chevron doctrine got a certain amount of deference under certain circumstances with respect to their decision. And the D.C. Circuit said, Well, as to the common law, that is not the statute, that is the common law, you get no deference to that. And the D.C. Circuit interpreted the common law to include a number of factors that the rulemaking process so far discounts: indirect, reserved control, routine and regular exercise of authority.

And rulemaking is prospective. The Board has a backlog of cases, people who are hurting, who have allegations of unfair labor practices against them, that are awaiting decision. The Board should be deciding those cases and not spending an effort contrary to what the D.C. Circuit said on a prospective exercise.

Mr. COURTNEY. Thank you. I think, again, in terms of just judicial review, obviously, the D.C. Circuit trumps -- to use a bad pun -- the NLRB in terms of a settled issue.

Again, just real quickly, the PRO Act obviously touches on this issue. I mean, that hopefully would bring total clarity in terms of just, you know, the definition of a joint employer rule. Is that right?

Mr. GRIFFIN. What the PRO Act would do, it would essentially codify the Browning-Ferris interpretation of the common law factors, yes.

Mr. COURTNEY. Thank you. And again, I think, as I said, we wasted, or spent a lot of time on this issue. And again, if the common law is organically moving in a direction that the D.C. Circuit embraced, I think, frankly, we should join them in that effort as well with passage of this law.

Again, in my remaining time, again, I just want to thank Mr. Alvarez for being here today and putting a human face on this issue. This is not sort of just a political "who is up, who is down" horse-race kind of issue, this affects real people in real lives. And again, thank you for being here today to really spotlight that.

And with that, I yield back.

Chairwoman WILSON. Thank you, Mr. Courtney. Mr. Allen of Georgia.

Mr. ALLEN. Thank you, Chairwoman.

Mr. King, would you like to finish your comments regarding Senator Kennedy?

Mr. KING. Thank you. Thank you for your courtesy. Senator John Kennedy did, in fact, support the 30-day period between the petition filing and the election. And we will submit that for the record.

[The information follows:]

Mr. Roger King

Submission for the record, US House of Representatives Committee on Education and Labor Health, Employment, Labor, and Pensions Subcommittee on "Protecting the Right to Organize Act: Modernizing America's Labor Laws" –

"There should be at least a 30-day interval between the request for an election and the holding of the election in which both parties can present their viewpoints." – Senator John F. Kennedy (D-MA)

Citation: 105 Cong. Rec. 5361 (1959).

Mr. KING. The second point I wanted to make is I worked in the Senate with the Senate Health Committee many years ago, and had the pleasure of working with Senator Ted Kennedy, including the time he was Chair. My patronage was Senator Robert Taft, Senators Taft, and Javits, and Kennedy worked together. So I do have a strong admiration for the Kennedy family. Thank you for your courtesy, sir.

Mr. ALLEN. Mr. King, Georgia is a right-to-work state. We have been named the best state to do business in the last six years to locate your business. Our reasons for that, obviously, a skilled workforce is usually number one. So workers have a choice in Georgia. But it was interesting, just this week, the presidential campaign of a leading socialist Democrat, they cosponsored the Senate version of H.R. 2474 was hit with an unfair labor practice charge for recommending a pay raise amidst collective bargaining negotiations. If this situation occurred with H.R. 2474 signed into law, and the charge was upheld, could Senator Sanders' presidential campaign be assessed a civil penalty costing tens of thousands of dollars, simply for trying to reward its employees with a pay raise?

Mr. KING. Certainly, Mr. Allen, that would be a distinct possibility. And I think this goes to show that our Nation's labor laws are affected, they do work, they are alive, they are well. And even someone at that level in our political system has to abide by them.

Mr. ALLEN. The workplace changes, in fact, the business world changes because of the e-commerce, and just everything moves rapidly. And so does -- the workplace looks much different than it did years ago, and so do benefits, so on and so forth. Much of what the unions fought for has been codified into law, eliminating issues from consideration and collective bargaining.

One of the things unions still pride themselves on are healthcare plans that they negotiate for their workers. The Democratic member of this committee has introduced legislation cosponsored by nearly 120 House Democrats to ban private health insurance, including union plans, and force every American on to a government-run healthcare. How might banning union healthcare plans in a government takeover affect the value of unions for workers?

Mr. KING. This is another very poorly thought-out idea. The H.R. Policy Association, where I am counsel, works closely with our member companies, and we have found consistently that employer-sponsored health plans are popular, and are very much desired by the employees. And I believe as someone said recently, if you turn anything over to the government, totally, you have issues and that is exactly where we would be headed.

So I can say on behalf of the H.R. Policy Association, and its member companies, and their employees, we should continue with our highly favorable and well-received employer sponsored healthcare plans in this country.

Mr. ALLEN. And then finally, with the remaining time, union allies insist that right-to-work laws, giving workers the freedom to decide for themselves whether to join and pay a union to undermine the right to organize. Has giving workers this freedom of choice in any way changed the union organizing process?

Mr. KING. I have not seen any data, Congressman, that would connect the two thoughts. I don't know of any data that says right-

to-work undermines union organizing. In fact, it can be just the opposite as I mentioned in a colloquy with one of your colleagues. I think this is another fallacy that is being stated here to support this legislation.

Mr. ALLEN. Well, we have the greatest economy in the world, every business I have talked to is looking for workers. I think, obviously, it is a great opportunity for those in the work. I tell young people I have never seen opportunity like this before in my lifetime. So we are grateful for that. And thank you, and I yield back.

Chairwoman WILSON. Ms. Underwood of Illinois.

Ms. UNDERWOOD. Thank you, Madam Chair. I am so glad that we are having today's hearing as part of the committee's ongoing work to protect the basic rights that American workers have fought so hard to win.

I would like to thank Mr. Alvarez for sharing his story, and for so clearly describing the American Dream, and the challenges and opportunities that you have gone through in your career. And I appreciate your willingness to share it with the committee today. Thank you.

I am incredibly proud to cosponsor the Protecting the Right to Organize Act. We know that unions provide an essential foundation for working families in Illinois's 14th District and across the country. Recent research from the University of Illinois, for example, highlights the link between unions and better wages for all workers, even those who are not union members.

And so, Mr. Griffin and Ms. Garden, in addition to better wages, how do labor laws that empower unions that benefit workers including -- I am sorry. How do labor laws empower unions that benefit workers, including those that aren't union members?

Ms. GARDEN. Thank you for that question. So I guess I would emphasize that labor laws protect workers including non-union workers by protecting their rights to engage in collective activity at work, even short of electing a union to represent them in bargaining. That can mean things like talking with their coworkers about how much they earn, which could reveal discrimination and pay practices that workers can then either take to their boss and try to remedy, or take to court, if that is appropriate.

When employers are aware that employees have the right to talk to each other, it can also encourage them to behave better.

Ms. UNDERWOOD. Thank you. And Mr. Griffin.

Mr. GRIFFIN. The classic example of collective action in a nonunion workplace is a fairly old Supreme Court decision called Washington Aluminum, where people were working in a very cold environment and they wanted heat. It was a complete nonunion workplace. So, they walked off the job to force their employer to provide heat in a frigid workplace; and they were discharged. And the Supreme Court, in an opinion by Justice Black, said they were engaging in conduct that any civilized country would recognize as lawful, and the Supreme Court agreed with the Board and ordered the reinstatement.

So, to Professor Garden's point, even in an unorganized workplace, the right to engage together to address workplace concerns, immediate workplace concerns, is protected under the National Labors Relations Act, and very importantly so.

Ms. UNDERWOOD. Thank you. Some 60 percent of Americans have a favorable view of unions, and some 48 percent of workers who are not in a union would like to belong to one. However, only 6 percent of private sector workers belong to a union.

Mr. Griffin, why is there such a wide gap?

Mr. GRIFFIN. I think there is essentially two reasons: Organized corporate opposition, which manifests itself in both legal opposition and illegal opposition: threats, firing, and things like that. And the law's inability to translate, to provide an efficient mechanism to translate people's desire to be represented by a union into actual union representation. So, I think there is really two reasons for it.

Ms. UNDERWOOD. Strong laws that protect and empower workers must ensure that workers are clearly informed of their legal rights.

Ms. Garden, in your testimony, you state that it is difficult for anyone who is not a labor lawyer to know what is allowed and what is not under Section 8(b)4 of the NLRA. How will be the PRO Act bring clarity to this area of law?

Ms. GARDEN. Great. Thank you.

So, Section 8(b)4 is worded in complex language. The NLRB's own website calls it mind-numbing. That level of complication is exacerbated by, you know, several decades now of Supreme Court and Board decisions putting glosses on 8(b)(4), often to attempt to save the statute from unconstitutionality.

So, that means not only do you need to read and understand this complex language, you then need to read a whole stack of Board and court decisions to know what you can and cannot do.

This isn't a problem that can be solved by tweaking 8(b)(4), and so, the PRO Act appropriately just goes back to the drawing board by getting rid of it.

Ms. UNDERWOOD. Thank you all so much to our witnesses for being here today, and for our friends in the audience who fight so hard on behalf working families every day.

We just heard one of our colleagues from another State lift up that State as a great place to do business, and yet, workers don't have the right to organize. They don't have the right to come together and bargain for safe workplaces or vacation days, as Mr. Alvarez said; and that, to me, cannot be a great place to do business. We are talking about a place that limits women's reproductive rights. That cannot be a great place to do business, and so here in the House, I am so glad that we have an opportunity to support legislation like this.

And with that, Madam Chairwoman, I yield back.

Chairwoman WILSON. Mr. Keller.

Mr. KELLER. Thank you, Madam Chair.

And I would like to thank the panel for being here today. Looking at H.R. 2474, the Protecting the Right to Organize Act, Modernizing America's Labor Laws, people do have a right to organize, and they also have a right not to organize if they wish not to.

And that is what, Mr. King, I would like to sort of focus on a little bit. There has been studies that show 90 percent of workers are represented by a union today that have never voted for that union to represent them in the first place. Last Congress, committee Republicans held several hearings on legislation reforming the National Labor Relations Act and the Labor Management Reporting

and Disclosure Act to make unions more transparent and accountable to their membership.

Drawing from your background and experience, what are your thoughts regarding the relationship between labor union accountability and transparency and the steady decline of unionization in this country?

Mr. KING. There is a great schism. I am familiar with the study you mentioned. It is a Heritage Foundation study where 90-plus percent of the workers that are represented today never had an opportunity to vote.

As we have talked about here today, Mr. Keller, there is less and less resources apparently being devoted by labor organizations to organizing and member opportunity, and more for political activity, which leads to the worker, the union member, not having the attention that she or he should from their organization.

I would disagree with Mr. Griffin in that the stats are clear that we have a low, a 75-year low, of union petitions being filed in this country; and as mentioned a couple of times already today, less than one tenth of 1 percent of the eligible workers in this country were sought for membership in 2018. So, there appears to be a great disconnect. I don't know necessarily why. I will leave that to the labor union leaders, but I think your question is spot on.

Mr. KELLER. Are there any things contained in H.R. 2474 that would reform or make reforms that make unions more accountable to and transparent to their membership?

Mr. KING. I could not find any. As I mentioned previously, all of the legislative proposals in this bill harm employees and employers, including only fines on employers. It is a very one-sided proposal.

Mr. KELLER. You mentioned fines on employers. H.R. 2474 undermines the original intent of the National Labor Relations Act by imposing severe monetary penalties, up to a $100,000 on employers for unfair labor practices, including on individual officers. Unions can also commit unfair labor practices under the NLRA such as earlier this year when the United Food and Commercial Workers Union tried to punish a worker for choosing to work rather than participate in a strike.

What are some other unfair labor practices unions can commit?

Mr. KING. Failure to refer in a hiring hall situation and an individual that does not agree with the union for work; failing to permit a rational way for a member to resign, we have had numerous recent cases on that; failure of the union to permit our democratic process of voting; failure of the union to permit an individual to be a dissident and oppose the union and retaliation for such resistance; failure to provide duty of fair representation for the individual member in grievances and arbitrations. That is just a partial list.

It is really remarkable to me, Mr. Keller, that this legislation ignores totally any type of sanction on the union. And, finally, per your point, not only do we have fines, this bill also proposes punitive damages and attorney's fees, again, only against employers.

Mr. KELLER. That actually answered my last question because my question was: Does the bill apply the same punishments to unions and union bosses found guilty of unfair labor practices as

it levies on employers? And I guess the answer is -- the answer is no on that.

Mr. KING. And, Mr. Keller, if we are going to go down this path of putting civil penalties in the National Labor Relations Act, which I submit is not a good idea, but if we are going to go down that path, let's do it on an equal basis. Let's at least hold that rogue union responsible, just like the rogue employer. We do have outliers. There are certain unions and employers in this country that need to be held accountable, but this is not the solution.

Mr. KELLER. I would agree with that, and I thank you for that.

I just want to make the important point that people in this country do have a right to assemble. They also have the right not to assemble and not to associate, and I think this bill goes a long way in taking rights away from people to freely assemble or not associate with certain organizations.

I yield back my time. I thank you.

Chairwoman WILSON. I thank you so much.

Mr. Morelle of New York.

Mr. MORELLE. Thank you, Madam Chair, for holding this important hearing.

And thank you to all the witnesses for being here to share your expertise.

I grew up in a strong union home. My father was a proud lifetime member of the Plumbers & Pipefitters Union Local 13 in Rochester, New York, which instilled in me and my family a deep appreciation for the benefits that unions provide American workers across the country. However, for decades, we have seen the erosion of workers' rights to organize and collectively bargain, which is why this hearing is so important.

So, on behalf of my constituents in the 25th Congressional District in New York, and the working men and women throughout the country, I am proud to support the committee's work to advance legislation that protects fundamental rights of the Nation's workforce.

I have a couple of different questions. But first, if I could just start -- and I think perhaps, Mr. Griffin, this might -- you might be able to help me with this. I thought I heard earlier, or there seemed to be the suggestion made that workers who engage in violent behavior when picketing somehow have some protections in this bill, or could not be prosecuted. I don't think that is true. I know there has been bills introduced, designed to outlaw what I think is already illegal threats, robbery, physical violence.

Is there anything that you know of that protects a worker from engaging in otherwise unlawful activities that relates to organizing?

Mr. GRIFFIN. No, I think -- thank you for the question.

No. I think what was being referred to was anyone who engages in violent activity is prosecutable under various statutes, certainly prosecutable under State law; and there is nothing in this bill that addresses that in any way, shape, or form.

I think what was being referred to was a decision in the Supreme Court under the Hobbs Act, the Enmons decision, which addresses whether, in addition to all the other ways you can be prosecuted, you can also be prosecuted under the Hobbs Act if you are

a union member or agent, or for engaging in violent activity in the course of achieving a legitimate union objective, which was, in that instance, a collective bargaining agreement. But there is nothing in this bill that addresses that one way or the other.

Mr. MORELLE. Good. I just wanted to make it clear, Madam Chair, and to the members that -- I just wanted to clear that up that there is no blanket protection for people engaged in otherwise illegal or unlawful activities.

I want to go back, because there are barriers that often restrict Americans from taking collective action for better wages and benefits. When the NLRA was amended in 1947, it put in place substantial restrictions, as I understand it, on workers' free speech rights; and many of these have enabled the National Labor Relations Board to prosecute workers in situations where they were peacefully seeking to improve labor conditions.

And we have seen crackdowns on even the simplest form of collective bargaining actions organized by employees, and I wanted to point out one example that occurred recently in the case before the NLRB between the International Brotherhood of Workers, IBEW Local 357, I believe, and the Desert Sun Enterprise Limited. In the case, NLRB ruled that Local 357 made an unqualified threat simply because it had copied a second company on a letter regarding its plans to hold a picket at a common situs shared with the company the union had a dispute with. And they were deemed to be wrong, because the union did not provide a Moore Dry Dock assurance.

I noticed, Professor Garden, you identified and addressed earlier, both in the conversation with Chairman Scott and in your testimony, the Moore Dry Dock assurance. But in my view, it violates basic freedom of speech rights, because it means a union's advanced notice of picketing may violate the law, even if the actual picketing is completely lawful.

And I wonder -- the ruling denied, by the way, IBEW workers, their fundamental right to take collective action against an employer that paid its employees for far less than the area standards confirmed by the local labor commissioner's wage determination for electrical work.

So, if I can ask you -- and I apologize, you are going to have to have a quick response. How does that Moore Dry Dock standard impact workers' right to take collective action? Could you just describe that?

Ms. GARDEN. Absolutely. Well, the case you are talking about reveals this sort of fundamental irrationality, right? So, a union sends a letter to a neutral employer, says, you know, maybe it is just a heads-up, right, we are going to be picketing a struck employer at your site.

Mr. MORELLE. And that is a requirement of the law, or of the standard?

Ms. GARDEN. Well --

Mr. MORELLE. This --

Ms. GARDEN. So, the picketing would have to comply with these Moore Dry Dock factors in order to be entitled to this sort of safe harbor. The union can have every intention of intending to comply and -- I apologize for going a little bit over -- just may, nonetheless,

find that it has committed an unfair labor practice, because it didn't know it had to say oh, and we are going to follow the law, right, something we don't usually say when we are conveying information to another person.

Chairwoman WILSON. Thank you.

Mr. MORELLE. Thank you, Madam Chair.

Chairwoman WILSON. Ms. Stevens from Michigan.

Ms. STEVENS. Thank you, Madam Chair.

And thank you to our witnesses for the second hearing on the PRO Act that we are having here today. For many of us, this is what we came here for.

I, coming from southeastern Michigan, a rich and profound history of labor traditions, the birth of our middle class, and the movement forward, join my colleagues in support of this legislation, and also, the opportunity to promote a 21st century labor movement that allows us to embrace the future of work and its changes to regional economies, like the one I represent.

As the cochair of the Future of Work Task Force in the New Democratic Coalition, we are laser-focused on how to make sure the rules around labor standards and work meet the realities of this 21st century economy, and as work continues to evolve -- and it is also something that I monitor closely as a member of the Science Committee -- and new types of worker arrangements emerge, we must critically examine how the test for employment interact with the ability for small businesses, emerging tech companies, and tech companies writ large, to succeed in innovation and employment growth as this legislation moves forward.

So, Ms. Garden, I note that there is multiple exemptions that are being sought to this ABC language, some of which is at the State level. How can we ensure that employers have these clear and reasonable instructions to classify employees while also maintaining protections for workers?

Ms. GARDEN. I mean, the ABC test is really very clear. People, it will help people to know whether they are an employee or whether they are an independent contractor when they start work. The previous test, the sort of multifactor test from the restatement of agency, leads to gamesmanship. It leads to protracted litigation as the sort of multiyear litigation over whether FedEx drivers were independent contractors are not revealed. So, the ABC test, I think, really sort of helps everybody plan for the future by making it clear who is an employee.

Ms. STEVENS. And so just to be clear, does collective bargaining allow employers flexibility in what they can bargain for at the table with their workers?

Ms. GARDEN. Oh, absolutely. There is no such thing as a one-size-fits-all collective bargaining agreement. That is the nice thing about a system of private ordering like bargaining.

Ms. STEVENS. And, Mr. Griffin, your testimony discusses the value of protecting rights under the NLRA but what -- but those rights have not been obviously fully exercised under, you know, a number of cases and maybe for some reasons.

If you had to prioritize, what are the top three weaknesses in the NLRA that would make the law more effective in protecting the rights of workers to organize and collectively bargain?

Mr. GRIFFIN. Well, I think many of them are addressed in this legislation; and the reason that they are addressed is because they are not just my view, but they are pretty much consensus view.

The first is the coverage of how many workers are covered. There are a lot of different exemptions, and there is the independent-contractor-complicated test that doesn't allow for coverage of a lot of people who really are properly classified as employees.

Secondly, the remedies under the Act are weak, and really don't penalize employers sufficiently for engaging in unlawful conduct.

And, third, there is a lack of people's understanding of their rights. People don't know what their rights are, and this law joins many of the other federal labor standards law by adding a specific notice posting provision that requires people to be advised of their rights in the workplace.

Ms. STEVENS. Yeah, great. Thank you. Those are my questions.

I yield back the remainder of my time.

Chairwoman WILSON. Thank you so much.

And now, since all of the committee members have spoken, let's welcome Mr. Kennedy of Massachusetts.

Thank you.

Mr. KENNEDY. Thank you, Madam Chair. I am grateful for the opportunity to join you today. Thank you for holding this important hearing and for this critical piece of legislation.

Over the past four decades, our economy has shifted dramatically. Companies and corporations have opened, shuttered, and opened again. Jobs have moved, jobs have changed, and some have vanished. But if there is a defining theme over the past four decades, it is the systematic assault on worker clout that is leading to stagnant wages, historic economic inequality, and all undermined by a sustained attack on union labor and bargaining rights.

While CEOs, on average, make 287 times more than those they employ, a minimum wage worker cannot afford a two-bedroom apartment in any corner of our country. That is a crisis, a crisis that will only grow worse if this government continues to turn a blind eye or, even worse, continues to roll back protections for workers; and no one in this country will feel that pain more acutely than contract workers who are denied decent protections and benefits.

At a moment when we are only years away from potentially half of American workers being classified as contract workers, we are on the precipice of an economic disaster. Instead of pointing to market forces and ceding influence to corporations, it is time that Congress stepped forward, protect our economy, protect those employees.

So, Mr. Alvarez, to begin, do you know the personal stake that the XPO CEO has in your company?

Mr. ALVAREZ. No, I don't.

Mr. KENNEDY. About $2 billion.

Do you know how much he directed his company to spend in a stock buyback this past year?

Mr. ALVAREZ. No, I don't.

Mr. KENNEDY. About $2.5 billion.

Do you or any other additional contract workers, your colleagues, benefit from the -- did they benefit at all from that stock buyback through a bonus or a raise?

Mr. ALVAREZ. No.

Mr. KENNEDY. A dime of that $2.5 billion?

Mr. ALVAREZ. No.

Mr. KENNEDY. Mr. Alvarez, if I can ask, if you were to be classified as a full employee from XPO, which, if I understand, you wear XPO clothing labeled with XPO, do you not?

Mr. ALVAREZ. Yes.

Mr. KENNEDY. And if you were actually classified as a full employee of XPO, how much more would you earn annually?

Mr. ALVAREZ. That is something the coworkers will bargain for.

Mr. KENNEDY. And would XPO contribute to any sort of retirement account for you?

Mr. ALVAREZ. What was the question?

Mr. KENNEDY. Would you be able to benefit from a retirement account if you were a full-on employee?

Mr. ALVAREZ. Yes.

Mr. KENNEDY. Do you know how much they would make in that contribution?

Mr. ALVAREZ. No, I don't. That was something we would bargain for.

Mr. KENNEDY. But at the moment, because, you are not actually a full employee, but you are a contract employee, you wear their apparel but do not benefit from that arrangement?

Mr. ALVAREZ. Correct.

Mr. KENNEDY. So, let me start with Ms. Garden.

Professor, I would like to talk to you about an emerging industry and the workforce it employs, our tech sector. Google employs over 200,000 workers today. More than half of those workers are classified as temporary workers or contractors. Facebook employs roughly 15,000 contract moderators globally, many working in poor or even dangerous conditions, doing some of the worst content that exists on the Internet with very little support, resources, or even job security.

So, Professor, could you explain to me how the PRO Act and the end of employment classification could help us prepare for this new workforce?

Ms. GARDEN. Yeah, absolutely.

One thing that has changed as work has evolved is the sort of technology that companies use to control how work is done in ways that the company say don't require them to take responsibility for the welfare of those workers. So, the PRO Act would help to change that by adopting a clear definition of who is an employee that comports with most people's sort of understanding of what their job is and who they work for.

Mr. KENNEDY. Mr. Griffin, same question to you.

Mr. GRIFFIN. I would give essentially the same answer.

I think that if Google is classifying people as contractors, and if those people would be employees under the -- likely be covered by the National Labor Relations Act, if they were determined to be not independent contractors under the ABC test, then they would be able to exercise rights that they are not able to exercise currently.

Mr. KENNEDY. Have you seen, in your opinion, sir, an erosion of workers protections, worker clout over recent American history?

Mr. GRIFFIN. Yeah, well, I think what we -- what I saw, I had a number of cases when I was the General Counsel that involved gig economy employers that had classified people as independent contractors, and I would note that in no instance did they come forward and produce a legal opinion that went through the 10 factors and said we considered this before we classified the people. They just started out on the theory that they wouldn't treat them as employees. They would not provide them benefits or the protections of the National Labor Relations Act; and so, yes, I have seen that in a number of gig economy --

Mr. KENNEDY. All this at a time when corporate profits are at a historic high?

Ms. GARDEN. The facts are what the facts are.

Mr. KENNEDY. Thank you.

I yield back.

Chairwoman WILSON. I thank you.

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 last day of the hearing, preferably in Microsoft Word format. The materials submitted must address the subject matter of the hearing. Only a member of the committee, or an invited witness may submit materials for inclusion in the hearing record.

Documents are limited to 50 pages each. Documents longer than 50 pages will be incorporated into the record via 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. What we have heard is very valuable. Members of the committee may have some additional questions for you, 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: letters from the Amalgamated Transit Union, the Labors' International Union of North America, and the United Steel Workers in support of the PRO Act.

Without objection, so ordered.

[The information follows:]

Amalgamated Transit Union

10000 New Hampshire Avenue, Silver Spring, MD 20903-1706
(301) 431-7100 Fax (301) 431-7117

Office of the International President

July 15, 2019

Dear Representative:

On behalf of the Amalgamated Transit Union (ATU), the largest labor organization representing transit workers in the U.S., I am writing to urge you to become a cosponsor of the *Protecting the Right to Organize Act of 2019* (H.R. 2474).

Public transit employees work under difficult circumstances. Bus drivers work long shifts, refraining from drinking water because they don't get adequate time to use the restroom. They frequently get assaulted by angry passengers who don't want to pay increased fares for reduced service. Transit maintenance employees do their jobs under dangerous conditions, from the garages they work in, to the tools they use, to the air they breathe.

Often times when low paid transit employees attempt to improve their standard of living by joining a union, they are thwarted by ruthless multinational companies which do everything they can to squash workers' dreams, and current U.S. Labor Laws enable them to do so.

Private transit employers regularly violate the National Labor Relations Act (NLRA) with no consequences. Workers are forced to attend "captive audience" meetings whose sole purpose is to convince them to vote against the union. Companies place massive pressure on workers living in poverty with their families and tell them lies about what it means to join a union.

Sometimes, the companies hide behind definitions in the law to get their way. Earlier this year, in the case of *SuperShuttle DFW, Inc. v. Amalgamated Transit Union 1338*, the National Labor Relations Board (NLRB) ruled that a shuttle company's drivers were correctly classified as independent contractors, making it difficult for gig-workers to be classified as employees under the NLRA because protected bargaining is only granted to traditional employees.

Moreover, even when workers actually vote to join a union, the companies still contest valid elections and work ruthlessly to decertify the bargaining unit and bust the union before they get a chance to negotiate a first contract. It never ends, and it is not a fair fight.

The PRO Act would modernize the NLRA by bringing its remedies in line with other workplace laws, imposing appropriate financial penalties on companies that violate the code. It would also establish a process for mediation and arbitration to help the parties achieve a first contract, making the freedom to negotiate a reality for countless workers who form unions but never get to enjoy the benefits of a collective bargaining agreement. It would generally provide a more level playing field so that an increased number of workers could join unions and have a better chance to successfully fight for their wages, benefits, and working conditions.

On behalf of the members and potential future members of the ATU living in your congressional district, we urge you to cosponsor and work to pass H.R. 2474. Thank you for your consideration of our views. If you have questions regarding this information, please ask your staff to contact Jeff Rosenberg in the ATU Government Affairs Department at (202) 309-4108 or jrosenberg@atu.org.

Sincerely,

John A. Costa
International President

Affiliated with American Federation of Labor and Congress of Industrial Organizations and Canadian Labour Congress

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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August 7, 2019

The Honorable Frederica Wilson
Chairwoman
Subcommittee on Health, Education, Labor, and Pensions
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Tim Walberg
Ranking Member
Subcommittee on Health, Education, Labor and Pensions
2101 Rayburn House Office Building
Washington, DC 20515

Dear Chairwoman Wilson and Ranking Member Walberg,

I write in my capacity as General President of the International Brotherhood of Teamsters (the "Union") to provide additional comments in support of the Protecting the Right to Organize Act ("PRO Act").[1] As has been stated, the PRO Act is the most comprehensive attempt to-date to amend the National Labor Relations Act ("NLRA").[2] Our country has never needed this legislation more than it does right now because the system is broken. Rather than advance the goals and ideals that led to the passage of the NLRA in 1935, the NLRA has been misused as a sword that employers can wield against unions and employees to stifle their right to improve working conditions through collectively bargaining. Without immediate intervention, collective bargaining will continue to decline, leading to increased wealth inequity and the eventual disappearance of the middle class.

Josue Alvarez, a commercial truck driver, gave powerful testimony to this Committee about how the broken labor law system makes it impossible for him and his family to persevere. He described the sham arrangements that trucking companies at our nation's ports employ to exploit workers—completely controlling every aspect of their drivers' work, and passing on every single conceivable operating expense to the drivers. Josue explained how both he and his father—an immigrant from El Salvador—work exclusively for the multi-billion dollar global logistics company XPO. Yet, despite the profits that XPO brings in, Josue and his father have to work 14 hours straight just to make ends meet. Although Josue is just one example, he is representative of tens of thousands of drivers at our country's ports—and millions of workers across the country—who are being hurt by the current state of labor law.

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[1] H.R. 2474, 116th Cong. (2019).
[2] National Labor Relations Act of 1935, Pub. L. 74-198, 49 Stat. 449.

One of the most malevolent aspects of labor law as it is applied today—and the aspect that this comment will focus on—is the fact that employers are able to deprive Josue and similarly situated workers of any protection under the NLRA merely by labeling them "independent contractors," even where there is no evidence that the workers in question actually operate their own business and even where the employers maintain complete control over the work performed by these workers. This sham is particularly pernicious because the employees who are most often sucked into such abusive arrangements are immigrant and low-income individuals whose only asset is their labor and who are often dissuaded from demanding change because of a fear of losing the only thing that allows them to put food on the table. These are the types of employees the NLRA was intended to protect, and it is unacceptable that employers continue to get away with excluding them from its protections.

The PRO Act would directly address Josue's situation—and that of millions of similarly situated workers—by providing explicit guidance for who is covered by the NLRA and entitled to the NLRA's protections. The clear and dispositive three-factor test contained in the PRO Act, which will replace the nebulous multi-factor test currently in effect, respects decades of precedent while restoring the NLRA's original purpose of creating a level playing field between workers and the employers upon which they are completely dependent, no matter what employers attempt to call those workers or what subterfuge they employ.

I. The National Labor Relations Act Was Initially Intended to Help Workers by Promoting Collective Bargaining

In the early 1900's, labor unrest spanned the country and violence was regularly employed against labor activists. Employees were subject to unconscionable working conditions with little to no protection against exploitation or unsafe working conditions. All too often, companies were allowed to perpetuate a form of indentured servitude through the use of company towns used to keep captive populations of workers perpetually indebted to the company, making them powerless to demand improvements to their working conditions. In the middle of the Great Depression, Congress passed the NLRA, explicitly recognizing that unions and collective bargaining were integral to improving the lives of workers across the country.

In introducing the NLRA, Senator Robert F. Wagner warned that employers' economic power would pose "a great danger to workers and consumers if it [were] not counterbalanced by the equal organization and equal bargaining power of employees."[3] Expressing a sentiment that applies with equal force today, he argued that equal economic bargaining power was "the central need of the economic world today" and was necessary "to insure a wise distribution of wealth between management and labor, to maintain a full flow of purchasing power, and to prevent recurrent depressions."[4] In other words, Senator Wagner believed that the NLRA was essential for promoting a prosperous economy and fighting income inequality by ensuring that employees are given the right to organize and pool their bargaining power.

This purpose was reflected in the legislation itself, which recognized that the imbalance of bargaining power "ha[d] rendered the individual, unorganized worker helpless to exercise actual

[3] 78 Cong. Rec. 3443 (1934) (statement of Sen. Wagner).
[4] *Id.*

liberty of contract, to secure a just reward for his services, and to preserve a decent standard of living, with consequent detriment to the general welfare and the free flow of commerce."[5]

Because the rights of workers were so central to a prosperous society as a whole, the NLRA made it Congress's express policy to:

> [E]ncourage the establishment of uniform labor standards, and to provide for the general welfare, by removing the obstacles which prevent the organization of labor for the purpose of cooperative action in maintaining its standards of living, by encouraging the equalization of the bargaining power of employers and employees.[6]

As a way to achieve this goal of balanced bargaining power, the NLRA guaranteed workers the "right to self-organize, 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."[7] It also obligated employers to bargain with employees who have voted to come together as a union.[8] The passage of the NLRA led to a strengthening of the middle class in our country through increased unionization and collective bargaining.[9] Had this trajectory continued, it is likely that we would be living in a world with real bargaining power for employees and much less income inequality.

The successes of the 1935 NLRA were short-lived, however, because in 1947 Congress passed the anti-union Taft-Hartley amendments to the NLRA.[10] These amendments backtracked on many of the guarantees of the original NLRA and created new prohibitions on union conduct. They also opened the door to employers' conducting virulent anti-union campaigns under the auspices of the First Amendment; conversely, the amendments infringed on unions' First Amendment rights by limiting what unions could say during labor disputes (the prohibition on so-called secondary activity, for example). Most importantly for purposes of this comment, the amendments narrowed the NLRA's reach by, for the first time, explicitly excluding "independent-contractors" from the NLRA. This left "independent contractors" without any right to improve their working conditions through collective bargaining. Had a properly narrow definition of "independent contractor" developed since 1947, this might not have been an issue. Such a definition did not develop, however, and instead we have been stuck with a flawed test that has been used to continually shrink the NLRA, often based on the ideology of specific members of the National Labor Relations Board (the "Board").

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[5] S. 2926, 73d Cong. § 2 (1934) (NLRA as introduced in Congress).

[6] *Id.*

[7] NLRA § 7, 49 Stat. 452.

[8] *Id.* § 8(5).

[9] *See* GERALD MAYER, CONG. RESEARCH SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 22-23 (2004) (showing an increase in union density from approximately 7.5% in 1930 to well over 25% in 1945).

