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THE RIGHT TO ORGANIZE: EMPOWERING AMERICAN WORKERS IN A 21ST CENTURY ECONOMY

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

ON

EXAMINING AMERICAN WORKERS IN A 21ST CENTURY ECONOMY, FOCUSING ON THE RIGHT TO ORGANIZE, AFTER RECEIVING TESTIMONY FROM MARK GASTON PEARCE, GEORGETOWN LAW CENTER WORKERS' RIGHTS INSTITUTE, AND HEIDI SHIERHOLZ, ECONOMIC POLICY INSTITUTE, BOTH OF SILVER SPRING, MARYLAND; JYOTI SAROLIA, ELLIS HOSPITALITY, TEMECULA, CALIFORNIA, ON BEHALF OF THE INTERNATIONAL FRANCHISE ASSOCIATION; AND GRACIE HELDMAN, PANDORA, OHIO.

JULY 22, 2021

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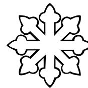

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THE RIGHT TO ORGANIZE: EMPOWERING AMERICAN WORKERS IN A 21ST CENTURY ECONOMY

Thursday, July 22, 2021

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., in room 430, Dirksen Senate Office Building, Hon. Patty Murray, Chair of the Committee, presiding.

Present: Senators Murray [presiding], Casey, Baldwin, Kaine, Hassan, Smith, Rosen, Lujan, Hickenlooper, Cassidy, Murkowski, Braun, Marshall, Tuberville, and Moran.

OPENING STATEMENT OF SENATOR MURRAY

The CHAIR. Good morning. The Senate Health, Education, Labor, and Pensions Committee will please come to order. Today we are holding a hearing on empowering workers and the right to organize and collectively bargain. Ranking Member Burr is not here at this time. Senator Braun will be taking his place. Welcome to our Committee this morning. We will each have an opening statement and then we will introduce the witnesses. After the witnesses give their testimony, Senators will each have 5 minutes for a round of questions.

While we were unable again to have this hearing fully open to the public or media for in-person attendance, live video, as always, is available on our Committee website at *help.senate.gov*. If anyone is in need of accommodations, including closed captioning, please reach out to the Committee or the Office of Congressional Accessibility Services.

Today's hearing is long overdue. We have been through 4 years of attacks on workers' rights from the previous Administration. It has now been 12 years since the minimum wage was raised and it has been over 70 years since the National Labor Relations Act, the cornerstone of our Nation's labor laws, was significantly updated. 70 years ago there was no Internet. Approximately one-third of women participated in the labor force.

Racial segregation was allowed under the law, and the average retirement age and average life expectancy were both around 68 years. While our ways of working and our workforce may have changed, the need for workers to be able to join together and have a voice in their wages and working conditions without fear remains as important as ever. Our labor laws are overdue for an update,

and the COVID–19 pandemic has only made this need more clear and more urgent. This crisis has changed a lot over the last year and a half, but it has also shown us how much it needs to be changed. This past year, we witnessed the most unequal economic crisis in modern history unfold as women, workers of color, workers with disabilities, and workers with low incomes disproportionately lost jobs, wages, and more.

We witnessed how important it is workers have paid family sick and medical leave, a livable wage, and quality, affordable childcare and health coverage. We witnessed growing inequality as millions of people lost jobs last year, and while the top 1 percent gained about $10 trillion in wealth. An increasing wealth inequality wasn't a pandemic-only phenomenon. It has been happening for decades. And all of this gave us an important reminder of the difference unions and the right to organize and collectively bargain make in countering this kind of extreme inequality.

Here is what unions mean. Unions mean higher wages. In 2020, non-union workers were paid about $0.84 per $1.00 compared to union workers. Unions mean better benefits. For example, union workers are more likely to have paid sick days. And while only around two-thirds of nonunion workers can get a retirement plan, health care plan, and prescription drug coverage through their employer, over 9 in 10 union workers had these benefits, and union workers were almost twice as likely to have the option of an employer sponsored dental plan. Unions also means safer workplaces. Unions work hard to educate members about their rights to a safe workplace, and as a result, unionized workplaces are much more likely to be held accountable for health and safety violations.

Perhaps one of the most important aspects of union representation is knowing you have other workers in your corner to help make sure you are treated with respect and dignity in the workplace, knowing you have got backup to make sure you will not only be paid fairly, but treated fairly. In short, unions mean workers who are the ones truly making our economy run have better wages and benefits that help them support their families and live their lives. That is why I am proud Washington State has the fifth highest rate of union membership in the Nation. But unfortunately for workers across the country, barriers to workers seeking to form or join a union have been mounting in recent years.

We have seen employers try and at times succeed at misclassifying workers to deny them their rights, preventing workers from organizing and collectively bargaining through complicated contracts and subcontracts, and undermining union elections in too many ways to count. Meanwhile, efforts at the National Labor Relations Board to educate workers about their rights and enforce worker protections have dwindled, particularly as Republicans have worked to skew the Board against workers in recent years.

I am really hopeful that the new NLRB nominees that have come before our Committee recently will help start to fix this because the results of this campaign against workers' rights have been deeply damaging, especially in light of this pandemic. Right now, only one in eight essential workers is represented under a collective bargaining agreement, and some of the highest risk industries during

this pandemic, health care, food, agriculture, have the lowest unionization rates.

Stronger organizing and collective bargaining rights could have helped change the trajectory of this pandemic and saved lives by making sure that workplace safety was a priority, more workers had paid sick days, and more workers had the wages and benefits that they needed to stay economically secure, like quality, affordable health care and a reliable retirement plan. In short, the pandemic made it clear than ever, we have got to make it easier for workers to exercise their right, their right to collectively bargain, and for unions to fight for the people they represent. Doing so will help us build our economy back stronger in a way that works for families and communities, not just those at the top. And it will help us build back fairer.

As data show, union memberships reflects the racial, ethnic, gender, and age diversity of America's workforce. Almost half of workers represented by a union are women, and nearly 4 in 10 union members are workers of color. When it comes to addressing racial inequities, data show Black union workers earn on average 16 percent more than their nonunionized counterparts. When it comes to the gender pay gap, women who are not represented by a union are paid $0.78 on the dollar compared to men. But women who are represented by unions are paid $0.94 on the dollar.

When it comes to creating more inclusive workplaces for people with disabilities, union covered workers in general are more likely than nonunion employees to request accommodations regardless of disability status. So as we work to rebuild our economy in the aftermath of this pandemic, our work has to include steps to finally update our labor laws in order to protect and empower workers. Because we know our economy is stronger when working families are stronger, and our working families are stronger when unions are stronger.

That is why I introduced the Pro Act earlier this year, and I am pushing it hard to get across the finish line. But we can't stop there. We need to raise the minimum wage, provide a comprehensive paid leave program, and more. It is also why I supported the unionization vote of Amazon workers in Alabama, and I support the continued fight for unionization of Amazon workers in Washington State and workers across our Country. And it is why we are having this hearing today.

I look forward to hearing from our witnesses today, thank you all for being here, about how we finally bring the NLRA into the 21st century, and how we can ensure every worker is able to form a union—form or join a union so they can bargain for better wages and benefits and safer workplaces in which they are treated with respect. With that, I will turn it over to Senator Braun for his statement.

OPENING STATEMENT OF SENATOR BRAUN

Senator BRAUN. Thank you, Madam Chair. When I was asked to fill in for a Ranking Member Burr, it is an honor to do it. Anyone in the U.S. Senate, I think I am most recently off the pavement of actually living through these issues we are going to talk about here today. I come from Main Street. I chose not to go to Wall Street

to move back to my hometown. My wife did the same thing and has had a small business in our downtown for 43 years this September. When I ask her what she pays in terms of wages to her own employees, and they are like family, they have been there for a long time, way above what the average wage rate would be across most states, even in a low cost of living State like Indiana. And my discussion is going to center around one premise.

I had a company that had 15 employees for 17 years. I know every aspect about what it takes to be successful in an enterprise, and it starts with treating your employees like family. And if you are going to grow into an enterprise like what I just left two and a half years ago, it is because you have done all those things. And if you do it right, you don't need a union. And I am for unions because you need them in places where you are up against a monolith of big business. But the premise today is going to be that whatever we do for workers' rights, which I believe in 100 percent, to be able to have them organize and express those, don't kill the golden goose that has made jobs for union workers possible is a small business.

Remember, every company in this country, from General Motors to Amazon started probably with an employee or two and did it in a hardscrabble way like I did for 17 years, where my paycheck was generally lower, way under what it would have been for running a business or an enterprise simply because of the fact that you deal with the economics at hand. And when you think about what it takes to get an enterprise large enough to have a union there representing employees, it is a perilous pathway. Most don't make it. And you need to measure, if we want the Pro Act to be considered, is it going to take out what allows unions to form in the first place or what allows a little business to become a big one.

My contention is, and from what I am hearing across the country in terms of small businesses, they think that this puts them in peril. And if you don't have small businesses that are healthy, you are not going to have big businesses and you are not going to have employment bases that are large enough to need unions in the first place. So I am worried that this is a one-size fits all like many things we do here in DC, and that for the reasons I am going to mention here now, it is going to be detrimental to small businesses.

Small businesses, most of them, don't get a return on investment. They live out of that business for their wage, for their livelihood. And if anything we do here, if it puts that in peril, it is a misguided effort from the top down and my opinion is not needed. Ms. Sarolia, who has an enterprise in California, a place that largely roles like the Federal Government in thinking you can do things from the top down—it is why many businesses are leaving the state. It is why many of us who consider doing business there do it with a second thought. We got there 10 years ago in my little business that now has become a big business and that where we pay the highest starting wage in my hometown, in the lowest unemployment county, you don't feel welcomed in places like that tell you how you need to operate your business and many times do it in a way that is going to chase you away from the very thing you are wanting to promote.

I said earlier I support the freedom to unionize. I think there is a place for it. You got big business. I have been one of the most outspoken here as a Senator that is a different type of entity than a Main Street enterprise. You may need to use dynamics differently to deal with them. But I want to list a few of the things we got. We have got 27 right to work states. And this pretty well says that it is going to get rid of that if it can. To me, you are taking—you are getting rid of the choice of whether you want to join a union or not. Unions, which I think should have the freedom to organize, got to make their case though. You are going to end up in a place like Illinois where there is not a right to work law. Think about this, their union membership has only gone up 1 percent since we put in right to work laws across the country. Union membership in Indiana has gone up 24 percent in a right to work state.

Violating the rights of workers across America to prop up an outdated system that benefits Washington elites is not the answer. A union power grab—I am not going to say that. I think that is kind of a hot phrase. I try to avoid them here. But if we are trying to grow anything for the sake of growing it, there is not merits to the case. It is misguided. The Pro Act will force employers to provide unions with work shift information and employees' personal contact information during organizing elections. Independent contractors such as gig workers will be made employees under the Pro Act, limiting these workers' ability to pick jobs and schedules that work for them and their families.

The Pro Act will put the burden of proof on employers to prove that they didn't interfere in a union election rather than the party claiming that they did. The Pro Act will change the very definition of an employer by codifying the 2015 standard expanding joint employer status. This means that many small businesses would be considered joint employers. Litigation against franchise businesses nearly doubled due to this in 2015, and that is another issue to contend with. Many of the reasons folks don't go into a place like California is because the trial lawyers in many cases run the administrative dynamic there, chasing businesses away, losing jobs.

For all of these reasons and many more, it is no surprise that American organizations across the country are strongly opposed to the Pro Act. Right here, a folder of over 280 organizations that represent small business have written accordingly. I ask unanimous consent to submit the eight letters here representing more than 280 groups opposing the Pro Act.

The CHAIR. Without objection.

[The information referred to can be found on page 68]

Senator BRAUN. Though, Government was much of the problem for small businesses last year, I acknowledge that without it, with what we—without what we did here through the PPP—in the moment of crisis, there is a need for it. That doesn't mean you take what we did, and you broaden in a way that has already made a small business one of the most difficult things to grow into a large one. And if the Pro Act does anything to make it harder to start and grow a small business, everything that you are trying to do through the Pro Act becomes immaterial, and it is actually working against what you are really concerned with.

The CHAIR. Thank you. We will now introduce today's witnesses. Our first witness has decades of experience in labor law protecting workers' rights. Mark Pearce is a former Board member and Chairman of the National Labor Relations Board. He was first appointed to the NLRB by President Barack Obama in 2010, served two terms on the Board concluding in August 2018. He is now a Visiting Professor and the Executive Director of the Workers' Rights Institute at Georgetown University Law Center.

Before that, he was a Senior Scholar and Lecturer at Cornell University's School of Industrial Labor Relations. Mr. Pearce, thank you for joining us. I look forward to your testimony. Next, I will introduce Dr. Heidi Schierholz, an economist with deep understanding of how workers' rights strengthen our economy as a whole. Dr. Schierholz is the Senior Economist and Director of Policy at the Economic Policy Institute, a nonprofit think tank focused on the needs of workers. She served as Chief Economist for the Department of Labor under President Obama, where she helped develop and execute initiatives to boost workers' rights, wages and benefits, protected workers' savings, and increased workplace safety.

Dr. Schierholz, we are pleased to have you with us today and look forward to hearing from you shortly. Our next witness is someone who knows firsthand some of the barriers workers are up against when they fight to exercise their rights. Gracie Heldman joins us from Pandora, Ohio. She works for the Heartside Food Solutions. It is an industrial bakery with over 1,000 employees, which provides goods for familiar names like Nabisco, General Mills, and Kellogg.

Mrs. Heldman has worked at the bakery for over 33 years in the packing department, and she has spent 20 of those years so far fighting to form a union. Mrs. Heldman, thank you so much for joining us. I look forward to hearing from you about your experience. And now I will turn it over to Senator Braun to introduce our final witness, Jyoti Sarolia.

Senator BRAUN. Thank you, Madam Chair. Jyoti Sarolia is a principal in Ellis Hospitality, which is now a third generation hotel company based in California. Their portfolio currently has seven hotel properties throughout California, a definition of a small business that has made it to the next level. The company was built and named to honor New York City's Ellis Island, where her family members had entered during the early years to pursue the American dream. Ms. Sarolia has grown up in the hospitality industry and even lived in a hotel owned by her extended family until the age of eleven.

She started learning about hotel operations, everything from housekeeping to the front desk. She has served as an Asian-American Hotel Owners Association Ambassador to the South Pacific region since 2015 and has been part of a franchise organization there since 2017. Since 2009, she has been involved in the Choice Hotels Owners Council.

She lives in Temecula, California, I will say that is close enough, and attended San Francisco State University. True example, someone that moves to this country, a country based upon immigrants

and entrepreneurs. And look forward to hearing your thoughts on the Pro Act today.

The CHAIR. Thank you. Ms. Sarolia, thank you for joining us today to share your experience. With that, we will hear our witness testimony.

Mr. Pearce, we will begin with you.

STATEMENT OF MARK GASTON PEARCE, EXECUTIVE DIRECTOR OF THE WORKERS' RIGHTS INSTITUTE, GEORGETOWN UNIVERSITY LAW CENTER, SILVER SPRING, MD

Mr. PEARCE. Chair Murray, Senator Braun, and Members of the Committee, and my fellow panel of witnesses, thank you for the opportunity to testify today on the right to organize on empowering U.S. workers in the 21st century. As the introduction indicates, I was a Former Chairman of the National Labor Relations Board, and I have had close to 23 years of service with that agency and more time practicing before that agency while in private practice.

Congress passed the National Labor Relations Act, also known as the Wagner Act, in 1935, out of recognition for workers' rights, fundamental rights. Despite its flaws, the NLRA was the first law to provide these protections. Among its fundamental purpose was to encourage collective bargaining, protect workers' rights to organize, and provide workplace democracy, so as to preserve worker integrity and balance and the relationship between labor and management. In that respect, the NLRA has lost its way. Because of lack of reform and years of manipulative interpretation, the Act has increasingly become ineffective in the 21st century. Workers are being classified outside of the Act's protection.

Concerted activity for mutual aid or protection is being restricted and reinterpreted. And through the reversal of decades of precedent, union access to employees and members has been all but extinguished. Policy isolation at the NLRB has created a confusing atmosphere where workers and businesses remain uncertain about their rights and obligations. Rules relating to conduct of union elections are subject to radical change with the change of administrations. Meanwhile, even when a union succeeds in becoming a bargaining representative, employers' unfair labor practices that aim to undermine employees' chosen bargaining representative can have a corrosive effect that linger for years.

Studies have shown that within 1 year after an election, less than 50 percent of newly organized units have obtained their first collective bargaining agreement. There are also procedural obstacles that are in the way of worker rights. Workers are subjected to—are expected to know their rights, yet employers cannot be mandated to post notices advising employees of these rights because this agency is a reactive not a proactive agency.

Workers file charges with the NLRB and often are left to wait for a significant period of time. By that—by the time, justice is reached, or a board order is enforced, years have gone by. By then, workers have lost homes, lost the respect of their family, and most of all, they have lost faith in a system that was designed to help them. The accent, inadequate remedies for unlawful conduct not only failed to deter or fully remedy violations, but in fact incentivize unlawful practices. The National Labor Relations Act

provides only limited remedies to violations, the ancillary limits, remedies to a cease and desist order or a notice posting. And where somebody is terminated, they get back pay and reinstatement, yet other worker protection agencies provide for compensation, such as punitive damages and compensatory damages.

Title VII provides that—and the FLRA provides that. Unfair labor practices against undocumented workers go unreported entirely. The Supreme Court held that undocumented workers are employees within the scope of Section 2–3 of the Act. We can celebrate that. But they also in Hoffman Plastics, state that undocumented workers can't receive the remedy. They can't get the back pay that they lost, and in fact, they will lose their position. They are not entitled to be reinstated. And in all likelihood, if they used the process of the Act, they will get deported. I will wrap up by saying this, because, of course, I have plenty more to say.

Workers continue to need the protection of the labor laws. The pandemic underscored that need. Workers' rights and protections are meaningless if the laws are not responsive to workers and business models of the 21st century. This statute had its 86th birthday on July 5th. Let's celebrate by blowing out the candles, cutting the cake, and retooling this needed vital piece of legislation for modern times.

Thank you very much for giving me the opportunity to testify before this Committee today. I look forward to your questions.

[The prepared statement of Mr. Pearce follows:]

PREPARED STATEMENT OF MARK GASTON PEARCE

Thank you for this opportunity to testify before you today regarding "The Right to Organize: Empowering American Workers in a 21st Century Economy." This is a special privilege for me because I have spent half of my forty-year career working with the National Labor Relations Board (NLRB or "the Board"), first as a lawyer, then ultimately as Board Member and Chairman. The NLRB is the agency charged with enforcing the foremost labor law in the country, the National Labor Relations Act (NLRA or "the Act"). The NLRB has, however, been hampered in effectively enforcing the NLRA because of the inadequacy of its remedies.

My first legal position after law school was the NLRB's Buffalo, New York Regional Office. For the better part of 15 years I conducted representation elections for workers as an NLRB agent. I was a Hearing Officer who heard evidence and made determinations about objectionable conduct affecting an election, and, as a Field Attorney and District Trial Specialist, I investigated and prosecuted violations of the NLRA. I was privileged to represent workers and unions at two private law firms in Buffalo. One of the firms, co-founded by me, was counsel to numerous local unions and several national unions in a variety of industries. In April 2010 I was honored to be appointed by then-President Barack Obama to the NLRB as Board Member, and later designated Chairman. I served in these positions for over 8 years. As I will fully discuss in my testimony, my experience has made me certain that our current system is not working and that all workers need greater rights to organize and have a voice in wages and working conditions.

The NLRA has as Among its Fundamental Purposes the Encouragement of Collective Bargaining and the Protection of the Worker's Right to Organize

Congress passed the NLRA, also known as the Wagner Act, in 1935 out of recognition that workers' rights were fundamental rights. Despite its many flaws, the NLRA was the first law to provide these protections even if not for all workers.

Section 1 of the NLRA declares that it shall be the policy of the United States to encourage "the practice and procedure of collective bargaining" and to protect "the exercise by workers of full freedom of association, self-organization, and des-

ignation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[1]

The NLRA was Established in 1935 to Achieve Workplace Democracy

Historic employer practices of union-busting and refusals to bargain collectively agitated workers, leading to strikes and increased industrial unrest and burdening commerce in the process. The drafters of the Wagner Act believed that improved industrial democracy, achieved by codifying the rights to bargain collectively and organize for mutual aid or protection, would "eliminate the causes of certain substantial obstructions to the free flow of commerce."[2]

By encouraging accessible democratic processes in the workplace, the Wagner Act gave employees the power to influence the terms and conditions of their employment and addressed the inherent inequity in bargaining power between a sophisticated employer and an employee acting alone. The drafters intended for more democracy in the workplace to lead to less wage depression and increased wage-earner purchasing power, thereby eliminating (or at least softening) the underlying economic conditions that drove workers to strike and to violence in the pre-Wagner era.[3]

The non-economic impact of industrial democracy mattered, too; the creation of private law through worker-led collective bargaining showed good faith government support of a central tenant of the labor movement—dignity at work.[4] Industrial democracy is the means through which industrial peace may be achieved. Correspondingly, cases from different eras demonstrated that courts were using various manifestations of industrial democracy to improve the experiences of employees. The Supreme Court when it upheld the establishment of the NLRA in *NLRB v. Jones and Laughlin Steel Corp.*,[5] drew heavily from the Commerce Clause to uphold the constitutionality of the NLRA while also acknowledging the plight of workers and Congress' intent to use industrial democracy to protect employees. The Court stated:

> " . . . the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer. That is a fundamental right."[6]

The Court's protection of collective bargaining was a key signal that it endorsed industrial workplace democracy as a means of workers, who in this case, were being discriminated against by an employer that disapproved of union association.[7] Decades later, the Supreme Court would recognize that under the NLRA, even employees with no union and no spokespersons still had voice through the exercise of the right to walk out of their workplace rather than be subjected to the bitterly cold conditions of an unheated Baltimore factory in 1962.[8] Still later, in 1984 the Court recognized an individual's worker's right to complain and assert the authority of the negotiated collective bargaining agreement, *the law of the workplace*,[9] as justification for a refusal to drive an unsafe truck. See, *NLRB v. City Disposal Systems, Inc.*[10] Through collective-bargaining, workers had a voice and formed into unions. These unions built the middle class and in so doing raised standards for all workers.