[10] Labor Management Relations Act of 1947, Pub. L. No. 80-101, ch. 114, 61 Stat. 136.

II. The Growing Problem of Misclassification and the Evils It Brings

It is true that the NLRA should not cover every single working relationship that can exist in the real world. When an office hires a caterer for one party, or a homeowner hires a plumber for a single repair, the NLRA should not ordinarily apply to those engagements. Unfortunately, these types of workers are not the only ones who are being labeled independent contractors and excluded from the NLRA's protections. Instead, the test used by the Board is so open-ended that employers can throw employees' status into question by merely giving them the tiniest bit of insignificant "freedom" at work and calling them independent contractors.

Even if the employee's status is eventually vindicated, the employer's claim will lead to years of litigation—which workers often cannot afford to pay or wait for—during which the workers will have absolutely no protection. In the modern economy, this issue often arises in the context of the "gig" economy, where entire industries and platforms have proliferated based on the lie that the individuals working for Uber, or Lyft, or Task Rabbit are completely independent businesses who have inherent bargaining power and therefore do not need the protections provided under the NLRA. This innovative form of misclassification prevalent in new gig-economy companies has its roots in traditional industries such as trucking, where for years businesses have increasingly structured themselves to perpetuate the myth that their workers are independent contractors, allowing them to bypass the decades of labor and employment protections that have been developed by Congress and localities.

Josue Alvarez's testimony is the perfect encapsulation of this phenomenon. Josue and his father work *exclusively for XPO*, for prices *set by XPO*, they deliver cargo *only for XPO's customers*, to the location and on the schedule *set by XPO*, and XPO retains the right to end their working relationship at any point. Any way you cut these facts, it is clear that Josue and his father are completely dependent on XPO and, on their own, have absolutely no bargaining power. It is illogical that the NLRA does not employ a test that makes it clear that such workers are employees, without the need for years of litigation. This fundamental flaw in the NLRA means thousands upon thousands of workers across the country find themselves in situations as tenuous as Josue's, without any ability to improve their lot, because a defective employee status test allows them to be excluded from coverage under the NLRA .

A. The Evils of Misclassification in the Port Trucking Industry

The port trucking industry—involving the movement of cargo containers in and out of the country's ports—is a prime case study in what misclassification does to an industry and a workforce. A 2014 report by the National Employment Law Project ("NELP") found that "49,000 of the nation's 75,000 port truck drivers are misclassified as independent contractors" and that in California alone trucking companies are likely liable for nearly $1 billion a year in wage and hour violations.[11] While misclassification of port truck drivers is a calculated business decision that significantly increases an employer's profits, this unlawful and pernicious practice exacts a heavy toll on workers, the public, and law-abiding employers who properly classify their drivers as employees.

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[11] REBECCA SMITH ET AL., THE BIG RIG OVERHAUL 4 (2014), https://bit.ly/2M2YBZT.

1. Misclassification harms workers, deprives them of essential workplace protections, and depresses their income

When employers unlawfully misclassify employees as independent contractors, they deprive them of the core workplace protections that Congress and the states intended as baseline standards. Misclassification denies workers the entire span of protections that most take for granted: workers' compensation if they are injured on the job, unemployment insurance, minimum wage and overtime protections, protections against discrimination and sexual harassment, and protections of the rights under the NLRA to organize and to form or join labor unions for purposes of collective bargaining or other mutual aid and protection.[12] The rampant misclassification at the ports has essentially carved the entire industry out of the NLRA, stripping workers of their rights en masse.

As the typical port truck driver is misclassified,[13] the abuses engendered by misclassification are particularly stark in this industry. The story of misclassified port truck drivers is repeated in decision after decision by the California Labor Commissioner, federal agencies, and courts. It unfolds as follows. The trucking company misclassifies the—usually Spanish-speaking—worker as an "independent contractor" and requires as a condition of employment that he sign a lengthy, complicated, non-negotiable lease agreement written entirely in English. Either directly through the company, or facilitated by the company, the worker is forced to pay for a truck to perform his job for the trucking company. The misclassification of the driver allows the trucking company to pass on all operating expenses to the driver—operating expenses that, by law, the company should be covering for its employees. Thus, under the agreement, the driver becomes the potential owner of one of the trucks used to do the company's business. In exchange for use of the truck and the remote and potential future right to own the truck, the driver loses on a weekly basis a significant amount of his earnings to fund the expenses of operating, insuring, maintaining, repairing, fueling, cleaning, and even parking the truck on company premises.[14]

The deductions are so egregious that workers often end up making significantly less than minimum wage on a per hour basis, and some workers even receive paychecks for zero dollars—after full weeks of work—due to unlawful deductions. These abusive practices are little different from the "company store" practices that a century ago were used to keep employees in crippling,

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[12] *See id.* at 12. The U.S. Department of Labor notes that misclassified employees "often are denied access to critical and protections they are entitled to by law, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces." *Misclassification of Employees as Independent Contractors*, U.S. DEP'T OF LAB., WAGE & HOUR DIVISION, https://www.dol.gov/whd/workers/Misclassification/ (last visited Aug. 5, 2019).

[13] SMITH ET AL., *supra* note 11, at 4; Brett Murphy, *Rigged: Forced into Debt. Worked Past Exhaustion. Left with Nothing*, USA TODAY (June 16, 2017), https://bit.ly/2ry2wnV. Between 2010 and June 2017, 1,150 port truck drivers have filed claims in civil court or with the California Department of Labor Standards Enforcement. Judges have sided with drivers in more than 97% of the cases heard, ruling that port truckers were unlawfully misclassified as independent contractors.

[14] REBECCA SMITH, DAVID BENSMAN & PAUL MARVY, THE BIG RIG: POVERTY, POLLUTION, AND THE MISCLASSIFICATION OF TRUCK DRIVERS AT AMERICA'S PORTS 1 (2010), https://bit.ly/2TfdCc6 (describing the industry as "sharecroppers on wheels").

inescapable debt, and which were part of the conditions that directly led to the need for the passage of the NLRA.[15]

The numbers are stark: a study based on driver surveys and industry analyses found that port truck drivers worked an average work week of 59 hours for poverty-level wages and that annual median net earnings before taxes were $28,783 for drivers paid as contractors, as compared with $35,000 for employees.[16] Drivers are also forced to pay what would otherwise be the employer's share of FICA and FUTA taxes, further depressing their take home wages. For example, Samuel Talavera Jr., a port truck driver in Los Angeles, grossed $1,970 on a 2011 paycheck. However, as a purported independent contractor, the money largely went back to his employer. After the lease and other truck expenses were deducted, he took home $33. In another 2012 paycheck, he made 67 cents.[17] For Rene Flores, a port truck driver in California, deductions and long hours—often 12 to 20 hours straight behind the wheel—can translate to a wage of $3 an hour, well below minimum wage.[18] Indeed, it is not uncommon for drivers, after working a full week, to receive a "negative paycheck" where their deductions exceed their earnings so they actually have to pay for a week of work. It is no wonder that economists, reporters, and advocates have described the system as "modern-day indentured serv[itude]," "sweatshops on wheels," and "sharecroppers on wheels."[19]

The agreements presented to these drivers are on a "take-it-or-leave-it" basis, meaning that workers either accept the agreement as is, or they cannot work for that company. While in the abstract it might seem like an easy decision to forego signing the agreement and look for work elsewhere, many times employees are desperate for a job and, when an entire industry follows the same practices, employees have no choice but to accept the ludicrous terms imposed on them by employers with all the bargaining power. Again, this is reminiscent of the inequality in bargaining power that led to the passage of the NLRA in 1935. Through these contracts of adhesion, drivers are not permitted to use the truck on their "off hours" to drive for other companies, further making the driver dependent on the company they are working for. Often, if drivers decide to cease working for the company with which they enter into the lease agreement, they lose the chance to eventually own that vehicle. After working for years and seeing a significant portion of their income go towards that promise of owning the vehicle, it becomes nearly impossible for the worker to leave that company no matter how atrocious the working

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[15] *Cf.* Merle Travis, *Sixteen Tons*, on *Folk Songs of the Hills* (Capitol 1947) ("You load sixteen tons, what do you get/ Another day older and deeper in debt.").

[16] SMITH ET AL., *supra* note 14, at 12.

[17] Murphy, *supra* note 13.

[18] *Id.*

[19] Murphy, *supra* note 13 (describing the leasing arrangement as modern-day indentured servitude and citing civil rights leader Julian Bond describing California port truckers the new black tenant farmers of the post-Civil War South); *see also Rigged System Rips Off Port Truckers*, USA TODAY (June 20, 2017), https://www.usatoday.com/story/opinion/2017/06/20/rigged-system-rips-off-port-truckers-editorials-debates/103015290/; Steve Viscelli, *Truck Stop: How One of America's Steadiest Jobs Turned Into One of Its Most Grueling*, THE ATLANTIC (May 10, 2016) https://www.theatlantic.com/business/archive/2016/05/truck-stop/481926/ (sociology professor stating industry economist describes contemporary trucking as "sweatshops on wheels"); SMITH ET AL., *supra* note 14 (describing the industry as "sharecroppers on wheels").

conditions are. Some drivers have even lost money overall, forced into debt or bankruptcy, by the industry's exploitative practices.[20]

Drivers have been forced to work when sick or exhausted just to make ends meet; they are regularly hurt and must pay those costs out of pocket; and all of this occurs while the port trucking industry itself is making billions of dollars in profits. And what do drivers get out of this arrangement? When Talavera could not afford repairs on his truck, the company fired him and seized the truck—along with $78,000 he had paid towards owning it.[21] Put in a broader context, the misclassification of port truck drivers is a paradigmatic example of the attack on our nation's working families.

2. Misclassification harms the public and law-abiding employers

Clearly, oppressive misclassification and leasing schemes harm drivers, sometimes even robbing them of their entire paycheck for a week's work. But the insidious effects of misclassification do not end there—misclassification of employees as independent contractors, and the specific practice of pushing business costs onto workers, harms society as a whole by diminishing state, local, and federal government tax revenues, and by disadvantaging law-abiding employers.

Employers who misclassify employees fail to pay the total amount of tax and payroll costs required by law. One study has calculated that employers who misclassify avoid 30% of payroll costs.[22] The U.S. Government Accountability Office ("GAO") has noted that employers have economic incentives to misclassify employees as independent contractors because it allows employers to avoid "paying certain taxes (Social Security, Medicare, and unemployment taxes), providing minimum wage and overtime wages, [and] including independent contractors in employee benefit plans."[23]

In line with the GAO's finding, the IRS has found that, when employers pay workers as independent contractors, their income is ultimately underreported to all tax agencies by 23%.[24] This reduces funds sent to state unemployment insurance and workers' compensation funds, and reduces federal, state, and local tax withholding and revenues. Experts estimate that in the port trucking industry specifically, misclassification results in a cost to the federal government of over $57 million in lost Social Security and Medicare contributions, nearly $21 million in lost unemployment insurance premiums, and nearly $5 million in lost workers' compensation contributions.[25] The California Department of Industrial Relations estimates the annual tax loss due to misclassification at $7 billion per year.[26]

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[20] SMITH ET AL., *supra* note 14, at 12; Murphy, *supra* note 13.

[21] Murphy, *supra* note 13.

[22] NELP, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 1 (2017), https://bit.ly/2OANM2S.

[23] GAO, GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 25 (2006).

[24] SMITH ET AL., *supra* note 13, at 32 (citing GAO, *supra* note 23, at 10).

[25] *Id.* at 36.

[26] *Worker Misclassification*, CAL. DEP'T INDUS. REL., https://bit.ly/2MS9Kg3 (last visited Aug. 6, 2019).

Law-abiding employers suffer from bad-actors' misclassification schemes directly and indirectly. They suffer directly because they must compete with companies that have artificially low labor costs due to tax evasion, unlawful deductions and immunity from some labor and employment laws. They suffer indirectly because they must pay inflated workers' compensation and unemployment insurance costs, given the "free rider" effect of companies who flout the law.

Thus, misclassification is a wide-reaching problem that can—and does—pervade entire industries, and it is not hyperbolic to say that this problem is returning us to a situation resembling the very darkest periods of worker exploitation before the NLRA was passed.

B. Other Forums Are Continually Finding Port Truck Drivers to Be Misclassified

Since 2011, port truck drivers have filed at least 1,000 claims with the California Division of Labor Standards Enforcement ("DLSE"). Of those, the California Labor Commissioner's office has issued determinations in at least 448 cases,[27] uniformly finding after a lengthy process that drivers were employees who had been misclassified as independent contractors, and owed over $50 million in stolen wages and penalties. Of the remaining cases, many are awaiting hearings. The other approximately 350 cases filed appear to have been settled prior to hearing or were transferred to court or private arbitration.

The test applied by the California Labor Commissioner is, concededly, a multi-factor test, not unlike that currently applied under the NLRA.[28] This demonstrates that misclassification is

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[27] See the table of decisions, with over 400 decisions finding drivers were misclassified, as of June 2018, at http://www.nelp.org/wp-content/uploads/CA-DLSE-Cases.pdf. A few examples are illustrative. In *Montero v. Total Transportation Services, Inc.*, the misclassified driver's company required him to sign a lease agreement to drive a truck. Under that lease, the company deducted more than $84,000 from his paychecks, despite the fact that the truck was not in his name, he could not drive for other companies, and he could not park the truck outside of company premises. Order, Decision, or Award of the Labor Commissioner, *Montero v. Total Transp. Servs., Inc.*, No. 05-54135 (Cal. Labor Commissioner Feb. 28, 2013). In *Hernandez v. Western Freight Carrier, Inc.*, the driver testified that he was allowed to work for the company only on the condition that he lease a truck through the assistance of the company and pay costs of operating and maintaining the truck. The hearing officer noted, "I find it interesting that the Defendant purchases the truck; however, the costs that go into purchasing and operating the truck, that burden is assumed by the Plaintiff . . . the defendant operates a trucking business [at] the expense of the Plaintiff." Order, Decision or Award of the California Labor Commissioner, *Hernandez v. W. Freight Carrier, Inc.*, No. 05-55593 DG (Cal. Labor Commissioner Feb. 2, 2013).

[28] Under the agency's economic realities test used for the adjudications, the most significant factor to be considered is whether the employer has control of or the right to control the worker, both as to the work done and the manner and means in which it is performed. Additional factors that may be considered are whether the person performing services is engaged in an occupation or business distinct from that of the principal; whether or not the work is a part of the regular business of the principal or alleged employer; whether the principal or the worker supplies the instrumentalities, tools, and the place for the person doing the work; the alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers; whether the service rendered requires a special skill; the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; the alleged employee's opportunity for profit or loss depending on his or her managerial skill; the length of time for which the services are to be

blatant in the port drayage industry because drivers are continuously found to be employees even under such a nebulous test. The more important point, however, is that the 448 cases cited represent a drop in the ocean of misclassified drivers throughout California. Most of these cases were brought with the help of the Union, who provided the personnel and other resources to help drivers develop the extensive evidence and make the presentations necessary to establish their employee status. The determination of something as fundamental as whether a worker is an employee or an independent contractor should not be so difficult and expensive to establish. That it is results in the widespread denial of workers' rights. Furthermore, even the small percentage of cases that are decided involve significant and unnecessary delay for the employees in question. In fact, recognizing the issues with its own version of the multi-factor test, the California Supreme Court has recently adopted a test which closely resembles the three-part test contained in the PRO Act and the California State Legislature is in the process of codifying that three-part test as the default test for employment purposes.[29]

Similarly, the California Unemployment Insurance Appeals Board has also concluded that port truck drivers were identified as independent contractors when in fact they were legally employees.[30] Indeed, at least 45 drivers have obtained determinations from the California Employment Development Department that they are employees who have been misclassified as independent contractors.

The results in California mirror agency determinations of port trucker misclassification in New Jersey,[31] and Washington state.[32] State findings of employee status for truck drivers are also consistent with agency determinations at the federal level. The U.S. Department of Labor's Wage and Hour Division,[33] the Internal Revenue Service,[34] and the National Labor Relations

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performed; the degree of permanence of the working relationship; the method of payment, whether by time or by the job; and whether or not the parties believe they are creating an employer-employee relationship. *See S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399 (Cal. 1989).

[29] *Dynamex Operations W. v. Superior Court*, 416 P.3d 1 (Cal. 2018), *reh'g denied* (June 20, 2018); Worker Status: employees and independent contractors, Assem. Bill 5, 2019-2020 Reg. Sess. (Cal.).

[30] *See, e.g.*, *Alfaro v. XPO Logistics, Inc.*, No. 5935974 (Cal. Unemployment Insurance Appeals Board July 3, 2017).

[31] *See, e.g.*, *Proud 2 Haul, Inc.*, EIN No. 26073576300000 (N.J. Department of Labor & Workforce Development Feb. 28, 2011). The test under New Jersey law allows for a finding of independent contractor status if the worker is free from the employer's control or direction in performing the work, the work is outside of the usual course of the business and outside of the place of business, and the worker is "customarily engaged in an independently established trade, occupation, profession, or business." N.J. Stat. Ann. § 43:21-19(i)(6).

[32] *See Sea Port Logistics* (Wash. Department of Labor & Industries Aug. 26, 2011); *RoadLink Servs.* (Wash. Department of Labor & Industries Apr. 10, 2012); *Island Transp. Logistics* (Wash. Department of Labor & Industries Aug. 24, 2012). Washington uses a modified three-part test that expands on the three-parts contained in the PRO Act's test by requiring a showing that the worker is responsible for her own costs, has a place of business that is eligible for a business deduction for federal income tax purposes, is responsible for filing with the Internal Revenue Service, has accounts with state agencies, and maintains a separate set of books. Wash. Rev. Code § 51.08.195.

[33] *See C&K Trucking*, No. 1715102 (Wage & Hour Div. Feb. 27, 2018); *Container Connection of S. Cal.*, No. 1634525 (Wage & Hour Div. Jan. 22, 2013).

[34] *See Total Transp. Servs., Inc.*, No. 76535 (IRS Nov. 4, 2010).

Board[35] have each found in favor of port truck drivers who brought claims against their employers for misclassification.

In addition to state and federal agency decisions, private and public litigation has resulted in judicial determinations finding port truck drivers to be employees and settlements admitting that employers misclassified their truck drivers as independent contractors. In *Perez v. Shippers Transport Express, Inc.*,[36] the U.S. Department of Labor and a market-leading port trucking company entered a consent judgment in which the company admitted to its practice of misclassification and agreed to reclassify its drivers as employees moving forward. Other federal and state court decisions have produced parallel findings of misclassification.[37]

Misclassified Port Truck Drivers have also been exercising their rights as employees in the courts with approximately 4,000 drivers involved in about 50 class action lawsuits against their employers, along with many other individual or "mass action" claims. These suits typically settle for millions of dollars after years of litigation, while the recidivist law breaking port trucking companies continue to misclassify with impunity. Meanwhile, the Attorney General of the State of California[38] and the City Attorney of the City of Los Angeles[39] have been prosecuting port trucking companies for misclassifying their workforce, requesting injunctive relief from the courts to end these companies' practice of misclassification.

III. How the Board Has Addressed Misclassification To-Date

There is no easy fix for the evils of misclassification described above. These detrimental effects span everything from labor and employment laws, to tax and unfair competition laws. They span matters of concern to the federal government, and matters of local concern. It would be disingenuous to claim that the PRO Act would fix all of this because a comprehensive solution to the misclassification issue would require the cooperation of dozens of government entities and localities to pass dozens of fixes and clarifications to various laws. With that said, addressing the

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[35] *See, e.g.*, *Rosado v. XPO Drayage, Inc.*, No. 5-CA-194058 (NLRB July 28, 2017).

[36] No. 2:13-CV-04255-BRO-PLA (C.D. Cal. Nov. 17, 2014).

[37] *See, e.g.*, *Garcia v. Seacon Logix, Inc.*, 238 Cal. App. 4th 1476, 1488 (2014); *Ramirez v. XPO Cartage, Inc.*, 753 F. App'x 467, 468 (9th Cir. 2019) (unpublished); *Miranda v. Pacer Cartage, Inc.*, No. D069425, 2017 WL 3725521, at *1 (Cal. Ct. App. Aug. 30, 2017) (unpublished).

[38] Between 2008 and 2009, the California Attorney General filed lawsuits against six area port trucking companies, five of which were settled. The sixth suit, against Pac Anchor, has moved forward following a unanimous 2014 ruling by the California Supreme Court that found that that the case was not preempted by federal law. The U.S. Supreme Court declined to review that decision in 2015, clearing the way for the original case to proceed. The case is currently on hold as a result of Pac Anchor's bankruptcy proceedings. *People v. Pac Anchor Transp. Inc.*, No. BC397600 (Sup. Ct. L.A. Cty. filed Sept. 5, 2008).

[39] On January 8, 2018, the Los Angeles City Attorney filed lawsuits against three port trucking companies owned by NFI/Cal Cartage, whose trucking enterprise is the largest at the Ports of Los Angeles and Long Beach, for violating the Unfair Competition Law by misclassifying port truck drivers as independent contractors, evading their obligation to provide benefits to drivers and failing to pay relevant taxes. *People v. CMI Transp. LLC*, No. BC689321 (Sup. Ct. L.A. Cty. filed Jan. 8, 2018); *People v. K&R Transp. Cal. LLC*, No. BC689322 (Sup. Ct. L.A. Cty. filed Jan. 8, 2018); *People v. Cal. Cartage Transp. Express LLC*, No. BC689320 (Sup. Ct. L.A. Cty. filed Jan. 8, 2018).

misclassification issue as it relates to the NLRA is one of the most significant steps that Congress can take at this time.

Just like in 1935, we are seeing an economy that is failing workers who are unable to exert any bargaining power against multi-national corporations that often see them as fungible. In the port trucking industry in particular, we are seeing a return to the company-store system of perpetual debt that mirrors indentured servitude. While the PRO Act will not directly address unlawful deductions nor will it directly provide misclassified employees with workers compensation, it will do something even better—it will give misclassified workers the opportunity to come together and demand those changes themselves with their employer through collective bargaining. When Congress passed the NLRA in 1935, it did so for the exact same reason and this Congress should take up that mantle of the 1935 Congress by reaffirming the bargaining rights of the vast swaths of misclassified workers across the country.

The PRO Act accomplishes exactly that by replacing the Board's current employee status test. The "Common Law" test currently used by the Board is a nebulous multi-factor test that is tailor made to cause delay and uncertainty, and opens the door to completely different decisions on the same set of facts based on the ideology of the individual applying the test. The three-part test contained in the PRO Act does away with this uncertainty and delay by creating a clear, workable, and definite structure for determining who is an employee. Applying this test will be much more straightforward, allowing for quicker determinations so that employees' rights do not languish and ensuring that the NLRA reaches as far as it was initially intended to. This three-part test will also ensure that the whims of individual Board members cannot undo Congress's intent.

A. History of "Independent Contractors" Under the NLRA

As described above, Congress did not explicitly exclude "independent contractors" from the protections of the NLRA when it was first passed in 1935. In the absence of such an exclusion, the Board was able to develop its own approach to determine who should be covered by the NLRA. Prior to 1947, the Board explicitly considered the purposes underlying the NLRA in order to determine whether the workers in question were the type of workers the NLRA was intended to protect because they were subject to the mischief that it was intended to remedy.[40] This approach was imminently logical—it furthered the purposes underlying the NLRA by making the question of coverage a practical one based on the realities of the working relationship, rather than relying exclusively on a legal standard unmoored from why the NLRA was passed in the first place.

In a seminal case, the Board found that certain newsboys were covered by the NLRA. In affirming the Board's findings, the Supreme Court explained that the NLRA was "premised on explicit findings that strikes and industrial strife themselves result in large measure from the

[40] Hiroshi Motomura, Comment, *Employees and Independent Contractors Under the National Labor Relations Act*, 2 INDUS. REL. L.J. 278, 280 (1977) (explaining that the Board considered the NLRA's "statement of purpose: to remedy the individual worker's 'inequality of bargaining power.' The Board then would examine all aspects of the bargaining relationship, in order to determine whether a group of workers was among those subject to the mischief which the Act was intended to remedy. This method of determining who is an 'employee' under the NLRA has been called the 'mischief-remedy test.'").

refusal of employers to bargain collectively and the inability of individual workers to bargain successfully for improvements in their 'wages, hours, or other working conditions' with employers."[41] It followed that the NLRA's "applicability [was] to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications."[42] Because the newsboys were "subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation," they were properly characterized as employees under the NLRA and were the type of employees who the NLRA was passed to protect.[43]

Had this decision remained the law of the land, Josue Alvarez and millions of workers across the country would not be in the situation they are in today. If the Board continued to look at the purposes of the NLRA when making these determinations—"to encourage collective bargaining and to remedy the individual worker's inequality of bargaining power"—there is no question that Josue and his coworkers would fall under the NLRA's protections, just as the newsboys did.[44]

B. "Independent Contractors" Under the NLRA After 1947

Unfortunately, by the time *Hearst Publications* was decided in 1944, Congress had shifted from favoring a level-playing field for collective bargaining to favoring employers and corporate interests at the expense of working people. Congress was incensed by the idea that these newsboys should be protected under the law, and it immediately rebelled against the Court's decision by passing the Taft-Hartley amendments.

As described above, one of the main changes that Congress made to the NLRA in 1947 is that it actually included a definition for "employee" and excluded from that definition—and thus from the NLRA's protections—anyone who was an "independent contractor." Congress then went even further and decreed that, in distinguishing between a covered employee and an excluded "independent contractor," the Board should ignore the purposes underlying the NLRA and should instead rely on "general principles of the law of agency"—what is now referred to as the "Common Law Test."[45] Although this is the standard that has survived to this day, it is not surprising that this standard is nearly unworkable in the NLRA context.

The Common Law Test developed in a completely incongruous context to the NLRA—it was used to determine who should be held liable for certain tortious acts unrelated to labor issues.[46] In fact, in *Hearst Publications*, the Supreme Court rejected the use of such "technical concepts pertinent to an employer's legal responsibility to third persons for the acts of his servants" to make determinations about who should be covered by the NLRA, and instead emphasized that the term employee "must be understood with reference to the purpose of the NLRA and the facts

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[41] *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 126 (1944), *overruled in part on other grounds by Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).
[42] *Id.* at 129.
[43] *Id.* at 127.
[44] *Id.* at 126.
[45] *See* Motomura, supra note 40, at 282.
[46] *Id.* at 280.

involved in the economic relationship" because "[w]here all the conditions of the relation require protection, protection ought to be given."[47]

Rejecting the Supreme Court's guidance, Congress in 1947 instead forced the Board to rely on the Common Law Test to determine employee status, which is the exact type of "technical legal classification for purposes unrelated to the statute's objectives" that the Supreme Court had cautioned against.[48] The Board and courts have spent the succeeding 70 years attempting to make this Common Law Test work in the labor law context, but this is a nearly impossible task when the starting point is the flawed standard that Congress adopted in 1947. As will be demonstrated below, it is time that this Congress directed the Board and courts to make more reasoned and practical decisions about who should be covered by the NLRA, without ideology coming into play.

C. The Evolution, and Devolution, of the Common Law Test

Even in the context in which it originally developed—establishing liability for tortious acts—the common law test has never been simple to apply. The Supreme Court, recognizing that the test's "simplicity has been illusory because it is more largely simplicity of formulation than of application," stated that "[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing."[49]

Thus, far from importing a clear and workable standard from the tort context into the labor law context, Congress in 1947 imported an already convoluted and difficult to apply test *from a completely inapposite* body of law into the labor law context. Tied to using this ill-suited test, the Board has for the past 70 years attempted to make the test workable, with very mixed results that are often motivated by ideology.

At its core, the Common Law Test is a list of factors that should be considered when making the determination, without any guidance as to why each factor is important *in the context of employees collectively bargaining*, or as to how the various factors should be weighed in the analysis. Adding to the uncertainty, the list of factors is non-exhaustive and other factors can be considered depending on the facts of the case.

Not surprisingly, this lack of clarity or further direction has led to immense back and forth and changes to how the Common Law Test has been applied in the Board's history.

Immediately following the 1947 Taft-Hartley amendments, the Board emphasized the "right of control" aspect of the common-law definition.[50] This focus on the "right of control" persisted for decades. Then, in 1965, recognizing that Congress had decreed the use of the Common Law

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[47] 322 U.S. at 129.
[48] *Id.* at 128.
[49] *Id.* at 121.
[50] *See, e.g.*, *Okla. Trailer Convoy, Inc.*, 99 NLRB 1019, 1022 (1952) (finding that the NLRA "requires application of the common law 'right of control' test" and describing the test as establishing employee status "where the person for whom the services are performed reserves the right to control not only the end to be achieved but also the means used in reaching such end.").

Test—which the Supreme Court had earlier derided in the labor law context—the Supreme Court accepted the Board's use of the Common Law Test but disagreed with the right of control focus because "there is no shorthand formula or magic phrase" for establishing employee status. Instead, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[51]

Board decisions following *United Insurance* struggled to apply the Supreme Court's direction, and there was a near complete lack of uniformity in how the test was described or applied, even in factually similar situations.[52] Decades later, in 1998, the Board made a major shift and officially abandoned the right of control test in a pair of companion cases: *Roadway Package System, Inc.* ("*Roadway*"),[53] and *Dial-A-Mattress*.[54] The Board rejected the argument that the "right of control" was the predominant factor in determining independent contractor status. Echoing the Supreme Court in *United Insurance*, the Board emphasized that the determination was based upon a multiplicity of factors—beginning with the Restatement (Second) of Agency—all of which must be considered.[55]

Although *Roadway* and *Dial-A-Mattress* remained the flagship cases regarding employee status, subsequent decisions began conflating certain factors, omitting some factors, and incorrectly focusing on one factor as an "animating principle."[56] To address these deviations, the previous Board "restate[d] and refine[d]" its analysis in *FedEx*. In that case, the Board pointedly challenged the notion that there was an "animating principle" or "key consideration" in the employee status analysis, reemphasizing the fact that "all incidents of the relationship must be assessed."[57] The Board also stopped a dangerous trend that had been developing—employers' claiming that individuals were independent contractors because of some vague notion of hypothetical entrepreneurial opportunity that individuals could have exercised. The Board made clear that, although entrepreneurial opportunity was relevant to the analysis, only *actual*, not merely theoretical, opportunity weighs in favor of independent contractor status.[58]

Not only did this represent a shift in the Board's analysis, it also highlighted the subjective nature of the test—for years, the Board and the DC Circuit had been going back and forth regarding how entrepreneurial opportunity should be analyzed. In spite of the Supreme Court's warning that there is no "shorthand formula or magic phrase," the DC Circuit insisted that entrepreneurial opportunity should be considered an animating factor in the employee status

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[51] *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968).

[52] For example, in *Standard Oil Co.*, 230 NLRB 967, 968 (1977), the Board itself pointedly criticized emphasis on the "right of control" because it "mistakenly emphasizes minor details of the day-to-day performance of the Company's work," even as other cases continued to apply that standard.

[53] 326 NLRB 842 (1998).

[54] 326 NLRB 884 (1998).

[55] *Roadway*, 326 NLRB at 850 (citing *Austin Tupler Trucking*, 261 NLRB 183, 184 (1992) ("Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.")).

[56] *See e.g.*, *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

[57] *FedEx*, 361 NLRB No. 55 (2014) slip op at 1 (quoting *United Insurance*, 390 U.S. at 258).

[58] *Id.*, slip op. at 12.

analysis.[59] Under the DC Circuit's formulation of the test, nearly any claim of hypothetical entrepreneurial opportunity could be sufficient to classify an individual as an independent contractor—allowing employers to exclude more and more workers from the protection of the NLRA by establishing sham arrangements that purported to provide entrepreneurial opportunity.

The current Board, a mere five years after the previous Board's *FedEx* decision, has completely overruled *FedEx*. In *SuperShuttle*, the Board sided with the DC Circuit and essentially held that control really is the overriding concern when applying the Common Law Test and that entrepreneurial opportunity is just another side of that same coin and the prism through which all common law factors should be viewed.[60] Not only does this get us closer to the control-focused test that the Board had rejected in 1998, it also conflicts with the Supreme Court's direction by essentially making control and entrepreneurial opportunity a shorthand formula for the analysis.[61] This holding has essentially been read as an invitation by the Board for employers to make specious claims of potential entrepreneurial opportunity that can then be used to strip employees of their rights under the NLRA.

D. Port Trucking Cases Under the Common Law Test

Even in light of the uncertainty and outright inconsistent messaging from different compositions of the Board, port truck drivers have been successful in establishing their status as employees. Our union has represented port truck drivers in three cases before Board administrative law judges—Green Fleet Systems,[62] Intermodal Bridge Transport,[63] and XPO Cartage.[64] In all three of those cases, the judges found that the drivers in question were employees under the Common Law Test and that they had been misclassified as independent contractors.[65]

In *Intermodal Bridge Transport* ("*IBT*"), for example, Judge Montemayor found that employee status was demonstrated by the extent of IBT's control over the drivers, the integral nature of the truck drivers' work to IBT's regular business, IBT's control of the work through the dispatching process, supervision and use of a progressive discipline process, the method of payment, and the

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[59] *FedEx*, 563 F.3d 492.

[60] *Supershuttle,* 367 NLRB No. 75 (2019) slip op. at 15.

[61] *Id.*, slip op. at 24 ("The majority seems to have been bewitched by just the sort of 'magic phrase' the Supreme Court warned about and has accordingly elected to replace a sound test with an unsupportable formulation that is inconsistent with Board precedent as well as both the common-law and Supreme Court precedent.").

[62] *Green Fleet Sys., LLC.*, Case Nos. 21-CA-100003, et al., 2015 WL 1619964 (NLRB Div. of Judges Apr. 9, 2015). The Employer did not file exceptions to this decision, so the Judge's findings and conclusions were adopted by the Board. *Green Fleet Sys., LLC*, 2015 NLRB LEXIS 505 (Aug. 18, 2015). In this same matter, Federal District Court Judge Phillip Gutierrez issued a 10(j) injunction to order Green Fleet to reinstate as employees the two misclassified drivers who were terminated because of their union activities. *Garcia v. Green Fleet Systems*, 2014 WL 5343814 (C.D. Cal. Oct. 10, 2014).

[63] *Intermodal Bridge Transp.*, Case Nos. 21-CA-157647, et al.,2017 WL 5852765 (NLRB Div. of Judges Nov. 28, 2017).

[64] *XPO Cartage Inc.*, Case Nos. 21-CA-150873, et al., 2018 WL 4357749 (NLRB Div. of Judges Sept. 12, 2018).

[65] In addition, in the numerous other charges the Union filed against port trucking companies, an NLRB Regional office made merit determinations that the drivers were employees but the cases settled before reaching trial.

fact that the truck drivers do not render their services as part of an independent business. In fact, despite the unwieldy and open-ended nature of the Common Law Test, this was one case where the facts were so unassailable the Judge found that, on balance, every single factor under the Common Law Test supported a finding that these drivers were misclassified.[66]

While this was the correct result in all of those cases—and should be under any possible formulation of the Common Law Test or under any test that examines the purposes underlying the NLRA—these cases also highlight one of the many problems with the current system—even when the result is clear, the Common Law Test is so convoluted that it takes years for parties to litigate misclassification charges to completion. As a result, neither IBT case nor the XPO Cartage case have reached final resolution.

Charges against IBT were first filed in August 2015. Since then, the Union has had to sink an untold number of resources into proving what should be an easily determined fact—that these drivers are employees who should be covered by the NLRA. The uncertainty of the Common Law Test meant that the investigation and lead up to trial took a year once the charges were filed. The trial took place on various days—totaling approximately six weeks—stretching between August and December 2016. It then took over a year following the trial for the parties to write comprehensive briefs analyzing the convoluted Common Law Test and for the judge to issue a decision finding the drivers to be employees. Now, it has been nearly two years since that decision was appealed to the Board itself and the workers remain without a final decision.

The XPO Cartage charges followed a similar path. Charges were initially filed in April 2015 and the investigation took two years. The judge issued a decision a year after the trial, and the following year—rather than decide the case—the Board remanded the decision back to the judge because it had decided the *SuperShuttle* decision in the interim.

In both of these cases, the workers—including Josue Alvarez and hundreds of his coworkers—have been trapped in limbo for over half a decade while being denied their fundamental right to choose to organize, form a union, and engage in collective bargaining for improved benefits and protections.

This predicament is unacceptable. The delay is in large part is due to the fact that the Common Law Test utilized by the Board, with its ten non-exhaustive factors, requires lengthy presentations of evidence, lengthy investigations, long trials, and extensive briefing. As former General Counsel Richard E. Griffin Jr. pointed out, this process not only heavily burdens the parties but also drains the Board's limited time and resources, even though the question should be simple because it is so clear that port truck drivers—and thousands of other employees across the country—are exactly the type of workers that should be protected by the NLRA.

This is highlighted by the fact that across jurisdictions, and amidst a diverse landscape of tests for distinguishing employees from independent contractors, courts as well as state and federal agencies have found that employers have consistently misclassified port truck drivers. As

[66] The judge also concluded that IBT used the misclassification of workers to commit a violation of the NLRA in a "preemptive strike" – i.e., by misclassifying drivers, IBT attempted to deny them rights to engage in protected activities for their and other workers' collective benefit.

explained above, to date, virtually every agency and court that has analyzed any individual or group of port drayage drivers has found that these drivers are in fact employees—no matter what subterfuge the employers used to attempt to obscure this employee-employer relationship. Yet, port truck drivers' indisputable status as employees has not resulted in timely relief under the NLRA, as the Common Law Test causes these cases to drag on for years.

E. Possible Future if the Common Law Test Continues to Be Used

When so many other adjudicators are finding port truck drivers—and workers across other sectors—to be employees, it is unconscionable that the Board expends such an inordinate amount of resources on this issue and cannot even provide certainty for employees five years after they have filed charges against their employer. This indirectly serves to invalidate the NLRA's protections because the vast majority of workers will be unable to stick around for that long without any certainty in their jobs or their future. And there is no indication that this will improve under the current Board. In fact, everything points to the fact that the current Board will likely create even more obstacles to employees organizing and will make it even easier for employers to exclude whole sectors of workers from the NLRA's protections. Although ideology has always come into play because Board members are political appointees, until recently there appeared to be a tacit understanding that the rule of law must prevail. Board members, once seated, typically provided due deference to precedent and dutifully deliberated the issues before them. Even in close cases where a decision was split on ideological lines, the Board attempted to issue a holding that was as narrow as possible under the facts and took into account the practical realities of the workplace.

This does not appear to be the case with the increased politicization of the current Board. Ideology seems to have become the primary concern for certain Board members, who will stop at nothing to target unions and give employers more power to prevent unionization. They do so without regard to precedent and make wide-ranging policy decisions in cases that do not directly implicate those issues, which means that no one—not even the parties to the cases before the Board—had an opportunity to directly address the merit of the Board's broad decision.[67] This policy making by fiat has the ultimate effect of perverting the NLRA and hurting the very workers it was intended to protect.

In this respect, the *SuperShuttle*[68] decision is a harbinger of the things to come. Already, the current Board has invalidated the reasoned decision from the previous Board that gave actual entrepreneurial opportunity the appropriate level of consideration by recognizing it is relevant

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[67] *See e.g.*, *Johnson Controls, Inc.*, 368 NLRB No. 20 (2019) slip op. at 16 (McFerran, dissenting) ("In the name of promoting employee free choice and preserving stability in collective bargaining, the majority does the opposite: It permits an employer unilaterally to withdraw recognition from an incumbent labor union, in the face of objective evidence that the union has not lost majority support among the employees it represents. It then requires the union to petition for and win an election to regain its representative status, which should never have been stripped from it. *This result—reached by reversing precedent unasked and without briefing—violates two foundational principles under the National Labor Relations Act.*") (emphasis added).

[68] 367 NLRB No. 75 (2019).

but not overriding to the analysis.[69] In doing so, the current Board has opened the door to employers continuing to refine their sham methods of claiming a lack of control or claiming that employers have entrepreneurial opportunity that does not really exist.

IV. The PRO Act Reasserts the NLRA's Initial Purposes and Ensures that the Employees that the NLRA Initially Intended to Cover are Actually Covered

In an alternate universe, the past 70 years of strife at the Board could have been avoided if Congress in 1947 had not passed the Taft-Hartley amendments excluding "independent contractors" from the NLRA's coverage. Then, the Board would have continued to develop and refine its expertise for who should be covered, and would have adapted that standard to modern times and for changing technologies. Unfortunately, the bell cannot be unrung. Even if Congress were to today do away with the statutory exclusion of independent contractors from the NLRA, the storied history of the employee status test would be hard to get away from. Moreover, taking such action would in no way address the increased politicization of the Board and the door would remain open for the Board to continue chipping away at the NLRA's coverage by expanding the list of employees who are excluded as "independent contractors" or non-covered employees.

Instead, the most productive action that Congress can take is provide clear and definite guidance to the Board about who should be protected by the NLRA and how to make that determination. In the PRO Act, Congress accomplishes this by amending the NLRA to state:

> An individual performing any service shall be considered an employee (except as provided in the previous sentence) and not an independent contractor, unless—
>
> (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
>
> (B) the service is performed outside the usual course of the business of the employer; and
>
> (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed."[70]

In other words, rather than a nebulous ten-plus factor test where the way the facts are framed can be unduly determinative, Congress is instituting a dispositive three-part test where *all three parts* must be satisfied in order for workers to fall outside the ambit of the NLRA.

In a procedural sense, the three-part test is vastly superior to the Common Law Test. A three-part test provides certainty for everyone involved. Employers will be able to predict how their employees will be characterized under labor law, and plan accordingly. Employees themselves will be able to much more easily examine their own working relationship to determine whether

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[69] *Id.*, slip op. at 1 ("[T]o the extent the FedEx decision revised or altered the Board's independent-contractor test, we overrule it.").

[70] Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong.

they are being deprived of rights they should be entitled to. Both employers and unions will save time and expenses with regard to the amount of evidence that must be presented to the Board both during investigations and during any subsequent hearing—and by that same token, employers will save litigation costs due to the simplified analysis. Regional offices will have a much easier time making merit determinations on employee status, saving the Board money and moving cases forward quicker. More certainty regarding employee status will facilitate and encourage settlement in cases where it is clear that workers are employees. Trials will be much shorter, and judges will be able to issue quicker decisions. Appeals to the Board will be much faster. In short, the entire process will be streamlined, advancing the purposes underlying the NLRA by empowering the Board to take on and prosecute more cases, and providing quicker resolution and remedies for employees whose rights are being violated because they are misclassified.

In addition, and more importantly, the three-part test closely aligns with the goal of using the NLRA to encourage collective bargaining in order to give workers the ability to collectively demand improvements to their working conditions.

Superficially, the Common Law Test and the three-part test appear disjointed. Under the surface, however, they are more similar than dissimilar. Under the Common Law Test, the ten non-exhaustive factors from the Restatement (Second) of Agency are the following:

> (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
> (b) Whether or not the one employed is engaged in a distinct occupation or business.
> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
> (d) The skill required in the particular occupation.
> (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
> (f) The length of time for which the person is employed.
> (g) The method of payment, whether by the time or by the job.
> (h) Whether or not the work is part of the regular business of the employer.
> (i) Whether or not the parties believe they are creating the relation of master and servant.
> (j) Whether the principal is or is not in business.[71]

One of the notable things about the Common Law Test is that—despite its myriad flaws (it is convoluted, it is difficult to apply, it allows ideological framing to lead to desired results)—the listed factors do have at least some minimum relevance to determining whether an employee-employer relationship exists. More control by an employer makes it more likely that a worker is an employee. A worker who invests in, owns, maintains, and is responsible for the tools and instrumentalities necessary to do his job—and who can use those tools for a myriad of employers—is more likely to be an independent contractor. Someone hired long term is more

[71] Restatement (Second) of Agency § 220 (1958).

likely to be an employee than someone hired on a job-to-job basis. And so on. The problem with the Common Law Test is not the factors that comprise it, but its lack of guidance regarding how to consider and apply those factors to employment relationships under the NLRA.

That is exactly the problem that the three-part test addresses. The three part test still considers all ten factors from the Restatement, but it does so in a fashion that makes clear what those factors mean and why they are important in the labor law context. In essence, the three-part test makes the Common Law principles relevant to the world of work, allowing government agencies, courts, employers, and workers to consider the realities of the relationship in question and realistically determine who is an employee and who is not.

The first part of the three-part test deals with the question of control, which means that it encompasses both factor (a) regarding control, and factor (c) regarding supervision because an increased level of supervision indicates increased control—if all the employer cared about was the finished product and it did not control the process leading to that finished product, there would be no need for the employer to supervise the worker.

The second part of the three-part test asks whether the work being performed is within an employer's usual course of business, which encompasses factors (h) and (j) which also look at how the work being performed relates to the principal's/employer's business.

The third part of the three-part test, dealing with whether the worker is performing work in the course of his own business or profession, encompasses factors (b), (d), (e), (f), (g) and (i). All of those factors speak to whether the worker is just a cog in the employer's machine or is actually running a business—someone who is performing highly skilled work under their own corporate name, with all their own tools and supplies, on a job-by-job basis where they get paid for the completed job is more likely than not running an independent business.

Thus, while the three-part test incorporates the salient pieces of the Common Law Test, it builds on that by giving guidance to decision-makers regarding how those factors should be applied and interpreted. This ensures that when adjudicators are applying the three-part test, they do so with an eye towards the goals that Congress wants to accomplish through the NLRA and with an eye towards the reasons why the NLRA was needed in the first place. Thus, to judge whether the three-part test is superior to the Common Law Test, we must analyze whether Congress's decisions about what is important serves the purposes underlying the NLRA by enabling workers who lack collective bargaining power to come together with their coworkers to improve their working conditions.

Because each part of the three-part test is dispositive, the only individuals who will qualify as independent contractors are those that engaged in an independent business providing services to an entity that are not a part of that entity's usual course of business under their own control and discretion. An individual who meets these criteria is not the sort of individual subject to the harms that the NLRA was intended to remedy. That individual, by virtue of operating an independent business, would have more bargaining power than a typical worker because the individual already likely has a pool of clients—or can easily find more clients—and he is not bound to one employer in particular. The fact that the individual is doing work outside of an

entity's usual course of business and has ultimate control over how they do that work means that they are not subject to direct exploitation by the employer through imposed requirements.

On the other hand, a worker who does not meet even one part of the three-part test will immensely benefit from being covered by the NLRA.

Traditionally, there is no greater indication of employee status than an employer controlling the performance of the work in question, and the first part of the PRO Act's three part test emphasizes this point. Control by an employer deprives the worker of the ability to make reasoned judgments and business decisions that could increase (or decrease) their profit from the job. Moreover, if an employer has complete control over how a worker performs the work in question, the employer has the ability to impose onerous and unreasonable demands on the employee. That is why any individual working under the complete control of another would benefit from having the right to collectively organize with other workers who are similarly controlled by the employer. Covering workers who operate under their employer's control directly advances the purposes underlying the NLRA.

Along the same lines, the second part of the test prevents an employer from absolving itself of all responsibility under labor and employment laws by making its entire workforce "independent contractors," notwithstanding the fact that those supposed contractors are the employer's meat-and-potatoes workforce. Consider how port trucking companies or Uber, by purporting to not be the employers of their drivers, are making untold amounts of money off the labor of individuals while escaping their legal obligations like paying minimum wage and withholding federal taxes. Moreover, labeling this core workforce "independent contractors" allows the employer to impose whatever working conditions it wants on its workforce, under the guise of these being nothing more than "contractual terms"—even if those working conditions fall below the standards established through decades of labor and employment law regulation, just as is happening for port truck drivers through their sham lease and independent contractor agreements. Ensuring that those workers are protected by the NLRA would put the burden back on these companies to obey the law while giving workers the means to improve their working conditions. This directly serves the purposes underlying the NLRA by promoting collective bargaining and industrial peace between employers and the individuals who are doing the work that is central to that employer's business.

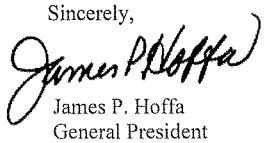
Finally, the third part of the test recognizes that a worker who is not actually engaged in a distinct occupation or business is always at a disadvantage in terms of bargaining power. Without an independent profession or business, the economic reality is that you will always be dependent on your current—and on potential future—employers deciding to hire you because all you have to give is your labor. This dependent relationship is prone to exploitation, and is the exact type of relationship that the NLRA was initially intended to address by leveling the playing field. Employees without their own business cannot make managerial decisions to improve their lot, nor can they invest capital to grow their non-existent business, nor can they easily go out and find new clients. Thus, workers without their own business will always benefit from the right to collectively bargain with the employers to whom they provide their labor, meaning that the NLRA would be strengthened by including such workers under its coverage.

That is why the PRO Act's three-part test is superior both procedurally and substantively to the current Common Law Test under the NLRA, and adopting this new test would go a long way towards fixing the misclassification problem that has been plaguing our country. In fact, other jurisdictions have already recognized that in order to truly address the growing misclassification problem, they have to step away from the rote application of flawed multi-factor tests. Under the Fair Labor Standards Act, the Department of Labor considers multiple factors but has always made clear that it is really the "economic reality" of the situation that governs, rather than "technical concepts" having to do with different factors.[72] The California Supreme Court has also recently adopted what it calls the "ABC" test, which is nearly indistinguishable from the PRO Act's proposed three-part test.[73] Congress should not wait any longer to take similar action.

V. Conclusion

There is no question that the current employee status test used by the Board has been flawed from the moment it was first adopted as an anti-union reaction to a Supreme Court decision. The PRO Act would correct the issues that have arisen from 70 years of a defective test by providing explicit guidance for who is covered by the NLRA and entitled to the NLRA's protections. The clear and dispositive three-factor test respects decades of precedent while restoring the NLRA's original purpose of creating a level playing field between workers and the employers upon which they are completely dependent, no matter what employers attempt to call those workers or what subterfuge they employ. I look forward to that day when such a test will ensure that the thousands of misclassified port truck drivers like Josue Alvarez are properly classified as employees and receive prompt vindication of their rights under the NLRA.

Sincerely,



James P. Hoffa
General President

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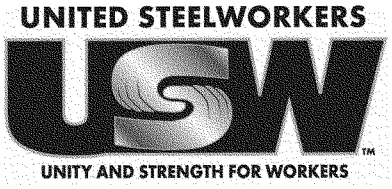
[72] *Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)*, U.S. DEPARTMENT OF LAB. (revised July 2018), https://www.dol.gov/whd/regs/compliance/whdfs13.htm.

[73] *See Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903 (2018).



Statement of

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW)

on

Protecting the Right to Organize Act: Modernizing America's Labor Laws

before the

Subcommittee on Health, Employment, Labor, and Pensions

of the

Committee on Education and Labor
United States House of Representatives

July 25, 2019

Chairwoman Wilson, Ranking Member Walberg, and Members of the Health, Employment, Labor and Pensions Subcommittee, on behalf of our 850,000 members, we would like to thank you for holding this important hearing and for the opportunity to share the perspectives of the United Steelworkers as the Committee considers the Protecting the Right to Organize Act (PRO Act, H.R. 2474) to modernize America's labor laws.

The PRO Act is one of the most significant, necessary, and impactful labor law reforms seen by working people since the introduction of the Taft-Hartley Act in 1947. Its passage will help restore the long-eroded rights of workers to organize in this country, ensuring vital access to collective bargaining rights. After years of attempts by employers to dismantle key labor laws and protections, it's time for Congress to stand with workers and protect their right to organize.

Union membership helps ensure that workers share in the benefits of the economic growth they help generate through collective bargaining, higher wages, increased access to healthcare, and improved retirement security. As a whole, union members earn approximately 20 percent more than their nonunion counterparts, helping to increase social mobility and improving workers' economic outcomes. In order for workers to access their collective bargaining power, Congress must protect workers who are exercising their right to form a union.

Reinstating Workers

Too often workers are illegally retaliated against for trying to organize a union, facing discipline, demotion, and even termination for exercising their rights. The only remedy these workers have is to file a charge against their employer with the National Labor Relations Board (NLRB), and they are often forced to wait months, or even years, before a final decision is issued.

The USW is well aware of the inadequacies of our country's ability to protect workers who are trying to exercise their right to form a union and are illegally terminated. In 2017, Mario Smith, an employee and lead organizer at Kumho Tire, was fired for discussing issues at work on a private message board of unionists. While the NLRB may seek to reinstate an employee, it rarely does so, and the Trump appointed General Counsel refused to even have a hearing on Smith's case.[1] Workers who attempt to legally improve their working conditions face intimidation and interference from their employers for exercising their democratic rights.

The PRO Act would address these wrongs by requiring the NLRB to immediately seek reinstatement of employees who have been terminated for exercising their rights and who have filed a charge with the NLRB, deterring employers from targeting workers involved in organizing campaigns.

Ensuring First Contracts

Under current law, unscrupulous employers have the ability to stall the signing of the first union contract, dragging out negotiations for months, or even years. The USW has seen successful organizing campaigns end with workers facing a barrage of obstacles and delays from anti-union employers attempting to run out the clock on the one year election bar. In May of 2013, the

[1] https://onlabor.org/at-trumps-nlrb-workers-dont-even-get-a-hearing/

employees at Ozburn-Hessey Logistics in Memphis, Tennessee voted in support of union representation by the United Steelworkers, but the company refused to recognize the union, appealing the vote and ultimately filing for decertification. In August of 2016, the U.S. Court of Appeals for the D.C. Circuit upheld the NLRB's finding that the employer had violated federal labor laws, but the company continued to stall, filing multiple failed petitions for decertification of the union.[2] Over six years later, workers at the warehouse facilities are still waiting to ratify their first contract with the employer. This cannot and should not be taking place at worksites where employees have made their voices clear. These workers, and all workers, should not have their democratic rights blocked by employers unwilling to recognize the law. These workers need the PRO Act, which would establish a much-needed process for the first contract between companies and newly certified unions, allowing for both mediation, and when necessary, binding arbitration.

Ensuring All Employers at the Table

As the largest union in the manufacturing sector, USW is well familiar with the pervasiveness of employers hiring "temporary" workers. Manufacturing accounts for as much as 40 percent of the US industrial temporary staffing segment, a 34.9 billion dollar market in 2018.[3] Under current law, an employer who subcontracts for parts of their workforce can both threaten to terminate and terminate workers for exercising their rights to form a union. Through termination of the contract with the subcontracted employer, the primary employer is free to cease doing business with the unionized contractor and effectively terminate those workers because its employees chose to unionize. The PRO Act would help to address this issue by ensuring companies sharing the control of the terms and conditions of employment, including contracting employers and their contractors, are viewed as employers in the collective bargaining process.

Workers standing next to each other, producing the same goods and services, directed by the same supervisor, and working similar hours, should not be divided by a labyrinth of legalese on who is the "employer." Codifying the joint employer standard the National Labor Relations Board (NLRB) enacted in its 2015 Browning-Ferris decision, as the PRO act does, establishes the ability of workers to band together in a meaningful way.

Economic Analysis

When the Environmental Protection Agency (EPA), the Consumer Financial Protection Bureau (CFPB), and the Securities and Exchange Commission (SEC) use macroeconomic modeling, behavioral science, and other tools to understand the impact of their regulations, they are able to provide impactful neutral economic numbers when rules they establish are challenged in court. The National Labor Relations Board is hindered by McCarthy Era red baiting and fear mongering when the agency was stripped of its ability to conduct economic analysis.[4] Good

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[2] http://archive.commercialappeal.com/business/logistics/Logistics-firm-loses-bid-to-keep-union-out-of-Memphis-warehouses-391053552.html/

[3] https://www2.staffingindustry.com/eng/Editorial/Industrial-Staffing-Report/June-20-2019/Slower-job-growth-in-manufacturing-a-headwind-for-staffing-firms

[4] https://www.nytimes.com/2018/05/01/opinion/national-labor-relations-economist.html

government requires good analysis. Restoring NLRB economic analysis will ensure the arbiter between business and labor is fully equipped to defend the agencies rulemaking.

Permitting Fair Share Agreements Between Employers and Workers

Since 1947, the ability for workers to freely negotiate with their employers has been hindered by state laws, which interfere with collective bargaining agreements between employers and workers. The fact that workers sacrifice a small share of their wages in order to band together and defend a contract, which protects their rights at work, has been undermined by laws with a history of racism.[5] The PRO Act empowers workers to set the terms for all workers and to defend their freedom to be in a union by permitting unions and employers to agree to require fair-share fees, regardless of state laws, to cover the costs of collective bargaining and contract administration.
As shown by state ballot initiatives in Missouri and Ohio, when voters have a say on empowering workers to collectively bargain they choose their own economic interest over corporate interests trying to limit union rights. [6,7]

Protecting Workers and the Right to Strike

No working family should ever have to face the economic hardships of permanent job loss in their fight for improved wages, benefits, and working conditions. And while walking off the job is always a means of last resort; the law currently allows employers to permanently replace workers who have exhausted all other means and chosen to join together and engage in the only leverage they have left.

This threat of job loss gives management the upper hand, chilling workers' willingness to strike, essentially nullifying their right to strike. As can be seen in current bargaining updates with major aluminum producers Alcoa and Arconic, our union carefully explains the various definitions of unfair labor strikes and "economic" strikes.[8] When strikes are settled, return to work agreements can become contentious issues as employers try to target activists. In order to ensure workers are able to retain their right to strike, the PRO Act would prohibit employers from permanently replacing or discriminating against striking workers. This will ensure workers retain the ability to hold employers accountable for bargaining in good faith.

Conclusion

It is time for meaningful and comprehensive labor law reform. It is time to update our labor laws to protect our workers and ensure their right to organize. The USW urges the Committee to undertake bipartisan efforts to modernize American labor laws and support the PRO Act.

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[5] https://aflcio.org/2018/3/23/racist-roots-right-work
[6] https://www.cleveland.com/politics/2011/11/ohio_voters_overwhelmingly_rej.html
[7] https://www.kansascity.com/news/politics-government/election/article215974460.html
[8] https://m.usw.org/union/mission/industries/metals/resources/arconic-bargaining-updates/may-14-2019-what-could-happen-when-our-contract-at-arconic-expires

Chairwoman WILSON. I now recognize the distinguished Ranking Member for his closing statement.

Mr. Walberg.

Mr. WALBERG. I thank you, Madam Chair.

And I would vote for any of the pronunciations of that word, and I would ask my staff never to put that in front of me either.

I do ask unanimous consent to place in the record letters from the following organizations opposing H.R. 2474: The Coalition for a Democratic Workplace; the International Franchise Association; the National Association of Home Builders; the American Hotel and Lodging Association; Associated Builders and Contractors; and the U.S. Chamber of Commerce.

[The information follows:]

COALITION FOR A
DEMOCRATIC WORKPLACE

June 10, 2019

Dear Representative:

The Coalition for a Democratic Workplace (CDW) urges the House 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 nefarious 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 the House to reject emphatically and unequivocally this bill.

Sincerely,

The Coalition for a Democratic Workplace

Agricultural Retailers Association
Air Conditioning Contractors of America
Alabama Retail Association
American Bakers Association
American Foundry Society
American Home Furnishings Alliance
American Hotel & Lodging Association
American Pipeline Contractors Association
American Rental Association
American Seniors Housing Association
American Staffing Association
American Supply Association
American Trucking Associations

Argentum
Arizona Builders Alliance
Arizona Retailers Association
Arkansas Hospitality Association
Arkansas State Chamber of Commerce
Asian American Hotel Owners Association
Associated Builders and Contractors
Associated Builders and Contractors Central Texas Chapter
Associated Builders and Contractors Cornhusker Chapter
Associated Builders and Contractors Florida East Coast Chapter
Associated Builders and Contractors Georgia Chapter
Associated Builders and Contractors Greater Michigan Chapter
Associated Builders and Contractors Greater Tennessee Chapter
Associated Builders and Contractors Hawaii Chapter
Associated Builders and Contractors Illinois Chapter
Associated Builders and Contractors Indiana/Kentucky Chapter
Associated Builders and Contractors Inland Pacific Chapter
Associated Builders and Contractors New Orleans/Bayou Chapter
Associated Builders and Contractors North Alabama Chapter
Associated Builders and Contractors North Florida Chapter
Associated Builders and Contractors Northern Ohio Chapter
Associated Builders and Contractors of Louisiana
Associated Builders and Contractors of Ohio
Associated Builders and Contractors Pelican Chapter
Associated Builders and Contractors Rhode Island Chapter
Associated Builders and Contractors South Texas Chapter
Associated Builders and Contractors West Virginia Chapter
Associated Builders and Contractors Western Pennsylvania Chapter
Associated Equipment Distributors
Associated General Contractors
Associated Industries of Arkansas, Inc.
California Business Properties Association
California Retailers Association
Capital Associated Industries, Inc.
Center for the Defense of Free Enterprise
Coalition of Franchisee Associations
Colorado Chamber of Commerce
Consumer Technology Association
Employers Coalition of North Carolina
Farm Equipment Manufacturers Association
Florida Retail Federation
Food Marketing Institute
Franchise Business Services
Georgia Retail Association
Global Cold Chain Alliance
HR Policy Association
Idaho Lodging & Restaurant Association
Idaho Retailers Association

Illinois Chamber of Commerce
Independent Electrical Contractors
Independent Electrical Contractors Central Ohio
Independent Electrical Contractors Chesapeake
Independent Electrical Contractors Midwest
Independent Electrical Contractors of Arizona
Independent Electrical Contractors of Atlanta
Independent Electrical Contractors of Central Indiana
Independent Electrical Contractors of Central Pennsylvania
Independent Electrical Contractors of Georgia
Independent Electrical Contractors of Greater Cincinnati
Independent Electrical Contractors of Greater St. Louis
Independent Electrical Contractors of Montana
Independent Electrical Contractors of Northwest Pennsylvania
Independent Electrical Contractors of Oklahoma City
Independent Electrical Contractors of Texas
Independent Electrical Contractors Rocky Mountain
Independent Electrical Contractors San Antonio Chapter
Independent Electrical Contractors Southern Colorado Chapter
Indiana Retail Council
Industrial Fasteners Institute
Interlocking Concrete Pavement Institute
International Council of Shopping Centers
International Foodservice Distributors Association
International Franchise Association
International Sign Association
International Warehouse Logistics Association
Iowa Association of Business and Industry
Kentucky-Indiana Automotive Wholesalers
Littler Workplace Policy Institute
Louisiana Retailers Association
Manufacturer & Business Association
Maryland Retailers Association
Material Handling Equipment Distributors Association
Metals Service Center Institute
Minnesota Grocers Association
Minnesota Retailers Association
Missouri Retailers Association
Motor & Equipment Manufacturers Association
National Apartment Association
National Association of Chemical Distributors
National Association of Home Builders
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Club Association
National Council of Chain Restaurants
National Demolition Association
National Federation of Independent Business

National Franchisee Association
National Grocers Association
National Lumber and Building Material Dealers Association
National Marine Distributors Association
National Multifamily Housing Council
National Pest Management Association
National Precast Concrete Association
National Ready Mixed Concrete Association
National Restaurant Association
National Retail Federation
National Small Business Association
National Tooling and Machining Association
Nebraska Retail Federation
Nevada Manufacturers Association
New Jersey Independent Electrical Contractors
North American Die Casting Association
Ohio Equipment Distributors Association
Outdoor Power Equipment and Engine Service Association
Plastics Industry Association
Power and Communication Contractors Association
Precision Machined Products Association
Precision Metalforming Association
Printing Industries of America
Retail Association of Maine
Retail Association of Nevada
Retail Industry Leaders Association
SNAC International
Texas Retailers Association
The Employers Association
TRSA – The Linen, Uniform and Facility Services Association
Truck Renting and Leasing Association
Tucson Metro Chamber
United Equipment Dealers Association
United Motorcoach Association
Virginia Trucking Association
Washington Retail Association
WCI, Inc.
Workforce Fairness Institute

July 24, 2019

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

Dear Chairwoman Wilson, Ranking Member Walberg, and Members of the Subcommittee:

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

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"outside the usual course of the hiring entity's business" to be considered an independent 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

National Association of Home Builders

1201 15th Street NW
Washington, DC 20005

T 800 368 5242
F 202 266 8400

www.nahb.org

Government Affairs

James W. Tobin III
Executive Vice President & Chief Lobbyist
Government Affairs and Communications Group

July 24, 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:

In advance of tomorrow's Subcommittee hearing, 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. This legislation would negatively impact the construction labor market at a time of widespread worker shortages and exacerbate the housing affordability crisis. Implementation of the PRO Act would come at the cost of small businesses and their workers – stifling communications, infringing on privacy, and stripping the balance from labor-management relations.

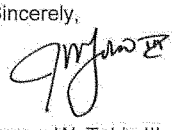
Of greatest concern to NAHB is the PRO Act's proposed codification of a broad joint employer standard and adoption of a rigid test for determining whether a worker is an employee or independent contractor. Together, they threaten to upend the contracting business model that is the very bedrock of the 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

July 25, 2019

The Honorable Frederica Wilson
Chairwoman, Health, Employment, Labor,
and Pensions Subcommittee
2445 Rayburn House Office Building
Washington, DC 20515

The Honorable Tim Walberg
Ranking Member, Health, Employment, Labor,
and Pensions Subcommittee
2266 Rayburn House Office Building
Washington, DC 20515

Dear Chairwoman Wilson and Ranking Member Walberg:

On behalf of the American Hotel & Lodging Association (AHLA), the sole national association representing all segments of the U.S. lodging industry, including hotel owners, REITs, global brands, franchisees, management companies, independent properties, bed & breakfasts, state hotel associations, and industry suppliers, I would like to thank the House Education and Labor Subcommittee on Health, Employment, Labor, and Pensions for holding a hearing today on "Protecting the Right to Organize Act: Modernizing America's Labor Laws" (PRO Act - H.R. 2474).

The lodging industry is one of the nation's largest employers. Supporting more than 8 million jobs across the country, the hotel industry provides $75 billion in wages and salaries to our associates and generates $600 billion in economic activity from the 5 million guestrooms at more than 54,000 lodging properties nationwide. It's particularly important to note that this industry is comprised largely of small businesses, with nearly 60 percent of all hotels falling under the SBA's definition of what constitutes a small business in the lodging sector.

Our Hospitality Is Working campaign underscores the innovative and proactive efforts underway to recruit and retain talent, protect our employees and guests, and invest in our communities. Our employees are the backbone of our hotels, but without stable and reliable rules and regulations around our workforce, we cannot thrive and continue to offer lifelong careers in our industry.

AHLA has significant concerns about H.R. 2474 and joins the Coalition for a Democratic Workplace (CDW), a broad-based coalition of hundreds of organizations representing millions of employees in various industries, in their concerns with the sections of the *PRO Act* including, but not limited to, eliminating workers' free choice, right to a private ballot election, and the privacy of personal information. Many of these ideas have been rejected by the judicial system, opposed on a bipartisan basis in Congress, and abandoned by agencies asked to enforce them.

Most concerning to AHLA, the *PRO Act* would codify the National Labor Relations Board's (NLRB) controversial *Browning-Ferris Industries (BFI)* decision, which greatly expanded and muddled the definition of joint employment. The monumental shift in labor law established under the *BFI* decision upended the most basic employment questions for any employer: "Who do you employ?" and "Are you liable for the actions and activities of employees that are not your own?" As a highly-franchised and segmented industry, our members rely on this business model to achieve the American Dream, and they are extremely concerned by the expanded definition of joint employment liability and the potential negative impacts on their business.

For these reasons, we urge Members to oppose H.R. 2474 and protect small business from the damaging *PRO Act*.

Thank for your consideration.

Sincerely,

Chris Burgoyne

Chris Burgoyne
Vice President, Government and Political Affairs

CC: House Education & Labor Committee

July 25, 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 Protecting the Right to Organize Act: Modernizing America's Labor Laws. 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.

Another deeply concerning provision of the PRO Act is the ability for unions to access employee personal data without consent. In today's world, the protection of privacy and personal information is important to financial security and personal well-being. If enacted, employees' home addresses, work locations, cellphone numbers, personal and work email addresses and shift times would be unknowingly shared with unions.