The NLRA has not Been Meaningfully Amended Since 1947 and is in Dire Need of Reform

Core provisions of the NLRA have been eroded by overly narrow NLRB and court interpretations which frustrate the congressional intent behind the creation of the NLRA. The right to engage in protected concerted activity has withered away over decades of judicial attack and the policies of labor hostile NLRB majorities. From 1980 until its recent 2018 temporary spike,[11] the worker's statutory right to strike

[1] 29 U.S.C. § 151.
[2] 29 U.S.C. § 151.
[3] 29 U.S.C. § 151. See also Kenneth G. Dau-Schmidt, et al., *Labor Law in the Contemporary Workforce* 40, 47 (3rd ed. 2019).
[4] Dau-Schmidt, et al., at 48.
[5] *NLRB v. Laughlin Steel Corp.*, 301 U.S. 1 (1937).
[6] Id. at 33.
[7] Id. at 22.
[8] *NLRB v. Washington Aluminum*, 370 U.S. 9, 17 (1962).
[9] *www.jwj.org/collective-bargaining-101*.
[10] 465 U.S. 822 (1984).
[11] *https://www.marketwatch.com/story/strikes-are-up-but-union-membership-is-down-and-that-could-be-a-good-sign-for-the-economy-2020-02-13*.

over working conditions and for mutual aid and protection has been curtailed almost to the point of ineffectiveness by policies that allow employers to permanently replace economic strikers without a showing of exigency. Recent interpretations of the NLRA law by NLRB majority of the previous administration has resulted in a findings that has substantially narrowed the rights of workers to engage in protected concerted activity. In the 2019 case, *Alstate Maintenance*,[12] an NLRB comprised of a majority of Trump appointees held that employer lawfully terminated a sky cap who engaged in a group work stoppage in protest of an employer's failure to address the airport tipping practice of a team of athletes. The Trump NLRB found that the activity was not protected concerted activity, but rather conduct stemming from unprotected "gripes."

In addition, there needs to be a statutory definition of "joint employer" and "employee." All too often the public is without consistent guidance as it is presented with oscillating policy on these subjects, depending on what administration is in the White House. Without clear statutory language, workers will continue to suffer from the see-sawing of labor law.

The Trump NLRB turned to rulemaking as a substitute for adjudication in its effort to modify the Obama Board's joint-employer standard in *Browning-Ferris Industries*.[13] While *Browning-Ferris* was pending before the U.S. Court of Appeals for the District of Columbia Circuit, the Board attempted to reverse the case through adjudication in *Hy-Brand Industrial Contractors, Ltd.*[14] That effort was derailed following a determination that participating Member William Emanuel had a conflict of interest.[15] As a result, *Browning-Ferris* was reinstated as the prevailing statement on the joint-employer standard. Undeterred, in September 2018, the NLRB issued a *notice of proposed rulemaking* (NPRM) that recommended codifying the approach taken in *Hy-Brand*. In December 2018, while the NLRB was reviewing public comments on its proposed rule, the D.C. Circuit substantially enforced the *Browning-Ferris* approach and emphasized that the common law "permits consideration of those forms of indirect control that play a relevant part in determining the essential terms and conditions of employment." [16]

The final rule, which the Board issued in February 2020,[17] failed to resolve key questions about how to determine if two entities are joint employers, revealing the limitations of rulemaking as a means of defining standards rooted in the common law. *Browning Ferris* is still in litigation, as the Republican majority has refused to apply its remedy to the parties.[18]

The Trump Board continued its trend of using rulemaking as a way to entrench its position on contentious policy questions in its NPRM on students' status as employees under the Act. Under the proposed rule, students who perform services at a private college or university related to their studies will be held to be primarily students with a primarily educational, not economic, relationship with their university, and therefore not "employees" within the meaning of Section 2(3).[19] This rule was intended to overrule the Board's decision in *Trustees of Columbia University*,[20] and reinstate the rule of *Brown University*[21] on a more permanent basis. The Trump Board, without the direction of the Supreme Court or an analogous doctrinal argument about the need for statutory consistency, sought to usurp the role of Congress and use rulemaking to modify the statutory scheme of the NLRA by excluding students from employee status. Similar to the tack in the joint employer rule, the goal of this proposed rule was clearly to change a standard that the Board was un-

[12] *Alstate Maintenance* 367 NLRB No. 68 (2019).
[13] 362 NLRB 1599 (2015).
[14] 365 NLRB No. 156 (Dec. 14, 2017).
[15] See *https://www.nlrb.gov/news-outreach/news-story/board-vacates-hy-brand-decision*.
[16] *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).
[17] See *https://www.govinfo.gov/content/pkg/FR-2020-02-26/pdf/2020-03373.pdf*.
[18] **369 NLRB No. 139 (July 2020)**: The Board found that retroactively applying any clarified version of the new joint-employer would be "manifestly unjust." The Board elaborated that *Browning-Ferris* changed old, reasonably clear law in a way that substantially affected reasonable expectations under the Act. So, the Board concludes that the new standard should not have been applied to *Browning-Ferris*. The old standard was applied, and it does not seem that the new standard was clarified in any meaningful way. **370 NLRB No. 86 (Feb. 2021)**: The Board denied the Charging Party's Motion for Reconsideration of the above decision since there was not (a) any material error or (b) extraordinary circumstances warranting reconsideration. **May 2021**: Court Petitioner filed to have the order reviewed.
[19] 29 U.S.C. 152(3).
[20] 364 NLRB No. 90 (2016).
[21] 342 NLRB 483 (2004).

able to achieve through adjudication. After the change of administrations, the Board on March 9, 2021, abandoned this rulemaking effort.[22]

However, the Trump NLRB's overly narrow interpretation of the term "employee" generally as decided in *SuperShuttle*,[23] continues to wrongfully deprive workers of their rights by allowing employers to more easily misclassify them as independent contractors, who are excluded from the NLRA's protections.

Other decisions during the Trump NLRB amounted to an all-out assault on access to the workers. As articulated in a 2020 presentation before the American Bar Association,[24] the Trump Board majority, in a tack designed to undercut the rights of workers—organized or not yet organized—to communicate with union staff and with the public, launched a breathtaking attack on access rights under Section 7, even as it has initiated the rulemaking process in regard to access questions.[25] In each of the cases, the majority has overturned clear precedent decided as recently as 10 years and as established as forty. The majority justified its decisions in these cases by refusing to address the union animus on which the ALJ premised their decision (*Kroger*),[26] misrepresenting the undisputed facts of the case (*UPMC*),[27] or ignoring clear, on-point authority from the D.C. Circuit (*Tobin Center*).[28] Moreover, these decisions represent a departure from the tradition of giving notice to the public when it is considering reversing significant precedents, as it does in each of these cases. The end results of stripping workers of Section 7 access rights seem to justify that majority's means.

With an agency designed to be reactive rather than proactive, many workers simply don't know their rights. Efforts by the NLRB to require that an employer post a notice of employee rights in the same way other labor laws require was struck down by the courts because the statute would have to be amended for such a mandate to take effect. Regional offices of the NLRB are often placed in facilities where immigrate and other low wage workers cannot access because they either require identification to enter, are invisible to the public due to lack of signage[29] or because of the closure of resident offices, are too distant from the worker's locale. In addition, longstanding budgetary freezes and the NLRB's mismanagement under the Trump Administration have left the Board's Regional Offices understaffed and under resourced for their critical mission.

Moreover, as has been recently demonstrated by the actions of the prior General Counsel, Peter Robb, the NLRB is susceptible to diminished effectiveness by a labor hostile administrator. A *new report*[30] by the nonpartisan US Government Accountability Office (GAO) found that Robb was dismantling the agency from the inside. He reduced staff size, destroyed employee morale, and failed to spend the money appropriated by Congress. This all occurred while Robb was pursuing what many in labor described as an anti-worker, pro-corporate *agenda*.[31] The NLRB's staffing fell 26 percent between fiscal year 2010 and fiscal year 2019, from 1,733 to 1,281. The personnel losses were disproportionately in the NLRB's field offices, where unfair labor practice charges are investigated, and union representation elections are held. The staffing problem was greatly exacerbated during Robb's time in office. For the 8 years preceding Robb, the agency filled 95 percent of vacancies in the headquarters and 73 percent in the field offices. But under Robb, staffing in the field dropped by 144 people, and only 13 people—a mere 9 percent—were hired to fill these vacancies.

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[22] *Federal Register: Jurisdiction-Nonemployee Status of University and College Students Working in Connection With Their Studies*.

[23] 367 NLRB No. 75 (2019).

[24] 24 *Get Off My Lawn! The Changing Nature of Employer's Property Rights Under Tobin Center, UPMC Presbyterian Shadyside, and Kroger Limited Partnership A union perspective*, by Pamela Chandran; ABA Committee on Development of the Law Under the National Labor Relations Act 2020 Midwinter Meeting San Juan, Puerto Rico March 1–4, 2020.

[25] The Board announced its intention to address access in its rulemaking priorities in May 2019. National Labor Relations Board, Semiannual regulatory agenda, 84 Fed. Reg. 29776 (June 24, 2019). The Notice of Proposed Rulemaking, however, has not been released.

[26] *Kroger Limited Partnership and UFCW Local 400*, 368 NLRB No. 64 (2019).

[27] *UPMC Presbyterian Shadyside (UPMC)*, 368 NLRB No. 2 (2019).

[28] Bexar County Performing Arts Center Foundation d/b/a Tobin Center for the Performing Arts (Tobin Center), 368 NLRB No. 46, slip op. at 24 (2019).

[29] Even the national headquarters of the NLRB was required to be relocated to a privately owned building in Washington, DC where external agency signage is prohibited.

[30] *GAO–21–242, NATIONAL LABOR RELATIONS BOARD: Meaningful Performance Measures Could Help Improve Case Quality, Organizational Excellence, and Resource Management*.

[31] *Unprecedented: The Trump NLRB's attack on workers' rights. Economic Policy Institute (epi.org)*.

There is a Need for Stable and Consistent Union Election Reform

In 2014, the Obama-era Board significantly revised the existing representation-case procedures to "remove unnecessary barriers to the fair and expeditious resolution of representation questions . . . streamline Board procedures, increase transparency and uniformity across regions, eliminate or reduce unnecessary litigation, duplication, and delay, and update the Board's rules on documents and communications in light of modern communications technology."

Opponents of the rule contended that the Board's primary objective was to speed up the union election process and delay employer challenges. Although business groups raised facial challenges to the rule in two court proceedings, the rule was upheld by both the U.S. Court of Appeals for the Fifth Circuit and the U.S. District Court for the District of Columbia Circuit.[32]

Despite these favorable court decisions, a newly configured Trump Board issued a request for information (RFI) seeking public input on how the 2017 rule was operating as one of its first orders of business. The RFI prompted thousands of statements from unions and employers alike, including praise from NLRB Regional Directors experienced in its implementation and operation.[33] Nevertheless, in 2019, the Republican-majority Board, while explicitly disclaiming any reliance on the RFI or the information the Board gathered during that extensive process, rolled back substantial portions of the 2014 rule without notice and comment or empirical data to support its modifications.[34] The final rule was found, in pertinent part, to have violated the Administrative Procedure Act and made "radical changes" to the election procedures without opportunity for notice and comment. Substantial portions of the rule were struck by Judge Ketanji Brown Jackson in litigation before the U.S. District Court for the District of Columbia.[35] It is noteworthy that the several 2019 modifications to the 2014 rule deemed procedurali by the court were retained and will be subject to change at any time by any succeeding Board without notice and comment. This does little to provide the public with policy stability.

The Need to Strengthen Protections During the Bargaining Process

Employer unfair labor practices that aim to undermine employees' chosen bargaining representative can have corrosive effects in the workplace that linger for years. As Kate Bronfenbrenner's research has shown, within 1 year after an election, only 48 percent of newly organized units have obtained first collective bargaining agreements. By 2 years, that number rises to 63 percent, and by 3 years to 70 percent. Even after 3 years, only 75 percent of units have reached a first contract.[36] During my time at the NLRB, I frequently encountered stories that demonstrated an urgent need for better protection for workers during their first-contract negotiations. One representative example is a case called *Somerset Valley Rehab Center and Nursing home*[37]—the employer would not bargain and deprived employees of a collective bargaining agreement for **7 years** after the union was certified as the representative of the employees. It took many legal proceedings and enforcement by the Third Circuit.

I welcome the PRO Act's proposal to strengthen protections for employees when they are in the vulnerable position of negotiating a first contract.

Procedural Obstacles to Relief

During my tenure with the NLRB's regional office as well has my period of private practice, I spent a significant amount of my time advising the public and clients who had been subjected to unfair labor practices. I would advise workers of their rights under the NLRA and the consequences of their employers' conduct. In every instance, I encouraged workers to rely on the Act's protections despite employer intimidation, misrepresentation, and abuse. All too often, because of a pro-

[32] *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce of the United States v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015).

[33] See *Representation-Case Procedures*, 82 Fed. Reg. 58783 (Dec. 14, 2017).

[34] *Representation-Case Procedures*, 84 Fed. Reg. 69524, 69558 (Dec. 18, 2019) (Member McFerran, dissenting).

[35] See *AFL–CIO v. NLRB*, Civ. No. 20-cv–0675 (KBJ), 2020 WL 3041384 (D.D.C. June 7, 2020).

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

[37] 1621 Route 22 West Operating Co., LLC d/b/a *Somerset Valley Rehabilitation and Nursing Center v. NLRB*, 3d Cir. No. 12–1031, March 14, 2018.

tracted process and virtually toothless respondent sanctions for unfair labor practices, victimized workers seeking and awaiting justice would pay the heavy price of retaliation and job loss. Workers might be blackballed and forced to go through extended periods without income. They would lose the support of their friends. Their families would suffer and become dysfunctional. Ultimately, these victimized workers lose hope.

After I became a Board Member, I observed how cases would be tied up for years on appeal, how vacancies on the Board would cause case processes to grind to a halt, and how efforts to provide the public with relief during periods of loss of quorum and political gridlock were curtailed and often reversed as a result of judicial intervention.

As I expressed previously, when workers file charges with the NLRB, they are often left to wait for a significant period of time. Proving that an employer has unlawfully terminated an employee or otherwise significantly interfered with that employee's rights under the NLRA can be a very lengthy process. Ordinarily, such charges must be investigated by an NLRB regional office, after which there is a hearing before an administrative law judge. After the administrative law judge renders a decision, employers typically file appeals and await decisions by the NLRB, after which they often refuse to comply with the Board's orders and appeal those orders to the Federal Courts of Appeals. By the time the Board's order is enforced, several years may have elapsed, and a fired worker has frequently found a new job. For this reason, although 1,270 employees were offered reinstatement in fiscal year 2018, only 434 accepted such offers. [38]

Even though Section 10(j) of the NLRA permits the Board to seek an injunction in Federal district court when an employer fires workers for organizing a union or engaging in protected concerted activity, the Board only uses this authority sparingly. [39] In fiscal year 2018, the Board only authorized 22 injunctions, despite employers' frequent interference with employees' right to organize unions. [40] By contrast, during my years as Chairman, the Board authorized an average of 43 injunctions per year. In addition, the NLRA requires the Board to seek an injunction whenever a union engages in unlawful picketing or strike activity. [41]

Sadly, what I have just described often represents the best-case scenario for a worker who must go through the full process of litigating an unfair labor practice charge. In recent years, procedural infirmities at the NLRB itself have all too frequently compromised its ability to act, further prolonging the delay workers must endure before finally enjoying the remedies they are due. Political gridlock has often prevented the NLRB from operating with the full five-member complement contemplated by the statute.

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

Similarly, I am encouraged by the PRO Act's provisions to address the Supreme Court's decision in *Epic Systems Corp. v. Lewis*. [42] During my time as Chairman, the NLRB issued *D. R. Horton, Inc.* [43] and *Murphy Oil USA, Inc.* [44] In these cases, the Board found that an employer violates Section 8(a)(1) when it requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment claims. [45]

The many cases involving mandatory arbitration agreements that followed in the wake of *D. R. Horton* and *Murphy Oil* stood as a testament to the prevalence of employers' efforts to preemptively stifle concerted activity. And though the Seventh and Ninth Circuit Courts of Appeals agreed with the NLRB's view that arbitration agreements that require employees to forego their Section 7 rights are invalid under the Federal Arbitration Act's saving clause, [46] the Supreme Court read the Federal

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[38] See *https://www.nlrb.gov/news-outreach/graphs-data/remedies/reinstatement-offers* (last accessed 4/30/19).
[39] 29 U.S.C. § 160(j).
[40] See *https://www.nlrb.gov/sites/default/files/attachments/basic-page/node1674/nlrbpar2018508.pdf* (last accessed 4/30/19).
[41] See 29 U.S.C. § 160(l).
[42] 138 S. Ct. 1612, 584 U.S.—(2018).
[43] 357 NLRB 2277 (2012).
[44] 361 NLRB 774 (2014).
[45] 45 29 U.S.C. § 158(a)(1).
[46] See *Ernst & Young LLP v. Morris*, 834 F.3d 975 (9th Cir. 2016); *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016).

Arbitration Act differently. As dissenting Justice Ruth Bader Ginsburg recognized, the "inevitable result of [the majority's] decision will be the underenforcement of Federal and state statutes designed to advance the well-being of vulnerable workers." By restoring employees' rights to pursue their employment claims on a class or collective basis, the PRO Act would empower workers to join together to protect themselves and each other and to seek vindication when they have been wronged at work.

Inadequate Remedies for Violations

As was stated in the testimony of Devki K. Virk before the House of Representatives *Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions*, [47] the Act's inadequate remedies for unlawful conduct not only fail to deter or fully remedy violations, but in fact incentivize unlawful practices. The NLRA provides only limited remedies for violations. Section 10(c) of the NLRA limits the remedies to a cease-and desist order and, in the event of an unlawful firing, reinstatement with back pay, along with a required notice posting. By comparison, victims of race-or sex-based discrimination are eligible for compensatory and, in some cases, punitive damages under Title VII of the Civil Rights Act. Claimants owed unpaid wages or overtime can recover liquidated damages in addition to their lost wages under the Fair Labor Standards Act.

Consistent with Devki Virk's observations, I have found that the lack of effective remedies under the NLRA is of obvious importance for individual workers who are fired for organizing a union or engaging in other protected activity under Section 7 of the NLRA. Because employers often calculate that noncompliance is less costly, the Board's limited remedies stand in the way of its ability to fulfill its statutory mission to "encourage the practice and procedure of collective bargaining" and "protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." [48]

I recall a particular example of a respondent's flagrant pattern of flouting the NLRA in light of the NLRB's inadequate remedies was the 2014 case *Pacific Beach Hotel*. [49] In that case, the Respondents had engaged in egregious unfair labor practices over the span of 10 years. The Board found that the Respondents had violated multiple provisions of the Act and engaged in objectionable conduct that interfered with elections on two occasions. In addition, the Respondents were subject to two Section 10(j) injunctions and had been found to be in contempt of court for violating a Federal district court's injunction. Nevertheless, in 2014 the Board in faced Respondents which still had not complied with the remedial obligations imposed on them after the Board's prior decisions.

Rather, the Respondents continued to engage in unlawful activity, some of which repeatedly targeted the same employees for their protected activity and detrimentally affected collective bargaining. For example, after the Board held that the Respondents unlawfully imposed unilateral increases to housekeepers' workloads in 2007, the Respondents briefly restored the lower workloads only to unilaterally raise them again. Similarly, the Respondents unlawfully disciplined, suspended, and then discharged an employee a second time for his protected activity, after he was reinstated pursuant to a Federal district court order of interim injunctive relief. Respondents continued making unilateral changes to work rules, taking adverse actions against employees for supporting the Union, placing employees under surveillance, undermining the Union, threatening, and intimidating Union agents, and in many other manners interfering with employee rights under the Act—all contrary to the Board's prior orders.

Faced with a flagrant violator of the Act of such magnitude, the Board, cognizant of its inability to impose punitive remedies, tried to do its best with the authority it had. Among other remedies specific to these violations, the Board ordered the Respondents to cease and desist from engaging in the recidivist behavior described previously and ordered reinstatement with back pay to the affected employees. It also ordered a 3-year notice-posting period and required mailing of the notice, the Decision and Order, and an additional Explanation of Rights to current and former employees and supervisors, as well as provision of the material to new employees

[47] Devki K. Virk, Bredhoff & Kaiser, P.L.L.C., *Testimony before the Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, U.S. House Of Representatives*, March 26, 2019.
[48] 29 U.S.C. § 151.
[49] *HTH Corp., Pacific Beach Corp., and KOA Mgmt., LLC, a single employer, d/b/a Pacific Beach Hotel*, 361 NLRB 709 (2014).

and supervisors for a period of 3 years. These notices had to also be published in local media of general circulation. Because its past orders were not self-enforcing and required the General Counsel and the Charging Party to incur additional litigation costs by seeking Federal court enforcement, the Board majority also ordered that the multiple years of litigation costs be awarded to the General Counsel and Union, as well as certain other costs incurred by the Union as a direct result of the Respondents' unfair labor practices. It should be noted that the remedy of litigation costs was, however, struck down by the Court of Appeals for the District of Columbia Circuit because the Board lacked the statutory authority to impose such sanctions.[50] Given the Act's significant remedial limitations, employers are commonly willing to flout the law by intimidating, coercing, and firing workers because they engage in protected concerted activity or attempt to organize a union. As the Board's experience in *Pacific Beach Hotel* shows, when employers discover that the cost of noncompliance is so low, they sometimes violate the law frequently over the course of many years.

It isn't difficult to understand why. Without a credible deterrent, employers weighing the consequences of violating the law face a choice that all but incentivizes such serious interferences with employees' rights. As Devki Virk explained, one-third of employers fire workers during organizing campaigns,[51] and 15 to 20 percent of union organizers or activists may be fired as a result of their activities in union campaigns. And although the NLRB obtained 1,270 reinstatement orders for workers who were illegal fired for exercising their rights in fiscal year 2018 and collected $54 million in back pay for workers,[52] even when the Board is able to timely intervene and order reinstatement and backpay, it is not always enough to prevent employer lawbreaking.

During my time as Chairman, the NLRB modified its approach to calculating backpay in an effort to better fulfill the agency's dual remedial mandate to ensure that discriminatees are actually made whole and to deter future unlawful conduct. In *King Soopers, Inc.*,[53] the Board modified its standard make-whole remedy to require respondents to fully compensate discriminatees for their search-for-work expenses and expenses they incurred because they were victims of unlawful conduct. Previously, the Board had treated search-for-work and interim employment expenses as an offset that would reduce the amount of interim earnings deducted from gross backpay, an approach which I and the other members who joined the majority in *King Soopers* argued unfairly prevented discriminatees from being made whole and amounted to a subsidy of employers' violations of the law.

While *King Soopers* marked a significant improvement that has helped the Board come closer to making employees who suffer unlawful termination whole, even the prospect of paying a full back pay award is often not a sufficient deterrent for employers. The PRO Act comes even closer to accomplishing a full make-whole remedy by providing that backpay is not to be reduced by interim earnings. And by including provisions for front pay, consequential damages, and liquidated damages, the PRO Act would help the Board more effectively deter violations by making compliance with the law a more rational decision for employers.

I see a particular need for the enhanced remedies the PRO Act would provide when employers violate Section 8(a)(4) of the Act, which makes it an unfair labor practice to discharge or discriminate against employees because they have "filed charges or given testimony" in a Board proceeding.[54]

Without the assurance that they will be fully protected when they file charges and participate in Board hearings, employees will *continue to* be fearful about coming forward to tell their stories or testify on behalf of their unions or fellow employees. *Unchecked retaliation against employees seeking enforcement of the NLRA*, threatens the viability of the whole remedial scheme the Act contemplates.

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[50] *HTH Corp. v. NLRB*, 823 F.3d 668, 678–81 (D.C. Cir. 2016).
[51] Josh Bivens et al., "*How today's unions help working people*."
[52] National Labor Relations Board, NLRB Performance Reports-Monetary Remedies/Reinstatement Offers, accessed February 2019.
[53] 364 NLRB No. 93 (2016), enf'd in relevant part, 859 F.3d 23 (D.C. Cir. 2017).
[54] 29 U.S.C. § 158(a)(4).

Unfair Labor Practices Against Undocumented Workers

In *Sure-Tan, Inc. v. NLRB*,[55] the Supreme Court held that undocumented workers are "employees" within the scope of Section 2(3) of the Act.[56]

However, the Supreme Court in *Hoffman Plastic Compounds, Inc. v. NLRB*,[57] also made it clear that Board lacked "remedial discretion" to award backpay to an undocumented worker who, in contravention of the Immigration Reform and Control Act (IRCA), had presented invalid work-authorization documents to obtain employment. While a respondent may be found liable for such unlawful conduct, victimized undocumented employees are prohibited from receiving the make whole remedies of back pay and/or reinstatement, which are commonly ordered as a remedy for such violations of the law. Consequently, because of the limitations in the statute, violators are merely obliged to post a notice committing to cease and desist from such conduct. This is tantamount to a slap on the wrist of flagrant violators of the law. I joined former NLRB Chairman Wilma Liebman in articulating the inadequacy of this remedy in *Mezonos Maven Bakery, Inc.*,[58] a post-*Hoffman Plastics* Board decision. Among the concerns former Chairman Liebman and I expressed are the following:

1. *Precluding backpay undermines enforcement of the Act*. Although the primary purpose of a backpay award is to make employee victims of unfair labor practice whole, the backpay remedy also serves a deterrent function by discouraging employers from violating the Act.

2. *Precluding backpay chills the exercise of Section 7 rights*. Provided it is severe enough, one labor law violation can be all it takes. The coercive message—that if you assert your rights, you will be discharged (and, perhaps, detained, and deported)—will have been sent, and it will not be forgotten.

3. *Precluding backpay fragments the workforce and upsets the balance of power between employers and employees*. Protecting collective action is the bedrock policy on which the Act rests, as was recognized by the Supreme Court when it upheld the Act's constitutionality.[59]

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

Both former Chairman Liebman and I recognized that an award of backpay to undocumented workers is beyond the scope of the Board's authority under the Court's decision in *Hoffman*. We nevertheless remained convinced that an order relieving the employer of economic responsibility for its unlawful conduct can serve only to frustrate the policies of both the Act and our Nation's immigration laws. Although untested, we suggested in *Mezonos* that a remedy requiring payment by the employer of backpay equivalent to what it would have owed to an undocumented worker would not only be consistent with *Hoffman* but would advance Federal labor and immigration policy objectives. Such backpay could be paid, for example, into a fund to make whole victimized workers whose backpay the Board had been unable to collect. The novelty of such a remedy would likely cause it to be tied up in court challenges, thereby delaying justice for an untold period. However, the PRO Act would bring forth a clear and expedient resolution to the consequential inequities presented by the current state of the law.

Thank you very much for giving me the opportunity to testify before the Committee today. I applaud you for thinking carefully about how best to ensure that working people in this country can enjoy full freedom of association.

[55] 467 U.S. 883, 892 (1984).
[56] 29 U.S.C. § 152(3).
[57] 535 U.S. 137 (2002).
[58] 357 NLRB No. 47 (2011).
[59] See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) ("Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.") (citing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921)).

The CHAIR. Thank you, Mr. Pearce.
Dr Shierholz.

STATEMENT OF HEIDI SHIERHOLZ, PH.D., SENIOR ECONOMIST AND DIRECTOR OF POLICY, ECONOMIC POLICY INSTITUTE, SILVER SPRING, MD

Ms. SHIERHOLZ. Chair Murray, Senator Braun, and other Members of the Committee, thank you for the opportunity to testify today on this urgent matter and I am really going to dig in on the economics of this. And I will start by saying that the share of workers covered by a collective bargaining agreement declined from 27 percent to 12.1 percent between 1979 and 2020. This decline was not because your workers don't want to be in unions.

In the four decades from the late 1970's to the late 2010's, the share of nonunion workers who said they would vote to unionize if they were given the opportunity rose from one-third to nearly one-half. The fact that workers want to be in unions is no surprise when workers are able to form a union and collectively bargain their wages, benefits, and working conditions all get better. So on average, a worker covered by a union contract earns 10.2 percent more than a similar worker who is not in a union.

Union workers are more likely to have employer provided health insurance, employer sponsored retirement plans, paid vacation and sick leave, more predictable schedules, and safer workplaces. Further, the right to a union is directly relevant to our urgent national conversation around racial equity. Black workers are more likely than white workers to be in unions, and Black workers who are in unions get a bigger boost from being in the union than white workers do. Those two facts together mean that unions help narrow the Black, White wage gap. And research shows that this phenomenon is not new. By 1950, Black workers were more likely to be in unions and had a larger union premium than white workers.

This means that the net effect of the mid–20th century spread of unionization was that the institution of collective bargaining was one of the most important institutions in our Country for advancing racial, economic, economic justice. And conversely, the decline of unionization has played a significant role in the expansion of the Black, white wage gap over the last four decades. I also want to highlight the fact that nonunion workers benefit from the presence of unions when union density is high. Unions essentially set standards that nonunion workers must meet in order to attract and retain the workers that they need.

This combination of the direct effect of unions on union members and the spillover effect to nonunion workers means that unions are crucial for decent wage growth for working people. Research shows that unionization accounts for a third of the growth in inequality between typical workers and workers at the high end of the wage distribution in recent decades. The pandemic also taught us crucial lessons about the importance of unions. While the number of workers represented by a union declined in 2020, as the economy shed millions of jobs, the unionization rate rose because union workers saw less job loss than nonunion workers.

This was due in large part to the fact that unionized workers had a voice in how their employers navigated the pandemic. They used

this voice for things like negotiating terms of furloughs or work sharing arrangements to save jobs. The importance of unions has been especially clear for frontline workers during the crisis. Unionized workers who provide essential services were able to do things like secure enhanced safety measures, additional premium pay, paid sick time. But like non-essential workers, most essential workers are not unionized.

During the pandemic, many nonunionized, essential workers were forced to work without personal protective equipment or access to paid sick leave or premium pay. The decline of unionization in recent decades has not been, as some would like us to believe, the natural result of a modern economy. It has been the result of fierce corporate opposition that has suppressed workers' freedom to organize. Aggressive anti-union campaigns were once confined to the most anti-union employers, but now they are the norm.

As a National Labor Relations Act makes—and though the National Labor Relations Act makes it illegal for employers to intimidate, coerce, or fire workers in retaliation for organizing, the penalties are so weak that they don't provide an actual economic disincentive for illegal union busting. And as a result, it is rampant. Employers are charged with illegal conduct in over 40 percent of union elections.

Despite these relentless attacks on unions and collective bargaining, an update to labor law to rebalance the system has not happened. The huge gap between the share of unions—the share of workers who want a union and the share of workers who are in a union makes it clear that our system of labor law is not working. Policy changes like the Protecting the Right to Organize Act are crucial for rebuilding an economy that guarantees all workers the right to come together and have a voice in their workplace. Thank you and I look forward to questions.

[The prepared statement of Ms. Shierholz follows:]

PREPARED STATEMENT OF HEIDI SHIERHOLZ

Chair Murray, Ranking Member Burr, and Members of the Committee, thank you for the opportunity to testify today on the right to organize and on empowering U.S. workers in a 21st century economy. My name is Heidi Shierholz and I am a senior economist and the director of policy at the Economic Policy Institute (EPI) in Washington, DC. EPI is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low-and middle-wage workers in economic policy discussions. EPI conducts research and analysis on the economic status of working America, proposes public policies that protect and improve the economic conditions of low-and middle-wage workers, and assesses policies with respect to how well they further those goals. I previously served as Chief Economist at the U.S. Department of Labor during the Obama administration.

Today I will discuss the importance of unions to working people, to racial equity, and to reducing economic inequality. I will also discuss how the decline in unionization in recent decades is the direct result of relentless attacks on unions. Finally, I will discuss the economic impacts of the coronavirus pandemic, how unions played a vital role in protecting workers during the pandemic, and why promoting unionization and the right to collectively bargain through labor law reform is essential for an equitable recovery.

The Benefits of Unions to Union Workers

The share of workers covered by a collective bargaining agreement dropped from 27.0 percent to 12.1 percent between 1979 and 2020, meaning the union coverage

rate is now less than half where it was four decades ago.[1] Importantly, this decline was not because workers are now less interested in being in a union. In the four decades between the late 1970's and the late 2010's, the share of non-union workers who said they would vote to unionize if given the opportunity *rose* from one-third to nearly one-half.[2]

It's no surprise workers want unions. When workers are able to come together, form a union, and collectively bargain, their wages, benefits, and working conditions improve.[3] On average, a worker covered by a union contract earns 10.2 percent more in wages than a peer with similar education, occupation, and experience in a nonunionized workplace in the same sector.[4] Unions also provide workers with better benefits. For example, unions workers are far more likely to be covered by employer-provided health insurance: More than nine in 10 workers covered by a union contract (95 percent) have access to employer-sponsored health benefits, compared with just 68 percent of nonunion workers. Further, union employers contribute more to their employee's health care benefits.[5] Union workers also have greater access to paid sick days: More than nine in 10 workers—93 percent—covered by a union contract have access to paid sick days, compared with 75 percent of nonunion workers.[6] Union workers are also more likely to have paid vacation and holidays, more input into the number of hours they work, and more predictable schedules. Further, union employers are more likely to offer retirement plans and to contribute more toward those plans than comparable nonunion employers.[7]

Unions also improve the health and safety practices of workplaces through their collective bargaining agreements by providing health insurance and requiring safety equipment.[8] Further, unions empower and allow workers to freely report unsafe working conditions without retaliation, which can lead to a reduction in work hazards.[9] Research has found that so-called "right-to-work" legislation, which weaken unions, has been associated with a roughly 14 percent increase in the rate of occupational fatalities.[10]

The Importance of Unions to Racial Equity

The right to a union and collective bargaining is also directly relevant to our urgent national conversation around racial inequality in its various forms, including economic disparities by race. Unions and collective bargaining help shrink the Black—white wage gap, due to the fact that Black workers are more likely than white workers to be represented by a union and that Black workers who are in unions get a larger boost to wages from being in a union than white workers do (i.e. the "union wage premium" is larger for Black workers than for white workers). Further, research shows that this phenomenon isn't new. Starting in the mid–1940's, Black workers began to be more likely to be in unions and to have a larger union premium than white workers.[11] While significant segments of organized labor—like nearly all institutions in U.S. society—exhibited racial bias well past the mid–1940's, the net effect of the mid–20th century spread of unionization made the

[1] Economic Policy Institute, "*Union Coverage*," *The State of Working America Data*, last updated February 2021.
[2] Thomas A. Kochan et al., "*Worker Voice in America: Is There a Gap Between What Workers Expect and What They Experience*?" *ILR Review 72*, no. 1 (January 2019): Figure 3, *https://doi.org/10.1177/0019793918806250*.
[3] Bivens et al., *How Today's Unions Help Working People: Giving Workers the Power to Improve Their Jobs and Unrig the Economy*, Economic Policy Institute, August 2017.
[4] Economic Policy Institute, *Unions Help Reduce Disparities and Strengthen Our Democracy* (fact sheet), April 23, 2021.
[5] Economic Policy Institute, *Unions Help Reduce Disparities and Strengthen Our Democracy* (fact sheet), April 23, 2021.
[6] Economic Policy Institute, *Unions Help Reduce Disparities and Strengthen Our Democracy* (fact sheet), April 23, 2021.
[7] Economic Policy Institute, *Unions Help Reduce Disparities and Strengthen Our Democracy* (fact sheet), April 23, 2021.
[8] Michael Zoorob, "*Does 'Right to Work' Imperil the Right to Health? The Effect of Labour Unions on Workplace Fatalities*," *Occupational and Environmental Medicine*, 75, (June 2018): 736–738, *https://dx.doi.org/10.1136/oemed-2017-104747*.
[9] Benjamin C. Amick et al., "*Protecting Construction Worker Health and Safety in Ontario, Canada: Identifying a Union Safety Effect*," *Journal of Occupational and Environmental Medicine*, 57, no. 12 (December 2015): 1337–1342, *https://doi.org/10.1097/JOM.0000000000000562*.
[10] Michael Zoorob, "*Does 'Right to Work' Imperil the Right to Health? The Effect of Labour Unions on Workplace Fatalities*," *Occupational and Environmental Medicine*, 75, (June 2018): 736–738, *https://dx.doi.org/10.1136/oemed-2017-104747*.
[11] Henry S. Farber, "*Unions and Inequality over the Twentieth Century: New Evidence from Survey Data*," *Quarterly Journal of Economics*, 136, no. 3 (August 2021): 1325–1385, *https://doi.org/10.1093/qje/qjab012*.

institution of collective bargaining one of the most important institutions in the country for advancing racial economic justice. Consequently, one of the most devastating casualties of the erosion of collective bargaining in recent decades has been the weakening of this force for racial equity. The *decline* of unionization has played a significant role in the *expansion* of the Black—white wage gap over the last four decades. An increase in unionization could help halt and reverse those trends. [12]

Unions and Economic Inequality

While union workers receive higher wages than nonunion workers, nonunion workers also benefit from the presence of unions. When union density is high, nonunion workers benefit, because unions effectively set broader standards—including higher wages—that nonunion employers must meet in order to attract and retain the workers they need (and to avoid facing a union organizing drive themselves). The combination of the direct effect of unions on union members and this "spillover" effect to nonunion workers means unions are crucial in raising wages for working people and reducing income inequality. [13]

Unsurprisingly, then, after decades of decline in the share of workers represented by a union, the U.S. economy in 2019 had the highest inequality ever in U.S. history, according to Census Bureau data. [14] Chief executive officer (CEO) compensation grew 1,167 percent between 1978 and 2019, while typical worker compensation had risen only 13.7 percent during that time. [15] From 1979 to 2019, the wages of the top 1 percent grew nearly 160.3 percent, whereas the wages of the bottom 90 percent combined grew just 26.0 percent, less than one-sixth as fast. [16]

Recent research examining the direct effect on wages of union workers and the spillover effect on wages of nonunion workers has demonstrated that the median worker's wages would have been higher, and inequality between middle-and high-wage workers much lower, had there not been an erosion of collective bargaining. For instance, the "typical" or median worker economy-wide would have earned $1.56 more per hour in 2017 had unionization not declined since 1979. This translates to an equivalent gain of $3,250 for a full-time, full-year worker. [17] **Figure A** provides an instructive raw comparison, showing that as union membership has eroded, the share of total income in the economy that gets funneled to the rich has risen accordingly. More rigorous research shows that de-unionization accounts for one-third of the growth in inequality between typical workers and workers at the high end of the wage distribution in recent decades. [18]

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[12] Valerie Wilson and William M. Rodgers III, *Black-White Wage Gaps Expand with Rising Wage Inequality*, Economic Policy Institute, September 20, 2016.

[13] Jake Rosenfeld, Patrick Denice, and Jennifer Laird, *Union Decline Lowers Wages of Nonunion Workers*, Economic Policy Institute, August 2016.

[14] United States Census Bureau, "*American Community Survey Provides New State and Local Income, Poverty and Health Insurance Statistics*" (press release), September 26, 2019.

[15] Lawrence Mishel and Jori Kandra, *CEO Compensation Surged 14 percent in 2019 to $21.3 Million*, Economic Policy Institute, August 2020.

[16] Lawrence Mishel and Jori Kandra, "*Wages for the Top 1 percent Skyrocketed 160 percent since 1979 while the Share of Wages for the Bottom 90 percent Shrunk*," *Working Economics* (Economic Policy Institute blog), December 2020.

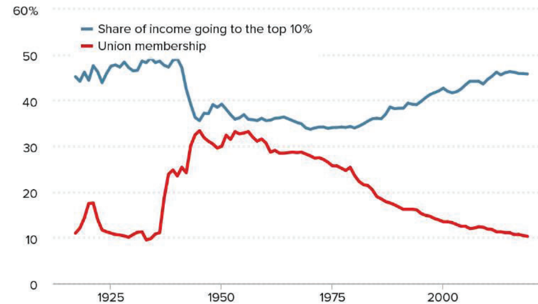
[17] Lawrence Mishel, *The Enormous Impact of Eroded Collective Bargaining on Wages*, Economic Policy Institute, April 2021.

[18] Lawrence Mishel, *The Enormous Impact of Eroded Collective Bargaining on Wages*, Economic Policy Institute, April 2021.

FIGURE A

As union membership declines, income inequality increases

Union membership and share of income going to the top 10%, 1917–2019



Source: Reproduced from Figure A in Heidi Shierholz, *Working People Have Been Thwarted in Their Efforts to Bargain for Better Wages by Attacks on Unions*, Economic Policy Institute, August 2019.

Economic Policy Institute

Unions and the Pandemic

The U.S. entered the COVID–19 pandemic with an economy characterized by extreme economic and racial inequality, historically low rates of union density, and weak worker protections, but low unemployment. In February 2020, the unemployment rate was at a 50-year low of 3.5 percent. In March and April 2020, the labor market shed an unprecedented 22 *million jobs*, losses the likes of which we hadn't experienced in modern history. Low-wage workers experienced vastly greater job loss due to the fact that low-wage jobs are concentrated in sectors that got hit particularly hard because they involve more social contact (such as restaurants and bars, hotels, personal services, events, and brick-and-mortar retail). Further, due to differences in labor market outcomes caused by occupational segregation, discrimination, and other disparities rooted in systemic racism and sexism, people of color—and particularly women of color—experienced much greater job loss. While white non-Hispanic workers saw a peak unemployment rate of 12.8 percent, Black non-Hispanic workers saw a peak unemployment rate of 16.7 percent, Latino workers saw an unemployment rate of 18.5 percent, and AAPI workers saw an unemployment rate of 15.0 percent. [19, 20]

The Bureau of Labor Statistics' most recent data on unionization shows that while the number of workers represented by a union declined in 2020, the unionization *rate* rose because union workers saw less job loss that nonunion workers. This increase in the unionization rate was due in part to the fact that unionized workers have had a voice in how their employers have navigated the pandemic, and have used this voice for such things as negotiating for terms of furloughs or work-share

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[19] Celine McNicholas et al., *Why Unions Are Good for Workers—Especially in a Crisis Like COVID–19: 12 Policies That Would Boost Worker Rights, Safety, and Wages*, Economic Policy Institute, August 2020.

[20] While jobs are now returning rapidly—on average, the labor market added more than 600,000 jobs in each of the last 5 months—an enormous gap in the labor market remains. We still have 6.8 million fewer jobs than we did before the COVID–19 recession began. And furthermore, that 6.8 million is not the total gap in the labor market. Before the recession, we were adding about 200,000 jobs per month. At that pace, we would have added 3.2 million jobs since the recession began, which means the total gap in the labor market right now is as many as 10 million jobs (6.8 + 3.2 = 10 million jobs). Further, the recovery remains highly inequitable. The June jobs report shows the overall unemployment rate is 5.9 percent. However, while the unemployment rate is 5.2 percent for white workers, the Black unemployment rate is 9.2 percent and the Hispanic and Asian unemployment rates are 7.4 percent and 5.8 percent, respectively.

arrangements to save jobs.[21] This engagement likely played a role in limiting overall job loss among unionized workers.[22]

The importance of unions in giving workers a collective voice in the workplace has been especially salient for frontline workers throughout the pandemic. During the crisis, unionized workers who provide essential services have been able to secure enhanced safety measures, additional premium pay, and paid sick time.[23] But most essential workers, like nonessential workers, are not unionized. For example, just 10 percent of essential workers in health care are unionized and just 8 percent of essential workers in food and agriculture are unionized.[24]

During the pandemic, many nonunionized essential workers were forced to work without personal protective equipment or access to paid leave or premium pay. Further, when nonunion workers have advocated for health and safety protections or wage increases, they were often retaliated against or even fired. The lack of these basic protections led to thousands of essential workers becoming infected with the coronavirus.[25]

The Decline in Unionization is the Direct Result of Relentless Attacks on Unions

As mentioned above, the decline in collective bargaining in recent decades has not happened because workers don't want unions—a far higher share of nonunionized workers report wanting to be in a union today than did four decades ago. The decline in unionization has been the result of fierce corporate opposition that has suppressed workers' freedom to form unions and bargain collectively. Intense and aggressive anti-union campaigns—once confined to the most anti-union employers—have become widespread; it is now typical, when workers seek to organize, for their employers to hire union avoidance consultants to orchestrate fierce anti-union campaigns.