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 craft professionals 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 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 frightful ideas:

- Eliminate right-to-work laws nationwide, including in the 27 states that have signed it into law, forcing workers to join unions they did not ask for;
- Stifle work of independent contractors, which limits workplace flexibility and opportunity; 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

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CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

NEIL L. BRADLEY
EXECUTIVE VICE PRESIDENT &
CHIEF POLICY OFFICER

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5310

May 16, 2019

TO THE MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES:

The U.S. Chamber of Commerce strongly opposes H.R. 2474, the "Protecting the Right to Organize Act." **Members who do not cosponsor this bill will receive credit for the Leadership component of their "How They Voted" rating.**

This bill would abolish any sense of balance between union rights and employer rights in labor organizing and negotiations by explicitly eliminating employers as a party in elections to determine if a union would represent that employer's workforce. Moreover, under this legislation a secret ballot election where the employees chose not to be represented by a union could be overturned if enough employees signed cards saying they supported that union.

H.R. 2474 would also potentially take away workers' traditional opportunity to ratify a first contract. If the newly recognized union and the employer cannot agree to a first contract through negotiation and mediation, an arbitration process would result in a contract without employees being able to vote on that contract.

This bill would also effectively repeal the Taft-Hartley Act, labor law reforms enacted in 1947 to rein in some of the most abusive union organizing tactics of that era. H.R. 2474 would once again allow unions to engage in secondary boycotts and picketing, meaning that they could target any employer doing business with a targeted company even if those employers have no connection with the union. This would allow for the disruption of entire segments of the economy.

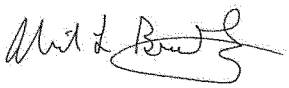
Another key provision of the Taft-Hartley Act allowed states to pass right-to-work laws, meaning that workers could no longer be fired for not paying union dues. Twenty-eight states have enacted right-to-work laws. H.R. 2474 would repeal the section of the Taft-Hartley Act allowing these laws, invalidating all states' right-to-work laws currently in place.

Moreover, H.R. 2474 would codify the National Labor Relations Board's unworkable *Browning-Ferris* definition of joint-employer liability based on "indirect" or "potential" control of another company's employees. It would also codify and nationalize the strict definition of independent contractors based on the California Supreme Court's *Dynamex* decision that threatens to make using or operating as an independent contractor extremely difficult. This court decision is poised to seriously damage the tech sector, start-ups, and "gig" economy companies, as well as the millions of individuals who value the independence and flexibility of working as independent contractors. In addition, it would reinstate the "persuader" rule, which was intended

to deprive employers of legal representation during union campaigns, a rule that a court found "defective to its core."

H.R. 2474 would codify bad labor policy and failed efforts at reform. The Chamber strongly urges you not to cosponsor this bill.

Sincerely,



Neil L. Bradley

Mr. WALBERG. Thanks to the panel for being here, and thanks, Madam Chair, for a good hearing. I say that because this hearing, I think, at least I think, made crystal clear the stark contrast of the competing agendas on whether union boss success should be priority number one or employee/employer success should be priority number one.

I truly believe that employees and employers being successful together only extends the opportunity for success. I would also hasten to say, as a former steel worker at U.S. Steel South Works, south side of Chicago, No. 2 Electric Furnace, that my job there was safer, my benefits were better than they would have been, had not the union involved themselves in providing some enhancements over the years to the point of 1969, when I came there and worked. And there is a place for that; but there is a place for each employee to make the decisions on her best or his best self-interest, on the basis of value, of what they purchase or join or involve themselves with.

I believe the best way to bring success to the employee is to also allow employers to succeed as well. Nothing that I see in this bill, the PRO Act, H.R. 2474, I believe, offer that opportunity for both sides. In fact, I think it takes us backwards. Choice and flexibility are key, I believe, to success, choice and flexibility. This bill offers no flexibility, except to one side. That is not flexibility. It takes away choice even for employees.

In my State, where the citizens supported a right to choose, a right to work for employees in a longstanding union state of Michigan, the home of the auto industry, motor capital of the world, they made that choice and employees still have a choice whether they can join or not join a union, and they make those choices.

There were statements made today with broad-sweeping brush strokes about the need to have this legislation because of income levels, income inequality, the middle income going down, and all of the rest. I would not hesitate to state they were broad-brush statements not making apples-to-apples judgments, but rather apples-to-oranges or banana judgments, and I am pleased that we will insert in the record alternative viewpoints with a much clearer understanding of what was there.

But let me just state median household income, for instance, reached its fifth straight record high last year, over $61,000, median income. Those are the middle-class workers that I represent in my district, and I could go on and on with actual statistics, not taking outside outliers and pulling them in, and I think we need to understand that as well.

Mr. Alvarez, thank you for coming all the way here. You are an individual at this point in time who is highly sought after. I would encourage you to come to Michigan. I know you like California. It is a lower-cost living state in Michigan, and there are 60,000 not simply in Michigan, but at this point in time the last number I saw was 60,000 truck seats unfilled. You are highly sought after. I was put into the driver's seat of an 18-wheeler, and encouraged the double shift, double clutch a lot better than I actually did. They didn't hire me but they said they would train me and they would put me in a seat, and these would be in seats in either Teamster union operations or private contractor operations as well.

You have choices, and you have skills. Whether you go into aviation or not, you have skills that are marketable now. This legislation I don't believe would assist in that.

So, Madam Chair, I appreciate the chance to have this crystal-clear difference hearing today, but I would certainly hope we wouldn't go backwards, that we would not move this legislation that I think would ultimately hurt the opportunities for people to have those choices, make those decisions, and have the flexibility to do what America has always proposed.

Thank you, and I yield back.

Chairwoman WILSON. Thank you, Mr. Walberg.

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

I thank you, again, to all of our witnesses for your testimonies today. Today, we heard compelling testimony on how the changing relationship between employers and employees is undermining workers' ability to exercise their collective bargaining rights and negotiate for better wages, benefits, and working conditions.

We heard from Mr. Alvarez how hard it is for him; and we learned from Professor Garden as the number of subcontracted freelance and third-party workers increase, employers are incentivized to exploit loopholes in the National Labor Relations Act to misclassify employees, subcontract work to evade labor laws, and restrict workers' rights to peacefully protest.

To make matters worse, the Trump administration is further enabling employers to exploit these weaknesses in labor law. From attempting to reverse the Browning-Ferris decision to denying SuperShuttle workers the right to organize, Republicans at the National Labor Relations Board continue to erode workers' rights to join a union, and to negotiate with their employers. But, more importantly, we discussed the long-overdue steps that Congress can take, and should take, to ensure our Nation's labor laws protect the right to organize.

By passing the PRO Act, we will provide workers with the safeguards they need for a modern economy. This bill will prevent workers from being misclassified as independent contractors, and will prevent employers from evading their obligations under the law. And we will repeal the provisions that violate workers' First Amendment rights.

Once again, I thank the witnesses for being here. I thank you, Ms. Garden, Mr. Alvarez, Mr. King, and Mr. Griffin.

And I thank my colleagues for a constructive HELP subcommittee hearing.

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

[Additional submission by Mr. King follows:]

Testimony of

G. Roger King*
Senior Labor and Employment Counsel
HR POLICY ASSOCIATION

For the

House Education and Workforce Committee

Hearing on

Joint Employer Policy and Legal Issues

July 12, 2017

* Mr. King acknowledges the assistance of his colleagues at the HR Policy Association in preparing this testimony including Mark Wilson, Chief Economist and Vice President, Health and Employment Policy; and Daniel Chasen, Director of Research and Publications. Portions of this testimony are based on the Association's recent report *Workplace 2020: Making the Workplace Work*[1]

[1] *Workplace 2020: Making the Workplace Work*. HR Policy Association, Apr. 2017. Web. http://hrpolicy.org/Content/documents/Workplace_2020_Report_WEB_06-07-17.pdf.

Chairwoman Foxx, Ranking Member Scott, and distinguished members of the Committee:

Thank you for this opportunity to again appear before the Committee. I am testifying today on behalf of HR Policy Association where I serve as Senior Labor and Employment Counsel. My biographical information is attached to my written testimony. I request that my written testimony and the exhibits thereto, in their entirety, be entered into the record of this hearing.

HR Policy Association is a public policy advocacy organization representing chief human resource officers of major employers. The Association consists of more than 380 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, these companies employ more than 10 million people in the United States, and their chief human resource officers are generally responsible for employee and labor relations for their respective companies. Recently, the HR Policy Association published *Workplace 2020: Making the Workplace Work*, a report representing the general views and experiences of the Association's membership on the trends shaping the workforce, the outdated policies that govern it, and the way forward.

❖ **Overview**

Policy and legal questions as to whether separate and distinct entities are "joint employers" and correspondingly whether a worker is an "employee" or an "independent contractor" are perhaps the two most important labor and employment questions facing the country today.[2] As you no doubt have heard from a number of your constituents, including particularly franchisees and other small and independent business owners, the regulatory and legal issues associated with the questions of joint employer and independent contractor status are becoming increasingly difficult and expensive to answer. These questions, however, are not solely issues and problems for small employers and franchisees. Our member companies, which constitute some of the largest employers in the country, view joint employer and independent contractor issues as some of the most important challenges they face today in the labor and employment area.

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[2] The joint employer doctrine, which includes situations where separate legal entities have chosen to handle aspects of their employer-employee relationship jointly, should not be confused with the "single employer doctrine." The single employer doctrine (a/k/a "integrated enterprise" doctrine) involves situations where multiple legal entities are found to: (1) have common ownership or financial control, (2) have common management, (3) have centralized control of labor relations, and (4) interrelations of operations. These indicia have been utilized by the courts in various fashions. The one common thread in most of the single employer findings, however, has been common ownership of the entities in question. *See Baker v. Stuart Broadcasting Co.*, 560 F.2d. 389 (8th Cir. 1977) and *Wells v. Firestone Tire & Rubber, Co.*, 421 Mich. 641, 364 N.W.2d. 670 (Mich. 1984). Further, as discussed later in the testimony, it is important to understand the differences between vertical joint employer relationships and horizontal joint employer relationships.

The reasons for these concerns by small, medium, and large size businesses are many and varied, but eventually all relate to the increasingly difficult regulatory and litigation climate that has developed in this area. At the base of this discussion is the potential for application of the legal doctrine of joint employer status, and its potential far reaching effects on all entities found to be a joint employer. This is a very powerful legal doctrine where unrelated entities can be jointly and severally liable for statutory violations, even if the other entity or entities that are found to be part of the joint relationship are wholly responsible for the violation, and the entity that is additionally being held jointly liable had no involvement in such matter or any practical means to prevent the alleged violation. Indeed, the non-actor joint employer may not even have any knowledge of the event(s) or circumstances that were involved until being served with a complaint in an administrative or judicial proceeding. This potential for unforeseen liability can result in considerable financial exposure in many different situations under an ever-expanding number of labor and employment regulations and statutes.

Although employer exposure to increased liability as a result of the National Labor Relation Board's (NLRB) recent decision in the *Browning-Ferris* case has received considerable attention—as it should—the potential for litigation risk is arguably even greater under other federal labor statutes such as the Fair Labor Standards Act (FLSA), the Occupations Safety and Health Act (OSH Act), and various federal employer discrimination statutes. The potential for broad legal exposure is particularly present in supply chain relationships that many large employers have with hundreds of unrelated business entities. In such relationships, if the user employer requires even minimum employment standards be met by suppliers in the labor relations area, the user employer may be found to be a joint employer. The social pressure, indeed, can be great in this area on large employers. For example, it is easy to recall numerous recent media stories where employers are being asked to assume social responsibility for the employment actions for all of their suppliers even if they have no ability to directly supervise such off-site workers or, as a practical matter, to oversee the day-to-day working conditions that are present in many remote areas of the world. Our member companies have and will continue to accept on a voluntary basis their corporate social responsibility in this area, but they do not want to be saddled with overreaching rules and regulations, and be exposed to onerous and expensive litigation. Finally, franchisors have experienced similar considerable legal exposure in their relationship with franchisees with whom they have, as a practical matter, little ability to oversee on a daily basis.

Employees are also increasingly left in a quandary as to their status in this joint employer discussion. Predictability and certainty as to their relationship with one or more employers has become increasingly problematic. Indeed, as outlined further in this testimony, workers in certain instances may be penalized by not being provided certain workplace benefits due to an employer's concern that the extension of such benefits to supplier employed individuals would make it a joint employer.

There is a great need for common sense to be brought into this area. Regulatory agencies and the courts need to do a "reality check." Further, the joint employer area merits thorough and

serious attention by this Committee—this is an area that needs an immediate legislative solution. Specifically, the HR Policy Association recommends the following outline for joint employer legislation:

- A simple and concise definition of the term "joint employer" for federal labor and employment statutes. The National Labor Relations Act (NLRA), FLSA, OSH Act, and various federal employer discrimination statutes, at a minimum, should be subject to this uniform definition.
- Before a regulatory agency or court could reach a legal conclusion of joint employer status, factual findings would have to be made that the entity or entities in question had the authority to: (1) hire and fire; (2) determine rates of pay and methods of payment; (3) manage payroll and leave policies; (4) directly supervise on a day-to-day basis the workers in questions, including determination of work schedules, assignment of positions and tasks, and administration of discipline; and (5) maintain employee records required by law.
- Authority in the above areas would have to be found to be direct, actual, and immediate.
- Federal preemption and safe harbors should be provided to any employer who meets the above criteria to preclude such employers from being subjected to increasingly onerous state and local labor and employment legislation and litigation. This approach would help to address the increasing phenomena of "reverse preemption" where certain state legislation and municipal ordinances have unduly influenced national labor and employment policy.

The Association also urges the Committee to do a long-range study regarding the potential to establish a new worker classification definition—the independent worker. This classification of a worker is discussed in a thoughtful and comprehensive study entitled "A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The 'Independent Worker'" by Seth D. Harris and Alan Krueger. While there remain issues regarding this proposal and how this new classification system would work, the concept of permitting workers to remain independent while receiving certain benefits from employers and also being covered by certain federal employment statutes certainly merits consideration given the continuing litigation and controversy regarding independent contractor status and joint employer classification.

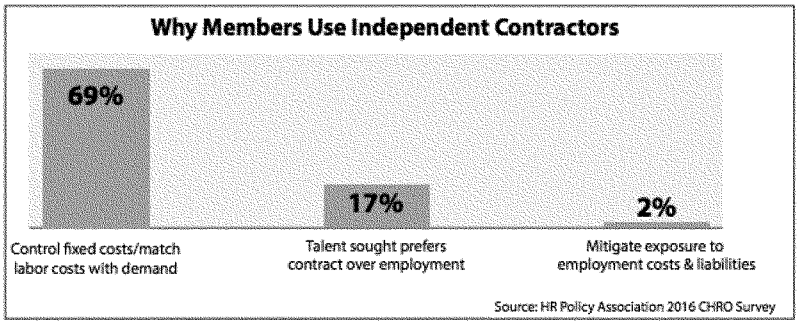
Finally, discussions of legislative solutions in this area, like in many areas in the labor and employment field, have the potential to result in highly partisan positions being taken by various stakeholders. Hopefully, such an approach can be avoided. While it is true that plaintiff-oriented attorneys and their clients on occasion hit the "legal jackpot" and win a case involving FLSA issues or prevail in an employee misclassification status case, such "victories" are few and far between. The vast majority of your constituents never see the fruits of such so-called victories, and even the successful workers in such litigation often only receive small payments while their attorneys receive large payouts in fees. Contrasted with these so-called victories is the harsh reality that employers are increasingly faced with additional regulatory compliance costs

and litigation defense expenses that curtail job development and limit wage and benefit growth. The only real winners in the current status quo of ambiguity and excessive litigation in the joint employer area are lawyers, and perhaps law professors, who can write interesting academic articles about this subject.

❖ **Joint Employer Workplace Discussions Frequently Have Proceeded from Misinformation and Incorrect Assumptions**

The discussion of joint employer issues has often started in academic and regulatory settings from the premise that employers outsource and subcontract work and enter into relationships with various business entities to affirmatively avoid coverage of federal and state employment statutes such as the NLRA, FLSA, OSH Act, and various anti-discrimination statutes. The "thinking" that flows from this premise is that employers who are engaging in such activities should be closely scrutinized, and subject to various penalties and regulation to discourage them from entering into such business relationships. Further, this type of analysis then concludes that the definition of "joint employer" should be considerably broadened to include a multitude of workplace relationships that traditionally have not been found to constitute a joint employment situation. This line of thinking is not only unfortunate, but incorrect.

An objective and thoughtful analysis in the joint employer area should begin with an entirely different premise—the reason that virtually all business entities outsource work is to maximize efficiency, productivity, and quality. Most functions that employers assign or contract out to other entities or to independent contractors are jobs or services that are not part of their core business function, and that they cannot perform in a cost efficient or quality efficient manner. Indeed, as illustrated by the following chart, virtually all outsourcing, subcontracting, or independent contractor relationships are not initiated by a desire to avoid "employee status" under various federal and state employment laws.



❖ **Increased Joint Employer Litigation Expenses and Conflicting Joint Employer Definitions**

As the HR Policy Association highlighted in the *amicus* brief it filed last week along with the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Retail Federation, and the Retail Litigation Center, with the U.S. Supreme Court supporting DirecTV's petition for certiorari in the case *Hall v. DirecTV,* 846 F.3d 757 (4th Cir. 2017)—and which is attached to the testimony as Exhibit 1—FLSA cases alone are at record levels in the federal courts. During the 12-month period ending on March 31, 2016, plaintiffs filed 9,063 FLSA cases in federal district courts, compared with 5,507 patent cases, 1,070 anti-trust cases, and 1,053 securities cases.[3] Further, a Westlaw search of federal district court decisions in 2016 revealed over 100 decision addressing claims of joint employer status under the FLSA alone. Franchisors and franchisees have been particularly hard hit in this legal area with litigation involving such entities increasing from only 3 in 2007, to 15 in 2012, and to 38 in 2016. Additionally, the General Counsel of the NLRB has initiated one of the most expansive proceedings in the Board's history by issuing dozens of complaints against McDonald's USA, LLC and independently owned and operated McDonald's franchisees located in New York, Philadelphia, Chicago, Indianapolis, Sacramento, and Los Angeles.

Currently, there are almost as many different versions of the legal test for who is a joint employer under the FLSA as there are Circuit Courts of Appeal in the United States. For example, the First Circuit (ME, NH, MA, RI) applies a four factor economic realities test (a.k.a. the *Bonnette* test), while the Second Circuit (NY, VT, CT) uses the *Bonnette* test but adds six functional control factors. On the other hand, the Third Circuit (PA, NJ, DE) uses the *Bonnette* test but also considers whether an employer can impose discipline on an employee, while the Fourth Circuit (MD, VA, WV, NC, SC) just created a novel "completely disassociated" test that looks at the relationship between the employers. In yet another approach, the Eleventh Circuit (AL, GA, FL) uses a distinct eight-factor test that is related to the economic realities test.

Moreover, the new joint employer test that the NLRB developed in the *Browning-Ferris* case[4] is exceedingly broad and ambiguous, and arguably permits a finding of joint employer status even if the entities in question possess unexercised and indirect authority to control terms and conditions of employment.[5] Remarkably, to further complicate the joint employment issue, the Equal Employment Opportunity Commission (EEOC) submitted an *amicus* brief in the *Browning-Ferris* case and argued that the Board should adopt the EEOC's 15 factor standard,

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[3] See Administrative Office of the United States Courts, Federal Judicial Caseload Statistics Table C-2 (June 2017).
[4] *Browning-Ferris Indus. Of Cal., Inc., D/B/A BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015).
[5] "Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to joint employer inquiries". *Browning-Ferris Industries of Calif., Inc.*, 362 NLRB No. 186 (2015).

which it described as "more flexible, more readily adaptable to evolving workplace relationships and realities."[6]

Policymakers need to enact legislation to clarify and simplify these widely varying joint employer tests for a number of reasons:

➢ **Decrease Regulatory Compliance and Litigation Expenses**

As noted in the above section, there has been a significant increase in joint employer litigation with regulatory agencies and courts applying differing and conflicting standards. There is no positive return on investment to employees, businesses, and indeed the nation as a whole for these types of expenditures. The resources currently being expended in this area could and should be expended to achieve other objectives, including investment for job creation, employee training, and for increased worker wages and benefits.

➢ **Importance of National Consistency**

Geographic consistency is particularly important for large multistate employers and franchisors. A uniform and consistent approach in the joint employer area will significantly reduce unnecessary and costly regulatory compliance and litigation expense. Many businesses operate across multiple circuit court jurisdictions, and are subject to multiple competing standards for determining compliance with federal labor laws. Surely, Congress did not intend this to be the case when it enacted these statutes. To simplify compliance and reduce unnecessary administrative costs, a uniform definition for joint employer status should apply to federal employment laws.

➢ **Need for Stability and Predictability in Business Arrangements**

As the Supreme Court noted in its decision in *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010), "predictability is valuable to corporations making business and investment decisions." Novel and disparate legal decisions are threatening to penalize and deter longstanding economically sensible business arrangements, including but not limited to employers and subcontractors and franchisors and franchisees. The United States Court of Appeals for Fourth Circuit recent decisions in *Hall v. DirecTV* and *Salinas v. Commercial Interiors*, 848 F.3d 125 (4th Cir. 2017) and the NLRB's *Browning-Ferris* decision threaten to deter companies from entering into business relationships that promote meaningful commerce and are good for both employees and shareholders alike.

➢ **Employer Good Deeds Should Not Be Punished**

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[6] Brief of the EEOC as Amicus Curiae, *Browning-Ferris*, 3C-RC-109684 (filed June 15, 2014).

Many companies have, and many more would like to have, the freedom to establish corporate social responsibility (CSR) standards for their contractors, franchisees or others—be it pay, benefits, training, drug testing, background checks, etc.—without having to be drawn into a joint employment relationship and perhaps expensive and protracted litigation.

For example, in 2015, one company announced a new CSR initiative where it would only do business with suppliers that provided certain employees with at least 15 days of paid leave annually. The NLRB argued that this request by the user company made it a joint employer with the supplier company in question even though it did not exercise any type of direct control over the terms and conditions of employment of the employees of the supplier employer. Ironically, the user company in question had, shortly before this unfortunate regulatory action occurred, been praised by President Obama's White House as being an example of a leading employer in the country that was promoting socially responsible terms and conditions of employment.

The HR Policy Association has brought this unfortunate regulatory overreach to the attention of the United States Court of Appeals for the D.C. Circuit in an *amicus* brief in the pending *Browning-Ferris* case. Attached as Exhibit 2 to this testimony is a copy of the Association's *amicus* brief in the *Browning-Ferris* case. If the NLRB's broad new joint employer decision is not overturned by the courts, such standard no doubt will deter other companies from adopting such policies. Indeed, some law firms that represent employers have issued alerts cautioning companies to limit requirements that they impose on their business partners affecting those partners' employees to avoid inadvertently creating joint-employment relationships.

➢ **Need to Shield Employers from Secondary Boycott Activity and Bargaining Obligations with Unrelated Business Entities**

Certain joint employer recent decisions, including the NLRB's decision in the *Browning-Ferris* case, have the potential to permit secondary boycott activity and related corporate campaign initiatives against an entity that historically has not been found to be a joint employer. Indeed, such conduct without a joint employer finding would, in many instances, be prohibited as illegal secondary conduct under section 8(b)(4) of the NLRA. Stated alternatively, if an entity is a neutral in a labor dispute it cannot be lawfully the target of secondary boycott activities and otherwise immersed in a dispute with the labor organization that has initiated such activities against another entity. If the previously neutral employer in question, however, is found to be a joint employer with the primary target of the dispute, a labor union could proceed to engage in boycott and other secondary activates against the neutral joint employer entity without being in violation of the NLRA.

Additionally, under the NLRA, a joint employer finding could require an otherwise unrelated and separate business entity to have bargaining obligations with a union that successfully organized another entity in the joint employer relationship.

❖ **Certain Joint Employer Definitions, Including the NLRB's Definition, Deter and Interfere with New Employer-Worker Relationships**

There is a significant danger that the current overbroad definition of joint employer status will create new barriers to the movement of work at a time when flexibility is critical to ensuring that workers find work arrangements best suited to their skills, career development, income and family responsibilities. The reality is that in many instances, workers who possess skills in critical demand seek to be tied to the market, not to individual employers. Recognizing this reality is not just essential to ensuring that businesses can be at their competitive best but also to empower the workers themselves to ensure that their skills are put to maximum use in a way that serves their own needs and desire for job security.

The benefits to workers of non-traditional work relationships are often overlooked. These benefits can derive from a wide variety of motivations on the part of those workers, including:

- Flexibility, which fixed employment with a single employer may for certain workers impede through obligations and a commitment of time to the needs of that employer; and
- Marketability, combined with entrepreneurship that provides workers with a special set of skills in high demand that bolster the ability to make more money on their own (or as an employee of a firm specializing in those skills) and be more selective of jobs that match their interest as a "free agent."

Meanwhile, employers may be motivated by a variety of factors that have nothing to do with avoiding liability under federal labor laws, including:

- Managing the ebb and flow of staffing needs, which is necessitated by fluctuating market demands;
- A lack of availability of certain specialized skills, in which case an employer can only acquire those skills from entrepreneurial individuals or companies specializing in providing those skills; and
- Focusing on core competencies of the company, and thereby relying on other individuals or companies who may provide better service through its own core competency (*e.g.*, security).

Finally, if the current state of the law is permitted to continue in this area, it may have a disruptive and expensive impact on the federal procurement process. As the Committee is well

aware, the government, on a daily basis, contracts with thousands of entities for essential products and services. If the approach taken by the Fourth Circuit Court of Appeals in the *DirecTV* case prevails, the government may be found in numerous instances, to be a joint employer with various contractors, and subject to considerable litigation under joint employer theories. *See* 29 U.S.C. § 203(d) which defines "employer" to include a public agency. *See also Murphy v. Volt Information Sciences, Inc.*, 203 Westlaw 5372787 at 2 (D.OR. September 24, 2013) (holding that federal government's waiver of sovereign immunity in family medical leave act case extends to joint employment).

- **The Current Legal Regime, with Its Extensive Regulatory and Litigation Outcomes, Will Impede Positive Developments for Workers**

Ultimately, the application of any definition of "employer" or "joint employer" depends on various "indicia [i.e., indicators] of employment." Being on a company's payroll is probably the clearest indicator but regulators look at a variety of other factors, such as control over schedule, work directions, the work performed, and whether a claimed "independent contractor" performs work for other companies. An overly rigorous enforcement of these factors forces companies to minimize these "indicia" in ways that are often harmful not only to those contingent workers but also to their own employees.

Thus, a company that has an on-site day care center or physical fitness program that is part of its wellness program may exclude from those benefits anyone who is not an employee of the company. In addition, a host company that contracts with an outside firm to provide physical security to its premises may believe that its employees' protection will be best served by certain hiring standards for the security personnel used by that firm. This may include drug testing and background checks, a minimum level of training, pay and/or benefits and so forth. Yet, if the host company seeks to impose those standards on the security firm, it increases the likelihood of being considered a "joint employer" of such individuals.

- **Certain of the Recent Joint Employer Decisions Have Ignored Congressional Intent and Misapplied the Law in this Area**

Certain decisions by regulatory agencies and courts in the joint employer area appear to be result-oriented with objectives to add a deeper pocket defendant or defendants. Such decisions appear to have little, if any, relationship with the substantial body of common law developed in the agency area. Further, some decisions have seemingly adopted a very liberal and self-imposed "humanitarian" mission of expanding the reach of the joint employer definition beyond what was intended by the Congress. For example, the Fourth Circuit's recent decision in the *Salinas* case stated that one of the rationales for the Court's holding was the premise that the FLSA has a "remedial and humanitarian…purpose [and therefore]…should be broadly interpreted and applied to effectuate its goals," *Salinas* 848 F.3d at 140. Such an approach is erroneous for a number of reasons including the fact that many, if not most, legislative enactments are remedial in nature. The Congress, not the courts, should be the decider of the

reach of a statute. Social engineering, whether it be under the FLSA or other statutes, is not the function of the courts. As the Supreme Court stated in the *Rodriguez v. United States* case, 480 U.S. 522, 525-26 (1987), "no legislation pursues its purpose at all costs," and that the correct statutory interpretation approach is that when a court analyzes the balance struck by Congress in a remedial statute, its goal should be to "neither liberally to expand nor strictly to constrict its meaning but rather to get the meaning precisely right," *Rodriguez* at 582.

The NLRB's holding in its *Browning-Ferris* decision is also a prime example of the will of Congress being ignored in the joint employer area. In 1947, the Congress expressly directed in the Taft-Hartley amendments to the NLRA that the Board utilize common law principles of agency when determining the questions of employee and employer status. The Congress specifically overruled an earlier Supreme Court decision in *NLRB v. Hearst Publications, Inc.*, 322, U.S. 111 (1944), which had disregarded common law principles of agency, and held that "independent contractors" could be considered "employees" under the NLRA. The legislative history to the 1947 Amendments is quite instructive on this question. For example, the House Committee Report accompanying the 1947 Amendments was quite critical of the Board and noted that the term "employee:"

> According to all standard dictionaries, according the law as the courts have stated it, and according to the understandings of almost everyone, with the exception to members of the National Labor Relations Board, means someone who works for another for hire…[and who] worked for wages or salaries under direct supervision…It must be presumed that when Congress passed the Labor Act, it intended words it used [such as "employee"] to have the meanings they had when Congress passed the Act, not new meanings that, nine years later, the Labor Board might think up…it is inconceivable that Congress, when it passed the Act, authorized the Board to give to every word in the Act whatever meaning it wished. H.R. Rep. No. 245 at 18, 80th Cong., 1st Sess. (1947). *See also Allied Chem. & Alkali Workers, Local Union No.1 v. Pittsburg Plate Glass Co.*, 404 U.S. 157 (1971).

It is clear that what Congress did in 1947 was designed to reinforce the applicability of common law agency principles to determine who is an employer and who is an employee under the NLRA. Thereafter, the Supreme Court has consistently utilized common law agency principles to determine who is an employee and who is an employer, *Town & Country, Elec., Inc.*, 516 U.S. 85 (1995).

As noted above, the Fourth Circuit Court of Appeals decision in the *Hall v. DirecTV* case also is a substantial deviation from not only joint employer tests utilized in other circuit

courts of appeal, but also is a substantial misinterpretation of the United States Department of Labor regulations in the joint employer area. Indeed, the Fourth Circuit's decision in the *Hall* case fails to understand the difference between vertical joint employer and horizontal joint employer relationships. In a vertical joint employer relationship, a worker has a relationship with an entity that supplies services to another entity, and allegations in this area generally state that both entities are the worker's employer. A horizontal joint employer relationship by contrast is a situation where an employee initially has a direct employment relationship with two or more entities, and the contention in these types of cases is that the entities in question should be treated as a joint employer for purposes of the FLSA. The Fourth Circuit, unfortunately, rejected the joint employer test that has been almost universally followed, at least in part, by other United States Courts of Appeal and as set forth in *Bonnette v. California Health & Welfare Agency*, 704 F.2d. 1465 (9th Cir. 1983), abrogated on other grounds by *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985). The substantial legal deficiency in the Fourth Circuit reason is set forth in Exhibit 1, the Association's *amicus* brief in support of DirecTV's petition for certiorari.

❖ **Solutions to Joint Employer Issues**

➢ **United States Department of Labor (USDOL) Action**

The USDOL recently took thoughtful and immediate action in withdrawing two interpretation letters that had been previously issued by the Department. These previous interpretation letters broadened the definition of instances when joint employer status could be found and also narrowed definitional approach with respect to independent contractor issues. Although such AI's have minimal legal significance, they do reflect a significant policy change from the Department in joint employer and independent contractor area. Department of Labor—Administrative Interpretation No. 2016-1: Joint Employment Under the Fair Labor Standards Act and Migrant Seasonal Agricultural Workers Protection Act (January, 20, 2016) and Administrative Interpretation No. 2015-1: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors (July 15, 2015).

The Department should further examine a number of outdated regulations in the FLSA area as they relate to joint employer status. Specifically, the Department should reexamine the present regulation that discusses horizontal joint employer relationships and remove the phrase "completely disassociated" as such requirement is virtually impossible for employers to meet and is subject to incorrect interpretation as recently evidenced in the Fourth Circuit Court of Appeal's holding in the *DirecTV* case.[7]

[7] 29 C.F.R. 791.2

➢ **Legislative Action**

Legislation relief in this area is needed. Such legislation should include a uniform, simple, and concise definition of joint employer status under various federal labor and employment statutes, and include, at a minimum, the NLRA, FLSA, OSH Act, and federal employment discrimination statutes. Additionally, such legislation should require, before a finding of joint employer status could be made, that the entity or entities in question have the authority to (1) hire and fire; (2) determine rates of pay and methods of payment; (3) manage payroll and leave polices; and (4) supervise on a day-to-day basis the workers in question, including determining work schedules, assignment of positions and tasks, and administration of employee discipline; and (5) maintain employee records required by law.

The above basic principles track the common law in this area, and also incorporate the basic principles set forth in the *Bonnette* case, which as previously noted is the lead circuit case authority in the joint employer area.

In addition, before a finding of joint employer status could be found, a court and administrative agency should be required to find that the above authority is exercised directly, actually, and immediately.

Correspondingly, however, entities should not be considered a joint employer if they only exercise indirect supervision of the individuals in question to ensure compliance with the contractually mandated brand standards, performance measurement, product requirements, quality requirements, safety requirements, customer or other service obligations, or federal, state, and local statutory and regulatory obligations. Additionally, any entity that provides basic training to potential employees to ensure statutory and regulatory compliance, and an ability to participate in basic benefit plans such as retirement, health, dental, and life insurance, should not be deemed to be a joint employer.

➢ **Need for Preemption and Safe Harbor Status**

As the Committee is well aware, there continues to be a proliferation of state and local labor and employment statutes and ordinances. While some cost of living-geographical considerations arguably might support such a local diversified approach with respect to the minimum wage standards, no such justification exists in the joint employer area. Employers and employees should not be subject to different and conflicting outcomes with respect to the definition of joint employer status based upon the jurisdiction in which they live and do business. As outlined above, consistency and predictability in this area is very important, especially for the planning and implementation of productive business relationships. Further, the added cost of having to adjust compliance approaches in different jurisdictions, and the exposure litigation due to varying and conflicting standards, should be eliminated. A national uniform definition of joint employer status with corresponding "ERISA type" preemption should be included in any legislation in the joint employer area.