Though the National Labor Relations Act (NLRA) makes it illegal for employers to intimidate, coerce, or fire workers in retaliation for participating in union-organizing campaigns, the penalties are insufficient to provide a serious economic disincentive for such behavior (there are *no* punitive damages or criminal charges under the NLRA; penalties may consist of being required to post a notice or reinstate illegally fired workers).[26] This means that employers can engage in illegal tactics with almost no financial concern; for example, employers often threaten to close the worksite, cut union activists' hours or pay, or report workers to immigration enforcement authorities if employees unionize. One out of five union election campaigns involves a charge that a workers was illegally fired for union activity.[27]

In the face of these attacks on collective bargaining, policymakers have egregiously failed to update labor laws to rebalance the system. In fact, in many cases policy is moving backward; 27 states have passed so-called right-to-work laws,[28]

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[21] Celine McNicholas et al., *Why Unions Are Good for Workers—Especially in a Crisis Like COVID–19: 12 Policies That Would Boost Worker Rights, Safety, and Wages*, Economic Policy Institute, August 2020.

[22] Celine McNicholas, Heidi Shierholz, and Margaret Poydock, *Union Workers Had More Job Security during the Pandemic, but Unionization Remains Historically Low*, Economic Policy Institute, January 2021. Another reason unionization rates increased in 2020 was a "pandemic composition effect." In particular, industries with lower unionization rates, like leisure and hospitality, have tended to experience the most job loss during the pandemic, while sectors with higher unionization rates, like the public sector, have tended to see less job loss. A simple decomposition of the increase in the overall unionization rate in 2020 shows that roughly half (46.5 percent) of the increase was the result of a pandemic composition effect, while roughly half (53.5 percent) was due to union workers seeing less job loss than nonunion workers in the same industry.

[23] Celine McNicholas et al., *Why Unions Are Good for Workers—Especially in a Crisis Like COVID–19: 12 Policies That Would Boost Worker Rights, Safety, and Wages*, Economic Policy Institute, August 2020.

[24] Celine McNicholas and Margaret Poydock, "*Who Are Essential Workers: A Comprehensive Look at Their Wages, Demographics, and Unionization Rates*" Working Economics (Economic Policy Institute blog), May 29, 2020.

[25] Celine McNicholas et al., *Why Unions Are Good for Workers—Especially in a Crisis Like COVID–19: 12 Policies That Would Boost Worker Rights, Safety, and Wages*, Economic Policy Institute, August 2020.

[26] Celine McNicholas et al., "*Civil Monetary Penalties for Labor Violations Are Woefully Insufficient to Protect Workers*," Working Economics (Economic Policy Institute blog), July 15, 2021.

[27] Celine McNicholas et al., *Unlawful: U.S. Employers Are Charged with Violating Federal Law in 41.5 percent of All Union Election Campaigns*, Economic Policy Institute, December 2019.

[28] National Conference for State Legislatures, *Right-To-Work Resources* (fact sheet).

which are intended to undermine union finances by making it illegal for unions to require nonunion members of a collective bargaining unit (who don't pay union dues) to pay "fair share fees"—fees that cover only the basic costs of representing employees in the workplace. And the Supreme Court decision in *Janus v. AFSCME*—a case financed by a small group of foundations with ties to the largest and most powerful corporate lobbies—made "right-to-work" the law of the land for all public-sector unions.[29]

Conclusion: The U.S. Needs the PRO Act

In the expansion following the Great Recession, the unemployment rate ultimately got down to 3.5 percent. However, given the tight labor market, wage growth for working people was surprisingly slow and uneven, racial wage gaps worsened, and the highest earners continued to see more than their fair share of economic gains. The years after the Great Recession marked a completely different story from the experience following the Great Depression, and there is no mystery to that phenomenon—Federal labor law policy following the Great Depression enabled workers to organize unions, while Federal lawmakers failed to pass labor law reform following the Great Recession. We can't make that same mistake now.

This is a critical moment and the policy decisions made will have longstanding impacts on our economy. We know that unions are essential to a fair and equal economy. It is crucial that policymakers prioritize labor law reforms that restore workers' rights to organize and bargain collectively. The Protecting the Right to Organize (PRO) Act addresses many of the major shortcomings with our current law. Passing the PRO Act would help restore workers' ability to organize with their co-workers and negotiate for better pay, benefits, and fairness on the job, and it would reduce racial disparities and help halt and reverse skyrocketing inequality.[30]

The large gap between the share of workers who *want* a union and the share of workers who are *in* a union underscores that our system of labor laws is not working. Fundamental reform is required to rebuild an economy that guarantees all workers the right to come together and have a voice in their workplace and no longer leaves most workers behind. Meaningful policy changes like the PRO Act are crucial for restoring a fair balance of power between workers and employers.

Thank you and I look forward to your questions.

The CHAIR. Thank you very much.
Mrs. Heldman. Can you turn on your mic?

STATEMENT OF GRACIE HELDMAN, WORKER, PANDORA, OH

Ms. HELDMAN. Thank you, Madam Chair. My name is Gracie Heldman and I live in Pandora, Ohio. I would like to thank the Committee for inviting me here today to tell my story. This is a story about a company that has broken the law for 20 years to stop its workforce from joining a union.

I am a long time employee of Heartside Solutions in McComb, Ohio. The company has huge bakeries all across the country. They make cookies, crackers, bars, and other baked goods for companies like Kellogg, Nabisco, and General Mills. There are over 1,000 of us in the McComb plant that runs 24 hours, 7 days a week. I have been working at Heartside for over 33 years, and I can tell you working in a huge industrial bakery is hard work. The hours are long, and the pain can be really bad, especially in your wrist, shoulders, back.

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[29] Celine McNicholas, Zane Mokhiber, and Marni von Wilpert, *Janus and Fair Share Fees: The Organizations Financing the Attack on Unions' Ability to Represent Workers*, Economic Policy Institute, February 2018.

[30] The decline of unionization over the last four decades has played a significant role in the expansion of the Black—white wage gap. See Valerie Wilson and William M, Rodgers III, *Black-White Wage Gaps Expand with Rising Wage Inequality*, Economic Policy Institute, September 2016.

The company does not take health and safety seriously, so it is not really surprising the McComb bakery has been cited by OSHA many times and this is one of the worst offenders in Ohio. It was one of the main reasons so many of us have been wanting to join the bakers' union since the late 90's. We have been overworked. We have been injured on the job, disrespected by supervisors, and forced to work in bad conditions. We wanted a union to protect us while we were at work, to give us a say about the conditions we had to work under, and to help us get respect from our bosses. In the early 2000's, there was a lot of support for the union.

Most of us were fed up with the way we were being treated. In 2002, over 65 percent of us signed BCTGM union cards so that we could have an election to vote on the union. That seems simple enough. But instead of having the election soon after we filed a petition, the company was able to stall and delay the election for over 2 months. This gave the company plenty of time to run an anti-union campaign and scare the workers, which is what they did. First off, the company hired union busters that walked the floor of the bakery, spied on us, held mandatory anti-union meetings. They told us the plant would close, that we would lose our wages and benefits, and that we would be forced to go on strike.

If we didn't go to these meetings, we would be fired. Then the company actually fired seven people that supported the union. They really scared people. Many of these people, they wanted to join the union, had signed union cards, were too scared to support it. When we finally had a union election after the company's months of delays, many of these unions for us voted no and we lost the election. They were scared and felt the law did not protect them. The law was just not on our side. If the Pro Act had been in place, we would have had the election earlier, the company would not have been able to hire union busters and lie about the union, and the company would have suffered major penalties for firing union supporters.

We would have won the first election almost 20 years ago. After the election of 2002, the union filed charges with the NLRB. Seems to me this was an open and shut case, but the case took more than 8 years to be decided. The Federal Court of Appeals finally found the company guilty, but only brought back two of the workers. For firing workers, breaking Federal labor law and dragging the NLRB case through the courts. For 8 years, the company only received a slap on the wrist, and we still didn't have the protection of a union. The Federal Court of Appeals did order a rerun election.

Once again, the company stalled and delayed the day of the election. The company ran a very vicious campaign. Hispanic workers like me were targeted. Many were told they would be deported if they supported the union. We finally had a rerun election in 2010, but the company had scared the workers so bad they voted against the union. Again, the union filed charges against the company, but it didn't make any difference. This was a really tough time for many of us that had been supporting for so long the union. I had coworkers that I was close to, they committed suicide.

Many others got severely depressed. From a personal standpoint, things went from bad to worse. A couple of years ago, a coworker found bedbugs in some of the cases and of course, they blamed us

workers for this. The supervisor made a whole line of women march into their first aid room where we were told to strip so a nurse could examine us for bedbugs. If we refused, we would be punished, sent home without pay, and possibly fired. So we stayed in line and stripped so we could be searched. It was humiliating. The next day, rumors swirled about women and their granny pants going around the plant. It could only have come from supervisors. This was such a degrading experience that I will never forget.

Last year, we had our third attempt in 20 years to join that union. We had more than 60 percent of 1,200 workers sign union cards, just like the previous election. The company hired union busters, spent 3 months trying to put fear into the workforce. This time, they really focused on the Hispanic or Hispanic workers again. Many were threatened with deportation if they supported the union and voted yes. Even at the height of the pandemic, the company forced us to attend mandatory meetings. They set up a big tent outside the plant to make it look like we would be safe. They squeezed more than 150 of us inside a tent, sitting side by side, less than two feet apart, even though people were scared.

I really thought we had a shot to win this election. We got closer than ever before in this election, but it was not enough to overcome the company's vicious anti-union campaign. For over 20 years, we have fought to join the BCTGM. For over 20 years, I have seen the law look the other way. Nothing protected our rights to join a union. And the worst part of it all is the company knew that. They knew they could do whatever they wanted and at worst they would get a slap on the wrist.

I am just one worker who wants to join a union, but there are millions out there in America. They would love to join a union so they can have dignity, justice, and respect, and not have their rights stolen.

[The prepared statement of Ms. Heldman follows:]

PREPARED STATEMENT OF GRACIE HELDMAN

Thank you, Madam Chair. My name is Gracie Heldman and I live in Pandora, Ohio.

I would like to thank the Committee for inviting me here today to tell my story. This is a story about a company that has broken the law for 20 years to stop its workforce from joining a union.

I am a long-time employee at Hearthside Food Solutions in McComb, Ohio. The company has huge bakeries all across the country that make cookies, crackers, bars and other baked goods for companies like Kellogg, Nabisco and General Mills.

There are over one-thousand of us in the McComb plant that runs 24 hours, 7 days a week.

I have been working at Hearthside for over 33 years, and I can tell you working in a huge industrial bakery is hard work. The hours are long and the pain can be really bad, especially in your wrists, shoulders and back.

The Company doesn't take health & safety seriously so it's not really surprising the McComb bakery has been cited by OSHA many times and is one of the worst offenders in Ohio.

That was one of the main reasons so many of us have wanted to join the Bakery Workers Union since the late 90's. We have been overworked, we've been injured on the job, disrespected by supervisors, and forced to work in bad conditions. We wanted a union to help protect us while we were at work, to give us a say about the conditions we have to work under, and to help us get just a little bit of respect from our bosses.

In the early 2000's there was a lot of support for the union. Most of us were completely fed up by the way we were being treated. In 2002, over 65 percent of us signed BCTGM union cards so that we could have an election to vote on the union.

That seems simple enough but instead of having the election soon after we filed the petition, the company was able to stall and delay the date of the election for over 2 months. This gave the company plenty of time to run an anti-union campaign and scare the workers. Which is what they did.

First off, the company hired union busters that walked the floor of the bakery, spied on us, and held mandatory anti-union meetings. They told us the plant could close, that we'd lose our wages and benefits, and that we'd be forced to go on strike.

If we didn't go to these meetings we'd be fired.

Then the company actually fired seven people that supported the union. That really scared people. Many of those people that wanted to join the union, and had signed union cards, were now too scared to support it.

When we finally had the union election, after the company's months of delays, many of these union supporters voted NO and we lost the election. They were scared and felt unprotected by the law.

The law was just not on our side.

If the Pro Act had been in place, we would have had the election earlier. The company would not have been able to hire union busters and lie about the union. And the company would have suffered a major penalty for firing union supporters.

We would have won that first election almost 20 years ago!

After that election in 2002, the Union filed charges with the NLRB. It seemed to me this was an open and shut case. But the case took more than 8 years to be decided.

The Federal Court of Appeals finally found the company guilty, but only brought back two of the seven workers!

For firing workers, breaking Federal labor law, and dragging the NLRB case through the courts for 8 years, the Company only received a slap on the wrist. And we still didn't have the protection of a union.

The Federal Court of Appeals did order a re-run election.

Once again, the company stalled and delayed the date of the election. Then the company ran a vicious anti-union campaign. Just like the first campaign, we were forced to attend mandatory meetings where we heard the lies all over again.

Hispanic workers like me were targeted. Many were told they'd be deported if they supported the union.

We finally had a re-run election in 2010, but the company had scared the workers so bad they voted against the union. Again, the Union filed charges against the company but it didn't make any difference.

This was a really tough time for many of us that had been supporting the union for so long.

I had co-workers that I was close with who committed suicide.

Many others got severely depressed.

But leaving wasn't really an option for a lot of folks. We needed to work to put food on the table and there's not a lot of jobs in and around McComb.

From a personal standpoint, things went from bad to worse.

A couple of years ago the company found bed bugs in some of the flour and other products. Of course, they blamed us workers for this.

The supervisors made a whole line of women march into their offices where we were told to strip so a nurse could examine us for bed bugs.

If we refused, we would be punished, sent home without pay and possibly fired. So, we stayed in line and were strip searched. It was humiliating.

The next day rumors about women in their "granny panties" were going around the plant. It could only have come from the supervisors. This was such a degrading experience that I will never forget.

Last year we had our third attempt in 20 years to join the BCTGM. We had more than 60 percent of 1,200 workers sign union cards. Conditions at the plant kept getting worse. And everyone's stress levels were high because of the threat of Covid–19. More than thirty workers contracted the corona virus during the spring and summer of 2020, so we were all worried.

Just like the previous elections, the company hired union busters who spent 3 months trying to put fear into the workforce.

This time, they really focused on my Hispanic co-workers. Again, many were threatened with deportation if the union was voted in.

Even at the height of the pandemic the company forced us to attend mandatory meetings. They set up a big tent outside the plant to make it look like we would be safe. Then they squeezed more than 150 of us inside the tent seating us side by side less than 2 feet apart.

Once again, they threatened loss of wages and benefits if we voted for the union.

Even though people were scared I really thought we had a shot to win this election. But the company had scared the workers so bad that we were never really given a fair chance to make a decision about joining the BCTGM.

We got closer than ever before in this election but it was not enough against the company's actions.

For over 20 years we have fought to join the BCTGM. For over 20 years I have seen the law look the other way. Nothing protected our right to join a union. And the worst part of it all, is that the company knew that. They knew they could do whatever they wanted and at worst, they'd get a slap on the wrist.

I'm just one worker who wants to join a union. But there are millions more like me. We just want a fair chance.

Thank you.

The CHAIR. Thank you. Thank you, Mrs. Heldman, I appreciate that.

Ms. Sarolia.

STATEMENT OF JYOTI SAROLIA, PRINCIPAL AND MANAGING PARTNER, ELLIS HOSPITALITY, TEMECULA, CA

Ms. SAROLIA. Good morning, Chair Murray, Senator Braun sitting in for Ranking Member Burr and distinguished Members of the Committee. What an honor and privilege it is here to sit here with you, and I thank you in advance for your time and your ability to listen to my story today. My name is Jyoti Sarolia. I am from Temecula, California, and I am the principal at Ellis' Hospitality that owned and operate seven hotels. Thank you very much for the invitation to appear before this Committee today. I am honored to share my story of small business ownership and discuss the views of local business owners everywhere as it relates to empowering American workers.

I will focus my comments on Protecting the Right to Organize Act or Pro Act. This is an issue of great importance to the 730,000 franchise business owners like me who employ nearly 8 million workers in a range of industries, and I appear before you today on their behalf as well. With both respect and candor, let me say this, the Pro Act is the most anti-small business bill in the history of Congress. With the stroke of a pen upon enactment, the Pro Act's joint employer and independent contractor provisions alone would steal the American dream of business ownership from countless entrepreneurs.

But indirectly I am also here to testify on behalf of all the bakers, physical therapists, realtors, freelancers, truck drivers, doctors, caterers, drivers, insurance agents, salespeople, commercial fishermen, stylists and many more who contribute so much to the economy and whose livelihood the Pro Act could upend. And not because of unionization, but because the Pro Act could practically de-

mote any of these professionals from entrepreneur to employee. They don't want that, and I don't want that.

As a franchise business owner, I have worked so hard to provide for my employees. My passion is making a difference in our team members' lives and growing more team members in the future so they can become upwardly mobile so that someday they can own their own hotel or franchise business if they want. And because, with due respect to great businesses like Starbucks and Chipotle, no matter how hard an employee works, you can't own a Starbucks and you can't own a Chipotle. But in franchising, you can own your own business. It doesn't matter if you are a man or a woman, what color is your skin, who you love, or where you came from.

That is why it is a business strategy that every Member of the Senate should support. But instead, the Pro Act seeks to streamroll businesses run by women entrepreneurs, entrepreneurs of color, and others that operate and grow using the franchise method. And instead, the Pro Act seeks, through its joint employer and independent contractor provisions to transform franchise systems from a network of small businesses into one big business. Why would 47 Senators seek to consolidate so much corporate power at the expense of small businesses and owners like me? Put simply, this legislation could end the franchise business model, the business format that has perhaps provided the most accessible path to business ownership for entrepreneurs of all backgrounds. Why should 47 Senators seek to enhance organized labor's political power at the expense of women entrepreneurs and entrepreneurs of color like me?

From the franchising perspective, these issues are bigger than the Pro Act today. The more important issue is that the incredible value of franchising needs to be more fully appreciated. My testimony today includes details on forthcoming Oxford Economics research that reveals three takeaways. First, franchises are locally owned and keep their resources in local community, unlike a business run by a faraway headquarters. Second, franchising offers a path to entrepreneurship to people of diverse backgrounds who would not otherwise own a business. Big corporations don't offer entrepreneurship.

Last, franchise jobs are good jobs that offer comparable pay and benefits to other Main Street business jobs. Madam Chair, the pandemic has drawn a historic curveball at the hospitality industry. There was no playbook for how hoteliers or other franchise owners were supposed to navigate the world. But due to hard work, support from our franchise brands, and even some SBA assistance, we are still here today serving our employees, customers, and communities. Small businesses are just starting to recover, and now we are facing the Pro Act. Women and immigrants and people of color have faced enough barriers to business ownership over the years, haven't they?

The Pro Act raises these barriers for people like me again. If you want to help build wealth for communities of color, if you want to support women entrepreneurs, if you want to give immigrants a shot at the American dream, and if you want to support people like me, then let's table the Pro Act and let's build better policies that

will both promote workers' future and protect the local franchise business owners in your state.

Thank you for the opportunity, and again your time, and what an honor and privilege it is to share our story.

[The prepared statement of Ms. Sarolia follows:]

PREPARED STATEMENT OF JYOTI SAROLIA

Good morning Chair Murray, Senator Braun, and distinguished Members of the Committee. My name is Jyoti Sarolia, and I am a Principal at Ellis Hospitality that owns and operates seven hotel properties in California. Our small business is named after New York City's Ellis Island, through which my family members entered America to pursue a better life. Thank you very much for the invitation to appear before this Committee to share my story of small business ownership and discuss the views of local business owners everywhere as it relates to empowering American workers in today's hearing. I will focus my comments on the *Protecting the Right to Organize Act*, or "PRO Act." This is an issue of great importance to franchise business owners like me, and it is important that small business perspectives are heard by our Nation's leaders.

I appear before you on behalf of the International Franchise Association. IFA is the world's oldest and largest organization representing franchising worldwide. Celebrating over 50 years of excellence, education and advocacy, IFA works through its government relations and public policy, media relations and educational programs to protect, enhance and promote franchising. IFA members include franchise companies in over 300 different business format categories, individual franchisees, and companies that support the industry in marketing, law and business development.

With both respect and candor, let me say this: the PRO Act is the most anti-small business bill in the history of Congress. With the stroke of a pen upon enactment, the PRO Act's joint employer and independent contractor provisions alone would steal the American Dream of business ownership from countless entrepreneurs.

There is a false notion that only businesses that have representation cases before the National Labor Relations Board are concerned about the PRO Act. This couldn't be further from the truth. Put simply, businesses do not react in a vacuum. If the PRO Act becomes law, franchise brands will react by offering fewer franchises, and as a result, people like me will be collateral damage. Senators, you cannot let this happen. Upending an entire business model and taking away business opportunities to people like me, just to increase union power, is unacceptable. There simply must be a better way to achieve the goals of the legislation.

In my testimony, I will describe my small business story, share how my business serves its employees and local communities, reveal how hotels and other small businesses are recovering from the COVID–19 pandemic, and show why the PRO Act needlessly threatens every small business during the economic recovery.

My Small Business Story

My granduncles came to this country to achieve the American Dream. My grandfather, who was the eldest of the siblings, was not as educated as his brothers and decided to continue farming and stay behind. His two brothers, Dhayabhai and Santibhai, whom I call grandparents, along with four other friends in the area, decided to come to America. They had someone from their hometown who was already running a hotel in San Francisco to host them when they arrived.

One can only imagine what life was like for my family, as they took 3 months to finally dock at Ellis Island. They were detained as their health checks cleared and continued their journey via train to get to San Francisco. They then met their host and saw the life they could live while operating a hotel. From 1952 to 1957, both of my grandparents worked various jobs until they were able to save enough money to lease their first hotel, the Alder. Shortly after, their wives immigrated to help with the business. This hotel still remains in my extended family. Our hotel sign has also been displayed at the Smithsonian for almost two years.

My parents then immigrated to the U.S. in 1967. In order for the family to grow their business, they called upon other family members to also join them in the business so they too could live their American Dream. My parents got to work right away, cleaning rooms and doing light maintenance.

Having lived in the Alder Hotel owned by my extended family in downtown San Francisco until the age of 11, I learned first-hand many of the responsibilities that

were involved in running and operating a successful hotel. I grew up learning the importance of hard work, gaining skills in carpet laying and fixing household appliances, like water heaters and toilets. I also later handled front-desk management, housekeeping, and so many other responsibilities. My father took on the responsibility of the more labor-intensive jobs, including home renovating, painting, and supply management. Together, we all pitched in to keep the business alive and our customers happy.

Today, hospitality still runs in my blood. I bought my first hotel in 1996, and we now have seven properties and I oversee all aspects of operations. My focus is to work with my leadership and provide continued excellent service to our visitors and customers. Our mission begins with our employees, ensuring they are our priority so we can provide excellent service and care for our guests. This employee-first mentality has proven to be the key to our success through the years, and it remains my focus even now. Our mantra is, "How can we better serve you?" This is the conversation that permeates our service environment.