Additionally, taking a uniform approach to the definition of joint employer status would be a needed check against the increasing "reverse preemption" phenomena that has started to develop in this country. This phenomenon has developed due to certain states implementing very far reaching local labor and employment statutes forcing large employers, including franchises that operate in multistate areas, to essentially adopt the most liberal policy or statute in question for all of it operations throughout the country to ensure consistency and minimize regulatory and court litigation exposure. Federal labor and employment law policy should be set by the Congress, not by various state legislative bodies and local municipalities. Stated alternatively, what is enacted in Sacramento should not unduly influence employer practices in Alabama, North Carolina, Michigan, Virginia, or any other part of the country.

❖ **Closing Thoughts**

As noted above, a broad and overreaching definition of joint employer status could also harm workers. Clearly, any employer seeking to affirmatively avoid liability by constructing sham arrangements with workers should be prosecuted. However, those seeking to provide certain benefits to contingent workers in addition to their own employees should be protected through the creation of specific safe harbors such as:

- Allowing employers to include contingent workers in certain events with employees, such as team-building exercises, thus removing barriers to optimal productivity by maximizing communications and chemistry between employees and non-employees working toward common objectives;
- Allowing participation—at the contingent workers' option—in the company's health care or defined contribution retirement plan;
- Allowing contributions to government insurance programs, such as unemployment insurance, workers' compensation, and paid family and medical leave insurance;
- Requiring drug testing and minimum levels of training for those involved in sensitive areas, such as security, that affect the safety and wellbeing of the employers' own employees;
- Requiring its contractors to provide to their own employees certain minimum pay and/or benefits; or
- Establishing methods to facilitate compliance by their franchisees or contractors with various employment laws.

Finally, the Association urges the Committee to undertake a long-range study on the potential benefit of developing a new statutory category for employees—an independent worker

classification wherein workers could receive certain benefit from employers, be covered by certain federal labor and employment statutes, but would retain their independent worker status.[8]

Ms. Chairwoman, this concludes my testimony. I would be happy to answer any questions Committee members may have.

[8] See "A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The 'Independent Worker'", by Seth Harris and Allan Krueger, The Hamilton Project (December 7, 2015).

[Additional submissions by Mr. Walberg follow:]

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
Member of Congress

Linda Sanchez
Member of Congress

Adam Smith
Member of Congress

Jamie Raskin
Member of Congress

Donald Norcross
Member of Congress

Paul D. Tonko
Member of Congress

Anna G. Eshoo
Member of Congress

John Yarmuth
Member of Congress

Bill Foster
Member of Congress

Brian Higgins
Member of Congress

Brendan Boyle
Member of Congress

Mike Doyle
Member of Congress

Susan Wild
Member of Congress

Stephen Lynch
Member of Congress

John Garamendi
Member of Congress

Raúl M. Grijalva
Member of Congress

Bonnie Watson Coleman
Member of Congress

Sheila Jackson Lee
Member of Congress

Gregorio Kilili Camacho Sablan
Member of Congress

Dina Titus
Member of Congress

Pramila Jayapal
Member of Congress

Salud Carbajal
Member of Congress

David Scott
Member of Congress

Eliot Engel
Member of Congress

Danny K. Davis
Member of Congress

Jimmy Gomez
Member of Congress

Ro Khanna
Member of Congress

Lori Trahan
Member of Congress

Judy Chu
Member of Congress

Tom Malinowski
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Jeff Van Drew
Member of Congress

John B. Larson
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Debbie Dingell
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Daniel W. Kildee
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David N. Cicilline
Member of Congress

Mikie Sherrill
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Daniel T. Kildee
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Norma J. Torres
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Mark DeSaulnier
Member of Congress

John Lewis
Member of Congress

David Price
Member of Congress

Albio Sires
Member of Congress

Peter J. Visclosky
Member of Congress

Joseph Morelle
Member of Congress

Jared Huffman
Member of Congress

Jesús G. "Chuy" García
Member of Congress

Debbie Wasserman Schultz
Member of Congress

Peter Welch
Member of Congress

Nydia M. Velázquez
Member of Congress

Henry C. Johnson, Jr.
Member of Congress

Madeleine Dean
Member of Congress

Andy Kim
Member of Congress

André Carson
Member of Congress

Charlie Crist
Member of Congress

Bobby Scott
Member of Congress

Barbara Lee
Member of Congress

Rashida Tlaib
Member of Congress

Jerry McNerney
Member of Congress

Dwight Evans
Member of Congress

Tony Cárdenas
Member of Congress

Andy Levin
Member of Congress

Eric Swalwell
Member of Congress

Haley M. Stevens
Member of Congress

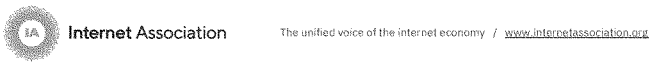
Charlie Crist
Member of Congress

Tom Suozzi
Member of Congress

Gwen Moore
Member of Congress

Raul Ruiz, M.D.
Member of Congress

Donald M. Payne, Jr.
Member of Congress



July 24, 2019

Honorable Robert C. Scott
Chairman
Education and Labor Committee
United States House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Honorable Virginia Foxx
Ranking Member
Education and Labor Committee
United State House of Representatives
2101 Rayburn House Office Building
Washington, DC 20515

Honorable Frederica S. Wilson
Chair
Subcommittee on Health, Employment,
Labor and Pensions
United States House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Honorable Tim Walberg
Ranking Member
Subcommittee on Health, Employment,
Labor and Pensions
United States House of Representatives
2101 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Scott and Ranking Member Foxx:

Internet Association (IA) appreciates the opportunity to share concerns with the *Protecting the Right to Organize (PRO) Act* introduced earlier this year. More specifically, we are concerned that by inserting a new "ABC test" into the National Labor Relations Act (NLRA), the PRO Act could substantially diminish opportunities for Americans to earn money flexibly through the sharing economy. The sharing economy provides Americans with the opportunity to earn money on their own terms. Individuals are able now, like never before, to build their own businesses and earn money how, when, and where they want. The sharing economy also empowers consumers by providing lower prices, higher quality, and more reliable choices for every day tasks and items.

As recently as 2017, IA conducted research examining the *True Size of The Online Labor Force*[1] that showed nearly 24 million online income positions (OIPs) nationwide from IA members alone, in all 50 states and DC. OIPs serve as an important lifeline to people across the country who need flexible opportunities to earn income. Research showed these OIPs typically serve as income supplements rather than primary job replacements. In fact, IA found no correlation between a state's unemployment rate and the prevalence of OIPs in that state.

The internet industry is concerned about the implications of inserting an "ABC test" into the NLRA because its overbroad definition sweeps in non-employees and potentially jeopardizes

[1] https://internetassociation.org/publications/true-size-online-labor-force/

freelance work, which provides great benefits for individuals and consumers.

The ABC test is also far from an accepted standard nationally. The test exists in only a minority of states and there are significant differences in how and when those states apply the test. For example, 14 states have codified the ABC test only in their unemployment benefits/taxation statutes, while a much smaller minority also apply it to their wage statutes. California is the only state to judicially impose its ABC test -- as a result of the *Dynamex* decision -- rather than codifying it in statute. California's interpretation is also based on the strictest version of the ABC test, which has negative implications for individuals who prefer the freedom and flexibility of independent contractor work and for the diverse industries who rely on them. This negative outcome is apparent as lawmakers in California are already moving legislation to limit the decision's impact on various industries, while calls for a broader legislative fix continue to be heard from freelancers and the business community.

IA and our members look forward to working with your committee to maintain the dynamism of the online marketplace and find ways to ensure American workers continue to benefit from internet-enabled economic opportunities.

Internet Association[2] is the only trade association that exclusively represents leading global internet companies on matters of public policy. Our mission is to foster innovation, promote economic growth, and empower people through the free and open internet. We believe the internet creates unprecedented benefits for society and the economy, and as the voice of the world's leading internet companies, IA works to ensure legislators, consumers, and other stakeholders understand these benefits.

Sincerely,

Michael Beckerman
President & CEO

[2] Member list available at https://internetassociation.org/our-members/.

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Telephone 202.650.5100 | Fax 202.650.5118
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July 24, 2019

The Honorable Frederica Wilson (D-FL)
Chairwoman
Subcommittee on Health, Employment, Labor, and Pensions
Committee on Education and Labor
2445 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Tim Walberg (R-MI)
Republican Leader
Subcommittee on Health, Employment, Labor, and Pensions
Committee on Education and Labor
2266 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Bobby Scott (D-VA)
Chairman
House Committee on Education and Labor
1201 Longworth House Office Building
Washington, D.C. 20515

The Honorable Virginia Foxx (R-NC)
Republican Leader
House Committee on Education and Labor
2462 Rayburn House Office Building
Washington, D.C. 20515

RE: TechNet Comments for the July 25, 2019 hearing titled, "Protecting the Right to Organize Act: Modernizing America's Labor Laws"

Dear Chairwoman Wilson, Republican Leader Walberg, Chairman Scott, Republican Leader Foxx, and Distinguished Members of the House Committee on Education and Labor:

As the Subcommittee on Health, Employment, Labor, and Pensions prepares for tomorrow's hearing to consider H.R. 2474, the *Protecting the Right to Organize* (PRO) *Act*, we would like to share our industry's perspective on a provision of concern included in the bill.

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TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda. Our diverse membership includes dynamic American businesses ranging from startups to the nation's leading technology companies and represents more than three million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance.

TechNet appreciates the Education and Labor Committee's efforts to champion the rights of workers, and to be sure, we believe that a vibrant labor movement can be good for workers and our economy. However, we are concerned that the **definitional test of what constitutes an employee as opposed to an independent contractor** in Section 4 of H.R. 2474 could have a chilling effect on the "on-demand' or "gig" economy as well as a broad array of American industries that hire independent contractors to do a host of critical functions not typically performed on a day-to-day or "in-house" basis. Moreover, it could actually hurt workers who currently enjoy the freedom to choose when and where they want to work, how long they will work, which trips, deliveries, or other "gigs" they want to do and, in some cases, which rates they want to charge. These are often workers who choose to supplement their salaries to afford a better standard of living for themselves and their families, pay for college or unanticipated medical expenses, take care of an elderly parent or simply pursue a passion like music or art. Many times, these are veterans, retirees, stay-at-home or single parents and students — people who cannot or do not want to do be employed in the traditional sense of the term. **In short, we believe it is possible to fix this provision in H.R. 2474 in a manner that is both pro-worker and pro-innovation.**

As you consider our perspective, I would like to share some important context on this issue stemming from TechNet's work at the state level. Since the April 2018 California Supreme Court decision in *Dynamex Operations West v. Superior Court* ("*Dynamex*"), the California Legislature has been grappling with the appropriate approach to determining workers' status that reflects the needs of its state's economy and its workforce. Given that California is our nation's largest economy and the center of the innovation economy, TechNet and our member companies have been engaged in conversations with the labor community to explore various benefits models for the millions of California's independent workers. Central to those conversations has been a recognition by our industry to keep workers' voices and protections paramount in any agreement seeking to balance worker protections with worker flexibilities. We believe progress is being made, and we are committed to finding an innovative solution. In fact, legislation moving through the California Assembly and Senate already seeks to carve out and exempt a broad swath of industries from the decision's dangerous impacts on many affected California workers. As these discussions continue between the affected parties advance in California, it would be premature for Congress to nationally codify something in federal law that is still being worked on at the state level.

Technology has enabled a valuable new form of work that offers people the opportunity to work flexibly, earn supplemental income after decades of wage stagnation, build their businesses, and ease the impact of income volatility. Innovative platforms have supported many workers and their families, as well as retail establishments, restaurants, and other small businesses that would otherwise be economically threatened. In addition to and outside the scope of the *Dynamex* decision, many of our member companies, recognizing the societal need and interest in future of work opportunities, have also developed innovative benefits solutions to protect and support workers within the current confines of labor law. These include offering occupational accident insurance, personal sick leave accounts, health and safety resources, upskilling opportunities, same-day access to earnings, and other portable benefits models.

However, given the strict nature of California's current labor law, and federal law generally speaking, there are many inhibitors preventing companies from being able to provide additional benefits while also maintaining the independent contractor status of workers. This is why TechNet also supports reforms to modernize employment law that enable companies to pioneer more forms of benefits, without sacrificing the flexibility that workers **currently** enjoy. TechNet member companies are openly collaborating with all interested stakeholders in California and will continue to advance discussions with workers, labor, the legislature, and Governor Gavin Newsom's Administration. We are confident that we can achieve a policy solution that truly serves as a model for the nation in a way that the current policy established by the California Supreme Court in *Dynamex* does not.

While hundreds of thousands of Californians choose to earn money through on-demand platforms, multiple studies have shown that these flexible work opportunities do not come at the expense of traditional employment. In September 2018, an analysis from Beacon Economics found that in California, five employees have been added for every independent contractor job from 2010-2016. Furthermore, the most widely recognized research on the gig economy, the 2016 Katz/Krueger study, was recently updated to show that the growth of "alternative work arrangements" has actually been much less than believed. That is also supported by the data reported by the U.S. Bureau of Labor Statistics. The Beacon Economics study concluded that, "a wholesale reclassification of workers would have significant consequences for a variety of different sectors in the state's economy. Since the nature of, and reliance on, independent contracting varies by industry, a one-size-fits-all policy ignores the complexity and nuance of such work arrangements, and the value they bring to California's economy."

It is important to note that the common concern with the *Dynamex* decision, and similarly under the provisions of H.R. 2474, for all affected companies, both tech and non-tech, is the conjunctive approach used to determine employee classification, specifically prongs B and C of the ABC test. Prong A says that an

independent contractor must be "free from the control and direction of the hirer in connection with the performance of the work." Prong B says that someone is an independent contractor only if they perform work "outside the usual course of the hiring entity's business." And Prong C requires that the "worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed."

For example, assuming that a company fails the B and/or C prongs and that company's workers can no longer be classified as independent contractors, there would be significant impacts on the company and the flexibility for workers who partner with that company. Companies could not sustain the flexible, on-demand model. It would not be viable to allow someone who qualifies for employee benefits to work just 1-2 hours a week or not to work on weekends at all when demand is typically highest. As a result, delivery providers, drivers, online freelance knowledge workers, software and website developers, artists, writers, and diversified service platform workers — which includes single parents, workers, retirees on a fixed income, caregivers, students, and teachers, who need more flexible schedules — would not be able to work at all. The impact will be squarely placed on workers who cannot or do not want to obtain any type of traditional employment. Workers could no longer decide they do not want a longer drive or a larger order or project. Companies would have to impose higher requirements to be a shopper, a driver, or a website designer, for example, to assure they all can complete every order or project instead of allowing them the flexibility to reject ones they cannot do. Additionally, software companies would be blocked from engaging online with freelance software developers, even though the freelancers are highly educated or have very technical skills, work wherever they want, (coffee shop, at home, or in a shared office space), choose what work they wish to perform, and use their own equipment, tools, and templates.

The ABC test, as modeled after California's *Dynamex* decision and as written in H.R. 2474, is also far from a nationally accepted standard. Indeed, it is an outlier approach imposed by a California court, without the benefit of a deliberative legislative process. Throughout the country, there is significant variety among states; and even within certain states' labor laws, there is inconsistency among the tests used to classify workers as employees or independent contractors. In fact, only one other state, Massachusetts, has a conjunctive approach (A + B + C) like the one *Dynamex* imposes in California. Again, we are concerned that codification of this stringent standard at the federal level is premature considering that California is actively trying to avoid unintended harms by revising it through the legislative process.

In sum, we believe that the inclusion of the new ABC test in H.R. 2474 could substantially diminish opportunities for Americans to earn money flexibly through the "on-demand" or "gig" economy on their own terms. Individuals are able now, like never before, to build their own businesses and earn money how, when, and

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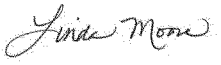
where they want. The sharing economy also empowers consumers by providing lower prices, higher quality, and more reliable choices for everyday tasks and items. As this bill is further considered, we hope TechNet can be a constructive partner in helping to strike the right balance between making sure employees are appropriately classified while protecting the unique opportunities afforded to countless Americans in the new "on-demand" economy.

To reiterate, we appreciate the Education and Labor Committee's efforts to champion the rights of workers and believe that California, if given the space to do so, can provide a meaningful path forward on how to address this issue at a national level. TechNet values the role both labor unions and American businesses play in sustaining and growing the U.S. economy. The future of work holds considerable promise for many Americans, and we look forward to finding innovative public policies that foster, support, strengthen, and ultimately grow the "on-demand" and "gig" economy.

If we can be of assistance to you and your staff on this or other future of work issues, please do not hesitate to contact us. Thank you for your attention to this important issue.

Sincerely,



Linda Moore
TechNet President and CEO

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Representative Steve Watkins (R-KS)
Representative Susan Wild (D-PA)
Representative Ronald Wright (R-TX)

July 24, 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 H.R. 2474, *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, small business start-ups, 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, with regards to the PRO Act, 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 flexibility for students, parents, small entrepreneurs and retirees as well as others who prioritize the benefits of scheduling work around their lives. In addition, the bill would unfortunately increase barriers to 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 all individuals to organize their work on their own terms. Technological advancements have 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 by connecting people with opportunities 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 their lives and work. To learn more about CWI, please visit www.workforceinnovation.net.

Sincerely,

Amway
Direct Selling Association (DSA)
Forge
Hungry
Hyr
IPSE-US
iWorker Innovations
Kelly Services
Lyft
Postmates
Retail Industry Leaders Association (RILA)
Seyfarth Shaw, LLP
TechNet

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https://www.wsj.com/articles/a-record-expansions-surprise-winners-the-low-skilled-11562763602

ECONOMY | CAPITAL ACCOUNT

A Record Expansion's Surprise Winners: The Low-Skilled

As unemployment remains near generation lows, the fortunes of low-wage workers have improved markedly

A sign advertising jobs in the window of an Insomnia Cookies store in Cambridge, Mass. **PHOTO:** BRIAN SNYDER/REUTERS

By Greg Ip
July 10, 2019 9:00 am ET

For years, falling wages and high unemployment seemed proof that low-wage workers needed an entirely new set of skills to succeed in an economy shaped by technological change and globalization.

It turns out what they needed most was time. As the economic expansion reaches a record age and unemployment remains near generation lows, the fortunes of low-skilled workers have turned up markedly. What looked like a permanent setback may be mostly cyclical.

Much of the debate over helping these workers revolves around the minimum wage, training and higher education. Low unemployment may deliver the most effective remedy of all. Of course, if the expansion ends, so will those workers' newfound good fortune. That seems to be adding to Federal Reserve policy makers' inclination to keep interest rates low and perhaps reduce them further.

The Fed's semiannual monetary policy report released last week noted that the share of people aged 25 to 54 years with at least a college degree who were employed dropped 2.5 percentage points between 2008 and 2010. It then began a steady recovery, and by last year was close to its prerecession peak. For workers with just a high-school diploma or less, the ratio plunged 6 percentage points and didn't begin a sustained recovery until 2014.

Wage data paint a similar picture. Adjusted for inflation, wages of workers with just high school or less initially fell much more sharply than for college-educated workers and then bounced back more strongly, and by last year had recovered all the lost ground.

Fed researchers found this has happened in all business cycles since at least 1980. This might be partly due to a long-term shift in demand from less- to more-skilled labor. Yet in individual states where local booms and busts are probably less influenced by those national trends, they found an even starker hit to lower-educated workers in recessions. It takes on average eight years for them to fully recover.

The traditional explanation for why some workers are fired first and hired last is that employers hoard their most valued and difficult-to-replace workers. New data offer a more nuanced explanation: employers and workers change their recruitment behavior over the course of the cycle.

In a 2016 study, Alicia Sasser Modestino of Northeastern University and two co-authors observed that as unemployment soared between 2007 and 2010, the percentage of job postings requiring a bachelor's degree on Burning Glass, a website that aggregates job postings, rose more than 10 percentage points. That share then fell over the next four years. The same thing happened with postings requiring at least five years' experience.

This wasn't because high-skilled occupations or industries had become more important; the authors found that even within the same company posting the same job, hiring criteria became tighter as unemployment rose and easier as it fell.

In counties that benefited most from the shale oil-fracking boom, local demand for labor shot up. As a result, manufacturing, agriculture and timber companies, which weren't benefiting from the fracking boom, still relaxed their education and experience requirements.

This suggests that when unemployment is high and labor is plentiful, employers opportunistically "upskill"—they raise the requirements of jobs, for example demanding a bachelor's degree when an associate's degree or experience used to be sufficient.

SHARE YOUR THOUGHTS

What's the best way to boost the wages and job opportunities for low-skilled workers? Join the conversation below.

This reverses when the labor market tightens. This, the authors say, counters the theory that high vacancies coexist with high unemployment because unemployed workers had the wrong skills: "A significant portion of what is sometimes labeled as structural mismatch unemployment is actually cyclical."

A related cause: college graduates may take less-skilled jobs when unemployment is high, displacing less-educated workers.

Now that low-skilled workers have largely closed the postrecession pay and employment gap, can they continue to advance?

No matter how tight the job market, they won't qualify for many premium pay jobs without well-developed skills. Some employers complain that many job applicants today lack even basic literacy and numeracy skills.

This year, the employment-to-population ratio for less-skilled workers has dipped, a possible sign those limits are being tested.

And low-skilled workers' gains will likely reverse when the expansion ends. Typically, that happens when inflation or financial-asset bubbles build, prompting the Fed to raise interest rates, precipitating a recession.

Yet there is no rule on when that happens. No bubble comparable to those that preceded the 2001 and 2008 slumps is apparent, and inflation has recently dropped further below the Fed's 2% target.

This gives the Fed a rare opportunity to further cement gains for the lowest-paid workers.

At a Fed conference in Chicago last month, Pat Dujakovich, president of the Greater Kansas City AFL-CIO, said many workers are finally getting a toehold in the economy because employers are waiving prerequisites such as minimum years of experience, looking past criminal-record blemishes, and sometimes dropping drug-test requirements.

Fed Chairman Jerome Powell cited those observations last month as the central bank signaled it was weighing cutting interest rates. "It's one of the reasons why we think it's so important to sustain the expansion, because we really are benefiting groups that haven't seen this kind of prosperity in a long time."

Write to Greg Ip at greg.ip@wsj.com

Appeared in the July 11, 2019, print edition as 'Long Expansion Lifts Low-Skilled Workers Too.'

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OPINION | COMMENTARY

Faster Growth Is Paying Off for Low-Skilled Workers

Wage gains are rising the most in lower-paying industries, and without a $15 minimum mandate.

By Andy Puzder
June 13, 2019 6:15 pm ET

With the Democratic presidential campaign under way, get ready to hear a lot about economic inequality. Sen. Elizabeth Warren, who's surging in the polls, has complained about "a rigged system that props up the rich and the powerful and kicks dirt on everyone else." In reality, the strongest economy in more than a decade is bringing benefits to everyday Americans.

According to an April study by the New York Federal Reserve, the average starting wage offer for full-time employees jumped from $58,035 in November to a series high of $66,415 in March. The average expected likelihood of receiving a job offer was also the highest recorded since the survey began in 2014—and the gain was "most pronounced for respondents without a college degree."

The Bureau of Labor Statistics' employment data have been reflecting significant income growth for working-class Americans for months. With more Americans working than at any time in history, the unemployment rate near a 50-year low, and 14 consecutive months with more job openings than unemployed people, for the first time in decades it's harder to find blue-collar workers than white-collar ones. This competition for employees is driving wages up, which narrows income inequality.

Wages in May for nonsupervisory employees increased 3.4% year over year, the 10th consecutive month at or above 3%—after a stretch in which wage growth had been below 3% for every month since May 2009. The recent gains were even more significant for workers in traditional low-wage sectors. For retail workers, wages rose 3.8% in April, the 14th consecutive month at or above that rate (December's 5.1% increase was the largest since 1998). For hotel and restaurant workers, the April increase was 4.7%, the eighth consecutive month at or above 4% (and March's 4.7% increase was the

largest since 2008).

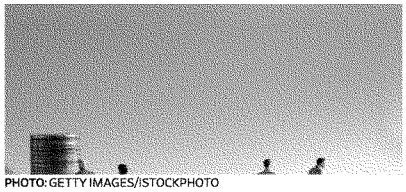

PHOTO: GETTY IMAGES/ISTOCKPHOTO

Large employers are driving hourly wages closer to the Democrats' $15 goal without a federal mandate. Within the past six months Costco and Amazon have raised their minimum wages to $15, and Target said that it will reach $15 by next year. In April Bank of America announced an increase to $17 an hour, and to $20 by 2021.

The minimum wage is bad policy, but prosperity renders it moot. With its starting wage already over $10 an hour and wages rising, even McDonald's has withdrawn its opposition to a minimum-wage increase. Walmart 's CEO recently went a step further and called for a minimum-wage increase. Walmart already pays an average wage of $17.50 an hour including benefits.

This trend will continue as employers compete for working-class employees—if the economy keeps growing. In a recent Wall Street Journal survey of economists, nearly 70% expected faster wage growth during the coming year.

Economic growth won't eliminate all income inequality—and that's good. Capitalist economies reward people for meeting the needs of others—their customers. Steve Jobs and Jeff Bezos didn't get rich by stealing. They accumulated disproportionate wealth because they provided disproportionate benefit.

Meanwhile, politicians who say they want to alleviate income inequality overstate the problem. Sen. Bernie Sanders asserts that the income gap is "wider than at any time since the 1920s." This claim is based on research by Emmanuel Saez, an economics professor at the University of California, Berkeley. But Mr. Saez ignores the impact of taxes on high earners. The top marginal income-tax rate in the late 1920s was 25%, vs. 37% today. Nor does he take account of welfare benefits. Food stamps, public housing, Medicaid and Social Security didn't exist in the 1920s.

Under Mr. Saez's analysis, liberal interventions—both increasing taxes on the wealthy or increasing benefits for the needy—are omitted from considerations of income inequality. Thus Mr. Sanders, Ms. Warren and others demand government action to stem what they claim is a long-term and rapidly worsening trend but fail to take into

account the impact on inequality of the government actions they advocate.

A 2018 study by nonpartisan economists David Splinter (of Congress's Joint Committee on Taxation) and Gerald Auten (of the Treasury's Office of Tax Analysis) came to a far different conclusion. Messrs. Splinter and Auten used 1960 as the base year and used "measures of pretax and after-tax incomes" including government transfers. They found that while economists including Mr. Saez had determined that the top 1%'s share of income "increased by two-thirds since 1960," the actual increase was "relatively modest" at "less than half a percentage point."

No matter how you measure income inequality, the most effective way to reduce it is through policies that encourage job-creating, wage-increasing economic growth. Unlike government redistribution, economic growth creates the competition for employees that lifts working-class wages, and that's what it's doing today.

Mr. Puzder is a former CEO of CKE Restaurants and author of "The Capitalist Comeback: The Trump Boom and the Left's Plot to Stop It."

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National Institute for Labor Relations Research NILRR.org

Right To Work States Benefit From Faster Growth, Higher Real Purchasing Power – Winter 2019 Update

Percentage Growth in the Number of People Employed (2007-2017)	Right To Work States	**8.8%**
	Forced-Unionism States	4.2%
	Source: Dept. of Labor, Bureau of Labor Statistics (BLS) Household Survey	
Growth in Manufacturing, Private-Sector Payroll Employment (2012-2017)	Right To Work States	**5.5%**
	Forced-Unionism States	1.7%
	BLS Establishment Survey	
Percentage Growth in Total Private Sector, Non-Farm Employment (2007-2017)	Right To Work States	**13.0%**
	Forced-Unionism States	10.1%
	Dept. of Commerce (DOC), Bureau of Economic Analysis (BEA)	
Cost of Living-Adjusted Per Capita Disposable Personal Income (2017)	Right To Work States	**$43,765**
	Forced-Unionism States	$42,043
	Missouri Economic Research and Information Center (MERIC); BEA	
Growth in Number of Residents Aged 35-54 (2007-2017)	Right To Work States	**1.6%**
	Forced-Unionism States	-7.4%
	DOC Bureau Of the Census (BOC)	
Cost of Living-Adjusted, After-Tax Mean Income Per Household (2017)	Right To Work States	**$57,416**
	Forced-Unionism States	$52,922
	BOC; MERIC; Tax Foundation	
Aggregate "Tax Freedom Day"* (2018)	Right To Work States	**April 13**
	Forced-Unionism States	April 26
	Tax Foundation; BEA	

Welfare (TANF) Recipients Per 1000 Residents (CY 2017)	Right To Work States	**4.1**
	Forced-Unionism States	11.4
	U.S. Admin. for Children and Families, BOC	

Unfunded Liabilities Per Capita of Public Pension Plans (2017)	Right To Work States	**$14,095**
	Forced-Unionism States	$23,354
	American Legislative Exchange Council	

Percentage Real Growth in Household Consumption (2007-2017)	Right To Work States	**21.2%**
	Forced-Unionism States	17.2%
	BEA	

New Privately-Owned Single-Unit Housing Authorizations Per Thousand Residents (2017)	Right To Work States	**3.5**
	Forced-Unionism States	1.5
	BOC	

* The term "Tax Freedom Day" was coined and popularized by the nonpartisan, Washington, D.C.-based Tax Foundation. As the Tax Foundation has explained, it is "the day when Americans . . . finally have earned enough money to pay off their total [federal, state and local] tax bill for the year." (For simplicity's sake, the Tax Foundation assumes an equal amount of income is earned every day, and does not distinguish weekdays from weekends.)

Indiana and Michigan became Right to Work states in early 2012 and early 2013, respectively. Wisconsin's Right to Work law was adopted in 2015, and West Virginia banned forced union dues and fees in 2016. These four states are excluded from all multi-year analyses including the year in which they went Right to Work. They are included among the Right to Work states for analyses covering only the period since their laws took effect. Since the Kentucky Right to Work law was not adopted until 2017, it is counted as Right to Work only for the analyses covering 2017 or 2018 alone. Since the Missouri Right to Work adopted in 2017 never took effect, it is never counted as a Right to Work state.

To obtain more detailed information about how any or all of the above comparative economic data were derived, contact Stan Greer -- e-mail: stg@nrtw.org, visit: NILRR.org, phone: (703) 321-9606, or write to:

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Did Right-To-Work Laws Impact Income Inequality? Evidence from U.S. States Using the Synthetic Control Method

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Abstract

There is an ongoing debate about the effect of changes in labor regulations such as Right-to-Work (RTW) laws on rising income inequality in the U.S. In this paper, we use a relatively new methodology, the Synthetic Control Method – which we argue is more suitable for analyzing this data – to examine the impact of a state's adoption of an RTW law on income inequality. We use a wide range of inequality measures for states that enacted their RTW laws between the 1960s and the 2000s. Unlike some earlier papers that suggest a negative link between the RTW laws and correlates of inequality such as wages, we find that RTW laws had no significant impact on income inequality in these states.

JEL Classification: J01, J08, J23, J38, J39, J51, L59
Keywords: Right-to-Work, Synthetic Control Method, unionization, inequality

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1. Introduction

Rising inequality has engendered a debate about its determinants with studies identifying trade, immigration, skill-biased technological change, female labor force participation and labor market regulations as potential factors (Gordon and Dew-Becker 2008).[1] Our paper contributes to this debate by studying whether labor regulations such as Right-to-Work (RTW) laws are possible contributors to increasing income inequality in the U.S.

RTW statutes remove union membership as a prerequisite for employment by making it illegal for labor unions and employers to enter into contracts that require employees to be fee-paying members of a union. In the media and public sphere – from policy beliefs generated by influential organizations and think tanks, articles in print media, reports in screen media to political documentaries – there is widespread belief that RTW laws have contributed to widening income inequality in the U.S. (Manzo and Bruno 2015).[2]

However, remarkably few papers have studied the direct link between RTW laws and income inequality, and none have done so using the Synthetic Control Method (SCM) approach, which offers a distinct advantage over traditional difference-in-difference models given the nature of the data. The existing literature presents some evidence of

[1] Income inequality is widening in the United States. The share of pre-tax incomes earned by the top 1% rose from 9% in 1976 to 20% in 2011. Average real incomes for the bottom 90% dropped from $32,261 to $30,439 while, for the top 10%, they increased by more than 80% from $140,827 to $254,449 (Alvaredo et al. 2013). Data from the Congressional Budget Office (CBO) that accounts for taxes and transfers largely mirrors these trends (CBO 2014).

[2] See, for example, *Los Angeles Times* (http://www.latimes.com/business/hiltzik/la-fi-mh-imf-agrees-loss-of-union-power-20150325-column.html), *The Washington Post* (http://www.washingtonpost.com/news/wonkblog/wp/2015/02/10/should-you-join-a-union-the-research-says-yes/), Nicholas Kristof in *The New York Times* (http://www.nytimes.com/2015/02/19/opinion/nicholas-kristof-the-cost-of-a-decline-in-unions.html), or *Mother Jones* (http://www.motherjones.com/politics/2011/02/income-inequality-labor-union-decline). Former labor secretary Robert Reich has discussed this in many different media such as print, cable news and documentary movies (http://robertreich.org/post/85532751265). An *International Monetary Fund* (IMF) report argues that declining unionization causing increased inequality is a world-wide phenomenon (http://www.imf.org/external/pubs/ft/fandd/2015/03/jaumotte.htm).

economically significant impacts of unionization on wages (Nieswiadomy et al. 1991, Western and Rosenfeld 2011).[3] These studies take the negative association between unionization and lower wages as evidence that RTW laws have constrained organized labor and worsened income inequality. At the same time, employment growth was higher in RTW states relative to non-RTW states over the period 2001-2011 which, in principle, is an inequality mitigating factor (Holmes 1998).[4] Studies of the net impact of RTW laws on inequality, meanwhile, are surprisingly few.[5] This paper is an attempt to address the following question: does adopting an RTW law result in greater income inequality in a state?

Our data covers nearly a 50-year period (1964-2013). This is important since, by most measures, inequality in the United States started to rise in the 1980s (Meyer and

[3] Freeman (1993) and Card (1992) estimate the union wage premium to be between 10 and 17 percent. Nieswiadomy et al. (1991), find union wages to be 10 to 20 percent higher than non-union wages in similar industries and occupations. Decomposing wage variance, Western and Rosenfeld (2011) argue that between 1973 and 2007, unions' impact on union and non-union wages explains a fifth to a third of the growth in inequality – an effect comparable to the growing stratification of wages by education. If unionization works to raise relative incomes of low and middle income workers, it can attenuate inequality. On the other hand, Moore (1998), while summarizing the empirical literature, concludes that "RTW laws have no impact on union wages, nonunion wages, or average wages in either the public or private sector." However, subsequent studies have challenged this conclusion. Gould and Shierholz (2011) – using household survey data compare wages between RTW and union security states while controlling for personal as well as state level characteristics – conclude that the mean effect of working in an RTW state is a 3.2 percent reduction in wages and in employer-provided benefits as well.

[4] As another pathway for links between RTW and inequality, Holmes (1998) examines manufacturing employment in border counties of neighboring states where one state had RTW protections and the other did not. Holmes (1998) finds that manufacturing employment as a percentage of county population increased by one-third in the counties within the RTW states vis-à-vis non-RTW states. Hicks (2012), using a long panel of states between 1929 and 2005, suggests that while RTW laws do not explain the industrial structure across the U.S., after adjusting for inflation, 7 out of 10 states saw manufacturing incomes increase by between 15 percent and 40 percent.

[5] While we find Nieswiadomy et al. (1991) to be the only study to look at the connection between RTW laws and inequality, a few studies look at the possible connections between inequality and unionization. In a recent review of research on determinants of inequality, Dew-Becker and Gordon (2008) ascribe a relatively small role to the decline of unionization towards the increase in inequality starting in the 1970s, particularly for females. They instead find the largest contributor to be skill-biased technical change. This mirrors the findings in Goldin and Katz (2007) who also associate the widened income inequality starting in the 1980s with an increased demand for skilled college graduates. Reed (2003) differs from the conclusion in Gould and Shierholz (2011). Reed (2003) controls for the states' initial conditions (such as per capita income in 1945) prior to the initial wave of RTW laws. This is crucial since RTW states are often lower income states. The results show that after controlling for income levels in 1945, RTW laws resulted in wages that were actually 6.7 percent higher and this effect was stronger in states with a lower income in 1945.

Sullivan 2013, Frank 2014). Seventeen of the early adopter states instated their RTW laws in the 1940s and the 1950s (Wyoming, the eighteenth adopter, instituted its RTW law in 1963) and these states offered little pre-intervention information for us to use with our methodology. Meanwhile, Indiana, Michigan and Wisconsin passed their laws in 2011 or later and offered little post-intervention information. The four states that we examine – Idaho, Louisiana, Oklahoma and Texas – are the only states that enacted RTW laws over a period of five decades between the 1960s and the 2000s, thus offering a reasonable number of both pre- and post-intervention periods.

We conduct a comparative case study of each of the four exposed states using the Synthetic Control Method (SCM) that is increasingly being used to evaluate the impacts of state-level policies (Abadie et al. 2010, Bohm et al. 2014, Maguire and Munasib, forthcoming). We find no significant impact of RTW on a comprehensive set of measures of inequality. We also look at some possible pathways through which these laws are commonly perceived to impact inequality, namely, investment, wages and salaries. Our finding of a lack of impact of RTW laws on inequality is further supported by findings of a lack of impact of the law on these variables.

In what follows, Section 2 and Section 3 describe the data and the estimation methodology, respectively. Section 4 reports and discusses the results and Section 5 concludes with the implications of the findings.

2. Data

To ensure that we cover different facets of – and different ways to look at – aggregate inequality, we use a wide range of inequality measures. To the best of our knowledge, only Nieswiadomy et al. (1991) assess the effects of RTW on income inequality;

they, however, use only the Gini coefficient. The reality of rising income inequality in the U.S. is that much of the increase can be explained by the upper end of the distribution (Lowell and Waller 2014). Thus, the Gini coefficient alone may not be sufficient to assess the dynamics of income inequality since it puts equal weight on all components of the income distribution. In contrast to Nieswiodomy et al. (1991), we look at a wide range of measures of inequality that put differential weights across groups. For example, while the Atkinson index puts greater weight on the lower end of the income distribution, measures such as 90-10 or 50-10 ratios look at different components of the income distribution (Atkinson and Piketty 2007).[6]

From Frank (2009, 2014), we were able to obtain data on traditional measures, namely, the Gini coefficient, the Atkinson index, the relative mean deviation and Theil's entropy index, as well as top 1% income share and top 10% income share.[7] The data provided through Frank (2009, 2014) ends in 2012. From the Current Population Survey (CPS), we obtained household income measures of inequality in the form of the 50-10 Ratio, 90-10 Ratio and 90-50 Ratio. That data ends in 2013. The income shares and the

[6] In Nieswiodomy et al. (1991) the exogenous variable used in the 2SLS estimation is the wage rate; it is not clear if it can satisfy the exclusion restriction. The estimated effects of RTW laws are highly sensitive to model specification (Ellwood and Fine, 1987). Farber (1984) argues that a convincing model of the simultaneous determination of RTW legislation and the evolution of unionization does not exist. Additionally, while the census data based estimates show a positive and significant effect (at 10 percent level) for 1970, there is no statistically significant effect using 1980 census data. Also, relying on cross sectional analysis, the results are extremely vulnerable to omitted variable problems.

[7] There is a widely held view that labor market institutions such as unions affect mostly low- and middle-income wage workers but are unlikely to have a direct impact on top income earners. However, Jaumotte and Buitron (2015) argue that with regard to unionization and/or union density, there is a basis for looking at measures of inequality that concerns top income earners as well. They argue that if de-unionization weakens earnings for middle- and low-income workers, this necessarily increases the income share of corporate managers and shareholders who fall in the upper end of the income distribution. The literature also points to the role of unions in directing redistribution policies itself (Korpi 2006). Weaker unions could further lead to higher top income shares by denting workers' influence on corporate decisions. Where unions are strong, firms tend to engage in consultations with workers that can influence the size and structure of top executive compensation (Lemieux et al. 2009, McCall and Percheski 2010). Volscho and Kelly (2012) show a negative effect of union density on top income shares for the United States.

household income ratios are widely used measures of inequality and have been used extensively to measure inequality in the U.S. states, for example, in Aghion et al. (2015).

The household income ratios as well as key predictor variables such as union memberships are not available before 1964. The rest of the data, when available, is collected since 1964 to establish a period prior to the implementation of the RTW law in a state. Information on these variables is obtained from the Census Bureau, Bureau of Economic Analysis (BEA) and Uniform Crime Reporting (UCR) by FBI. Table 1 provides summary statistics of the outcome variables as well as predictor variables of the four treatment states and the 26 non-RTW states.

3. Estimation

In this section we first detail the advantages of the SCM approach in state-level policy evaluation. We then discuss why it is particularly appropriate to use the SCM approach to estimate the impact of the RTW law on a state's income inequality.

3.1. A Case Study Approach with Synthetic Control Method (SCM)

In program evaluation, researchers often select comparisons on the basis of subjective measures of similarity between the affected and the unaffected regions or states. SCM provides a comparison (or synthetic) state that is a combination of the control states. A data-driven procedure calculates 'optimal' weights to be assigned to each state in the control group based on pre-intervention characteristics thus making explicit the relative contribution of each control unit to the counterfactual of interest (Abadie et al., 2010). SCM provides a systematic way to choose comparison units where the researcher is forced to

demonstrate the affinities between the affected and unaffected units using observed characteristics (Abadie et al., 2014).[8]

Secondly, when aggregate data are employed (as the case is in this paper), uncertainty remains around the ability of the control group to reproduce the counterfactual outcome that the affected unit would have exhibited in the absence of the intervention. This type of uncertainty is not reflected by standard errors constructed with traditional inferential techniques for comparative case studies. As Buchmueller et al. (2011) explain, in a 'clustering' framework, inference is based on asymptotic assumptions that do not apply in our case as the focus is on one state at a time.

The comparison of a single state against all other states in the control group collapses the degrees of freedom and results in much larger sample variance compared to the one typically obtained under a conventional asymptotic framework. The latter can seriously overstate the significance of the intervention (Donald and Lang, 2007, Buchmueller et al., 2011). We, therefore, apply the permutations or randomization test (Bertrand et al., 2004, Abadie et al., 2010, Buchmueller et al., 2011, Bohn et al., 2014) that SCM readily provides.

Additionally, unlike the traditional regression-based difference-in-difference model that restricts the effects of the unobservable confounders to be time-invariant so that they can be eliminated by taking time differences, SCM allows the effects of such unobservables to vary with time. In particular, Abadie et al. (2010) show that with a long pre-intervention

[8] Neumark et al. (2014), in the context of the impact of minimum wage legislations, point out that in several studies that adopted regression-based models, there were underlying assumptions of similarities across states (for example, categorization by region). Unlike the *ad hoc* strategies with a presumption of affinity, SCM demonstrates affinities of the donor pool states with the exposed state.

matching on outcomes and characteristics, a synthetic control also matches on time-varying unobservables.[9]

Finally, because the construction of a synthetic control does not require access to post-intervention outcomes, SCM allows us to decide on a study design without knowing its bearing on its findings (Abadie et al., 2010). The ability to make decisions on research design while remaining agnostic about how each particular decision affects the conclusions of the study is a safeguard against actions motivated by a 'desired' finding (Rubin 2001).

We present a more formal description of the Synthetic Control Method of Abadie et al. (2010, 2014) in the Appendix.

3.2. Appropriateness of SCM in Estimating the Impact of the RTW law on State's Inequality

In terms of the timing of adoption of the laws, while almost half the states in the U.S. currently have RTW laws, within the 50 year period between the 1960s and the 2000s, only 4 states (the ones we study) 'switched' from non-RTW status to RTW status. As a result, even though one can have a 50-year long panel for all U.S. states, the fact that only 4 states switched to RTW underscores the choice of SCM as the preferred method for assessing the impacts of the RTW laws.

With so few treatment units – as discussed in section 3.1 above – accurate inference is difficult, perhaps impossible, in a clustering framework (Donald and Lang, 2007, Buchmueller et al., 2011). SCM, on the other hand, is devised to address precisely these kinds of situations, and the method naturally renders itself to permutations or randomization tests for inference (Bertrand et al., 2004, Abadie et al., 2010, Buchmueller et

[9] As Abadie et al. (2014) put it, "only units that are alike in both observed and unobserved determinants of the outcome variable as well as in the effect of those determinants on the outcome variable should produce similar trajectories of the outcome variable over extended periods of time."

al., 2011, Bohn et al., 2014). If instead, a state-level difference-in-difference (DID) regression analysis were chosen, it would almost tantamount to a cross-section analysis since very few units would have treatment variation over time.

One of the important contributions of this paper is that by estimating RTW's impacts in each state individually, we accommodate for possible treatment heterogeneities. Keele et al. (2013) argue that treatment heterogeneity in state policies needs to be taken seriously. The assumption of a uniform effect across states that essentially differ in history, population, and a host of observed and unobservable characteristics can be restrictive. For example, as RTW laws were being enacted at different times, the affected cohorts varied across states: the law was adopted in Louisiana almost two decades before the passage of the North American Free Trade Agreement (NAFTA); Texas passed the law at about the same time as NAFTA was enacted; and Oklahoma introduced a RTW law a little less than a decade after NAFTA. Given the different timings for the implementation of the RTW law across states, the pre-intervention period is 1964-1975 for Louisiana, 1964-1984 for Idaho, 1964-1992 for Texas and 1964-2000 for Oklahoma.

Reflecting on another source of heterogeneity across states, Canak and Miller (1990) show that the composition of business support for RTW laws varied across states and over time. The variation in business support is important from the perspective of how businesses react to RTW in terms of bringing in investment and generating employment.

In a program evaluation context, one of the more serious issues is finding appropriate comparison or control states that can provide a reliable counterfactual for the treatment (or RTW) states. Not every non-RTW state would be a suitable candidate for a comparison unit for a treatment state. For instance, RTW states are often lower income

states (Reed 2003). It is also unlikely that we can find a single non-RTW state that would have characteristics such as the size of labor force, industry makeup, taxation policies, and numerous other state-specific factors similar to those of a treatment state.

Under these circumstances, SCM provides a systematic way to choose comparison units. In SCM, the counterfactual is the weighted average of the non-RTW states where the pre-intervention matching across a wide variety of characteristics and over a long period of time generates the weights. Our set of control units, or donor pool, consists of the 26 non-RTW states. We use an extensive set of predictor variables, as described in section 2, to obtain pre-intervention matching.

3.3. Implementing SCM

In the Appendix we describe some of the details of the process to obtain the optimal weights, $\mathbf{W}^*$. These weights are applied to calculate the weighted average of the donor pool, which is the synthetic control of a treatment unit. The post-intervention values of the synthetic serve as our counterfactual outcome for the treatment unit. We calculate the ratio of post-intervention to pre-intervention Mean Square Prediction Error (MSPE), denoted by Δ_{TR}. This ratio puts the magnitude of the post-intervention gap (between the actual and the synthetic outcome) in the context of the pre-intervention fit (between the actual and the synthetic outcome): the larger the ratio, the greater is the impact of the intervention.

To formally test the significance of the estimated impact, we apply the permutations test (Bertrand et al. 2002, Buchmueller et al. 2009, Abadie et al. 2010, Bohn et al. 2014). First, for each state in the donor pool, we carry out an SCM estimate as if the state had passed the RTW law the same year as the exposed state (i.e., apply a fictitious policy intervention). We can then calculate the post-pre MSPE ratio for each of these states. The

distribution of these "placebo" post-pre MSPE ratios (Δ) then provides the equivalent of a sampling distribution for Δ_{TR}. The cumulative density function of the complete set of Δ estimates is given by $F(\Delta)$, which allows us to calculate the p-value of a one-tailed test of the significance of the magnitude of Δ_{TR} (Bohn et al. 2014, Munasib and Rickman 2015). Note that this answers the question of how often would we obtain an effect of the RTW law of a magnitude as large as that of the exposed state if we had chosen a state at random, which is the fundamental question of inference (Bertrand et al 2002; Buchmueller et al. 2009; Abadie et al. 2010).

Abadie et al. (2010) utilize the placebo tests for inference with two more criteria. They examine the ranking of the magnitude of the post-pre MSPE ratio of the exposed state vis-à-vis those of the placebos. If the exposed state is ranked first, then they consider it significant, the rationale being that for the treatment effect to be significant no placebo effect should be larger than the actual effect estimated for the exposed state. And, finally, Abadie et al. (2010) produce a statistic that is obtained by dividing the rank of the post-pre MSPE ratio by one plus the size of the donor pool; this is the probability of obtaining a post-pre MSPE ratio as large as the treated if one were to assign the intervention at random in the data. We call this statistic 'donor probability' and report it for each estimate.

4. Results

We start with our main results where, using the donor pool that includes all 26 non-RTW states, we perform the SCM analysis with the main set of predictor variables listed in Table 1. Subsequently, as robustness checks, we conduct additional tests with different predictors and different donor pools (Tables 6-8). We also examine the impact of RTW on

average wages and salaries and foreign direct investment as these are often hypothesized to be the main channels through which RTW could impact inequality (Table 5).

We use two 'representative' measures of inequality – the top 1% income share and the 50-10 ratio – to describe the details of the results (Tables 2 and 3). The pictorial representations of the results detailed in Table 2 are presented in Figures 1-5. The SCM estimates of the remaining 7 inequality measures are presented in Table 4. Every specification and robustness check has been conducted, and reported, for all 9 measures (Tables 6-8).

4.1. The Main Results

In our main estimates we carry out SCM estimates where we include in the set of predictors the variable that can primarily be perceived to be directly related to incomes and redistributions. For example, Piketty et al. (2014) highlight factors such as tax rates as contributors to inequality that vary across states. We include in our main set of predictors the following variables: per capita income, measure of unemployment, effective minimum wage, poverty, medical benefits, state unemployment insurance compensation, supplemental nutrition assistance program (SNAP), taxes paid to state governments, current transfer receipts from federal, state and governments as well as businesses, and employer contributions to employee pension, among others.

In Figures 1-4, the left panels show the pre-intervention match and the post-intervention deviation between the synthetic and the actual. The right panels present the permutations/randomization tests where the post-intervention gap for the treatment state is the dark line whereas its placebo counterparts are the light lines. This test answers the question, "How often would we obtain a gap as large as that of the exposed state if we had

chosen a state at random?" We therefore apply the synthetic control method to each state in the donor pool (the placebos). The visual evidence in the figures clearly suggests a lack of causal impact of RTW on the top 1% income share as well as the 50-10 ratio in household income in any of the four treatment states. Across all cases, the post-intervention gaps for the treatment states (the dark line) do not stand out from their respective placebo counterparts (light lines).

Table 2 reports the SCM estimates where, in panel A, we present the pre-intervention absolute prediction error to mean ratio (APEMR) and mean square prediction error (MSPE) show good pre-intervention fits.[10] Panel A also includes the statistical results of the permutations or randomization tests (p-value and rank of the post-pre MSPE ratio as well as 'donor probability'). As discussed in details in second 3.3, if the post-pre MSPE ratio for the exposed state is ranked first, then the treatment effect is significant (Abadie et al. 2010). The p-value represents another way to indicate statistical significance of the post-pre MSPE ratio. And finally, the donor probability is the probability of obtaining a post-pre MSPE ratio as large as the treated if one were to assign the intervention at random in the data.

The p-value for post-pre MSPE is not significant for Louisiana, Idaho or Texas. The post-pre RMSPE ranks are not 1 for any of the four states and the 'donor probability' is high for each estimate. In the case of Oklahoma the rank is 2, the p-value is significant at 5% level, and the donor probability is a relatively low 7%. However, as we see in Tables 6-8, this marginally significant effect of RTW on the top 1% income share in Oklahoma is not

[10] From APEMR, for instance, we see that, across-the-board, the pre-intervention prediction error remains smaller than one tenth of the mean. The pre-intervention MSPE values are also small when we compare them to the variance of the respective outcome variable.

robust. Furthermore, as we see in the rest of Table 2 and Tables 6-8, RTW does not have even a marginally significant effect on any of the other 8 inequality measures in Oklahoma.

Panel B of Table 2 presents the w-weights that describe the contributions of the different donor pool states in the synthetic. For instance, in the first column, we find that West Virginia, Kentucky, New York and Delaware (in that order) are the biggest contributors in the construction of the synthetic control for Louisiana's Top 1% income share. Similarly, Kentucky, California, Minnesota, Delaware and Illinois (in that order) contributed the most in the construction of the synthetic control for Oklahoma's 50-10 ratio.

These weights, however, are more meaningful if we examine Table 3, which presents the pre-intervention characteristics matches between the actual and the synthetic outcomes. We find the characteristics matching between each synthetic and the actual to be very similar. Importantly, in terms of the crucial variable of per capita income (Reed 2003), for instance, we find a very close match between the actual and the synthetic outcomes for each state.

Table 4 presents the SCM estimates of the impacts of RTW on the rest of the seven measures of inequality.[11] In none of these seven measures for any of the four states do we obtain a significant impact of the RTW law: rank statistics are all greater than 1, no p-value is significant and all donor probabilities are large.

4.2. The 'Dosage' Test

Provided that the data permits, one useful way to verify the SCM results is to conduct a so-called 'dosage' test (Abadie et al. 2014, Mideksa 2013). The dosage test in this

[11] Pictures for the remaining 7 inequality measures also show the same pattern as those in Figures 1-4. These pictures and other details are available upon request.

context would be to juxtapose the SCM estimate against the unionization rate of the treated unit. If we find certain systematic patterns of movement over time between the unionization rate and the gap between actual and synthetic outcomes (for instance, if we find that the rate of unionization and the gap are parallel during pre-intervention but post-intervention, as unionization rate declines, the gap increases), then our finding of a lack of impact of RTW on inequality is not supported by the dosage test.

Figure 5 presents the dosage tests for the top 1% income share and the 50-10 ratios (the rest of the pictures are available upon request). In the top right picture, for instance, we have the case of Louisiana where the line marked unionization is the rate of unionization in Louisiana, and the other line is the gap between the 50-10 ratio in the actual and the synthetic outcomes for Louisiana.[12] The common observation in Figure 5 is that the declining unionization post-intervention is not matched by an increasing (or decreasing) gap between actual and synthetic outcomes. In fact, overall, the gap does not seem to have any specific pattern of movement vis-à-vis unionization over time. The case of top 1% income share in Oklahoma shows a slight post-intervention uptick; this corresponds to the marginal significance of that particular measure, which is the only one out of the 36 measures of inequality that is marginally significant.

In this study we have emphasized the importance of individual case studies. To further this argument, we mention a few state specific factors that indicate, perhaps, the economic realities were simply not conducive for the RTW laws to have an impact on inequality. For instance, the manufacturing boom in Idaho post-RTW implementation was

[12] The case of Idaho is particularly interesting where the unionization rate fell from 23.1% in 1981 to 12.2% in 1985, 4years before RTW enactment (Collins 2014). This dramatic fall in unionization there during 1981-84 coinciding with President Reagan's strike breaking in the PATCO showdown in 1981 and the decline in the well-organized timber industry.

driven by the high-tech industry which did not have significant unionization (Lafer and Allegretto 2011). In Oklahoma, employment is concentrated in oil and gas, government, and military services; the latter is unaffected by RTW (Lafer and Allegretto 2011).

4.3. The Possible Pathways

Investments and wages-salaries are the most talked about pathways through which an RTW law can, in principle, impact inequality. Table 5 presents the SCM estimates of the impact of the RTW law on average wages and salaries and per capita foreign direct investments (FDI). We find no significant impact on either of these variables: all rank statistics are greater than 1, and both the p-values and the donor probabilities are very large. These findings of no effects on possible pathways for affecting inequality essentially corroborate the findings of no significant effect of RTW on the inequality measures in each state.

4.4. Robustness

In this section we carry out a number of robustness checks by perturbing the set of predictors as well as the donor pool.

4.4.1. The Issue of Changes in Pre-intervention Unionization

It has been argued that the adoption of RTW legislation in a state may reflect its citizens' preference regarding unionization (Lumsden and Petersen 1975, Farber 1984). There has been an across-the-board decline in unionization over the last half-a-century.[13] It follows that the states that adopted RTW laws may have a preference for lower unionization exhibiting in faster than average pre-RTW decline in unionization. To account

[13] Various explanations have been offered for the across-the-board decline in unionization. These include improvements in education levels, which reduce workers' incentives to organize unions by raising the outside option of skilled employees and inducing workers to move to less unionized sectors (Acemoglu et al 2002). At the same time, a rising share in the economy of less-unionized services sector would also reflect in the declining union density (Jaumotte and Buitron 2015).

for this, we carry out a robustness check where we add pre-intervention rate of change in unionization to the set of predictors. This allows us to construct a synthetic that did not have RTW but exhibited movements in unionization similar to those in the treated state. The results are presented in Table 6. We find good pre-intervention fit but none of the post-pre MSPE ranks are even close to 1. In other words, findings are robust to this perturbation.

4.4.2. The Issue of Border States

It is possible that there are spillover effects in the preferences of the citizens and policies of the governments among neighboring states. There might also be some labor market linkages among these states. A control (non-RTW) state that borders the treatment state can be viewed as contaminated because of spillovers across the state border. To rule out the possibility that this may have influenced our results, we perform SCM analyses with donor pools where neighboring states to the treatment states are expunged from the respective donor pool. Table 7 reports these results. Note that all the bordering states of Louisiana are already excluded in the main donor pool. Hence, this robustness test does not include Louisiana. Similar to the main estimates in Tables 2 and 4, we have excellent pre-intervention fits. In all measures for the three states, the estimates reinforce those of the main specification.

4.4.3. A Completely Different Set of Predictors

In our main specifications through Tables 2-7, we have used variables that are perceived to be related to incomes and redistributions. As a robustness check we re-run all the estimates using a completely different set of predictors that includes primarily demographic variables such as the total population growth, the non-White population

growth, the proportion of adult population with high school, and the proportion of adult population with college. We have also added percent of rural population and crime rates. And finally, we have added average wages and salaries and per capita FDI, the presumed 'channels' through which the law is supposed to impact inequality. The results are reported in Table 8. We observe that even with this alternative set of predictors, while we get a good pre-intervention fit we do not find a significant impact of the RTW laws on any of the 9 inequality measures for any of the treatment states.

4.5 Discussion

The estimates of the union wage premium in Freeman (1993) and Card (1992) in the 10-17% range in the 1970s and the 1980s, the lack of impact of RTW on wages in Moore (1998), the higher wages of 6-7% in RTW states in Reed (2003), and 3.2% lower wages in RTW states in Gould and Shierholz (2011) could differ simply because they cover different time periods. In contrast, we cover the entire time period of 5 decades between the 1960s and the 2000s.

At the same time, note that union density does not necessarily equate with union strength. Bouis et al. (2012) find that increases in the excess coverage of collective bargaining – defined as the difference between the share of workers covered by collective agreements and the share of workers that are members of a union – lead to higher unemployment implying diminished strength.

Last but not least, it is possible that for RTW to bear on inequality, the required threshold of unionization rate needs to be much higher than what we observe across U.S. states. Since the 1960s, the U.S. ranks last among the 21 top developed nations in both unionization rates and union coverage of the workforce (Visser 2006). Besides, while

private sector unionization in the U.S. has fallen steadily, unionization among public sector workers has remained stable.

5. Conclusions

The findings in this paper do not speak in favor or against RTW adoption since we do not assess the welfare implications of the law which could have effects on different outcomes (for example, unemployment). This paper is specifically focused on the perceived connection between these laws and income inequality.

As more states adopt or consider Right-to-Work laws, there is an ongoing debate whether these laws are contributing to rising income inequality in the U.S. We adopted the Synthetic Control Method (SCM) for comparative case study to examine this issue at the state level. Specifically, we find that adoption of RTW laws in Louisiana, Idaho, Texas and Oklahoma – states that enacted their RTW laws between the 1960s and the 2000s – did not contribute to the worsening of their state's income inequality. We use a wide range of inequality measures. Our results are consistent across all measures. The finding is also robust across different specifications and choice of the control groups.

While our findings are specific to these four states they do have somewhat broader implications. It is important to reiterate that these four states, where we do not find any impact of RTW on inequality, are the only states that converted to RTW between 1964 and 2010. Most of the RTW states implemented RTW laws in the 1940s or the 1950s. However, inequality in the U.S. started to exacerbate in the mid-1980s (Frank 2014). If RTW had an impact on inequality, it would have to be that RTW started to have a causal effect on inequality in the states that enacted the law in the 1940s and the 1950s with a lag of more than 30 years.

Therefore, while the worsening inequality in the U.S. merits extensive exploration, RTW laws do not seem to be the answer. This is particularly important in light of the emerging literature and policy debates that argue that the tails of the income distribution are being affected by different labor market policies. The suppression of income growth in the middle and the lower part of the distribution is well documented and can originate from many different sources in an economy like the U.S. Our results suggest that, perhaps, more attention needs to be paid to disparities in relative factor returns, and aspects of the labor market beyond collective bargaining.

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Appendix

A typical SCM analysis is feasible when one or more states exposed to an intervention can be compared to other states that were not exposed to the same intervention. In this paper, an outcome is an inequality measure, an exposed state is an RTW state, the intervention is the passage of the RTW, and the donor pool (unexposed/control states) consists of states that did not have a similar law for the observed period.

The following exposition is based on Abadie et al. (2010, 2014). For states $i = 1,\ldots,J+1$ and periods $t = 1,\ldots,T$, suppose state i is exposed to the intervention (the RTW law) at $T_0 \in (1,T)$. For states $i = 1,\ldots,J+1$ and periods $t = 1,\ldots,T$, suppose state i is exposed to the intervention (RTW) at $T_0 \in (1,T)$. The observed outcome for state i at time t is,

(1) $\quad Y_{it} = Y_{it}^N + \alpha_{it} S_{it}$,

where Y_{it}^N is the outcome for state i at time t in the absence of the intervention, the binary indicator variable S_{it} denotes the existence of the RTW law taking the value 1 if $i = 1$ and $t > T_0$, and α_{it} is the effect of the intervention for state i at time t. Thus, state i is exposed to the intervention in periods $T_0 + 1$ to T. We assume that the passage of the RTW law had no effect on the outcome in the exposed state before the implementation period. We restrict the donor pool to states that did not enact an RTW law.

Indexing the exposed state as state 1, we want to estimate $(\alpha_{1T_0+1},\ldots,\alpha_{1T})$. From equation (1) we note that $\alpha_{1t} = Y_{1t} - Y_{1t}^N$ for $t \in \{T_0 + 1,\ldots,T\}$, and while Y_{1t} is observed Y_{1t}^N is unobserved. Suppose Y_{it}^N is given by the model, $Y_{it}^N = \delta_t + \boldsymbol{\theta}_t \mathbf{Z}_i + \boldsymbol{\lambda}_t \boldsymbol{\mu}_i + \varepsilon_{it}$, where, δ_t is an unknown common factor constant across states, $\mathbf{Z}_j$ is a $(r \times 1)$ vector of observed covariates (not affected by the intervention), $\boldsymbol{\theta}_t$ is a $(1 \times r)$ vector of unknown parameters, $\boldsymbol{\lambda}_t$ is a $(1 \times F)$ vector of unobserved time-varying common factors, $\boldsymbol{\mu}_i$ is a $(F \times 1)$ vector of

unknown unit specific factors, and ε_{it} are the unobserved transitory shocks at the state level with zero mean.

Consider a $(J \times 1)$ vector of weights $\mathbf{W} = (w_2, ..., w_{J+1})'$ such that $\{w_j \geq 0 \mid j = 2, ..., J+1\}$ and $\sum_{j=2}^{J+1} w_j = 1$. Each value of the vector $\mathbf{W}$ represents a weighted average of the control states and, hence, a potential synthetic control. Abadie et al. (2010) show that, there exist $\mathbf{W}^* = (w_2^*, ..., w_{J+1}^*)'$ such that, $Y_{1t}^N = \sum_{j=2}^{J+1} w_j^* Y_{jt}$, $t = 1, ..., T_0$, and $\mathbf{Z}_1 = \sum_{j=2}^{J+1} w_j^* \mathbf{Z}_j$ (that is, pre-intervention matching with respect to the outcome variable as well as the covariates, henceforth referred to as predictors), then under standard conditions we can use,

(2) $\hat{\alpha}_{1t} = Y_{1t} - \sum_{j=2}^{J+1} w_j^* Y_{jt}, \qquad t \in \{T_0 + 1, ..., T\},$

as an estimator for α_{1t}. The term $\sum_{j=2}^{J+1} w_j^* Y_{jt}$ on the right-hand-side of (2) is simply the weighted average of the observed outcome of the control states for $t \in \{T_0 + 1, ..., T\}$ with weights $\mathbf{W}^*$. The procedure to obtain $\mathbf{W}^*$ is discussed in Abadie et al. (2010).

It is important to note, as Abadie, Diamond and Hainmueller (2010) show, the model for Y_{1t}^N above is a generalization and that the traditional regression-based difference-in-difference model can be obtained if we impose that $\boldsymbol{\lambda}_i$ be constant for all t. Thus, unlike the traditional regression-based difference-in-difference model that restricts the effects of the unobservable confounders to be time-invariant so that they can be eliminated by taking time differences, this model allows the effects of such unobservables to vary with time. In particular, Abadie, Diamond and Hainmueller (2010) show that a synthetic control can fit $\mathbf{Z}_1$ and a long set of pre-intervention outcomes, $Y_{11}, ..., Y_{1T_0}$, only as long as it fits $\mathbf{Z}_1$ and μ_1 (unknown factors of the exposed unit).