Community service is also a major priority of mine. Active engagement with our local communities and business partners is essential to advancing our journey together. With this in mind, I've served on multiple boards, such as the Asian American Culture Society of San Diego and the Choice Hotels Owners Council (CHOC). I also proudly served as the first female Chair of the Franchise Advisory Council in 2018.

As a franchise business owner, I have worked so hard to provide for my family, employees, customers and stakeholders in my community. But along the way, franchising has afforded me every opportunity to succeed, no matter where I came from, my background, my gender, color of my skin, or any other personal characteristic. It is a business format every policymaker should support.

Background on the Franchise Business Format

Franchising is perhaps the most important business growth strategy in American history. Today, there are more than 740,000 franchise establishments, which support nearly 7.6 million jobs and $674.3 billion of economic output for the U.S. economy. [1] "Franchising is a method of marketing goods and services" that depends upon the existence of the franchisor's control over a trademark, other intellectual property or some other commercially desirable interest sufficient to induce franchisees to participate in the franchisor's system by distributing goods or services under the franchisor's name. [2]

Franchising democratizes business ownership for people of all backgrounds. There is a higher minority ownership rate among franchised businesses than in nonfranchised businesses: 30.8 percent of franchises were owned by minorities, compared to 18.8 percent of nonfranchised businesses. Asians, Blacks, Hispanics, and "other" minorities had a higher rate of ownership of franchises than nonfranchised businesses in 2012, while American Indians and Pacific Islanders had roughly the same ownership rates among franchised and nonfranchised businesses. Asians owned 11.8 percent of all franchises, compared to 6.3 percent of nonfranchised businesses. Hispanics owned 10.4 percent of all franchised businesses, compared to 7.2 percent of nonfranchised businesses. Blacks owned 8.0 percent of all franchised businesses compared to 4.7 percent of nonfranchised businesses. [3]

Despite how it is often characterized, franchising is not an industry. Franchising is a business growth model used *within* nearly every industry. More than 230 different sectors that are represented in franchising, and franchise brand companies offer a huge range of services from lodging to fitness, home services to health care, plumbing, pest control, security, and lawn care.

Furthermore, notwithstanding any popular misapprehensions, franchising consists of far more than merely the "fast food" industry. As you can see in the graphic below, there are far more local (50 percent of all franchised brands) and regional brands (34 percent of all franchised brands) whose names you might not recognize than the fast food giants that garner the most attention. In fact, 63 percent of companies that franchise are not in the food services at all, and 83 percent are not in fast food. [4]

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[1] *Franchiseeconomy.com* (2021).

[2] Joseph H. King, Jr., Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees, 62 Wash. & Lee L. Rev. 417, 420–21 (2005).

[3] Franchised Business Ownership by Minority and Gender Groups. IFA Foundation (2018).

[4] FRANdata research. (2021).

There are two principal explanations given for the popularity of franchising as a method of distribution. One is that it "was developed in response to the massive amounts of capital required to establish and operate a national or international network of uniform product or service vendors, as demanded by an increasingly mobile consuming public."[5] The other is that "franchising is usually undertaken in situations where the franchisee is physically removed from the franchisor, and thus where monitoring of the performance and behavior of the franchisee would be difficult."[6] These two motivations are consistent with a business model in which the licensing and protection of the trademark rests with the franchisor and the capital investment and direct management of day-to-day operations of the retail outlets are the responsibility of the franchisee, which owns, and receives the net profits from, its individually owned franchise unit.

It is typical in franchising that a franchisor will license, among other things, the use of its name, its products or services, and its reputation to its franchisees. Consequently, it is commonplace for a franchisor to impose standards on its franchisees, necessary under the Federal Lanham (Trademark) Act to protect the consumer. Such standards are essential for a franchisor that seeks to ensure socially desirable and economically beneficial oversight of operations throughout its network. These standards allow franchisors to maintain the uniformity and quality of product and service offerings and, in doing so, to protect their trade names, trademarks and service marks (collectively the "Marks"), the goodwill associated with those Marks, and most importantly, the protection of the consumer. Because the essence of franchising is the collective use by franchisees and franchisors of Marks that represent the source and quality of their goods and services to the consuming public, action taken to control the uniformity and quality of product and service offerings under those Marks is not merely an essential element of franchising, it is an explicit requirement of Federal trademark law, which is discussed further in the section below titled "Franchising already 'heavily regulated.'"

The State of the Small Business Economic Recovery

The COVID–19 pandemic battered small businesses in historic ways. By August 2020, within the first 6 months of the COVID–19 outbreak, an estimated 32,700 franchised businesses had closed; 21,834 businesses were temporarily closed, while 10,875 businesses were permanently closed.

While the pandemic affected nearly all small businesses, the SBA noted industry and demographic differences in the impact of the pandemic on business owners.

[5] Kevin M. Shelley & Susan H. Morton, "Control" in Franchising and the Common Law, 19 Fran. L. J. 119, 121 (1999–2000)

[6] Paul H. Rubin, The Theory of the Firm and the Structure of the Franchise Contract, 21 J. Law & Econ. 223, 226 (1978).

Among demographic categories, there were larger declines for Asian and Black business owners. The total number of people who were self-employed and working declined by 20.2 percent between April 2019 and April 2020. The Hispanic group experienced a higher decline, at 26.0 percent. The highest declines were experienced by the Asian and Black groups, with a decline of 37.1 percent for the Asian group and 37.6 percent for the Black group. Meanwhile, leisure and hospitality had the largest decrease in employment, at 48 percent, and had the third largest small business share, at 61 percent. [7]

Franchise business owners have been grateful to policymakers for the Federal response. Congress provided $525 billion in emergency funds extended through the Paycheck Protection Program and $194 billion through the Economic Injury Disaster Loan program to help businesses in need.

By the end of this year, franchising will have recovered to nearly 2019 levels in most metrics, including business growth and gross domestic production. In 2021, 26,000 new franchise businesses will open and 800,000 new jobs will be added by new franchise businesses. 8.3 million people will be employed by new franchise businesses by the end of this year. [8]

The hotel industry has been uniquely negatively affected by COVID–19. According to the American Hotel and Lodging Association's July 2021 analysis, the pandemic erased 10 years of hotel job growth. [9] The pandemic also devastated the hospitality industry workforce. For every 10 people directly employed on a hotel property, hotels support an additional 26 jobs in the community, according to a study by Oxford Economics. With hotels expected to end 2021 down nearly 500,000 jobs, based on the pre-pandemic ratio, an additional 1.3 million hotel-supported jobs are in jeopardy this year without additional support from Congress. [10]

Leisure travel is starting to return, but the hotel industry's road to recovery is long and uneven, with urban markets disproportionately impacted. Projections have improved since January with the uptick in leisure travel, but the industry remains well below pre-pandemic levels. As of May of this year, twenty-one of the top 25 U.S. hotel markets remaining in a depression or recession. Urban hotels were still in a "depression" cycle while the overall U.S. hotel industry remained in a "recession." Urban markets, which rely heavily on business from events and group meetings, continue to face a severe financial crisis as they have been disproportionately impacted by the pandemic. Urban hotels were down 52 percent in room revenue in May 2021 compared to May 2019. [11]

Despite all of these economic headwinds, and if Congress does no harm, franchise businesses in all sectors will surely accelerate the post-COVID economic recovery. While the number of unemployed individuals peaked at nearly 30 million workers early in the pandemic, such workforce dislocation forced many individuals to try entrepreneurial ventures, including starting new franchise businesses, which will likely result in the economic growth cited above. This outsized growth should be expected because franchising has helped fuel recovery following past economic downturns. After the financial crisis from 2009–2012, employment in the franchise sector grew 7.4 percent, versus 1.8 percent growth in total U.S. employment. [12]

Now the biggest questions facing franchise small businesses like mine during the economic recovery are legislative and regulatory risk. There is no more significant and avoidable threat to small business job creators than the PRO Act.

The Extremist PRO Act

The PRO Act is perhaps the most anti-small business bill ever introduced in Congress. There must be a better way to advance worker rights in an evenhanded way. Instead, on the backend of a global pandemic that had a disproportionately negative impact on Main Street businesses, business owners are facing this bill. It is incredibly disheartening to small business owners that this legislation has already passed the U.S. House of Representatives and is cosponsored by 47 U.S. senators.

The PRO Act puts the very existence of franchise businesses in jeopardy. The PRO Act cobbles together more than 50 imbalanced amendments to the National Labor Relations Act which are designed to tip the scales against small businesses.

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[7] Daniel Wilmoth, The Effects of the COVID–19 Pandemic on Small Businesses. U.S. Small Business Administration (2021).
[8] Franchiseeconomy.com (2021).
[9] Economic Impact of the US Hotel Industry. Oxford Economics (2021).
[10] *Ibid*.
[11] *Ibid*.
[12] FRANdata research (2021).

Two provisions are exponentially worse than the rest for franchising—an industry that empowers new entrepreneurs to operate under a national brand, letting small businesses and national companies grow faster and contribute more to local communities and the wider economy. The enormous risk associated with the PRO Act will serve only to corporatize the franchise model, encouraging brands to grow through franchisor-owned outlets, while shying away from offering ownership opportunities to new entrepreneurs.

First, the bill would enshrine in Federal law a boundless "joint employer" standard, making franchise brands responsible for actions taken by small businesses at the unit level. This puts franchisors at risk of being sued for things they never did and had no power to stop.

Faced with the PRO Act's new liability regime, franchise companies are much less likely to partner with local entrepreneurs, which means small business ownership opportunities will dry up on Main Street. The joint employer standard created by the National Labor Relations Board in 2015 led to a nearly doubling of litigation against franchise businesses, cost franchising $33 billion per year, and preventing the creation of 376,000 new jobs in the four ensuing years. While the NLRB eventually restored the traditional, clear joint employer standard in 2019, the PRO Act would reverse course, make that harmful standard permanent, and result in lower job creation and small-business formation.

The bill's second provision directly impacting franchising is perhaps worse. It would institute a three-part, so-called "ABC test" to determine when individuals can be classified as independent contractors. The purpose is to classify more workers as direct employees, thereby making them easier to unionize. The PRO Act's ABC test language is so broad that it would likely define franchisees as employees of their brand, instead of the independent small business owners that they really are. This would eliminate the distinction at the heart of franchising—and the opportunities and incentives within the business model.

As one consequence, these changes would mean hiring numerous attorneys at the franchisor level to oversee employment issues and claims over which the franchisor has no control. Ultimately, the additional costs to the franchisor would translate into additional cost to independent owners like me, that would make the franchise business model untenable. These changes would take away the equity and independence of franchise small business owners and would put their success and livelihoods, including mine, in jeopardy.

Ironically, these changes would encourage concentration of business into one big corporation at the franchisor level. As franchise contracts come up for renewal, franchise brands will be encouraged to convert locations into corporate locations. Rather than assume the risk, they will grow using a corporate model instead.

Without a doubt, these seismic shifts in employment policy would hurt small businesses and provide fewer opportunities, particularly for women and People of Color. Growing a business through the corporate model does not provide ownership or wealth building opportunities. We need policy and regulatory changes that will drive wealth creation and new ownership opportunities for the most underserved communities, not hinder it.

Due in large part to its treatment of franchise small businesses, the PRO Act puts the national economic recovery at risk. As written, the PRO Act would harm current franchise owners through a potential massive expropriation of equity. It would harm potential franchise owners through a limiting of economic opportunities available to them. It would harm franchise employees through a sudden change of their places of work away from their communities and into a large corporation. Finally, it would harm franchise brands by upending the business model that they use to grow and expand in communities across the U.S.

California Experience

In my home state of California, small business owners are constantly facing new public policy threats to how we operate.

One of the most invasive laws passed in California has been Assembly Bill 5, or A.B. 5, which became effective in January 2020. The law established California's "ABC test" for independent contractor status. The upshot of A.B. 5 is that it classified nearly all wage-earning workers as employees, and severely affected thousands of independent contractors that operated in the state.

IFA and several other parties are challenging in court the California ABC test's application to franchisors and franchisees. IFA is arguing the test is preempted by the FTC Franchise Rule and the Lanham Act, imposes excessive burdens in viola-

tion of the Commerce Clause of the U.S. Constitution, and violates the Fifth and Fourteenth Amendments.

Relevant to the PRO Act, the IFA lawsuit argues that California's ABC test is irreconcilable with the Federal laws that regulate franchising. Under Prong A of the A.B. 5 test, a person may not be classified as an independent contractor unless that person is "free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact." Moreover, under Prong B, a person may not be classified as an independent contractor unless that person "performs work that is outside the usual course of the hiring entity's business."[13] In the context of a franchise relationship, under California law, the operation of a franchisee's business must be "under a marketing plan or system prescribed in substantial part by the franchisor," and "substantially associated with the franchisor's trademark." Without meeting these requirement of the California Franchise Investment Law, a franchise brand's registration with the state would be rejected, but by meeting them, they run the very real risk of running afoul of the rigid ABC test under A.B. 5. This dissonance between the ABC test and the franchise business model was emphasized by the United States District Court for the District of Massachusetts in the case of *Patel v. 7-Eleven, Inc*.

A.B. 5 itself recognized that it created an unworkable framework for workers in many industries, as the law as amended currently includes over 100 exemptions for categories of workers. These include licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, commercial fishermen, workers providing licensed barber or cosmetology services, and others performing work under a contract for professional services, with another business entity, or pursuant to a subcontract in the construction industry.[14]

Since A.B. 5 became law, several other industry groups have fought for exemptions to the law. App-based transportation and delivery companies prevailed in A ballot initiative called **Proposition 22** in November 2020 passed with 59 percent of the vote and restored app-based transportation and delivery companies as independent contractors under California labor law. Numerous lawsuits challenging A.B. 5, in sectors ranging from journalism to trucking, have been filed in state and Federal courts, and these legal challenges continue today.

As poorly drafted as California's ABC test was, the PRO Act's ABC test is far more expansive. There are no worker exemptions in the PRO Act's independent contractor provision. Simply put, as harmful as A.B. 5 is, it at least recognizes that the ABC test is inappropriate for determining independent contractor status in numerous industries and business sectors. The PRO Act in no way recognizes this fact, and instead imports a highly flawed standard across the board, applicable to all workers in all industries.

Franchising Already "Heavily Regulated"

Senators should keep in mind that multiple Federal statutes currently provide the rules of doing business by the franchising method. Indeed, franchising is already a "heavily regulated" method of doing business,[15] as it is fundamentally governed by the Lanham Act, the FTC Franchise Rule and multiple joint employment tests.

As mentioned earlier, the Lanham Act is the Federal law regulating trademarks, service marks, and unfair completion, and it mandates that owners of trademarks must "maintain sufficient control of the licensee's use of the mark to assure the nature and quality of goods or services that the licensee distributes under the mark."[16] Moreover, because the Lanham Act provides that a trademark can be deemed "abandoned" when "any course of conduct of the owner . . . causes the mark . . . to lose its significance,"[17] franchisors have a strong incentive to control the nature and quality of the good or services sold by their franchisees. As a result, franchisors are compelled to establish and monitor brand standards and provide global oversight of their franchisees. Likewise, it is imperative that franchisees protect their franchisors' brands, and the trademark value of those brands. A franchisee, functioning as an independent operator under a Brand License, is trusted and relied upon (by the franchisor) to protect the trademark value in imple-

[13] California Labor Code 2775(b)(1)(B).
[14] Text of California Assembly Bill 5 (2019).
[15] Cislaw v. Southland Corp., 4 Cal. App. 4th 1284, 1288 (1992).
[16] 15 U.S.C. § 1064(5)(A).
[17] 17 15 U.S.C. § 1127.

menting brand standards, and to exercise day-to-day management over the operation, since the franchisor is not present at every individual franchise location. Because franchising requires the collective use by franchisees and franchisors of Marks, all stakeholders affiliated with a brand collectively share risks and rewards. For example, if a franchisee fails to take adequate steps to protect the brand or otherwise engages in an action that injures the brand's reputation, the damage inflicted on the brand impacts all of the brand's stakeholders, including all other franchisees and the consuming public. With that being the case, it is essential to franchising that all the stakeholders understand the expectations for brand protection standards and take all necessary action to ensure that those standards are met. Furthermore, these rights and obligations are enunciated in well-drafted franchise agreements and reviewed in advance under a prescribed set of mandated disclosures.

The Federal Trade Commission (FTC) authorizes and regulates the sale of franchises in the U.S., and defines a "franchise" in part as "any continuing commercial relationship or arrangement" whereby the franchisor promises that the franchisee "will obtain the right to operate a business that is identified or associated with the franchisor's trademark. . . ."[18] In 1978, the FTC published the Franchise Rule, which provides prospective purchasers of franchises information they may use to weigh the risks and benefits of a franchise investment, and requires franchisors to provide potential franchisees with specific items of information about the offered franchise, its officers, and other franchisees. Importantly, the Franchise Rule mandates that a franchisor "exert a significant degree of control over the franchisee's method of operation."[19] However, many state independent contractor laws require businesses to classify workers as employees unless they are "free from control" and direction while performing their work. Taken in a literal sense, this requirement would ignore the realities of the franchise model, and so the conflicting "control" requirements of the FTC's Franchise Rule and the Lanham Act must be viewed as preemptive. Below is a discussion of a recent Massachusetts decision in which a Federal judge ruled in favor of a franchisor based on the Franchise Rule's requirements, finding that the Rule preempted the conflicting state independent contractor standard.

Franchising is also subject to joint employment tests under multiple Federal laws. Under the Fair Labor Standards Act, courts around the country have issued divergent rulings on the joint employer issue, most of which purport to apply the Department's previous, outdated joint employer regulation. The number of different standards and factors employed in each test by various courts has bewildered and frustrated employers seeking to operate franchise businesses efficiently and profitably, without inadvertently creating joint employment. By way of examples only, the Second Circuit has applied a six-factor test in *Zheng v. Liberty Apparel Co.*, while the Third Circuit applied four different factors in *Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, the Fourth Circuit utilized a different six-factor test in *Salinas v. Commercial Interiors, Inc.*, while various cases in the Seventh Circuit have applied "economic realities" tests (that are indeterminate in nature), and the Eleventh Circuit applied an eight-factor test in *Freeman v. Key Largo Volunteer Fire and Rescue Dept., Inc*. Adding to this complication, under Federal civil rights laws, courts have applied (again, not always uniformly or consistently), a multi-factor "common law" test.

Most relevant to the PRO Act, prior to the promulgation of joint employer regulations by the NLRB in 2020, courts and the Board interpreted "joint employer" status under the NLRA inconsistently, most notably adopting a standard in 2015's *Browning-Ferris* case that would find an employer to be the joint employer of another company's employees, where an employer exercised only indirect, limited, or routine control of an unrelated firm's employees, or perhaps only reserved that right to control.

As discussed above, the PRO Act would create a severe conflict in Federal law. Long-standing Federal trademark law requires a franchisor to exert certain brand controls over its franchisees, to protect the franchisor, all franchisees, and most important, the consuming public, which can know with certainty that it will have the same quality of experience or purchase across a franchisor's numerous franchises around the country or around the world. The PRO Act, on the other hand, would use those legally required obligations to create liability for franchisors for acts over which they had no control, simply because they were fulfilling their obligations under the Lanham Act and FTC Franchise Rule. Put most simply, the PRO Act ultimately tells franchise brands, "heads I win, tails you lose."

[18] 16 C.F.R. § 436.1(h)(1) (the "Franchise Rule").
[19] *Ibid*.

Alternatives to the PRO Act

There are so many better ways to promote both worker AND small business interests than the extremist PRO Act.

The franchise business community stands ready to collaborate with senators to find policies that will better support workers and employers. We support efforts that encourage brands to share information and best practices with franchise owners on COVID–19 safety measures and employee education. Thus, rather than considering the extremist PRO Act, which would dramatically change liability rules during a small business economic recovery, the Senate should be proactively finding ways to encourage businesses to engage in important corporate social responsibility activities and develop apprenticeship training programs by providing a safe harbor for these practices from additional liability.

Myths and Realities About Franchising

Through no fault of ours, franchise business owners have faced an increasing number of public policy threats to our mode of operation. One critic, Brandeis professor Dr. David Weil, whom the Committee is currently considering to return as Wage and Hour Administrator, claimed in his 2014 book, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, that businesses (namely, franchise brands) have increasingly shed their role as direct employers of the people responsible for their products, in favor of outsourcing work to small companies (franchise owners). While Dr. Weil may have his own ideological motivations for promulgating his assumptions, he claims that the result of the franchise business model has been declining wages, eroding benefits, inadequate health and safety conditions, and ever-widening income inequality for workers. These claims are simply not borne out by the facts.

To test Weil's hypotheses, earlier this year the IFA asked Oxford Economics to examine the value of the franchising model along a range of dimensions. There were three goals for this research:

(1) Analyze pay, benefits, and training at franchised firms and compare these attributes with similar non-franchise employers where possible;

(2) Assess franchising as a path to entrepreneurship and uncover areas where the business model provides vital support to prospective business owners; and

(3) Understand how franchisees are embedded in their local communities by examining their supply chains and charitable giving.

While the full report will be released in Fall 2021, the primary findings of a survey of more than 3,500 franchisees is summarized below:

(1) FRANCHISES OFFER PAY, BENEFITS, AND TRAINING ON PAR WITH COMPARABLE NON-FRANCHISE SMALL BUSINESSES. To determine how wages at franchise firms stack up, the report will explore wage data from a sample of 3,700 franchise and 137,000 non-franchise small businesses, drawn from a payroll data base. An econometric analysis of workers' wages controlling for a variety of factors finds that workers at franchise firms earn slightly more than workers at non-franchise firms, although the difference is statistically insignificant. This is consistent with existing academic research, including Cappelli and Hamori (2008) and Kruger (1991). Franchise firms in our dataset are somewhat larger on average (13.6 versus 9.6 distinct workers per month), in line with results from the 2016 Annual Survey of Entrepreneurs. An analysis of newly hired workers also finds that starting wages, wage growth, and worker turnover are extremely close between franchises and non-franchises, while franchise workers were somewhat more likely to be promoted to manager (14 percent of remaining workers after 19 months vs. 11 percent at non-franchises).

(2) FRANCHISING OFFERS A PATH TO ENTREPRENEURSHIP TO ALL AMERICANS, BUT ESPECIALLY TO NEW ENTREPRENEURS AND WOMEN. The 2016 Annual Survey of Entrepreneurs (ASE) suggests that franchise businesses tend to be larger than non-franchise businesses. The report suggests that, on average, franchises report sales 1.8 times as large as non-franchise businesses and provide 2.3 times as many jobs as non-franchise businesses. Sales and jobs in franchised businesses exceed non-franchised businesses across all demographic cuts, including gender and race. For example, Black-owned franchise firms earn 2.2 times as much in sales compared to Black-owned non-franchise businesses, on average.

(3) FRANCHISES ARE LOCALLY OWNED AND THIS KEEPS RESOURCES IN THE LOCAL COMMUNITY. Unlike the multi-unit company-owned business model, franchises allow franchisees to buy and own the units they operate. By doing so, franchisees essentially become small business owners, who live and work in their communities. The brands they represent do not ship workers in from other parts of the country, but rather franchisees recruit and train local residents. The franchise model therefore encourages local employment and wealth-sharing with local communities.[20]

While some use Dr. Weil's core hypotheses as justification for the PRO Act, we can now see that many of Weil's core assumptions about franchising are incorrect. This forthcoming Oxford Economics report will show that franchises offer wages, benefits, and training on par with similar non-franchise small companies. The study will also show that franchising offers a path to entrepreneurship to all Americans, but particularly to first-time owners and women. Last, the report will highlight how franchisees are embedded in their local communities through their local supply chains and charitable giving.

In sum, all of the economic opportunity and contribution made by businesses operating under the franchise model is on the line as the Senate considers the PRO Act. It's not too late for lawmakers to realize the unintended consequences of the PRO Act, to avert course, and to protect small businesses at a time when many Main Street owners are simply trying to pay their bills with uncertain income during the global pandemic. Millions of workers and companies, and not just franchises, will be harmed if the PRO Act ever becomes law.

Conclusion

Franchise small businesses are poised to lead our country's economic recovery and are particularly well-suited to ensuring that hard-hit minority communities have access to the opportunity and equity they need to build back better. Unfortunately, the extremist PRO Act jeopardizes that.

Put simply, this legislation could end the franchise business model, the business format that has perhaps provided the most accessible path to business ownership for entrepreneurs of all backgrounds. It makes little sense to promote organized labor's political power at the expense of women entrepreneurs, veteran entrepreneurs, LGBTQ+ entrepreneurs and entrepreneurs of Color.

Thank you Madam Chair, for holding this hearing and for the invitation to speak on behalf of small business owners everywhere. While I am honored to participate today, it is important to recognize and respond to the legislative overreach represented by the PRO Act. I urge all members of this Committee to support locally owned businesses in your states by stopping this legislation. I look forward to answering any questions you may have.

The CHAIR. Thank you again to all of our witnesses this morning. We will now begin a round of 5 minute questions of our witnesses, and I ask our colleagues again to please keep track of your clock. Stay within those 5 minutes. Mr. Pearce, the National Labor Relations Act has not been significantly updated since 1947.

This failure to update the law has led to significant problems for workers trying to exercise their rights. And Dr. Schierholz, you have led research into the impacts of union membership for workers and the impact of declining union membership on working families for our economy. So let me ask both of you, what would be the impact of updating labor laws to enable more workers to have a voice in their workplace? Mr. Pearce, I will start with you.

Mr. PEARCE. Thank you for the question, Chair Murray. The National Labor Relations Act was created for the purpose of providing employees with the opportunity to have workplace democracy. Workplace democracy provides an opportunity for employees to negotiate a collective bargaining agreement. A collective bargaining

[20] Oxford Economics (2021).

agreement is essentially private law of the plant where—which is mutually negotiated and gives workers a voice. The impact of that would be to provide more protections to employees, more opportunities for employees to negotiate circumstances like the pandemic, to provide an ability for both the employer and the employees themselves to have equal voice at the table to overcome issues as they come up, whether they be catastrophic issues or economic issues, and wages and hours and safety issues.

The CHAIR. Okay, thank you.

Dr. Schierholz.

Ms. SHIERHOLZ. What we know is over the last four decades, inequality has risen dramatically. Wages have really stagnated for working people for most of that period. And a big chunk of those trends is due to declining unionization. So the Pro Act, which would boost unionization, make it so workers who want to join a union, are able to do so. It would reduce inequality. It would put thousands of dollars per year in the pockets of working people. It would raise their benefits. It would raise their—improve their working conditions. It really would push us toward an economy that works for all that doesn't just work for a thin slice of people on the winning end of rising inequality.

The CHAIR. Thank you. Mrs. Heldman, thank you for your courage today in telling your story. No one should be denied the ability to join together with other workers in the workplace to advocate for improved wages and working conditions. Tell us what it would mean for you to have a greater say in your workplace.

Ms. HELDMAN. Well, it would mean——

The CHAIR. Do you want to turn on your microphone?

Thank you.

Ms. HELDMAN. Thank you. It would mean to have a say on safety and issues on the workplace. And the Pro Act would give you the right, because without the Pro Act, you don't have that, you don't have the rights. With the Pro Act you would have your dignity, your justice, and respect, and you are going to be told by—when you are being stole your rights and everything, you can be told by policemen when you want to report this injustice, that you need a union that the law can't protect you.

The CHAIR. Thank you. Dr. Shierholz, you have dedicated your career to studying the economics of work, including union memberships' effect on wages and job quality for workers of color and women. Why does union membership have such a positive impact on workers who make low wages or workers of color, women, and other groups that face barriers in the workplace?

Ms. SHIERHOLZ. Yes, it is a good question. I can talk—I will talk first about the impact on women. We know that the unionization rate for men and women right now is about the same. Like it is no longer the case that workers—that women—that men disproportionately are in unions. And one of the reasons for that is that unions really do help women more because they raise their wages, raise their benefits, raise—improve their working conditions. We know one of the things that is still true in our society today is that women shoulder disproportionate responsibility for care work. One of the things unions do is make sure workers have greater paid sick leave, they are more likely to have vacation pay, holiday pay,

more likely to have more input into their schedules, more advance notice of their schedules.

Those are the kinds of things that make it possible for many women who have care responsibilities to work, or at least to work without enormous chaos added to their lives. And I will stop there because I have taken a bunch of time. But the benefits of unionization to workers, to the lowest wage workers are absolutely enormous.

The CHAIR. Thank you very much.

Senator Braun.

Senator BRAUN. Thank you, Madam Chair. I think today the conversation gets framed very well by the testimony from Mrs. Heldman and Ms. Sarolia. As someone who has owned the business and treated my employees like family, that is a tragic story. That is the reason you need unions out there. But you can't necessarily generalize upon it. And like anything that is done, you do not want to throw a wet blanket on the point I made earlier, that if you are making it more difficult for small businesses to become large, you are defeating the purpose of even what you are trying to attempt here in the Pro Act.

I think if we have a second round of questions I will have questions for the entire panel. I am going to start with Ms. Sarolia. You are in California. I cited earlier that my own business got there 10 years ago. And you have got—you are in the hotel business. What are you hearing from the abundance of other employers, especially in California, about something like this?

I cited 280 organizations out there thinking that this Act is going to wreak havoc on the ability to start a small business and maintain it. What are you hearing across the spectrum in California?

Ms. SAROLIA. [Technical problems] answer the question that Senator Murray asked earlier is that for me, it takes away my independence to be able to directly work for my employees. A lot of my colleagues and I feel that we are one industry—sorry, one of the industries that can work closely with our employees. And I have a great story. I had one hotel in Temecula where we groomed three general managers. So the upward mobility of any employee starts from housekeeping to front desk to all the way to management. We feel that this Pro Act would impede that and take away our independence to work directly with them.

Senator BRAUN. Thank you. And chances are this is not going to pass because not all Democrats are for it. But then the next thing that will happen is you will get an executive order. And the bureaucracy and the regulatory side of life is just as complicated in many cases as it is with legislation coming down upon you. What do you—do you fear that if legislation isn't passed, and hopefully it won't in this particular Act because it needs a lot of refinement, what happens then? What has been your experience dealing with regulations through a bureaucracy as opposed to a law itself?

Ms. SAROLIA. I am going to take again—so there is some—it is not that we oppose the entire Pro Act. I do believe that there are—we need to sit together and work on ideas that we can work together that support laborers, but that doesn't destroy the franchise model. So I think every time an Act is passed, I don't think they look to how it affects small businesses. I think we need to do a bet-

ter job writing policies that support us to be able to employ people in our community who have livelihoods that they have to provide for their families.

Sometimes when we don't pass the correct Act, it impedes that. I just—25 years ago I got into this business of running a hotel. It was family run, right, so we all had family. Ten years later, we are employing communities. Today, our company is run by people that are not family. Most of my team members are outside. And anything I can do to help them grow, to pay them more, as the standard of living increases and rises, I want to have policies that support that. So I hope I answered your question.

Senator BRAUN. I am going to get into one of the particulars of the Pro Act and I guess that is where we need to focus, because a lot of the general discussion I don't think is going to be as palpable to folks in terms of what this does. Pro Act would require employers to turn over the personal information of their workers to unions, including their shift information, emails, home addresses, and phone numbers. As a business owner, would you feel comfortable doing that in light of protecting the privacy of your employees?

Ms. SAROLIA. No, and I think it is very simple. We as the employer take the risk of our employees. So protecting them and their interests is our No. 1 priority. When it shifts to the franchisors, I don't know if the risk factor is there for them. So with that to be the case, I would say that is my statement.

Senator BRAUN. Then this other question of the corporate versus franchisee. Do you consider yourself an employee of your brand company? And do you want to be an employee of your brand company, or do you need a separation like you might lose through this?

Ms. SAROLIA. No, Senator, thank you for asking that question. I am an independent entrepreneur. Local franchise businesses owners like me have direct control over their own hiring practices, working conditions, wages, and hours of operation. I have a separate employer identification number from all of my franchisees. They file their own taxes, are responsible for following all applicable state, local, and Federal law. So we are already being governed to take care of our employees and their best interest. I just don't think—the answer is no to your question.

Senator BRAUN. Thank you.

The CHAIR. Thank you.

Senator Hassan.

Senator HASSAN. Thank you. Sorry for the delay and thank you, Chair Murray and Ranking Member Braun this morning. And thank you to all of our witnesses for being here. First question to you, Mr. Pearce. We have to protect the rights of workers to organize and collectively bargain. So-called right to work legislation has been passed into law in a number of states. And there are ongoing efforts to pass these bills in other states, including my home State of New Hampshire.

We know that these so-called right to work laws are actually right to work for less laws, making it significantly more difficult for workers to form unions and resulting in lower wages, more dangerous working, conditions and less access to health care and other

benefits. So, Mr. Pearce, can you explain what Congress can do to address this and help workers collectively bargain?

Mr. PEARCE. Thank you for the question. I am so eager that I didn't turn on my mic. Well the Pro Act deals directly with the question of right to work laws. They eliminate that from the National Labor Relations Act. Right to work law exists because it was part of those compromises that were made for the passage of the National Labor Relations Act, and it has an insidious past. Right to work laws emanated from legislation that was just insisted by Southern Senators in order to substantially control people of color in the South from being able to join and enjoy the benefits of unionization.

Those vestiges of slavery, adjacent processes need to be removed. Otherwise you have situations where a union is trying to effectively represent employees, including employees that do not have to pay a dime toward those services, yet the union would have to have a duty under the law to zealously represent, irrespective of how expensive the process is. That has to change.

Senator HASSAN. Thank you. Another question for you. The COVID–19 pandemic presented new health and safety challenges for workers all across the country and highlighted widespread inequities. The pandemic has also made it more difficult for workers to gather and discuss challenges that they face in the workplace. So how can Congress help address worker inequities that the pandemic exacerbated?

Mr. PEARCE. Well, the Pro Act provides opportunities for workers to be able to unionize more freely. Those oppositions to unionization impacts workers' ability to be able to deal with things like the pandemic. As I stated in my opening, it is because of many unions being present at a facility that protections were brought in, exposures to bad policies and vulnerabilities were made public as a result of union intervention. The Pro Act's provisions will provide that kind of protection for employees.

Senator HASSAN. Thank you. Dr. Schierholz, I have a question for you. We know that when workers organize, it can result in better working conditions and benefits across the board. This can be particularly meaningful for women whose earnings continue to lag behind their male counterparts. So can you talk about how expanding the rights of workers to organize will support women in the workforce, including helping them close the gender pay gap and increase retirement savings?

Ms. SHIERHOLZ. Yes, that is an important—that is a really important point. And I talked a little bit about this, but I think what unions do is that they raise wages for workers by allowing workers to join together with their colleagues in a union and collectively bargain. We see higher wages that women—women in unions have higher wages than similar women who aren't in unions, better benefits, better working conditions.

Then I mentioned this, but I will just say it again because it is so worth repeating, this idea that, the point that workers and unions have better schedules. They have better—they have more control over their schedules, they have more advanced notice over their schedules. And so what that means is that people, predominantly women in the society who have care responsibilities, have

more predictability in their job, and that makes their lives, their working lives much more possible.

Senator HASSAN. When they earn more, too, they can save more for retirement, right?

Ms. SHIERHOLZ. Well put. Yes.

Senator HASSAN. Okay. Thank you. Last question for Mrs. Heldman. Many workers aren't aware of the rights that they have in the workplace, including laws to protect the rights of workers to organize. You have tirelessly worked to collectively organize your workplace. Do you think workers need to have greater access to information about their right to organize under the law? You need to——

Ms. HELDMAN. Yes, they do. And I mean, when we try to organize, they always really go out there and they—some of these people do not know their rights to organize, so they intimidate them. And they follow you around and they take you to these captive meetings. And as you are walking into these captive meetings, they are yelling, vote no, vote no at the top of their lungs. That is our supervisors, and they sit up there, they say vote no.

You go out on the floor, and they follow you around, they still intimidate you. And they tell these coworkers of mine, they say, if you vote yes for the union, you are going to get fired. And some of these people don't really know their rights and they lie to them about the union, and they lie to them about everything.

That is why we haven't won our union elections. If not, we would have had it 20 years ago. We would have won the first one.

Senator HASSAN. Thank you very much. And thank you, Madam Chair, for your indulgence.

The CHAIR. Thank you.

Senator Tuberville.

Senator TUBERVILLE. Thank you, Madam Chair. And thank you for being here today, all four of you. This a short statement here. It is a huge topic back in my State in Alabama, huge. Basically this is coming from the people of Alabama. The Pro Act represents a massive power grab to override the will of the voters. Federal power grabs like these are unconstitutional and go against our entire system of Government. The Pro Act would overrule the right to work laws across the country and force tens of millions of employees to join a union.

Currently, only 27 states have a right to work laws. Alabama is one of them. Right to work laws give workers freedom. And more importantly, it gives workers the freedom to choose whether to unionize or not. Alabama's right to work law has been a huge benefit for our state because we are in the car business. We have got about six or seven car businesses and manufacturers from Hyundai, Honda, Toyota, Mercedes, 40,000 manufacturing jobs, 40,000. We make a million cars, trucks a year, $8.2 billion, and we are not a union.

By forcing unionization on every worker and sector, many industries would grind to a halt, especially in Alabama. Employer costs would skyrocket, which could lead to a loss of jobs, not to mention like States like Alabama lose the ability to recruit companies. The top 10 CEO this morning was in my office, Airbus, a large corpora-

tion. I asked him about the Pro Act, and he said it would kill us. Absolutely kill us.

This corporation would move back to Europe and to other countries. They have to make a profit. But they also love to come where people have the right to choose. On top of that, according to the State Policy Network, the Pro Act would negatively affect 57 million American workers who call themselves freelancers. Unions, to some degree, they have helped this country. They have helped the country. However, in 2021 there are multiple Government entities that exist purely to uphold workplace safety standards and protect workers. We got the—we have got Department of Labor. We got OSHA. Are we going to start unions and just close that down.

We need to give workers the ability to choose. This is a free country. Choice creates competition, competition breeds success. We used to compete in this country. We are not competing anymore. We want everybody to be the same. Everybody is not the same. You have got the right to do as much as you want to do, if you put your nose to the grindstone. President Biden says, and I quote, "every worker should have a free and fair choice to join a union." I believe in that statement. But the Pro Act would tip the scales.

Among other things, as you have heard, it requires workers' personal contact information to be sent to a union. We are already having problems with that. Removes voters to a secret ballot, subject of the union coercion, being able to vote out loud. And limits the information workers may receive during a union organizing campaign. That doesn't sound free to me.

This is still a free country, folks, free country, and this Pro Act is not going to do anything for us, especially for the people that run this country. That is the hard working Americans. Mrs. Sarolia, you mentioned that in your testimony, the COVID–19 pandemic hit businesses especially hard. If the Pro Act is passed, how will this provision slow down this much needed recovery and why?

The CHAIR. You can turn on your microphone, please.

Ms. SAROLIA. Can you repeat it one more time?

Senator TUBERVILLE. If the Pro Act is passed, how is that going to affect your business?

Ms. SAROLIA. More so business—it is like 25 years ago we got—I owned my first hotel in 1996 thinking that I would be able to employ people in my community. If the Pro Act passes, I think the control that I had over overseeing my operation would be given to a third party like the unionization or even our franchisor. Someone that sits 4000 miles away from me wouldn't be able to control that. I am going to tell you a little quick story what happened in 2020, right.

Our Government shut us down for good reasons to make everyone feel safe. I was scared and I asked my family members, we are going to have to jump in and pitch in and help our employees because we need to allow them to be comfortable doing what they need to do. So we got—we retained 100 percent of the people that stayed. For those that didn't stay, we had to roll up our sleeves and start working again.

If the Pro Act passes, I don't think we would be having a business to run anymore. That would be No. 1, because the scare of anybody wanting to own under that Pro Act, I don't think it is

going to be a small business and I don't think it is going to get an American dream story, and I definitely don't think I would be an entrepreneur. So I hope I answered your question with that.

Senator TUBERVILLE. Thank you. Thank you, Madam Chair.

The CHAIR. Senator Casey.

Senator CASEY. Thank you, Chair Murray. And I want to thank you and Senator Braun. Especially want to commend and salute the work of Senator Murray to lead the introduction of and work to pass the Pro Act. And I want to as well thank our witnesses for being here for your testimony. I want to especially thank Mrs. Heldman for her testimony and her uncommon courage coming forward. You are—that kind of courage is, as I said, all too rare. The fact that you came forward to help others come forward to tell their story. And we appreciate that. At the end of your testimony, you articulated the three words that you hope will encapsulate what a union would mean to you, dignity, justice, and respect.

I want to commend you for reminding us that is what this debate is all about when it comes to unionization. So I salute your courage. I wanted to pose a question to Mr. Pearce, and I appreciate your work in this area, for many, many years and your scholarship, and for reminding us what the National Labor Relations Act it is not advisory. It is a statute that was passed in 1935. And I think we have seen it degraded for many of the reasons you outlined.

It is interesting that we need reminders but section 1, that you highlight on page 1 of your testimony, that outlines the protection, "by workers of full freedom of association, self-organization, and designation of representatives of their choosing." Nothing could be more American than that. But it has been badly undermined not only by the National Labor Relations Board, but by these efforts that Mrs. Heldman outlined. These union busting tactics that have gone on for years. I have seen it firsthand in Pennsylvania in many contexts, usually in the context over the last 20 years in health care, union busting law firms.

These are white-shoe law firms, big, big corporations, really. They get paid by the hour to bust unions. Simple as that. And it is in direct conflict with the National Labor Relations Act. So, Mr. Pearce, I would ask you this. How can we strengthen protections for workers when they are negotiating with their employer for the very first time?

Mr. PEARCE. Thank you, Senator Casey, for that question. It is a vital piece of the representation process to be able to effectively negotiate during the time that you first receive certification. The workers are hoping for the best. The employer sometimes does not necessarily take the union busting tactic during the election campaign. They lay back and then they wait for bargaining to hardball to be entrenched to be extremely recalcitrant.

Consequently, you have statistics that the Kate Bronfenbrenner study that I put in my testimony shows that less than 50 percent of unions are able to get a first contract in the first year. The Pro Act, what it does is it intensifies the obligation during that first year of negotiations.

It requires mediation. It requires that if the parties cannot reach an agreement, then it can be put to arbitration, where arbitrators make a determination as to whether or not negotiations are being

properly affected. The full court press on the first year of negotiations is a vital piece of the Pro Act that would facilitate bargaining going forward, because once that first year has passed and once that first contract is negotiated, collective bargaining will benefit for everybody.

Senator CASEY. Thank you very much. I will just conclude with this Dr. Shierholz. I don't have time to ask you a question. I will post some in writing. But on page one of your testimony, you said, and I quote, "a worker covered by a union contract earns 10.2 percent more in wages than a peer with similar education, occupation, and experience in a non-unionized workplace in the same sector." That and so many other statements that you articulated here today should be lifted up. Thank you, Madam Chair.

The CHAIR. Thank you.

Senator Moran.

Senator MORAN. Madam Chair, thank you very much. Let me direct my questions to Ms. Sarolia. Thank you, first of all, for being here today. I want to do what I can to increase the number of jobs that are available to Americans, and one of the likely places for that to occur is in entrepreneurship, new businesses, startups.

One of the places that happens frequently is in franchise relationships. So I want to see what you can tell me about how the Pro Act would hinder or help in regard to that new business startup and the opportunity for franchises to continue to grow. How would the franchise business model ability to promote entrepreneurship be affected by the Pro Act? I am sorry——

The CHAIR. If you can turn your mic on.

Ms. SAROLIA. Apologize for always—Senator Murray for forgetting that. The Pro Act is trying to put another barrier between for us having direct control over our business versus what the idea of what Pro Act is wanting to do, having the franchisor be involved in running our business. I don't think the ability for me to be able to grow would be there anymore, because it wouldn't be my business that I would be running. It would be someone else's business I would be running.

You can see how that is not really the right direction that we should go down to. My family has been in this business since 1952. Entrepreneurship is all they have ever done. I mean, we have grown from one hotel to if you look at my uncles and my aunts, we probably have 32, but none of us look like we have 32 hotels.

We are normal people, we roll up our sleeves, we are cleaning toilets, making rooms. I don't know if we would be able to do that if a franchisor gets to have better control over our business. I don't know if I answered your question.

Senator MORAN. You did. And I am sorry that you had to answer it twice. Three hearings, all at 10 o'clock this morning. Ms. Sarolia, the California AB5 experience with the ABC test led, I think, to some pretty real consequences for many, many California workers who had their livelihoods uprooted as a result of these policies. As you know, AB5 ended up being amended to allow exemption for certain category of workers.