Figures

Figure 1: Synthetic Control Method Estimates of the Right-to-work Law in Louisiana

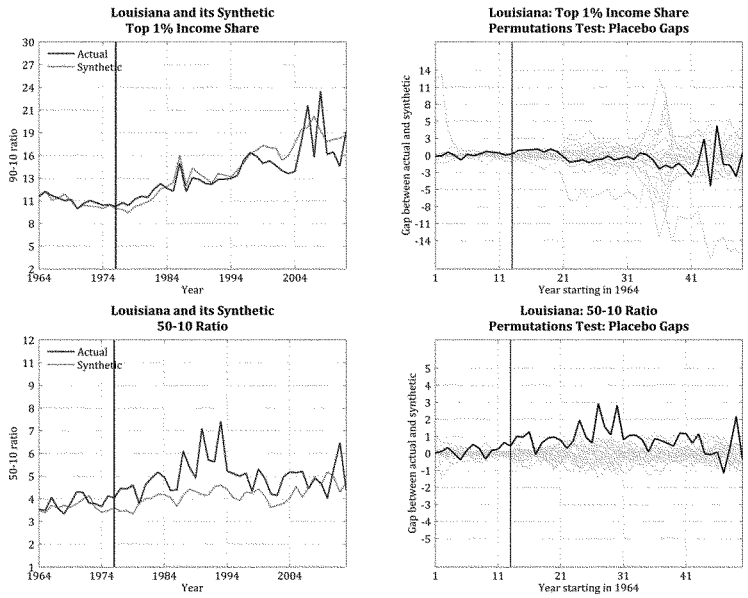


Figure 2: Synthetic Control Method Estimates of the Right-to-work Law in Idaho

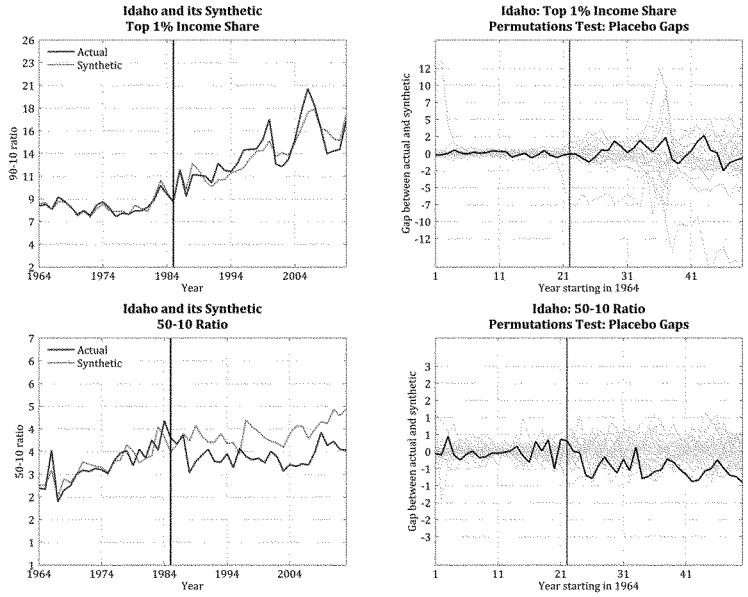


Figure 3: Synthetic Control Method Estimates of the Right-to-Work Law in Texas

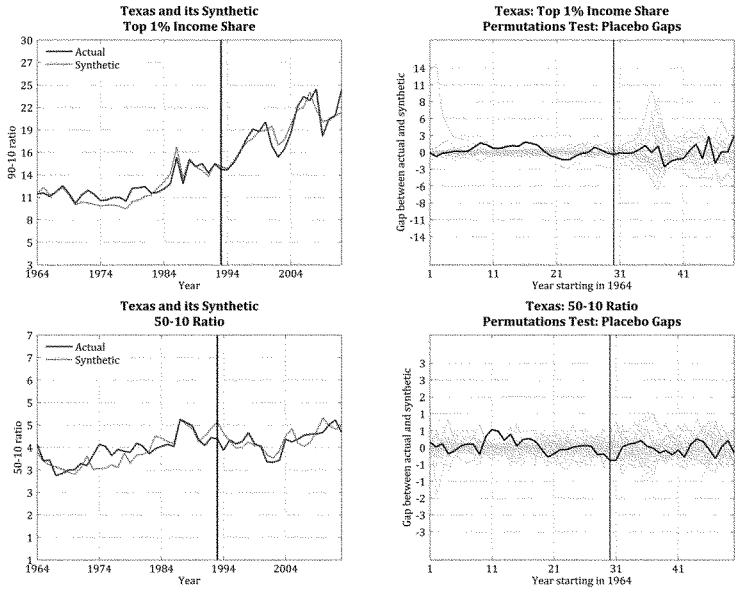


Figure 4: Synthetic Control Method Estimates of the Right-to-Work Law in Oklahoma

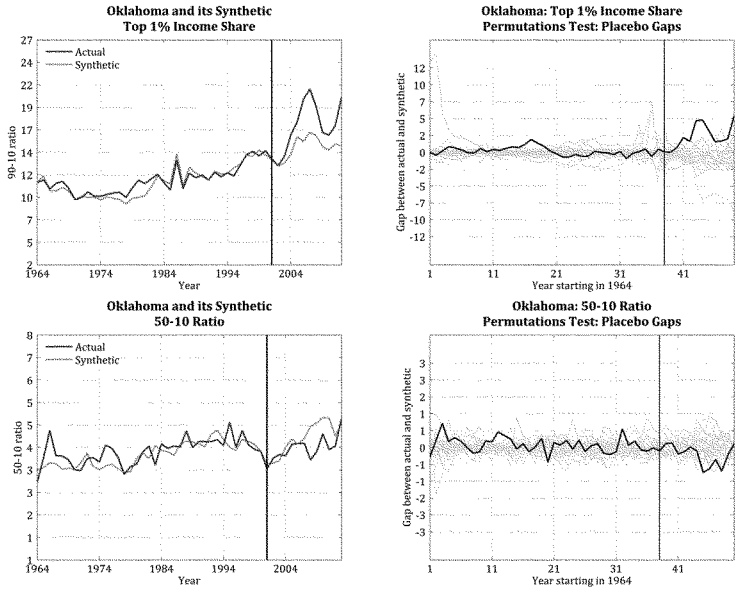
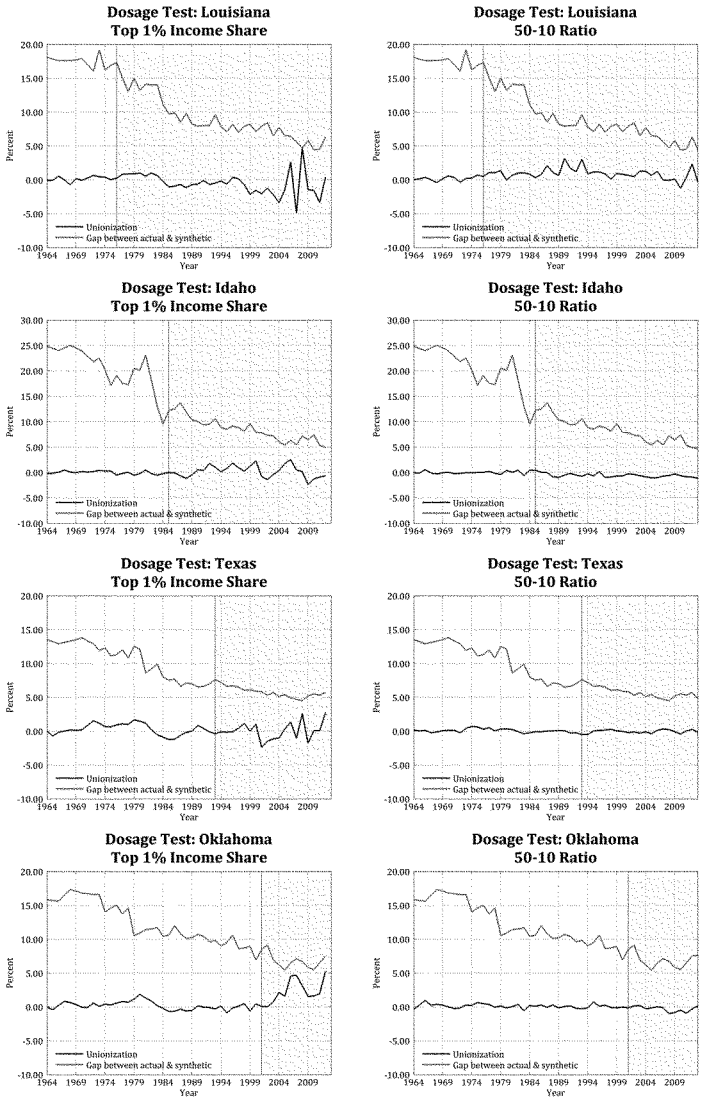


Figure 5: Dosage Test - Impact of RTW Laws on Inequality Measures: Top 1% Income Share and 50-10 Ratio



Tables

Table 1: Summary Statistics

	Donor pool (26 states)				Mean			
	mean	sd	min	max	Louisiana	Idaho	Texas	Oklahoma
Family income: 50-10 ratio (1964-2013)	3.92	0.64	1.71	6.00	4.84	3.47	4.12	4.04
Family income: 90-10 ratio (1964-2013)	9.01	2.39	3.79	17.00	12.63	7.54	10.50	9.65
Family income: 90-50 ratio (1964-2013)	2.27	0.29	1.65	3.31	2.59	2.17	2.53	2.38
Inequality: Gini coefficient (1964-2012)	0.51	0.05	0.41	0.67	0.53	0.53	0.55	0.53
Inequality: Atkinson index (1964-2012)	0.22	0.04	0.15	0.39	0.22	0.20	0.24	0.21
Inequality: Theil's entropy index (1964-2012)	0.55	0.20	0.29	1.39	0.54	0.48	0.64	0.52
Inequality: relative mean deviation (1964-2012)	0.72	0.07	0.56	0.95	0.75	0.74	0.78	0.74
Top one percent income share (1964-2012)	12.25	4.03	6.73	31.33	12.44	10.47	13.72	11.85
Top decile income share (1964-2012)	37.11	5.16	28.05	58.84	38.59	33.73	39.01	37.01
Unionization rate (1964-2013)	20.88	8.04	6.20	44.80	10.97	13.51	8.51	10.97
Main set of predictors								
Log per capita income (2005 dollars)	9.82	0.27	9.22	10.41	9.58	9.64	9.74	9.67
Employment to population ratio	0.54	0.07	0.37	0.68	0.48	0.53	0.53	0.52
State effective minimum wage (current dollars)	4.16	1.91	1.60	9.19	3.95	3.95	3.95	3.95
Proportion of population in poverty	0.12	0.03	0.06	0.31	0.22	0.13	0.17	0.16
Current transfer receipts from governments	8.06	0.58	6.48	9.10	7.99	7.86	7.79	8.03
Medical benefits	6.74	1.14	0.96	8.44	6.70	6.37	6.48	6.72
State unemployment insurance compensation	4.84	0.68	2.66	6.74	4.38	4.78	4.12	4.12
Supplemental Nutrition Assistance Program (SNAP)	3.90	1.33	0.00	5.73	4.70	3.56	4.00	3.68
Receipts from state and local governments	2.50	1.09	0.00	3.48	2.50	2.50	2.50	2.50
Current transfer receipts from businesses	4.16	0.47	2.97	5.00	4.15	4.13	4.15	4.13
Personal current taxes to State governments	6.17	0.98	3.12	7.66	5.52	6.38	3.88	6.13
Employer contributions employee pension, etc.	7.57	0.54	6.08	8.51	7.38	7.28	7.47	7.37
Alternative set of predictors								
Growth rate: population	0.10	0.08	-0.08	0.31	0.08	0.19	0.22	0.10
Growth rate: Non-White population	0.56	0.45	-0.22	2.36	0.12	0.97	0.53	0.39
Proportion population 25 plus with high school	0.72	0.13	0.32	0.92	0.62	0.75	0.65	0.69
Proportion population 25 plus with college	0.19	0.07	0.06	0.39	0.15	0.17	0.18	0.16
Average wage and salary growth	1.23	0.22	0.97	1.88	1.26	1.20	1.34	1.24
Percent rural population	0.29	0.16	0.06	0.68	0.31	0.42	0.19	0.33
Log overall crime rate per 100,000	8.27	0.37	6.71	8.97	8.43	8.12	8.54	8.36
PC FDI growth	4.46	2.96	0.80	19.10	2.66	5.63	2.95	2.99

Notes: (a) Maximum time period is 1964-2013. Number of observations are not same across variables. The period of availability is described in parenthesis. (b) 26 states in the donor pool. DC is excluded. Alaska and Hawaii are not RTW states, but they have missing data and hence not in the donor pool. (c) Indiana and Michigan included in the donor pool because they became RTW states in 2012. (d) Unionization rate refers to % non-agri w-s employees members of collective bargaining. All monetary variables are in real per capita terms. (e) In order to preserved maximum number of observations, wage-salary and FDI growths are calculated as ratio to the first observed year.

Table 2: Synthetic Control Method Estimates of the Impact of Right to Work Laws on Two Inequality Measures

	Top 1% income share				50-10 Ratio			
	LA	ID	TX	OK	LA	ID	TX	OK
Panel A: Estimation Statistics								
Pre-intervention APEMR	0.03	0.03	0.06	0.04	0.08	0.07	0.06	0.06
Pre-intervention MSPE	0.15	0.10	0.71	0.38	0.12	0.08	0.08	0.11
Post-intervention gap	-0.55	0.22	0.03	2.46	0.90	-0.62	-0.04	-0.30
post/pre MSPE ratio rank	20	20	25	2	8	7	25	7
P-value: Post-pre MSPE ratio	0.70	0.70	0.89	0.04	0.26	0.22	0.89	0.22
Donor probability	0.74	0.74	0.93	0.07	0.30	0.26	0.93	0.26
Panel B: Donor Pool w-weights								
California	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.23
Colorado	0.00	0.00	0.00	0.00	0.00	0.62	0.00	0.00
Connecticut	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Delaware	0.04	0.00	0.02	0.08	0.00	0.01	0.00	0.10
Illinois	0.00	0.00	0.00	0.00	0.00	0.00	0.39	0.08
Indiana	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Kentucky	0.30	0.00	0.00	0.00	0.55	0.00	0.20	0.44
Maine	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Maryland	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Massachusetts	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Michigan	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Minnesota	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.15
Missouri	0.00	0.00	0.00	0.26	0.00	0.00	0.35	0.00
Montana	0.00	0.74	0.00	0.00	0.00	0.00	0.00	0.00
New Hampshire	0.00	0.00	0.00	0.00	0.00	0.00	0.05	0.00
New Jersey	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
New Mexico	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
New York	0.23	0.00	0.42	0.00	0.00	0.00	0.00	0.00
Ohio	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Oregon	0.00	0.00	0.00	0.00	0.29	0.00	0.00	0.00
Pennsylvania	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Rhode Island	0.00	0.00	0.00	0.00	0.00	0.37	0.00	0.00
Vermont	0.00	0.26	0.00	0.00	0.00	0.00	0.00	0.00
Washington	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
West Virginia	0.42	0.00	0.56	0.65	0.17	0.00	0.00	0.00
Wisconsin	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

Notes: (a) Pre-intervention periods: Louisiana (LA) 1964-1975, Idaho (ID) 1964-1984, Texas (TX) 1964-1992, Oklahoma (OK) 1964-2000. Pre-intervention outcome variables are for each states are for the respective pre-intervention periods. (b) APEMR refers to absolute prediction error to mean ratio, MSPE refers to mean square prediction error. 'Donor probability' is the probability of obtaining a post-pre MSPE ratio as large as the treated if one were to assign the intervention at random in the data. (c) Donor pool states with w-weight<0.01 are reported as zeroes. (d) Except for the pre-intervention outcome, the set of predictors is the same in each estimate (see Table 3 for details).

Table 3: Pre-intervention Characteristics Comparison (Top 1% Income Share and 50-10 Ratio SCM Estimates)

	Louisiana			Idaho			Texas			Oklahoma		
	Synthetic			Synthetic			Synthetic			Synthetic		
	top 1% share	50-10 ratio	Actual	top 1% share	50-10 ratio	Actual	top 1% share	50-10 ratio	Actual	top 1% share	50-10 ratio	Actual
Per capita income	9.35	9.33	9.22	9.49	9.63	9.46	9.52	9.59	9.55	9.45	9.56	9.51
Employed to population ratio	0.42	0.43	0.40	0.48	0.51	0.47	0.43	0.48	0.49	0.43	0.47	0.48
Effective minimum wage	1.63	1.60	1.60	2.30	2.30	2.30	2.32	2.30	2.30	2.30	2.31	2.30
Proportion poverty	0.20	0.20	0.27	0.13	0.11	0.13	0.17	0.14	0.18	0.18	0.16	0.17
Transfers from government	7.37	7.28	7.09	7.48	7.48	7.34	7.73	7.50	7.21	7.61	7.51	7.52
Medical benefits	5.12	4.95	4.91	5.64	5.75	5.35	5.80	5.61	5.38	5.39	5.67	5.81
State unemployment insurance	4.13	4.07	4.01	4.51	4.35	4.55	4.66	4.45	3.51	4.43	4.55	3.88
SNAP	2.98	3.02	3.31	2.99	3.17	2.50	3.55	3.21	2.86	3.65	3.30	2.16
Receipts from state-local govt.	0.73	0.73	0.73	1.75	1.74	1.74	1.75	1.75	1.74	1.75	1.74	1.74
Transfers from businesses	3.76	3.71	3.70	3.92	3.97	3.92	4.00	4.01	3.96	3.97	3.97	3.92
State personal tax	5.50	5.51	4.62	5.96	5.67	5.96	5.92	5.45	3.78	5.57	5.86	5.47
Employer benefit contribution	6.75	6.69	6.60	6.77	7.12	6.78	6.97	7.01	7.02	6.85	7.03	6.92

Note: The underlying estimates are reported in Table 2.

Table 4: Synthetic Control Method of the Impact of Right to Work Laws on Various Inequality Measures

	Gini	Atkinson	Theil	Rel mean deviation	Top 10% share	90-10 Ratio	90-50 Ratio
Louisiana							
Pre-intervention APEMR	0.01	0.03	0.03	0.01	0.01	0.10	0.07
Pre-intervention MSPE	0.00	0.00	0.00	0.00	0.37	1.18	0.04
Post-intervention gap	0.03	0.02	0.10	0.04	-0.51	2.96	0.16
Post-pre MSPE ratio rank	7	7	5	5	18	12	26
P-value: Post-pre MSPE ratio	0.22	0.22	0.15	0.15	0.63	0.41	0.93
Donor probability	0.26	0.26	0.19	0.19	0.67	0.44	0.96
Idaho							
Pre-intervention APEMR	0.02	0.03	0.04	0.02	0.03	0.07	0.04
Pre-intervention MSPE	0.00	0.00	0.00	0.00	1.46	0.45	0.01
Post-intervention gap	0.00	0.00	0.03	0.00	-0.95	-2.40	0.04
Post-pre MSPE ratio rank	23	25	13	25	27	5	24
P-value: Post-pre MSPE ratio	0.81	0.89	0.44	0.89	0.96	0.15	0.85
Donor probability	0.85	0.93	0.48	0.93	1.00	0.19	0.89
Texas							
Pre-intervention APEMR	0.02	0.03	0.06	0.03	0.02	0.08	0.04
Pre-intervention MSPE	0.00	0.00	0.00	0.00	0.59	0.92	0.01
Post-intervention gap	0.01	0.00	-0.10	0.03	0.33	0.10	0.05
Post-pre MSPE ratio rank	23	25	15	15	17	26	25
P-value: Post-pre MSPE ratio	0.81	0.89	0.52	0.52	0.59	0.93	0.89
Donor probability	0.85	0.93	0.56	0.56	0.63	0.96	0.93
Oklahoma							
Pre-intervention APEMR	0.01	0.03	0.05	0.01	0.04	0.07	0.03
Pre-intervention MSPE	0.00	0.00	0.00	0.00	2.67	0.63	0.01
Post-intervention gap	0.00	0.01	0.09	0.01	-0.71	-1.30	-0.02
Post-pre MSPE ratio rank	24	13	10	8	26	4	21
P-value: Post-pre MSPE ratio	0.85	0.44	0.33	0.26	0.93	0.11	0.74
Donor probability	0.89	0.48	0.37	0.30	0.96	0.15	0.78

Notes: (a) Pre-intervention periods: Louisiana (1964-1975), Idaho (1964-1984), Texas (1964-1992), Oklahoma (1964-2000). Pre-intervention outcome variables are for each states are for the respective pre-intervention periods. (b) APEMR refers to absolute prediction error to mean ratio, MSPE refers to mean square prediction error. 'Donor probability' is the probability of obtaining a post-pre MSPE ratio as large as the treated if one were to assign the intervention at random in the data. (c) Donor pool is the same as that in Table 2. (d) Set of predictors is the same Table 3.

Table 5: Synthetic Control Method (SCM) Estimates of the Impact of Right to Work Laws on Per capita FDI and Average Wages and Salaries

	Average wage and salary growth				PC FDI growth		
	Louisiana	Idaho	Texas	Oklahoma	Idaho	Texas	Oklahoma
Pre-intervention APEMR	0.00	0.01	0.03	0.03	0.11	0.03	0.09
Pre-intervention MSPE	0.00	0.00	0.00	0.00	0.17	0.01	0.12
Post-intervention gap	0.09	0.10	-0.01	0.02	1.81	-0.82	0.67
Post-pre MSPE ratio rank	7	7	27	24	25	10	18
P-value: Post-pre MSPE ratio	0.22	0.22	0.96	0.85	0.89	0.33	0.63
Donor probability	0.26	0.26	1.00	0.89	0.93	0.37	0.67

Notes: (a) Pre-intervention periods: Louisiana (1964-1975), Idaho (1964-1984), Texas (1964-1992), Oklahoma (1964-2000). Pre-intervention outcome variables are for each states are for the respective pre-intervention periods. (b) APEMR refers to absolute prediction error to mean ratio, MSPE refers to mean square prediction error. (c) Donor pool is the same as that in Table 2. (e) Set of predictors is the same Table 3. (d) FDI data starts in 1977, hence pre-intervention FDI for Louisiana does not exist which enacted RTW in 1976.

Table 6: SCM of the Impact of Right to Work Laws on Various Inequality Measures (Matching on Pre-intervention Unionization)

	Louisiana		Idaho		Texas		Oklahoma	
	APEMR	Rank	APEMR	Rank	APEMR	Rank	APEMR	Rank
Gini	0.01	5	0.02	23	0.02	22	0.01	24
Atkinson	0.03	10	0.03	26	0.03	16	0.03	17
Theil	0.02	6	0.04	13	0.06	15	0.05	9
Rel mean dev	0.01	5	0.02	24	0.03	13	0.01	7
Top 1% share	0.03	20	0.03	21	0.06	25	0.04	4
Top 10% share	0.01	19	0.03	26	0.02	17	0.04	27
50-10 Ratio	0.08	8	0.07	7	0.05	25	0.06	6
90-10 Ratio	0.10	10	0.07	5	0.08	26	0.07	5
90-50 Ratio	0.07	26	0.04	26	0.04	26	0.03	21

Notes: (a) Pre-intervention change in unionization is added to the set of predictors used in the main estimates in Table 2. This is a rate of change measured by dividing each year's value by the value of the first year observed (see Munasib and Rickman 2015). (b) Donor pool is the same as that in Table 2. (c) Pre-intervention periods: Louisiana (1964-1975), Idaho (1964-1984), Texas (1964-1992), Oklahoma (1964-2000). (d) APEMR refers to absolute prediction error to mean ratio. The 'Rank' refers to Post-pre MSPE ratio rank where MSPE = mean square prediction error. Rel mean dev refers to relative mean deviation.

Table 7: SCM of the Impact of the Right to Work Laws on Various Inequality Measures (Excluding the Border States from the Donor pool)

	Idaho		Texas		Oklahoma	
	APEMR	Rank	APEMR	Rank	APEMR	Rank
Gini	0.03	22	0.03	24	0.01	16
Atkinson	0.03	21	0.03	19	0.03	7
Theil	0.04	10	0.06	19	0.05	9
Rel mean dev	0.03	22	0.03	20	0.01	15
Top 1% share	0.07	20	0.06	23	0.04	3
Top 10% share	0.03	21	0.02	14	0.05	21
50-10 Ratio	0.06	7	0.06	22	0.06	7
90-10 Ratio	0.07	5	0.08	24	0.07	6
90-50 Ratio	0.04	22	0.05	25	0.04	23

Notes: (a) All the bordering states of Louisianan are already excluded in the main donor pool. (b) In case of Texas, Colorado is excluded. Although Colorado technically does not border Texas the two states are separated by only a 35-mile-stip of the Oklahoma panhandle. (c) Pre-intervention periods: Idaho (1964-1984), Texas (1964-1992), Oklahoma (1964-2000). (d) Set of predictors is the same Table 2. (d) APEMR refers to absolute prediction error to mean ratio. The 'Rank' refers to Post-pre MSPE ratio rank where MSPE = mean square prediction error. Rel mean dev refers to relative mean deviation.

Table 8: SCM of the Impact of the Right to Work Laws on Various Inequality Measures (Alternative Set of Predictors)

	Louisiana		Idaho		Texas		Oklahoma	
	APEMR	Rank	APEMR	Rank	APEMR	Rank	APEMR	Rank
Gini	0.01	7	0.02	25	0.02	21	0.01	23
Atkinson	0.03	14	0.03	24	0.03	10	0.03	16
Theil	0.03	12	0.04	24	0.05	20	0.05	7
Rel mean dev	0.01	9	0.02	25	0.03	14	0.01	10
Top 1% share	0.03	20	0.03	19	0.06	25	0.04	4
Top 10% share	0.01	19	0.03	26	0.02	17	0.04	27
50-10 Ratio	0.08	9	0.07	13	0.05	25	0.06	7
90-10 Ratio	0.10	11	0.07	6	0.08	27	0.07	4
90-50 Ratio	0.07	25	0.04	25	0.04	27	0.03	21

List of predictors

Population growth rate: population, Non-White population growth rate, proportion population 25 plus with high school, proportion population 25 plus with college, percent rural population, log overall crime rate per 100,000, average wage and salary, per capita FDI.

Notes: (a) Pre-intervention periods: Idaho (1964-1984), Texas (1964-1992), Oklahoma (1964-2000). (b) APEMR refers to absolute prediction error to mean ratio. The 'Rank' refers to Post-pre MSPE ratio rank where MSPE = mean square prediction error. Rel mean dev refers to relative mean deviation. (c) (c) Donor pool is the same as that in Table 2.

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OPINION | REVIEW & OUTLOOK

The 99% Get a Bigger Raise

New data show much faster growth in wages and incomes.

By The Editorial Board
July 30, 2019 7:29 pm ET

An assembly line worker packages items from an online order to be shipped out of a Target store in Edison, N.J., Nov. 16, 2018.
PHOTO: JULIO CORTEZ/ASSOCIATED PRESS

Political discourse nowadays is enough to depress anyone, and the media don't help by ignoring good economic news. But buck up, Americans: Worker wages are growing much faster than previously reported.

The Bureau of Economic Analysis (BEA) on Tuesday published its annual revisions to personal income data, and the surprise was the huge jump in disposable income and employee compensation.

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The revisions show that employee compensation rose 4.5% in 2017 and 5% in 2018—some $4.4 billion and $87.1 billion more than previously reported. The trend has continued into 2019, with compensation increasing $378 billion or 3.4% in the first six months alone. Wages and salaries were revised upward to 5.3% from 3.6% in May year over year. And in June wages and salaries grew at an annual rate of 5.5%, which is a rocking 4.1% after adjusting for inflation.

This is far more than the 3.1% year over year increase in average hourly earnings that the Labor Department's jobs report showed for June. One reason for the disparity may be that employers are hiring millions of younger, lower-income workers, which may be depressing average hourly earnings as older, more highly paid workers retire.

The BEA also revised overall personal income up by 1.7% for 2017 and 2018 and transfer receipts down 0.7%. In sum, Americans are earning more and relying less on government. Personal savings estimates were also increased by $217 billion for the last two years and are now $1.3 trillion, which means Americans are socking away more of their earnings.

The personal savings rate was revised upward to 8.1% from 6.1% in May, which is much higher than the roughly 5% before the last two recessions. This should make the current economic expansion more durable since consumption isn't being pumped up largely by increased household debt. Instead consumer spending has increased as wage growth has accelerated amid a tight labor market.

Recall how liberals blamed "secular stagnation" as the reason worker incomes weren't growing faster during the latter years of Barack Obama's Presidency. Yet employee compensation has increased by $150 billion more in the first six months of 2019 than all of 2016. Compensation increased 42% more during the first two years of the Trump Presidency than in 2015 and 2016. This refutes the claim by liberals that the economy has merely continued on the same trajectory since 2017 as it was before.

The economy barely skirted recession in the final Obama years, and economic policy changed in 2017. Deregulation has unleashed repressed animal spirits, especially in energy. Tax reform has also spurred business investment in new facilities and equipment, which over time should translate into higher worker productivity and wages.

Those reforms are continuing to pay economic dividends despite the damage from Mr. Trump's trade policies. While Democrats and even some conservatives complain that workers haven't benefited from tax reform, the evidence suggests otherwise.

Corporate after-tax profits increased by about $220 billion between 2016 and 2018 while employee compensation swelled nearly $1 trillion. Corporate profits declined 2.9% in the first quarter of 2019 even as wages grew at an annual rate of 10.1%. This sure sounds like an economy that is benefiting the 99%.

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The Link Between Wages and Productivity Is Strong

AUTHOR

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ABSTRACT

Much of the public debate in recent years suggests that wages are not primarily determined by productivity. Indeed, the argument that the link between compensation and productivity has been effectively severed is commonly made. In this paper, I first discuss the wage-setting process and the conceptual issues that are of critical importance to any empirical investigation of the link between compensation and productivity. I then highlight some recent evidence suggesting that, contrary to the current narrative in some policy circles, the link between productivity and wages is strong.

1. How Should We Think About Wages?

Adam Smith's invisible hand is alive and well in the textbook understanding of wages.

Workers—who need jobs in order to generate earnings to purchase goods and services—enter the labor market willing to supply their labor in exchange for a wage above which (or equal to) the rate at which they are indifferent between working and not working.

Employers enter the labor market because they need workers to produce goods and services. Assuming the labor market is "competitive," firms take the market wage as a given, operating under the assumption that they cannot influence it. They hire workers up to the point at which the additional revenue generated by hiring an additional worker is equal to the wage rate (i.e., the additional cost of employing that worker).

In this simple model, the higher the wage, the greater the number of workers who want to work; the lower the wage, the greater the number of workers firms want to hire. The labor market reconciles these conflicting wants by settling at an "equilibrium" wage rate—a wage rate such that everyone who wants to work (at the equilibrium wage) finds a job, and every firm that wants to hire workers (again, at the equilibrium wage) finds all the workers it wants. At the equilibrium wage, the labor market clears: labor supply (the number of workers who want to work) equals labor demand (the number of workers firms want to hire). A wage rate above the equilibrium wage would result in too many workers seeking too few jobs; a wage rate below would result in the opposite.

Let's pause here and note that this is a *model* of how labor markets work. In reality, the labor market for an industry or a geographic area—to say nothing of the U.S. labor market as a whole—likely never reaches equilibrium.

Why not? Wages may be "sticky," in the sense that firms are reluctant to reduce workers' nominal pay when market conditions change. (Economists refer to this as "downward

nominal wage rigidity.") Minimum wages and other labor market regulations may interfere with the ability of the labor market to adjust wages to the market clearing point where labor supply and demand are equal. International trade and technological advances may frequently change the demand for some types of workers, inhibiting a stable equilibrium from holding. These are just a few of many reasons.

Another crucial way the simple textbook model abstracts from reality is by assuming that firms typically face a market wage that they must take as given. In actual labor markets, firms often have some control over the wages they offer to their workers—labor markets deviate from the "perfectly competitive" standard textbook treatment. For example, firms in some locations and industries may have to increase their wage offering in order to attract additional workers. (This is an implication of the traditional understanding of "monopsony power" in the labor market.) These firms might be seeking workers who have a hard time changing jobs, such that higher wages are required to induce mobility. Firms that have a hard time monitoring their workers might pay higher wages in order to increase the costs workers face from slacking off and potentially losing a relatively well-paying job. Or firms might pay a higher wage to workers in order to increase their productivity and reduce turnover and the costs associated with it. (Implications of "efficiency wage" theory.) Businesses with monopoly power, meanwhile, face less incentive to hold down costs and may pay higher wages as a result.

Importantly, wages in many firms are also in part the result of a bargaining process between firms and workers. If firms have increasing bargaining power, then they will be able to push worker wages to the lowest wage workers will accept.

Even given these real-world considerations, the textbook model is extremely useful because it highlights the central role productivity plays in wage offerings. Intuitively, this link should be strong: If a worker can only produce, say, $15 per hour of revenue for his employer, then why would his employer pay him more than $15 per hour? And if a worker generates $15 per hour in revenue, then why would she accept a wage less than $15 per hour? The relationship between productivity and wages—wages equal "marginal revenue product"—also has attractive moral properties. If the relationship is strong, then workers are being paid, in a sense, "what they are worth" to the firm.

In my view, it is most useful to think of wages as being determined by a combination of competitive market forces, bargaining power, and institutions. Worker productivity is the baseline for which wages are determined. But unlike in the simple textbook model, the baseline is not the end of the story. Deviations from the baseline occur for a variety of reasons, several of which I discussed above.[1]

1 For a more formal discussion, see Clemens and Strain (2017).

In what follows, I will highlight some recent evidence suggesting that the link between productivity and wages is strong. This short paper is not intended to present a comprehensive summary of the economics literature, or to be a comprehensive discussion of wage determination. Instead, the evidence I discuss is illustrative and is intended to provide a framework for thinking about the wage-setting process, and how that process has evolved over time.

2. Conceptual Issues

In this section, I will discuss some of the conceptual issues that are of critical importance to any empirical investigation of the link between wages and productivity.

MEASURING WORKER PAY: WHICH WORKERS?

The strength of the link between productivity and wages is more complicated than it appears at first glance, in part because there are several sensible ways to define wages, and it is not clear which is best. Specifically, one must decide *whose* wages are of interest.

A natural answer here is the typical worker. To study whether the typical worker's pay is strongly related to productivity, the median wage of all workers is a good measure to use. Half of workers earn above the median and half earn below, making the median wage a good measure for middle-income (and, arguably, middle-class) wages.

Another measure of the typical worker's pay that's often used is the average wage for production and non-supervisory employees. This group of workers, which constitutes about 80% of the private-sector workforce, can roughly be thought of as workers, not managers. The Bureau of Labor Statistics defines this group as "production and related employees in manufacturing and mining and logging, construction workers in construction, and non-supervisory employees in private service-providing industries" (U.S. Department of Labor, 2018).

Economists Josh Bivens and Larry Mishel—who don't share my view on the strength of the link between productivity and wages—provide a reasonable argument for focusing on production and non-supervisory employees when thinking about the relationship between wages and productivity. They argue that researchers' focus should be on the strength of the relationship for "*most* American workers," and that "a key part of the growing gap between typical workers' pay and productivity is precisely the huge increases in salaries for highly paid managers and CEOs" (Bivens and Mishel, 2015). Therefore, they argue, managers should be excluded when investigating the relationship.

In addition to the typical worker's wages, it is also of interest to study the relationship between productivity and the average wage of all workers in the economy. The logic here is straightforward: If you are using economy-wide productivity to study the relationship between productivity and wages, then you should use economy-wide wages as well. While it is true that wages have been growing relatively faster for high-wage workers over the past several decades, it may also be true that the productivity of those workers has been growing relatively faster. Excluding them from the analysis may leave a key piece of the puzzle missing.

In addition, if the underlying reason for interest in the relationship between productivity and wages is not to see how workers' standards of living have evolved with productivity, but instead to study how firms compensate workers in their role as a key input to production, then it's desirable to study the average wage of all workers, not just of production and non-supervisory workers.

MEASURING WORKER PAY: CONVERTING NOMINAL WAGES TO INFLATION-ADJUSTED WAGES

The conceptual distinction between payments to workers as a factor of production and payments to workers as a measure of their standard of living also plays a critical role in deciding which measure of inflation should be used to convert nominal wages into real wages. When interested in the former, it is sensible to use a measure of producer prices because that captures the costs facing employers. When interested in the latter, a measure of consumer prices is reasonable because the prices consumers face are most relevant to their standards of living.

But when investigating the relationship between wages and productivity, a strong case can be made that wages should be deflated using a measure of the change in the prices of goods and services produced by businesses, not those consumed by workers. Economic theory predicts that workers are paid according to the marginal product of what they produce, not what they consume. Thus, an output price deflator is most appropriate.

MEASURING WORKER PAY: WAGES OR TOTAL COMPENSATION?

When determining whether higher productivity is translating into higher pay for workers, it is important to look at more than just real cash wages. For the "typical" worker—both the median worker and the average production and non-supervisory worker—and for all workers, non-wage compensation, including health benefits, is a large portion of total compensation. Indeed, non-wage compensation has risen as a share of total compensation from around 14% in the 1970s to around 19% today (Bureau of Economic Analysis, n.d.a.; Bureau of Economic Analysis, n.d.b.). In addition

to benefits, performance pay such as bonuses should be included in compensation. Arguably, stock options should be included as well, as those constitute a significant component of total compensation for some of the economy's highest-compensated workers.