The Pro Act contains no workers exemption. Given the broad consequences of AB5 and the ABC test on California workers, does it seem like an appropriate standard for the Federal Government?

Does AB5 seem like it should be the standard for what we might do in Congress?

Ms. SAROLIA. The answer to that question is no. While the Pro Act proposes to amend the National Labor Relations Act in AB5 amended California State law, franchises' reaction to the risk involved with both proposals has to be identical.

Corporate franchise brands will react to the increased risk by not franchising, taking back contracts when they are up for renewal, or otherwise taking away opportunities to risk what they created by both proposals. So what I am trying to say is that maybe my franchisor doesn't want to go into business with me because of the Pro Act, which definitely takes away from being an entrepreneur and a small business owner.

Senator MORAN. Thank you for your answers. Thank you, Madam Chair.

The CHAIR. Senator Kaine.

Senator KAINE. Thank you, Madam Chair and Senator Braun. And thank you to the witnesses. So I do think we all come at this from our own perspective. And it has been helpful to hear Mrs. Heldman and Mrs. Sarolia and Senator Braun share perspectives. So I will just offer mine in a minute. I grew up in a in a household very familiar with unions and small businesses. My dad ran an ironworking shop in the stockyards of Kansas City, Missouri, Iron Crafters. Iron worker organized, union members.

Five employees and a tough year, plus my mom and my two brothers and me. And in a really great year, maybe eight or nine employees, and union and a small business were just fine within the franchise. So I am hearing there are different business models, but union and small business work just fine. I am sure my dad had some disagreements over time with unions in a negotiation. You are going to do that.

But he always would tell us my business acumen will put my workers' kids through college, and their artistry and skill will put you boys through college. He told my two brothers and me that a lot. And I saw that they were artists. My dad, one of the honors of his life, was at one time the Iron Workers National Pension Fund, which has a board, three union reps, and three employer reps. Asked my dad to be on the board and he said, I only have five employees.

I mean, this is a national union. Yes, but you are fair. You are a good business owner. We want you on the board. And he did that for about 10 or 15 years, and it was one of the professional honors of his life. I want to clear up a couple of misconceptions or maybe elaborate a little bit about the Pro Act. So a statement was made earlier that it would take away people's right to vote secretly in a union election. And my understanding is that is not true at all.

The Pro Act basically maintains a requirement for secret ballot, except in this condition if an employer commits an unfair labor practice. And the unfair labor practices are so serious that it jeopardizes the ability to have a fair election, then the NLRB can order a rerun election by card check rather than by secret ballot.

But everybody gets to cast a secret ballot in union election under the Pro Act unless the employer violates the law and violates it so

seriously that intimidation is so likely that a card check is allowed. Am I wrong about that? That is how I read the Pro Act.

Mr. PEARCE. Is that to me?

Senator KAINE. Yes, if you would.

Mr. PEARCE. Yes, sure. You are absolutely correct. And I also would like to take the opportunity, if I could, to create—correct the record with respect to another thing. In terms of personal—the supply of personal information, the Senators should know that Excelcia Underwear, which is a Supreme Court case, stated that unions have the right to get the names, the addresses, and the phone numbers of the workers that they are trying to organize because, of course, they are outside of the facility.

Senator KAINE. Because in an election, the employer would have that information. And so to make it even, Steven, you would want to have a second issue. So I think it is really important, people have a right to secret ballot, and it is only after a finding of an unfair labor practice that it could be ordered by card check.

Second, this is a really important thing. Mrs. Heldman talked about how hard it is to win a union election against the onslaught of an anti-union campaign. When you finally do win an election and when the employee say we want a union, I think it so outrageous that having lost an election the employer is able to stonewall for sometimes years at a time and not get a contract.

I mean, it is like trying to overturn the results of an election. We saw an effort to do that here on January 6th. It wasn't too good. An election should have meaning. And so the provision in the first year to—if there is an election, if the employee say we want a union, that should be able to be converted into a contract in a reasonable period of time.

Finally right to work. Virginia is a right to work state. But I want to focus on something that most people don't focus on, which is if the employees choose a union, then the union is required by law to negotiate for every last member of the bargaining unit, whether or not the person wants to join a union. That is a requirement of union, is it not?

Mr. PEARCE. That is correct.

Senator KAINE. Right. So if the union is required by law to negotiate for everyone, then I don't think it is unfair for somebody to say, well, I don't want to join the union, but for there to be an agency fee.

Okay, you may not want to join the union. You may not want to contribute to the union's political activities or whatever, but since the union is required by law to negotiate for you and you are getting the pension benefit and you are getting the salary and you are getting the health care benefit that the union is negotiating for you to say not only I don't want to join the union, but I also don't want to pay for the benefit of the representation that the union is required to carry out on my behalf, I just—I think the notion of the agency fee, letting that be negotiated, and if it is negotiated into a contract, letting that contract be upheld, just like we would uphold other contracts at law, seems to me to be very, very fair. With that, Madam Chair, I yield back.

The CHAIR. Thank you.

Senator Cassidy.

Senator CASSIDY. If there is ever a hearing that contrasted the two parties, it would be this, with this side interested in expanding corporate power, both the power of the company that would franchise to others, as well as the power of the union over the individual making her own decision, this is a bill that draws that contrast. My staff gave me, we should call this the Consolidation of Corporate Power Act, which the alliteration being CCP with all the kind of implications of that.

By the way, there are some really specious logic in here. All due respect, Mr. Pearce, somehow in your discussion of the origins of right to work, you suggest that it is somehow embedded in racism, that the current practice is embedded in racism. I will tell you, in my State of Louisiana, Alabama, Tennessee, South Carolina, Mississippi, right to work states have the highest percentage of African-Americans in the Nation. The ability to attract good paying jobs with right to work laws has created untold economic opportunity for people of all races, but certainly those who are of color.

Now, my gosh, we could say now you just go ahead and stay up North, where the unions traditionally discriminated against Blacks. Instead, we opened up the laws. People moved south. And now folks who formerly didn't have jobs, have great paying jobs, not because they are unionized, but because that is the industry standard. Now Dr. Shierholz, I am reading this thinking I am a doctor, I am not an economist, but in medicine, we contrast between association and causation.

The fact that union membership has fallen, and income inequality has risen in many respects has no relationship whatsoever. If I may, it is clear that what has happened is the number of unionized manufacturing jobs has declined. Those of the service industry, SCIU has greatly increased. Because those manufacturing jobs have declined, in part because companies moved manufacturing overseas because inflexible work rules, inflexible work rules, created a cost disadvantage over factories, manufacturing plants that were located overseas.

You can make the case that right to work laws is actually created the opportunity for manufacturing to remain in the United States because it is not just the wage, it is also the inflexibility of work rules that make it difficult. One example of this, and I would love your opinion on this, we are speaking about how union laws make things so much safer. There is Federal employees that didn't work for 14 months? They didn't work from home. They didn't work in the office.

We paid billions in salaries to people who didn't work for 14 months. So I called the supervisor. I can't get a passport for someone. Why are they not working? Well, the union won't agree to work rules. Wait, the union won't agree to work rules? Yes, they won't agree to the PPE requirements that would allow people to come in and work safely in order to process passports and so therefore we have got this backlog for however long. You want to take your, some—apparently there is a lot of people that want to get married in [inaudible].

My office had to handle a lot of those, done by supervisors. May have changed now. 14 months, unions objected to that. Those are the kind of work rules that increased cost. And if it is not the tax-

payer who just kind of sucks it up and takes it on the chin, if it is a manufacturing plant, they move elsewhere. I kind of dispute this motion—this notion that we are getting all this value added from this insistence on safety.

By the way, I thought we had OSHA guidelines that kind of demanded safety. I thought OSHA—if not, we better go after the OSHA people if they are not doing their job. One example, I will just say this, your figure showing income equality as union membership. Think about your hospital, your major hospital in New York City, that CEO is probably making $5 million, totally unionized workforce, totally unionized. And yet there is no relationship between she or he making $5 million or maybe more, I am probably being conservative, well I am conservative all the time, but conservative for a New York CEO of a hospital.

Relative to what the—it is all unionized. Again, just because you have an association doesn't mean a causation. We have been evolving from a manufacturing to a service industry. And as that happens, union membership has disproportionately moved to the public sector. Now, Ms. Shierholz, I see you writing things down. What would you say?

Ms. SHIERHOLZ. Thank you. Thank you for the ability to talk on this. So you are absolutely right that causation doesn't—that correlation does not mean causation. And in that testimony, that figure A that showed the really rough relationship between rising inequality and unionization, the text in there pointed out that this thing really does show the correlation. Rigorous research that digs in and really gets at causality does show that about a third of the increase in inequality between typical workers and workers at the high end was over the last 40 years, was due to the decline in unionization.

It is not the whole—the whole rising inequality is not due to unionization, but a big chunk of it. And the decline in unionization is not primarily the result of the change in sectors from manufacturing, the shift from manufacturing to the service sector in this country. That had something to do with it. But if you look, there has been a decline in unionization both within manufacturing and within services. So a shift from one to the other doesn't—isn't the cause——

Senator CASSIDY. But in part, and I know I am over time, Madam Chair. I apologize. But that in part is because of right to work laws used as an economic development tool that brings benefits to people, people of color included, who otherwise would not have in states formerly impoverished, but now doing better.

Ms. SHIERHOLZ. I will just say that rigorous——

Senator CASSIDY. Somebody else wishes to speak, that is fine. But she is giving me the nod.

The CHAIR. Thank you. Thank you so much.

Senator Murphy.

Senator MURPHY. Thank you very much. I was walking over here during Senator Cassidy's questioning, and he may have been covering some of the same ground that I hope to cover with you, Dr. Schierholz, on this sort of extraordinary increase in the gap between the pay of CEOs and average workers. And it sounds like that was the space that Senator Cassidy was into. Maybe I will

just give you an opportunity to sort of continue to expand on your answer. But what is in people's heads just shake, I mean, frankly, Republicans, Democrats, conservatives, liberals, when you tell them that today the pay ratio for S&P 500 companies from CEO to worker are 299 to 1.

I mean, Connecticut, we have got a cable company which is a regulated industry in which the CEO is making 687 times the median worker at that cable company. Just doesn't make sense to anybody. And so maybe I will ask the why question. Right, you have got sort of a lot of data to sort of explain how unionization can shrink that differential between CEO executive pay and worker pay, which has never been bigger than it is today. But what drives that? Why is that the case?

Ms. SHIERHOLZ. That is a really good question. I think the way that I think about this is, as we talked about, the decline of unionization explains a huge share of the rise in inequality over the last four decades. And the rise in CEO pay is a really big part of the rise in inequality over the last four decades.

I think a useful way to think about it is the decline of unionization has led to a big shift, a big upward redistribution in money from workers to corporate executives and shareholders. And that is where the skyrocketing CEO pay really comes in. And that we just have this incredibly unbalanced playing field right now.

Legislation like the Pro Act would do things that would just make it possible for workers who want to join a union, want to join together with their colleagues, to be able to do that.

Senator MURPHY. I think it is a really good point. Without the ability for unions to argue for a bigger share of that money that ends up in their pockets, and without other effective checks on the explosion of CEO pay, that imbalance just gets worse and worse. Mr. Pearce, I know we have talked in and around this subject of abuses that happen during organizing drives.

Again, maybe I am treading on a little bit of ground that has already been covered. But we had an instance in Connecticut where groups of workers were trying to organize at McDonald's restaurants that were part of our rest stops along the highway. And there is reporting to suggest that as a means of trying to intimidate those workers, McDonald's actually called ICE and sent in immigration enforcement officials to threaten family members of workers.

Just absolutely extraordinary, absolutely extraordinary tactics. There are much more sort of mundane and more pedestrian intimidation tactics that take place all the time. And it seems that our current enforcement structure is just not nearly strong enough to incentivize these kind of abuses. Why does the current system not work to create a level playing field? Why does it allow for so many employers to get away with captive audience meetings and threats and sort of low level intimidation?

It just—at least anecdotally in Connecticut, as I talk to folks that are trying to organize workers and I talked to workers, the breadth of intimidation and harassment seems to have exploded. And it just doesn't seem like our current regulatory structure can keep up with the ways in which employers and union busters innovate to try to

prevent folks from being able to cast a legitimate, free, and fair ballot as to whether they want to join a union.

Mr. PEARCE. It is a simple cost of doing business because the penalties are so light. We are talking about an agency that is incapable of enforcing its orders and we are talking about an agency that cannot impose any kind of sanctions that have a meaningful bite to it. Quite frankly, and I have said this before, I would submit that an employer can fire an individual who is trying to start a union and put the money that would probably be owed to that employee when reinstated in a simple interest bearing bank account.

By the time the employer was obliged to have to pay the employee back, the employer would have made money and would have been able to stop unionization and probably write the expense off as a business expense. This is why the Pro Act changes the game. One, it gives solid damages to the employees if the employer has engaged in these unfair labor practices.

Two, it requires, it mandates that the General Counsel go in and seek injunctions when employees get terminated so employees are not caught in the weeds for inordinate periods of time before justice comes about.

Senator MURPHY. Well said. Thank you both. Thank you very much.

The CHAIR. Thank you.

Senator Marshall.

Senator MARSHALL. Thank you, Madam Chair. The first time I heard of the Pro Act or reviewed it, I asked myself what is broken? What are they trying to fix? And I concluded, if it ain't broke, don't fix it, right. And worse is that it harms small businesses. And I am going to submit a letter for the record.

I am going to quote, this is from the NFIB, "the radical legislation would dramatically upend longstanding employment law in favor of labor unions at the expense of small businesses and employees." I could not have said it better. And Madam Chair, I would like to ask unanimous consent to submit this letter from the NFIB for the record.

The CHAIR. Without objection.

[The information referred was not submitted for the record.]

Senator MARSHALL. Thank you. My first question to Dr. Shierholz. Across the country, thousands of Americans have realized their American dream of owning a small business through the franchise business model. The Pro Act would dramatically expand the joint employer standard, putting the Government squarely in the middle of the employer, employee relationship and potentially making business owners liable for actions taken by other companies. My question, would you agree that the expansion of the joint employer definition threatens the ability of small businesses to utilize independent contractors?

Ms. SHIERHOLZ. No, I wouldn't. What that joint employer standards does is it if—what it does is it actually helps small businesses, it helps franchisees. They are already required to be at the bargaining table under the NLRA with a union. What the joint employer standard would do is, strengthen joint employer standard, and the Pro Act would do, would make it so the big company, the franchisor would also be able—would also be required to be there

if they actually do have control over the conditions of those workers.

Senator MARSHALL. You really think that 10 percent of franchised companies would agree with you, or would it be less than that?

Ms. SHIERHOLZ. I have no idea how much franchise companies would agree with me, but what I know is I did a very in-depth, rigorous look at what the joint employer rule, the Trump joint employer rule that limited that weakened the joint employer standards, the impact of that on workers, and found that it would cost workers more than $1.3 billion a year by reducing their ability to bring all work, all firms who have control over their conditions of work to the bargaining——

Senator MARSHALL. We will just have to agree to disagree. I think it would destroy the franchise model, which is the backbone of so many small businesses and so many success stories as well. My next question for Mr. Pearce. Only 6 percent of the private sector employees belong to a union, and recent unions drive across the country have failed.

Additionally, 27 states have passed right to work laws, including my home State of Kansas, protecting a combined 81 million workers nationwide from being forced to pay union dues in order to retain a job. I also have a list, Madam Chair, to ask unanimous consent to submit the document highlighting Democrat leader support for right to work laws to the record.

The CHAIR. Without objection.

[The information referred was not submitted for the record.]

Senator MARSHALL. My question, Mr. Pearce, is this, why should the Federal Government restructure Federal law in their favor when unions are failing to make a compelling case to workers?

Mr. PEARCE. Unions are failing to make a compelling case to workers because unionization is being blocked by unfair labor practices and it is difficult for workers to be able to vote for a union. Statistics and studies have shown that the majority of workers surveyed, if had the opportunity to join a union, that they would.

What has happened is high percentages, close to 50 percent of unfair labor practices occur during the organizing campaign. Further, unions don't have access to the facility. It is like two candidates running for an election, but one has to campaign outside of the country in order to get elected.

There is an added basic inequity in the process and therefore that has to be changed and the process has to go to a neutral site so that unions have a fair opportunity.

Senator MARSHALL. I got a yes or no question. The Pro Act would—and I will go back to you, Mr. Pearce. The Pro Act would force workers to pay $1,000 or more in mandatory annual dues. Speaking of inequities, do you agree this would disproportionately impacts low income workers? Yes or no?

Mr. PEARCE. No.

Senator MARSHALL. Thank you. I yield back.

The CHAIR. Thank you.

Senator Smith.

Senator SMITH. Thank you, Chair Murray and Senator Braun, and welcome for our witnesses. It is great to be here with you

today. So I start from the place that everyone in this country should have the right to come together and collectively organize for better wages, better benefits, better working conditions, safer working conditions. And that when working people—when this happens, working people have the opportunity to reap the actual value of their labor.

The right to organize people empowers working families like Ms. Heldman's. And in short, it gives Americans, all Americans the freedom and the opportunity to build the lives that they want. To me, this is what is at stake in this moment as we think about strengthening and modernizing labor laws that, as you all know, many of you have said so eloquently are so out of date.

Dr. Schierholz, I would like to ask you a question, really to respond to this argument that I hear from time to time, which is that strengthening labor rights comes at the expense of U.S. competitiveness, that basically if workers have more power and more representation, this argument goes that this hurts businesses. They become less competitive, they create fewer jobs, and that slows economic growth. So, Dr. Schierholz, could you address this argument?

Ms. SHIERHOLZ. [Technical problems]—turned off my talking—it is a really important question. What the evidence shows on unions is that they have real productivity enhancing features, like, for example, when job quality is better because unions are there to do things like get better wages, benefits, working conditions, turnover goes down. Turnover is incredibly expensive and productivity draining for companies. So that is one thing, like one really important thing that unions do.

Another thing is they can make a company just run much more efficiently, because what it does, it allows for an entity that can aggregate worker interests and worker information and communicate that to management, which can really be an important way to help an organization run more productively, actually more efficiently, be more competitive. So this is, I think this is typically just—it doesn't bear out when you look at what really goes on.

Senator SMITH. Well, and also, as you are—there seems to be such strong evidence that the rights of individuals to organize and increase their incomes, that makes our economy more fair and more fair economy is, I would argue, a more competitive economy. That actually—a more fair economy actually creates more growth rather than stifling growth. Is that—would you agree with that?

Ms. SHIERHOLZ. Yes, exactly. One of the ways that I would also characterize that is, as we have seen, rising inequality is a much higher share of overall income is going to people who already have a lot of money. That actually hurts our economy because people who already have a lot of money, if they get a little bit more, they are not likely to spend it on goods and services because they already have what they need.

What unions do by getting money in the pockets of working people, by getting money in the pockets of middle class people, it really does stimulate economic activity because those are folks that if they get an extra thousand dollars a year, they get an extra few thousand dollars a year, it is going to go right into the economy.

Senator SMITH. Right. The Economic Policy Institute has a really compelling chart, which it shows productivity growth compared to

worker compensation over time. And what is interesting about this chart is during most of the postwar period, productivity growth and worker's compensation kind of they sort of moved together. But then that changes.

After a while, starting in around 1979, those lines diverge. The two lines begin to separate, which essentially means that the way I understand it, I am not an economist either, that workers are not benefiting from that productivity growth. So could you explain that to us? And can you explain what impact kind of like how that matches up with what is happening with unionization in this country?

Ms. SHIERHOLZ. Yes, you explained it really well, that what we have seen since the 80's is the economy growing relatively strongly, productivity increasing, but the gains of that productivity growth not going to working people largely. It is largely being captured by people at the—who already have the most.

One reason for that, one key reason for that is the decline of unionization that really does do this sort of upward redistribution of money from workers to corporate executives, shareholders. So fundamental reform like the Pro Act really would help halt and reverse those trends and move us toward an economy that works for everyone, not just for a little slice at the top.

Senator SMITH. Right. I mean, I think that what we have seen—thank you for that. What we have seen is after years of concerted, coordinated effort to whittle away at workers' rights, that it is time for Congress to address that imbalance. And by addressing that imbalance, we will be able to address the greater imbalances in our economy. That means that it doesn't work for everyone. And as Paul Wellstone from my State of Minnesota used to say, we can get back to a place, hopefully to a better place, where we all do better when we all do better. Thank you.

The CHAIR. Thank you.

Senator Baldwin.

Senator BALDWIN. Thank you, Madam Chair, for hosting this incredibly important hearing. And thank you to the Ranking Member also. Mr. Pearce, as a former National Labor Relations Board Chairman, you have witnessed how worker misclassification has hurt the interests of workers and their efforts to collectively bargain. There has been a lot of misinformation out there about what the Protecting the Right to Organize Act will do to address worker misclassification.

I would like to just urge us, let's be clear and address this once and for all. What problem is the Pro Act to protecting the right to organize acts ABC test trying to fix, and how will it work, and will it require freelance workers to become W2 employees?

Mr. PEARCE. Thank you so much for the question, Senator. I am glad to have the opportunity to clear that up. First of all, the ABC tests more or less basically said it has the ability to discern whether or not an individual worker is truly an employee under the National Labor Relations Act for the purposes of the ABC's coverage. The ABC test assumes that someone is an employee if unless the worker is free from the employer's control or direction in performing work, the work that takes place—the work takes place outside of the usual business. So if somebody has a bakery and they

have a worker, have somebody—they hire somebody to install ovens, clearly that is not baking.

That is not going to be considered the same as being an employee. And customarily do the work that is being performed is independently done. So if the person is installing ovens, do they have a business of installing ovens? Well clearly they are not employees of that employer.

The ABC test discerns that. And it is not new. It is being done by half of the states in this country for the purpose of wage and hours and other benefits and unemployment insurance. So the—what it does is codify that standard so that it would apply in discerning who is eligible for coverage under the National Labor Relations Act.

Senator BALDWIN. Thank you. Ms. Heldman, thank you so much for your testimony and your presence here and your efforts to organize your workplace. As you know, the Protecting the Right to Organize Act allows the NLRB to assess monetary penalties for labor law violations and imposes personal liability on executives responsible for such violations. How would your employer perhaps have acted differently during your union drive if they knew that they could be liable for fines of up to $50,000 per labor violation?