MEASURING PRODUCTIVITY: NET OUTPUT OR GROSS OUTPUT?

Productivity can be defined as the amount of goods and services (output) produced in the economy for every unit of labor. For example, output per worker and output per hour of work are both productivity measures. Gross output includes capital depreciation, while net output does not. Since depreciation is not a source of income, net output is the better measure to use when investigating the link between worker compensation and productivity.

3. Direct Evidence on the Link Between Pay and Productivity

In a recent working paper, economists Anna M. Stansbury and Lawrence H. Summers (2017) address the link between pay and productivity. To my knowledge, their paper is the most recent to directly address this question. They use fluctuations in productivity growth over time to study how changes in productivity growth affect (or do not affect) wage growth.

Their paper is very thoughtful and carefully done. They study compensation of typical workers, using both the median wage and the average wage of production and non-supervisory employees, as well as the average wage of all workers. They deflate their compensation series using a consumer price measure rather than an output price measure, which I advised against above but which does increase the degree to which their results relate to the standard of living enjoyed by workers.[2] They use net domestic product per hour of work for their productivity measure.

Their empirical strategy is relatively straightforward. They calculate the three-year moving average of the change in (the log of) inflation-adjusted compensation for each group of workers and the three-year moving average of the change in (the log of) labor productivity. In this way, their measures of compensation and productivity can be thought of as measures of smooth, short-run compensation and productivity growth.

They then simply regress the compensation growth measure on the productivity growth measure, controlling for measures of the unemployment rate in order to make

2 In their paper, Stansbury and Summers report that using an output price deflator produces little change in their results.

sure that business cycle effects aren't distorting their estimates of the underlying relationship between productivity and compensation. Their main results use data from 1975 through 2015.

For median compensation, they find that a one percentage point increase in the growth rate of productivity is associated with a 0.73 percentage point increase in the growth rate of compensation. Importantly, they find that their estimate is "strongly statistically different" from zero—i.e., from no relationship between productivity and compensation—but not statistically significantly different from one. In other words, they cannot reject the hypothesis that productivity growth maps to compensation growth one-for-one, but they can reject the hypothesis that there is no relationship between the two.

When studying compensation for production and non-supervisory workers, Stansbury and Summers find that a one percentage point increase in the growth rate of productivity is associated with a 0.53 percentage point increase in the growth rate of compensation. The relationship for these workers is weaker than for median compensation, and their estimate is statistically significantly different from both zero and one.

For average compensation, they find that a one percentage point increase in the growth rate of productivity is associated with a 0.74 percentage point increase in the growth rate of compensation. As with median compensation, their estimate is statistically significantly different from zero, but not from one.

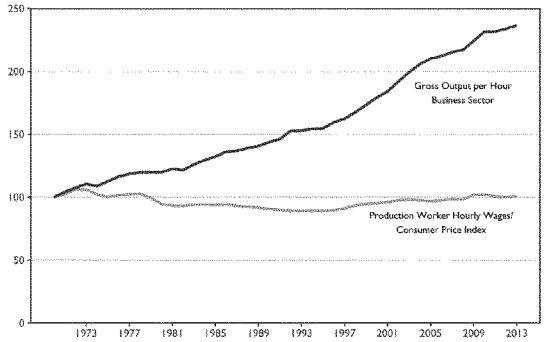
They conclude that "productivity growth still matters substantially for middle income Americans," and argue that "the substantial variations in productivity growth that have taken place in recent decades have been associated with substantial changes in median and mean real compensation." They take as given that compensation for typical workers has been stagnant over the past several decades, and reconcile their results with this by concluding that "other factors are suppressing typical workers' incomes even as productivity growth acts to increase them."[3]

4. Wages and Productivity Over Time

The conclusion from the Stansbury and Summers (2017) paper might be surprising given the public debate around the relationship between compensation and productivity, much of which suggests the link has been severed. This impression has been generated in part by charts that look like the following (Lawrence, 2016).

3 Stansbury and Summers estimate other models to confirm the robustness of their results. They also estimate models on data from decades prior to those discussed above, and separately for the period since 2000. In addition, they investigate whether technological progress has created a divergence between productivity and compensation. My brief treatment here has omitted discussion of many interesting components of their paper. I encourage those who are interested to read their entire paper.

Hourly Wages and Output per Hour, 1970-2013



Source: Lawrence (2016); U.S. Bureau of Economic Analysis; U.S. Bureau of Labor Statistics

Note: 1970=100

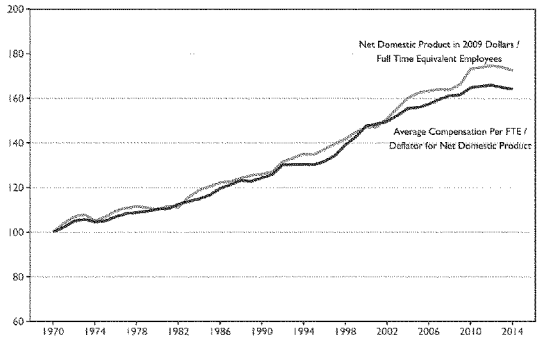
This chart, created by the economist Robert Lawrence, shows wages and productivity over time when the former is defined as the wages of production and non-supervisory employees, deflated by the consumer price index, and the latter is defined as gross output per hour in the business sector. The takeaway is clear: productivity has grown quite a bit, while wages have stagnated for decades. More specifically, the chart shows that productivity grew by 124% from 1970 to 2012, while wages during this time period increased by 26 cents (in 1982-84 dollars). This chart ignores the important conceptual issues discussed in Section 2 of this paper.

Lawrence then makes the following adjustments to the calculations that produced the chart above: (1) He uses output from the total economy, rather than just the business sector. (2) He uses net output (which removes capital depreciation), rather than gross output. (3) He includes both full- and part-time workers. Taken together, Lawrence finds that measuring productivity as the ratio of net total economy output divided by full-time equivalent employment reduces the 2013 gap in the chart by 20%.

Lawrence also considers a number of adjustments to the compensation calculation in the chart above. He finds that using compensation rather than wages reduces the 2013 gap in the chart by 8.2%. By including workers in managerial and professional positions, and by using a more inclusive measure of earnings, Lawrence explains 30% of the 2013 gap in the chart. By deflating wages using an output price index, Lawrence explains 35% of the gap. After those adjustments, the chart looks as follows.[4]

4 In his chapter, Lawrence also discussed differential compensation growth for workers in different parts of the wage distribution, and how these differences have contributed to growing inequality. He notes that many explanations for growing inequality are consistent with a strong link between productivity and compensation. He also discusses international trade, arguing that average wage differences between nations move in line with productivity. I encourage those who are interested to read his entire chapter.

Net Domestic Product and Real Product Compensation per Full-Time Equivalent Employee



Source: Lawrence (2016); Bureau of Economic Analysis National Income Accounts.

Note: 1970=100

In the chart above, productivity growth and compensation growth were coincident between 1970 and 2001. The chart depicts a divergence since 2001, especially since the Great Recession, but not a dramatic one.

The takeaway from this chart is clear: When properly measured, with variable definitions based on the most appropriate understanding of the relevant underlying economic concepts, trends in compensation and productivity have been very similar over the past several decades. Of course, it is also the case that two variables can evolve similarly over time without necessarily being related. But this chart, combined with the statistical evidence in the Stansbury and Summers paper and economic theory, provides compelling evidence that productivity and compensation are strongly related.

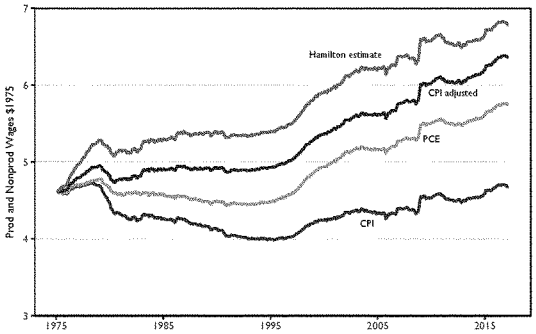
5. Stagnating Wages?

Implicit in the conversation over pay and productivity is that pay has been stagnant, with little or no growth for the typical worker since the 1970s. As with the relationship between pay and productivity, the question of wage growth is heavily influenced by the choice of inflation measure.

It is common for economists and analysts to use the consumer price index (CPI) to adjust wages for inflation over time. However, the CPI is not obviously the superior measure. The personal consumption expenditures (PCE) price index is the Federal Reserve's preferred measure of inflation. The PCE has many advantages over the CPI. Arguably, it's most important advantage is that, unlike the CPI, it accounts for the fact that consumers change the goods they purchase in response to price changes.

The next chart is produced by economist Bruce Sacerdote (2017).[5] The blue line represents average wages for production and non-supervisory workers, adjusted for inflation using the CPI. The green line represents the same wages, adjusted for inflation using the PCE. The red line represents those same wages, adjusted assuming that the CPI overstates inflation by 20% (a common, rough estimate of CPI bias). And the orange line deflates wages using a correction to the CPI proposed by economist Bruce W. Hamilton. The data run from 1975 through 2015.

Real Wages as Published and Adjusted



Source: Sacerdote (2017), used with permission.

Using the PCE, Sacerdote calculates real wage growth for production and non-supervisory workers of 24% from 1975-2015, or 0.54% per year. Removing 20% of CPI price inflation growth results in real wage growth of 0.76% per year. The Hamilton adjustment finds growth of 1% per year.

To be clear, I am not arguing that real wage growth of 0.5% per year is strong. I am making the weaker, but still important, claim that the dominant narrative of "no wage growth" in recent decades is heavily dependent on one's choice of inflation measure, and that there are good reasons to prefer other measures to the CPI.

6. The Need to Increase Productivity

In my view, wages and productivity are strongly linked. But that does not mean wage gains have been equally distributed across workers. Indeed, they have not been. Half of workers do not reach typical compensation levels (when defined as median compensation), and many workers do not reach average compensation levels.

5 In addition to what I discuss in this paper, Sacerdote also examines changes over time in the enjoyment of consumption goods such as cars and the size of homes among lower- and middle-income workers.

Public policy acknowledges this and has taken steps to correct it through the tax and transfer system. The nonpartisan Congressional Budget Office (CBO) reports that between 1979 and 2014, the sum of market income and social insurance payments among households in the bottom 20% of the income distribution grew by 26%. After taxes and transfers, income growth for this group of households was 69% (Congressional Budget Office, 2018).[6]

But more should be done. Given the strength of the link between pay and productivity, it is important for public policy to attempt to make workers, particularly low-wage workers, more productive. Policies to increase the skills of, and training available to, workers—for example, reforms to our K-12 education system and the expansion of apprenticeships and other forms of work- based learning—should be enacted. Earnings subsidies should be expanded to draw more people into the workforce. Policies to encourage business investment should also be considered. Labor market regulations that serve as barriers to workers and reduce the quality of matches between workers and jobs should be removed.

And policymakers should have confidence that measures to increase the productivity of workers will translate into higher pay.

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6 Income before taxes and transfers is defined as market income (labor, business, and capital income, in addition to other income related to market activities) plus social insurance benefits, including Social Security and Medicare, among others. Income after taxes and transfers is defined as income before taxes and transfers less federal taxes plus means-tested transfers, including cash payments and in-kind transfers such as Medicaid and food stamps, among others. These income measures are conceptually very different from what has been discussed in this paper, but they serve to illustrate the extent to which the tax and transfer system addresses inequality.

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[Additional submission by Ms. Wilson follows:]

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LiUNA!

July 22, 2019

The Honorable Bobby Scott
Chairman
House Committee on Education and Labor
2176 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Scott:

On behalf of the 500,000 men and women of the Laborers' International Union of North America (LIUNA), I write to endorse H.R. 2474, the Protecting the Right to Organize (PRO) Act. The right to join a union is critical to ensure workers receive fair pay and benefits and safe jobsites. H.R. 2474 will expand the National Labor Relations Act to ensure that workers and unions have real, enforceable protections under the law.

H.R. 2474 expands remedies, punishes employer violations of workers' rights, and strengthens workers' rights to organize and bargain for better working conditions. Importantly, it also strengthens workers' and union representational rights and protects immigrants' labor rights. It will also prevent employers from misclassifying workers as supervisors and independent contractors and ban "captive audience" meetings. Importantly, to push back on the recent so-called "right to work" laws harming unions and our members, the PRO Act will allow unions to collect fair share fees covering the costs of items covered by a collective bargaining agreement.

For these reasons, LIUNA supports H.R. 2474, and our Union is proud to endorse your bill.

With kind regards, I am

Sincerely yours,

Terry O'Sullivan

TERRY O'SULLIVAN
General President

rj
opeiu2liuna

Feel the Power

[Questions submitted for the record and their responses follow:]

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Ms. Charlotte Garden, J.D., LL.M
Co-Associate Dean for Research and Faculty Development and Associate Professor
Seattle University School of Law
901 12th Avenue
Seattle, WA 98122

Dear Professor Garden,

I would like to thank you for testifying at the July 25, 2019, Subcommittee on Health, Employment, Labor and Pensions hearing entitled *"Protecting the Right to Organize Act: Modernizing America's Labor Laws."*

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Friday, August 9, 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 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Health, Employment, Labor and Pensions Subcommittee Hearing
"Protecting the Right to Organize Act: Modernizing America's Labor Laws"
Thursday, July 25, 2019
10:15 a.m.

Representative Frederica Wilson (D-FL)

- Professor Garden, your testimony describes how, in NAACP v. Claiborne Hardware Company, the NAACP organized a secondary consumer boycott of Mississippi businesses to protest segregationist government policies. There, the Supreme Court held that this behavior was legal and represented essential First Amendment expression. However, Section 8(b)(4) of the National Labor Relations Act (NLRA) makes it illegal for workers to peacefully picket companies where they are not employed to change the policies of another entity.
    - Why are secondary boycotts conducted by workers treated differently than those conducted by civil rights groups and other organizations?
    - How does Section 8(b)(4) square with modern Supreme Court law, which broadly interprets First Amendment speech rights?

- Professor Garden, current law treats the speech of workers differently than the speech of other concerned citizens. It also treats the speech of workers more restrictively than the speech of employers.
    - How does the NLRA and current Supreme Court precedent permit employers to have broader speech rights than workers?
    - How does the PRO Act fix this problem?

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August 2, 2019

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Mr. Richard F. Griffin, Jr., J.D.
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805 Fifteenth Street, NW, Suite 1000
Washington, D.C. 20005

Dear Mr. Griffin,

I would like to thank you for testifying at the July 25, 2019, Subcommittee on Health, Employment, Labor and Pensions hearing entitled *"Protecting the Right to Organize Act: Modernizing America's Labor Laws."*

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Friday, August 9, 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 202-225-3725 should you have any questions.

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Health, Employment, Labor and Pensions Subcommittee Hearing
"Protecting the Right to Organize Act: Modernizing America's Labor Laws"
Thursday, July 25, 2019
10:15 a.m.

Representative Frederica Wilson (D-FL)

- Mr. Griffin, in 2016, the Department of Labor closed a major loophole in the Labor Management Reporting and Disclosure Act by requiring that employers disclose information about third-party labor consultants. This regulation, called the Persuader Rule, would have brought to light an entire sector of the union avoidance industry that drafts captive audience speeches and produces anti-union videos and literature that employers deploy. However, the Trump administration repealed this rule on July 18, 2018.
    - Did this rule impermissibly require attorneys to breach their attorney confidentiality regarding legal advice they give to employers?
    - What is your view on the provision in the PRO Act that reinstates this rule?

- Mr. Griffin, last Congress, this Committee considered legislation seeking to narrow the standard for determining whether an entity is a joint employer. Joint employment typically involves situations where workers hired by one entity perform work for another entity, such as with temporary staffing agencies that handle payroll while the primary company possesses control over terms and conditions of employment. However, many who want to advocate narrowing the joint employer standard highlight the franchise industry—even though franchisors often limit their control to being over management of the brand. What are people missing when they try to make joint employment about the franchise relationship?

- Mr. Griffin, how would the PRO Act remedy employer interference in representation elections?

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

The Protecting the Right to Organize Act: Modernizing America's Labor Laws

Charlotte Garden
Seattle University School of Law
Seattle, Washington

Madame Chair Wilson, Ranking Member Walberg, and Members of the subcommittee, thank you for the opportunity to testify at the June 25, 2019 hearing on the Protecting The Right to Organize Act. Thank you also for the opportunity to respond to the following additional questions; I hope these answers are helpful to the subcommittee.

Question 1:

Professor Garden, your testimony describes how, in NAACP v. Claiborne Hardware Company, the NAACP organized a secondary consumer boycott of Mississippi businesses to protest segregationist government policies. There, the Supreme Court held that this behavior was legal and represented essential First Amendment expression. However, Section 8(b)(4) of the National Labor Relations Act (NLRA) makes it illegal for workers to peacefully picket companies where they are not employed to change the policies of another entity.

- Why are secondary boycotts conducted by workers treated differently than those conducted by civil rights groups and other organizations?
- How does Section 8(b)(4) square with modern Supreme Court law, which broadly interprets First Amendment speech rights?

Answer:

The Supreme Court's reasons for upholding the restrictions contained in Section 8(b)(4) of the National Labor Relations Act (NLRA) have changed over time. But the Court's most recent explanation is that "[s]econdary boycotts and picketing by labor unions may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'"[1] Then, two years after Justice Blackmun wrote of the NLRA's "delicate balance," the Court in *Claiborne Hardware* drew a distinction between the "economic activity" regulated by the NLRA, and political activity, such as an NAACP secondary boycott aimed at pressuring local government to proceed with desegregation: "While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in his case."[2]

The Supreme Court has not revisited the constitutionality of Section 8(b)(4) since 1980. But more recent Court decisions have undermined the premises that supported both

[1] Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 428 n.12 (1990) (quoting NLRB v. Retail Store Employees, 447 U.S. 607, 617-18 (1980) (Blackmun, J., concurring)).
[2] Nat'l Ass'n for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982).

the "delicate balance" rationale, and the different treatment of economically motivated labor speech as compared to politically motivated speech. As a result, Section 8(b)(4) cannot be squared with the last three decades of First Amendment case law.

The Supreme Court has recognized that speech about economic conditions is often political. For example, in a case holding that Section 8(b)(4) does not apply to secondary handbilling, the Court observed that union speech that "pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace" was not "typical commercial speech such as advertising the price of a product or arguing its merits."[3] In other words, even if one assumes that the political/economic distinction is viable, union speech often falls on the "political" side of the line. Yet Section 8(b)(4) prohibits unions from engaging in even political secondary activity.

Further, modern First Amendment law calls for courts to rigorously scrutinize infringements on even commercial speech. For example, in *Sorrell v. IMS Health*, the Supreme Court struck down a Vermont law restricting pharmaceutical advertisers' use of information about physicians' prescribing practices.[4] The Court held that "heightened judicial scrutiny" applied because the law regulated speech based on the identity of the speaker and the content of the speech.[5] In explaining why Vermont would have to clear this high bar in order to preserve its law, the Court further undermined the economic/political distinction from *Claiborne Hardware*, writing that "[w]hile the burdened speech results from an economic motive, so too does a great deal of vital expression."[6]

In applying heightened scrutiny, the *Sorrell* Court did not simply accept Vermont's assertions that the law was necessary in order to protect medical privacy and preserve the integrity of doctors' prescribing decisions. Instead, it held that even though those interests were important, the state had not proved that a restriction on marketing-related speech was necessary to achieve them. The Court closely probed the state's reasoning, considering whether less restrictive alternatives might have been sufficient to achieve the state's goals, and criticizing the state for offering "no explanation why remedies other than content-based rules would be inadequate."[7] And, the Court emphasized that "[s]peech remains protected even when it may 'stir people to action,' 'move them to tears,' or 'inflict great pain,'"[8] and added that "[i]n an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime."[9]

Like the speech restriction that the Court struck down in *Sorrell*, Section 8(b)(4) discriminates based on the identity of the speaker and the content of the speech. But unlike in *Sorrell*, the Court has not closely probed whether Section 8(b)(4) is necessary to achieve important state interests that do not turn the fact that a union's message might

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[3] Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 458 U.S. 568, 576 (1988).
[4] 564 U.S. 552 (2011).
[5] Id. at 563-64.
[6] Id. at 567; *see also* Bates v. State Bar of AZ, 433 U.S. 350, 364 (1977) (a "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.").
[7] Id. at 575.
[8] Id. at 576 (quoting Snyder v. Phelps, 562 U.S. 443 (2011).
[9] Id. at 577.

persuade listeners to make a particular choice in a commercial setting. As *Sorrell* itself reflects, heightened scrutiny demands more than simply invoking a concept such as the "delicate balance." Instead, the government would have to make an affirmative case that legitimate goals could not be achieved through any less speech-restrictive mechanism.

In such a case, could government adequately justify prohibiting janitorial workers from picketing in front of the building they clean in order to alert the public to alleged sexual harassment by their employer?[10] Could it justify prohibiting unions from inflating rubber rat balloons near businesses that have arranged to use non-union labor on a construction project?[11] Even to ask these questions is to answer them: there is no justification for these restrictions that would satisfy *Sorrell*-style First Amendment scrutiny.

Question 2:
Professor Garden, current law treats the speech of workers differently than the speech of other concerned citizens. It also treats the speech of workers more restrictively than the speech of employers.

- How does the NLRA and current Supreme Court precedent permit employers to have broader speech rights than workers?
- How does the PRO Act fix this problem?

Answer:

The NLRA restricts unions' and workers' secondary and recognitional activity, including peaceful picketing. There is no equivalent restriction on employers; instead, the NLRA protects employers' speech through Section 8(c), which states that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." Thus, employers are free to mount aggressive anti-union campaigns as long as those campaigns do not rise to the level of coercion. For example, employers may hold "captive audience" meetings up until the last 24 hours before a union election – with no right of reply by either workers themselves, or by the union.[12] Moreover, weak NLRA remedies do little to deter employers from committing unfair labor practices while fighting a union drive – at most, employers who break the law are likely to face a re-run election, and to be required to pay remedial (but not punitive) damages.[13] In contrast, the

[10] Preferred Building Services, 366 NLRB No. 159 (Aug. 28, 2018).
[11] *King v. Construction & General Building Laborers' Local 79*, Case No. 1:19-cv-03496, 2019 WL 2743839 (E.D.N.Y. July 1, 2019).
[12] Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953) (establishing rule that "employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election"); *see* William B. Gould IV, *Independent Adjudication, Political Process, and the State of Labor-Management Relations: The Role of the National Labor Relations Board*, 82 IND. L.J. 461, 484, n.111 (2007) (discussing evolution in NLRB's treatment of captive audience meetings, from their prohibition by the NLRB, to a requirement for union "equal time," to today's one-sided, pro-employer regime).
[13] 29 U.S.C. § 160(c); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

costs to employees who lose their jobs because of their support for a union can be devastating.[14]

The PRO Act would level a skewed playing field. It would eliminate the NLRA's restrictions on unions' secondary and recognitional activity – restrictions that are, in any event, likely unconstitutional. It would also enhance employees' rights to support labor unions and to engage in workplace concerted activity in other ways. First, it prevents employers from forcing employees to listen to captive audience speeches against their will. Second, it would create remedies for employer unfair labor practices that could meaningfully deter employer lawbreaking, while also minimizing the harm to employees when employers do commit unfair labor practices. Taken together, these provisions would help achieve the original Wagner Act's vision of "full freedom of association" and "actual liberty of contract" for employees.

[14] In a study of over 1000 NLRB elections held between 1999 and 2003, Professor Kate Brofenbrenner found that "employers threatened to close the plant in 57% of elections, discharged workers in 34%, and threatened to cut wages and benefits in 47% of elections." Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Economic Pol'y Ins't (May 20, 2009) https://www.epi.org/files/page/-/pdf/bp235.pdf.

Health, Employment, Labor and Pensions Subcommittee Hearing
"Protecting the Right to Organize Act: Modernizing America's Labor Laws"
Thursday, July 25, 2019
10:15 a.m.

Responses of Richard F. Griffin, Jr. to Questions for the Record

From Representative Frederica Wilson (D-FL)

Mr. Griffin, in 2016, the Department of Labor closed a major loophole in the Labor Management Reporting and Disclosure Act by requiring that employers disclose information about third-party labor consultants. This regulation, called the Persuader Rule, would have brought to light an entire sector of the union avoidance industry that drafts captive audience speeches and produces anti-union videos and literature that employers deploy. However, the Trump administration repealed this rule on July 18, 2018.

Q: Did this rule impermissibly require attorneys to breach their attorney confidentiality regarding legal advice they gave to employers?

Answer: No. DOL's rules explicitly stated that nothing in the rules required the reporting of privileged information or legal advice.

Q. What is your view on the provision in the Pro Act that reinstates this rule?

Answer: I agree with the views of the numerous union and worker attorneys who wrote (copy attached), in support of the original rules, that: "They close a giant loophole in reporting that employers and firms have been able to hide behind for decades to avoid reporting on activities aimed at dissuading employees who are seeking to form a union with their co-workers. The transparency brought about by the new rules will provide working people with important information about their employer's activities and spending regarding their employees' decision about forming a union."

Mr. Griffin, last Congress, the Committee considered legislation seeking to narrow the standard for determining whether an entity is a joint employer. Joint employment typically involves situations where workers hired by one entity perform work for another entity, such as with temporary staffing agencies that handle payroll while the primary company possesses control over terms and conditions of employment. However, many who want to advocate narrowing the joint employer standard highlight the franchise industry—even though franchisors often limit their control to being over management of the brand. What are people missing when they try to make joint employment about the franchise relationship?

Answer: The question is correct that most joint employer issues that come before the National Labor Relations Board do not involve franchisor-franchisee relationships. More typical is the situation where a temporary agency supplies employees to a user employer which supervises the work of the temporary employees at its workplace; this was the factual context the Board faced in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB

No. 186 (2015), the Board's current lead case on the joint employer standard. And, even when a franchisor-franchisee relationship is reviewed, in many cases the franchisor does not co-determine the franchisee's employees' terms and conditions of employment, and therefore the facts do not establish a joint employer relationship. See the Advice Memorandum in *Nutritionality, Inc. d/b/a Freshii*, Case No 13-CA-134294 et al. (April 28, 2015) cited at footnote 10 of the written testimony I submitted for the July 25, 2019 hearing on the PRO Act. Moreover, it is important to recognize that the franchisee—typically the smaller entity—will always be the employer of the franchisee's employees. The question in the franchisor-franchisee joint employer cases (like *McDonald's*) is whether the larger entity (the franchisor) is sufficiently involved in the co-determination of the franchisee employees' terms and conditions of employment to also be found to be an employer. A proper joint employer standard, like the one established by the former Board in *Browning-Ferris* and codified in the PRO Act, will hold the larger employer responsible for its actions; a too narrow standard, like the one the current Board seeks to establish in its proposed rulemaking, will absolve the larger employer of its responsibility and leave the smaller employer-franchisee solely liable for the actions of both. Thus, the joint employer standard adopted by the PRO Act is small business-friendly.

Mr. Griffin, how would the PRO Act remedy employer interference in representation elections?

Answer: Under the bill's provisions, if employer interference in the conduct of a representation election results in the union losing the election, the Board will have the authority to issue an order requiring the employer to bargain with the union if, at any point in the year prior to the commencement of the election, a majority of employees in the relevant bargaining unit had authorized the union to represent them for purposes of collective bargaining.

May 17, 2015

The Honorable John Kline
Chairman, Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

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

The Honorable Lamar Alexander
Chairman, Committee on Health, Education, Labor and Pensions
U.S. Senate
Washington, D.C. 20510

The Honorable Patty Murray
Ranking Member
Committee on Health, Education, Labor and Pensions
U.S. Senate
Washington, D.C. 20510

Dear Representatives Kline and Scott and Senators Alexander and Murray:

We are attorneys who represent working people and unions. We are writing in support of the Department of Labor's rules requiring greater reporting and transparency by employers and the outside consultants they hire to develop and run anti-union campaigns. 81 Fed. Reg. 15923 (March 24, 2016).

DOL's rules are reasonable and necessary. They close a giant loophole in reporting that employers and firms have been able to hide behind for decades to avoid reporting on activities aimed at dissuading employees who are seeking to form a union with their co-workers. The transparency brought about by the new rules will provide working people with important information about their employer's activities and spending regarding their employees' decision about forming a union.

The American Bar Association (ABA) filed comments with the Department of Labor opposing the new rules, and joined the U.S. Chamber of Commerce and management-side law firm Littler Mendelson to lobby the Obama Administration against the rules, alleging that the rules will interfere with the attorney-client privilege and violate state ethical rules of confidentiality. On April 27, 2016, the President of the ABA submitted testimony to the House Committee on Education and the Workforce opposing the rules on these grounds.

We disagree with the ABA on this issue and object to the ABA taking management's side on this labor-management issue contrary to the views of its members who represent workers and

unions. DOL's rules explicitly state that nothing in the rules requires the reporting of privileged information or legal advice. We disagree with the ABA's claims to the contrary. The ABA does not speak for us on this issue.

We are signing this letter in our individual capacities and not in any official ABA capacity.

cc: Paulette Brown, President, American Bar Association
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Alan Shapiro, Jamaica Plain, Massachusetts

Sasha Shapiro, Pittsburgh, Pennsylvania, ABA Member

Katy Shaw, Pittsburgh, Pennsylvania

Evan Sherman, Los Angeles, California, ABA Member

Josh Shiffrin, Washington, District of Columbia, ABA Member

Diane Sidd-Champion, San Francisco, California, ABA Member

Robert Sieber, Findlay, Ohio

Carla Siegel, North Potomac, Maryland, ABA Member

Lydia Sigelakis, New York, New York

Anne Sills Sills, Newton, Massachusetts

Ellen Silver, Rockville, Maryland, ABA Member

Jennifer R. Simon, Washington, District of Columbia

Rochelle Skolnick, St. Louis, Missouri, ABA Member

Donald Slesnick, Coral Gables, Florida, ABA Member

Eric Smith, Toledo, Ohio

Jennifer Smith, Boston, Massachusetts, ABA Member

Jules Smith, Rochester, New York, ABA Member

Lisa M. Smith, Southfield, Michigan, ABA Member

Martha Smith, New York, New York

Sean Smoot, Springfield, Illinois, ABA Member

Laura Snazelle, Woodhaven, New York

Jess Speaker, Springfield, Virginia

Jennifer Stair, Baltimore, Maryland

Leah Stanfield, Martinsburg, West Virginia

Robert Starkman, Southfield, Michigan

Marc A. Stefan, Salem, Oregon

Robert Stevens, Boca Raton, Florida

Crystal Stokes, Chicago, Illinois

Robert Stropp, Jr., Washington, District of Columbia, ABA Member

David W Stuckel, Peoria, Illinois, ABA Member

Kory Stuer, Washington, Massachusetts

Stefan Sutich, Washington, District of Columbia, ABA Member

Peter Swanson, Minneapolis, Minnesota

Richard Swanson, Indianapolis, Indiana, ABA Member

Mark Sweet, Sweet, Wisconsin

Katelyn Sypher, Seattle, Washington, ABA Member

Atul Talwar, New York, New York

Sarah Tarlow, Chicago, Illinois

Trent Taylor, Columbus, Ohio

Nicole Teixeira, San Francisco, California, ABA Member

Adam Thomas, Los Angeles, California, ABA Member

Vincent Torregiano, New York, New York, ABA Member

Emil Totonchi, Chicago, Illinois

Justin Touretz, New York, New York

Fred Tpwe, Indianapolis, Indiana

Laurie Traktman, Los Angeles, California, ABA Member

Vincent Trivelli, Morgantown, West Virginia

Jay Trumble, Vancouver, Washington

Clement Tsao, Cincinnati, Ohio, ABA Member

David Tykulsker, Montclair, New Jersey

Paul Tyler, Alexandria, Virginia, ABA Member

Steven Ury, Los Angeles, California, ABA Member

Angie Valenzuela, Los Angeles, California

Jeffrey Vanderhorst, Toledo, Ohio

Randall Vehar, Akron, Ohio

Alvin Velazquez, Washington, District of Columbia, ABA Member

James Versocki, Melville, New York, ABA Member

Cristino Vilorio, Bergenfield, New Jersey

Joseph J. Vitale, New York, New York

Liz Vladeck, New York, New York, ABA Member

David Vlink, Indianapolis, Indiana, ABA Member

Marta Wagner, Herndon, Virginia

Kimberly Walker, Fairhope, Alabama, ABA Member

James Wallington, Lovettsville, District of Columbia, ABA Member

Noah Warman, Coral Gables, Florida, ABA Member

Gerald Warner, Curtice, Ohio

Kristin Watson, Columbus, Ohio, ABA Member

Gregory Watts, Alexandria, Virginia, ABA Member

Caleb Weaver, Atlanta, Georgia, Georgia

Robert Weaver, Decatur, Illinois, ABA Member

Kimberley Weber, Oakland, California, ABA Member

Paula Weinbaum, Chicago, Illinois

Michael D Weiner, Los Angeles, California, ABA Member

Jon Wentz, Columbus, Ohio

John West, Washington, District of Columbia, ABA Member

Charles R. Wheatley II, Cincinnati, Ohio, ABA Member

Keren Wheeler, Pittsburgh, Pennsylvania, ABA Member

Brendan White, Oakland, California

Patricia A White, New York, New York

William A Widmer, Chicago, Illinois

Gwynne A. Wilcox, New York, New York, ABA Member

Mike Wilde, St. Paul, Minnesota, ABA Member

Eric Wilke, Albany, New York

Alaine Williams, Philadelphia, Pennsylvania, ABA Member

Robert Willis, Moncure, North Carolina

Gary Witlen, Washington, Maryland

Jason Wojciechowski, Pasadena, California, ABA Member

Walter Wolanyk, Somerset Town of, New York

Michael Wolly, Washington, District of Columbia, ABA Member

Lynne Wooby, Toms River, New Jersey

Lewis Woods, Olympia, Washington, ABA Member

Richard Wrede, Rosemont, Illinois

Jeffrey Young, Augusta, Maine, ABA Member

Josh Young, Los Angeles, California, ABA Member

Colleen A. Youngdahl, Little Rock, Arkansas, ABA Member

Fausto E Zapata, Jr, New York, New York

Bennet Zurofsky, Maplewood, New Jersey, ABA Member

Peter Zwiebach, Astoria, New York

[Whereupon, at 12:52 p.m., the subcommittee was adjourned.]

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