Ms. HELDMAN. Well, if they knew that, we would have won our first election and we have not we lost that election, and they would have thought twice about firing union supporters and how they treated people and how they pulled us into office and interrogated us and told us to vote no and be out there on the floor right on our faces and telling us to vote no and following us wherever. And send us posts to vote no because we don't need a union. That would make them think twice. I really think that would make them think about what they are doing.

Senator BALDWIN. Thank you.

The CHAIR. Thank you.

Senator Rosen.

Senator ROSEN. Thank you, Chair Murray, Senator Braun, and really thank you for holding this hearing today so we can have a discussion about the important—how important the right to organize is to ensure our good paying safe jobs for workers all across our states. And I come from Nevada. Nevada, built by union workers. It runs today because of the work that the union members do.

The Nevada AFL–CIO has worked to raise wages, secure benefits, and ensure safe working conditions for workers all over our state. The ACIU and Teamsters locals in Nevada, well, has COVID right now. So they are fighting for our nurses, our caregivers, they are fighting for our convention workers, bus drivers, other men and women all across our state. I want to say hardest hit in the Nation with unemployment this last year. And I also want to mention that our Culinary Union 226 turned 85 years old last year and celebrated decades of providing hundreds of thousands of Nevada hospitality workers a pathway to the middle class.

During the darkest days of the pandemic, unions delivered food to the furloughed workers, helped them sign up for their unemployment benefits, ensured they had a right to return to their jobs as Nevada carefully reopens and welcomes back visitors. And I myself am a former member of a Culinary Union 226. I am proud of that

and Unite Here and our other Nevada unions that are fighting to protect workers, secure benefits for their families.

My grandmother was a lifelong member of the Baker and Confectioners Union. And so I know a little bit about unions, and I want to thank all of you for fighting for that. But, Mr. Pearce, we tend to hear a lot, my colleagues are talking about, these competing narratives, that is the Pro Act really necessary? People will do the right thing. Businesses will do the right thing. And is it necessary for achieving workplace democracy?

Can you explain that concept of workplace democracy? Why it is important and how strengthening our right to organize cannot only help us achieve a more democratic workplace, but I would say a more harmonious workplace?

Mr. PEARCE. Thank you so much, Senator, for this opportunity. So often I am hearing that what unions are doing is undemocratic. It is violating employees' democratic rights. What folks fail to realize is that without legislation, there is no democracy in the workplace. It is the National Labor Relations Act that provided democracy in the workplace. And the whole idea was balance the playing fields, bring workers an opportunity to have a seat at the table.

The Pro Act provides and facilitates collective bargaining in an enhanced way in environments that are comparable to the 21st century so that employees have a better chance to be able to bring democracy into the workplace. I talked about the value of the collective bargaining agreement. It is the contract, the constitution of the of the workplace mutually negotiated.

It is important because it provides abilities for people to have safe working conditions to employees, to be able to be hired and retain their jobs with just cause standards and not be subject to cronyism or possible racism. All of those things that are vital to have workplace integrity. And that is important.

Senator ROSEN. Well, you speak about some of this, and we know all too well that the pandemic this last year has really laid bare the disparities that have always existed. So, Dr. Schierholz, Black and Latino unemployment at their peaks were higher than unemployment for white workers, including in my home State of Nevada, which has one of the largest Latino populations in the country. Can you talk about the benefit of unionization for Black and Latino workers in particular please?

Ms. SHIERHOLZ. Yes, it is really an important thing to highlight. I think that there is this idea because unionization started and it didn't have a lot of people of color originally was mostly men, that there is this idea that is still how it is, and it could not be farther from the truth. The unions really do reflect the diversity of our Country as it is today. And we—there is enormous benefits to people of color of union.

Black workers get a—and Hispanic workers get a bigger boost to being in unions than white workers do. And workers get a boost of being in unions. But it is more important the boost is bigger for people of color.

Black workers are more likely to be in unions than white workers. And you put all that together, unions are just an incredibly important force for racial economic justice in this country. It is just—if we take seriously this national discussion we are having about

racial economic justice, a really important thing that we have to do there is boost unionization.

Senator ROSEN. Thank you. I appreciate all of your time here today.

The CHAIR. Thank you.

Senator Hickenlooper.

Senator HICKENLOOPER. Thank you, Madam Chair. And I want to just briefly go over some territory that I think Senator Casey touched on. And Dr. Schierholz, you have commented on that parallel between the shrinking of the middle class of America with the reduction, the shrinking of the percentage of workers who are represented by organized labor. Has that been pretty consistent over the whole—when you look back over the last five decades. Has that been a pretty consistent process?

Ms. SHIERHOLZ. I think I understand your question. But, yes, as we have seen—as we have seen union unionization decline, that has been accompanied by this increase in inequality. And if you look over the whole period, you really can look and see that it is that decline in unionization was causally related. A big chunk was—was the reason for a big chunk of that rising inequality. I am not sure if I answered that question.

Senator HICKENLOOPER. I was asking more about just looking at the size of the middle class, how you want to define it in the United States, that has been shrinking by almost every measure over the last 50 years. That causality.

Ms. SHIERHOLZ. Yes, that is—it is interesting. There is a sort of a structural trend over time in stagnant wages for working people over most of that period. There has been some breaks like when we have strong expansions, the expansion of the late 90's, we did see some gains for working people. But the broader trend really has been just over that whole period, just a steady erosion of the sort of the ability of our economy to deliver for all workers.

Senator HICKENLOOPER. Got it. Appreciate. And also, when I was Governor of Colorado, I signed an executive order that set up an, we called it the enforcement task force to—we were looking at alleged worker misclassification, basically tax fraud, payments under the table in the construction industry. We did this because not everyone was playing by the same rules. It really penalizes those that do play by the rules, the law abiding businesses. They were being undercut.

I think when some workers within an industry are allowed to join a union and others not, again, it creates an unleveled playing field. I have heard concerns from some of my friends in the business community about the ABC test within the Pro Act is being applied more broadly, possibly outside the NLRA.

Can you confirm and just reiterate that the ABC test within the Pro Act will only be used regarding workers' rights to join a union? And then can you explain how this test could help—how it would help level the playing field?

Ms. SHIERHOLZ. Yes, that is a good question. And you are absolutely right. The Pro Act would only amend the NLRA, no other worker protection statute. So it would only test for an employee in the bill would only apply to rights workers have under the NLRA, which is essentially unions and collective bargaining. So that is 100

percent true. And then the—what the test would do is just help ensure that all workers are properly classified.

I think you brought up a really important point. Most employers actually classify their workers correctly. But what this would do is make it so those bad apple companies that are unable to miss—are less able to misclassify their workers and gain that competitive advantage. So in that way, it really does help level the playing field amongst all companies.

Senator HICKENLOOPER. Great. And then, Mr. Pearce, most business owners do everything they can to comply with the law, oftentimes with limited resources. I was a small business myself, a small businessperson myself for many years.

We have heard some concerns that the Pro Act will force small businesses to comply with excessively burdensome Federal regulations. How would you respond to those concerns? And how can we better educate and equip business owners to facilitate their compliance with the law?

Mr. PEARCE. Well, I guess I just disagree that it would require employers to comply with more burdensome Federal regulations. The Pro Act does nothing toward making employers have to comply with anything more than they already are obliged to.

If anything, the Pro Act would enable employers to have a little bit more clarity with respect to their rights and obligations under the law. They would have the opportunity to be further educated with respect to a union and employee rights under the National Labor Relations Act. So it is not going to be an invisible situation.

Many employers, given my many years involved with the National Labor Relations Board, oftentimes fall into situations where they commit unfair labor practices out of ignorance. I mean, some employers do it with malicious intent, but some just do it because they don't know the program to provide an educational system for that everybody to be aware of.

There would be a requirement that notices be posted so people would know what their rights are now. Now, employers would have to, would be obliged to report when they are hiring persuaders to union bust, and that would be certainly a new obligation on the part of the employer. But that's all.

Senator HICKENLOOPER. Right. Great. I appreciate you for that clarification. Thank you all. Thank you all for being here. I yield back to the Chair.

The CHAIR. Thank you.

Senator Braun.

Senator BRAUN. Robust conversation here today. And I want to make a couple of comments. I think bad apple companies like Mrs. Heldman talked about, is a reason we need to have the discussion. Senator Murphy was talking about a public company CEO pay and never would be for stuff like that were you have got a proportion of 290 or even 200 or even 100 to 1. That gives companies a bad name. But I don't think you can generalize upon that because it gets back to my thesis on all of this.

If this Act in any way impinges upon small business, I think it hurts the future of unions and businesses to get large. I want you to answer as briefly as you can, Mr. Pearce, Dr. Schierholz, I view this as a flattened triangle with small businesses at the bottom,

unions and larger businesses at the top. This will be a bill that is a one-size fits all.

Do you think there is a place to where you differentiate so you don't kill the golden goose that produces large companies over time, creates jobs, generally is the progenitor of them? Would you be comfortable with something that distinguished between unions and large business and how this might impact small business?

Mr. Pearce.

Mr. PEARCE. What I would say is this, the vast majority of bargaining units in the United States are average at about 20 to 25 employees. So the unionization was pretty much created in an atmosphere that under current standards would be a small business atmosphere. Small businesses are the backbone of this country. And I agree, I believe that the Pro Act does nothing to jeopardize small businesses' abilities to function and proceed. And in fact, the Pro Act provides opportunity for clarity.

As I indicated to Senator Hickenlooper, there will be a greater understanding of rights and obligations and those businesses that love their employees and provide more for them. Those employees may believe that they don't need to be unionized.

Senator BRAUN. I make the point that the difference between unions and a small business and business owners just taking care of their employees is almost no difference. I think where it comes into play and even though the average might be there, I think the bigger issues are with larger entities.

Dr. Shierholz.

Ms. SHIERHOLZ. Yes, I would say that just like you said, small business owners are the ones who know their employees. They are like family. They know their kids. They know they know what is going on in their lives. They are—want to be able to pay their workers more, provide them benefits, all the things that make a good quality job.

If larger union busting firms are able to crack down on unions and so doing reduce wages, reduce benefits, that actually hurts the small businesses' competitive advantage. So leveling that playing field actually makes these small businesses who want to do right by their workers better off. The Pro Act will actually——

Senator BRAUN. I am careful throw the baby out with the bathwater there. So just as a food for thought. And real briefly, devils are always in the details. I think this is going to affect the gig economy. It is a growing freelance part of our economy that is growing. Independent contractor status, which many small employers have to use because they don't have a position that could hire an individual.

We have got to be careful that we don't attenuate them. And in this case, in terms of binding arbitration that you can trigger within 100 days and basically have a panel come in and put a working agreement or a contract out there is not good. And then finally, very briefly, Ms. Sarolia, do you want to add anything else to wrap up the conversation from an independent business owner?

Ms. SAROLIA. I do, Senator Braun. There were so many questions that were asked of my colleagues that are sitting next to me. I wish I would have really——

[technical problems] respond to but just a couple of points that I want to reiterate. If there are any ideas that we all like me too, can work together to support workers by not destroying the franchise model, I am going to sign myself up to make it my work. So understand that everyone sitting in this room.

The second thing I know, we talked about what keeps turnover—what keeps turnover from our businesses. Small business owners, creating the right culture and paying a standard of living, which is what my company has done that really attributes to keeping the turnover. And I am not great with statistics, but I can tell you with my gut instinct of doing this job, all the jobs that are employed under me and their work, we are one of the only industry, I think, the hospitality, travel, and tourism where we all started out cleaning rooms or folding towels, delivering laundry at the age of nine, which labor wasn't part of it back then, but we did that at a younger age, so we have a lot of respect for those that we actually employ. But we want to do nothing but to see them also be a part owner of the business that we are.

Who better than our industry to be able to do that? So that is that. The other thing is how does it threaten this business? I want to end with this one, Senator. The Pro Act is such a mammoth proposal, it would upend in my business in two ways. And it is the first two provisions in the bill specifically that I am really passionate about.

First, the Pro Act's joint employer standard is unpredictable. No one here can assure a franchise brand that its business may not run afoul of nebulous, indirect, and reserve control standard. Ultimately, the Pro Act's joint employer standard would take away the incentives to franchise. These are changes that would take away the investment, the equity, and the independence of franchise small business owners like me.

Who really wants to be under the ABC test. I don't want to be the employer of the franchisor when it is my business that I own. Just doesn't make sense. Second, the Pro Act's independent contractor test features an a-prong that most franchises would likely fail. That is because the a-prong sets up a conflict of laws with the Laymen Act, which requires franchises to have the same control that the Pro Act prohibits.

There is a lot of inconsistencies in that language. And I want to end with that in terms of what it would do and impact me as a small business. Thank you, Senator Braun.

Senator BRAUN. Thank you.

The CHAIR. Thank you. I have one additional question before our hearing end, and that is to you, Mrs. Heldman. And I really appreciate your testimony here. But you, like millions of other essential workers, continued to go to your work site during the pandemic to make sure that Americans had access to what they needed, needed goods and services. And like many essential workers, you feared for your safety and the economic impact of the illness on yourself and your colleagues and your families. I wanted to just have you tell us how the pandemic affected your views on the need for a union.

Ms. HELDMAN. Well, they would hire new people and they would bring them, treat them out, in and out right next to you. And this was at the beginning of the pandemic. And they had no mask for

us. They didn't give us masks until Mondalese gave a mask, gave us masks. And I just, I told them, I feel they trying to get me to get COVID–19 because they see trains of just people in and out. And I asked them, I go, why are you guys doing this? This is the beginning of a pandemic.

The girl for the IS office that takes these new people around, she just went like f and this f and my f-ing boss, this and that. And I was like, wow, I went to the office, and I said, you know what, she doesn't need to talk to me like that. I used to ask her why are you guys doing this? This is the beginning of a pandemic. And the girl gave me a lame excuse, I don't remember what it was, but it was just an excuse.

Then she said, well, did you have any witnesses out there? Because she made it sound like I was trying to cause trouble or whatever. And I go, yes, I have witnesses that they watched do this and tell me the stuff. Yes, I do. And she calm down because I think they were going to try and get me fired or something. And then we had like 73 by the fall, we had 73 cases.

Once we had done our voting, they quit telling us what our cases were up to. We weren't allowed to have no more information.

The CHAIR. You didn't know who else was being——

Ms. HELDMAN. No. But in January, a lady passed away. She was in the hospital from November to January, and then she passed away from COVID. And then July 1st, we just lost the guy who was 50 years old. And that day when the guy died, they said you guys don't need to wear your mask anymore. And people said, some of them decided to not wear the mask. But then you got a lot of them that are wearing their mask. And then also, I mean all these captive meetings, they were just grandmas in there. It was like, are we really serious? This is the middle of a pandemic. Are you guys really serious.

I mean, they would put like semis on the street, like they crammed into this tent, 150 of us, and then they put cement barrels right along them trailers. And all then all of supervisors were out there. And some of the supervisors were sitting out there with us yelling, vote union no.

Then where we would stand and hand bills and talk to people, they went out there and they put cement barrels all along the public sidewalk so we wouldn't be able to stand out there and talk to people or stand out there, period. This is a public sidewalk and then they put chains on them, so we weren't able to be hang out there.

I mean, we had a girl come in and she told them she goes I am not feeling good today. And they took her temperature, and they didn't pay attention to her. Well, she went out there and she worked all day and then she had the pandemic. She—finally she got a fever, I think, later on in the day. And then they sent her home, and she had the quarantine and then she came back. But just stuff like that. And that is how they handled the pandemic.

The CHAIR. Thank you so much for sharing your personal experience.

Ms. HELDMAN. Thank you.

The CHAIR. Really appreciate it. And I want to thank all of our witnesses today and all of our colleagues for their participation.

Mr. Pearce, Dr. Schierholz, Mrs. Heldman, Ms. Sarolia, thank you for sharing your time and your expertise with the Committee today. I seek unanimous consent to put on the record six letters from organizations in support of the Pro Act. So ordered.

[The information referred was not submitted for the record.]

The CHAIR. For any Senators who wish to ask additional questions, questions for the record will be due in 10 business days, August 5th, 5 p.m. The hearing record will remain open until then for Members who wish to submit additional material for the record.

This Committee will next meet Tuesday, July 27th in Dirksen 430 for a hearing on how we learn the lessons of this pandemic and strengthen our Nation's public health and preparedness systems. The Committee stands adjourned.

ADDITIONAL MATERIAL

ENTREPRENEUR MAGAZINE

SERIES ON NEGATIVE IMPACTS OF THE PRO ACT AND HOW IT WOULD DESTROY ENTREPRENEURSHIP IN AMERICA

Why Entrepreneur Stands Against the PRO Act

"But today, for the first time, Entrepreneur is entering the world of advocacy on a single issue: It is to oppose a bill called the Protecting the Right to Organize Act, which is currently being considered in Congress, and which could do lasting harm to the small-business and franchise community." (Entrepreneur, 6/21/21).

Women Franchise Owners Fear The PRO Act

" . . . [T]he Protecting the Right to Organize Act, or PRO Act, which is currently being considered by Congress . . . contains language called the joint-employer standard, which some legal experts say could force corporate franchise brands to become the employer of their individual franchisees' staff. That would eliminate franchisees' autonomy. If the franchise industry is disrupted, then many women's careers are disrupted too. Women now open one out of every three new franchises, in a business model where about 30 percent of the owners are women." (Entrepreneur, 7/12/21).

Parents and Caregivers Say PRO Act Would Harm Their Families

"I'm hoping to go another 20 years with good health," Hosty says. "I'll be 59 in July, and I really love what I do. I hope to be driving until I'm 80 years old.' But that likely would not be possible if Congress passes the Protecting the Right to Organize Act, or PRO Act. Its ABC Test would target companies that hire independent contractors in all kinds of professions, and reclassify those contractors as employees under labor law. Those affected would include owner-operator truckers like Hosty, who says the idea makes no sense at all." (Entrepreneur, 7/1/21).

Small Business Owners Fear the PRO Act's ABC Test

"Today, Reyes is watching in disbelief as Federal lawmakers say they intend to follow California's lead. The same ABC Test is in the Protecting the Right to Organize Act, or PRO Act—which proponents are promoting as 'civil rights legislation' despite the economic harm this ABC Test caused for marginalized people like Reyes, along with other Californians in hundreds of professions. 'You cannot create blanket legislation to cover all of these different professions and say you're protecting them,' Reyes says. 'You're actually making life harder.'" (Entrepreneur, 6/24/21).

Older Women Say PRO Act Unfairly Targets Them

"That's why she is among those enraged that Federal lawmakers are even considering the Protecting the Right to Organize Act, or PRO Act. Under the proposed law, many independent contractors would have to be reclassified as employees of their clients—stripping them of the career flexibility they prefer . . . 'I was looking for W2 work—I wanted the steady paycheck,' she says. 'I wanted all the things like benefits that go with a W2 job. But the more I did independent work, the more I

realized that I was so much happier. I actually like being my own boss.'" (Entrepreneur, 6/24/21).

What is the ABC Test, and how Could it Harm Freelancers and Independent Contractors?

"Freelancers and independent contractors in America may soon face a test—and if they don't pass it, their ability to earn a living could radically change. The test is called the ABC Test, and it's included in Federal legislation called the Protecting the Right to Organize Act (commonly known as the PRO Act) that's currently being considered by Congress. If freelancers or independent contractors pass the test, they can continue working independently. If they fail it, they'd be classified as employees of their clients for the purposes of labor law—which means they may no longer be able to operate independently." (Entrepreneur, 6/21/21).

This Legal Change Could "Severely Disrupt" Franchising. Learn About The PRO Act's Joint-Employer Standard

"The PRO Act includes a change to language known as 'joint employer,' which means that, in certain circumstances, the franchisee and the franchisor might both be considered the cashier's employer. The franchisor could be legally on the hook for an individual franchisee's mistakes, or for mistakes made by the franchisee's employees, and may even force a change to the franchisee's own relationship with the franchisor. The implications are substantial. There are nearly 800,000 franchises in the United States, many of them beloved brands such as McDonald's, 7-Eleven, Ace Hardware, Marriott International and Re/Max. All of them, according to industry and legal experts, could be harmed." (Entrepreneur, 6/21/21).

STATE POLICY NETWORK
1655 NORTH FORT MYER DRIVE, SUITE 360 ARLINGTON, VA.
July 29, 2021.

Hon. PATTY MURRAY, *Chair*,
Hon. RICHARD BURR, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIR MURRAY AND RANKING MEMBER BURR:

As state economies, small business owners, and workers recover and persevere through a global pandemic, we strongly urge the Senate Health, Education, Labor, and Pensions (HELP) Committee to oppose the Protecting the Right to Organize (PRO) Act. Instead of helping workers and small businesses get back on their feet, the PRO Act burdens job creators with layers of red tape and infringes on individuals' right to earn a living.

While supporters of the PRO Act suggest it advances workers' rights, the provisions of the legislation speak otherwise. A key provision gives organized labor greater power to compel workers to join a union in order to keep their jobs. Further eroding workers' rights, the PRO Act threatens the privacy of workers by giving unions their private information—email, phone number, home address—without any ability to opt-out.

Unemployment levels remain well above pre-pandemic levels. Now is not the time to move forward with the PRO Act or any other legislation that overturns worker freedom throughout the country, stifles independent workers' ability to support their families, harms small businesses, and increases burdens on job creators.

The PRO Act Undermines Federalism, Worker Freedom, and Economic Growth

One provision of the PRO Act would effectively overturn state right-to-work laws and nullify the ability of states to pass these laws in the future. Undercutting state right-to-work laws strikes against the core democratic principle of federalism and weakens the individual rights of workers.

Repealing right-to-work laws is not merely a poor policy decision—one that would strip workers of their freedom to choose whether to join a union—but it's also an overriding of the will of the people in the 27 states that have enacted right-to-work

laws. Workers in several states have enjoyed these protections since the 1940's.[1] Voters in these states have voiced their preference to give workers the right to opt out of joining a union, a decision the Federal Government should respect.

In part, right-to-work laws are popular and enacted in most states because they positively impact economic growth and employment. States with right-to-work laws outperform their counterparts in several categories.

For example, between 2001 and 2016:

- Private sector employment grew by 27 percent in right to work states, compared to 15 percent in non-right-to-work states.
- Personal income rose by 39 percent in right to work states, compared to 26 percent in non-right-to-work states.[2]

Surveys and research find states with right-to-work laws are viewed as business-friendly[3] and play a role in the location of industry—particularly manufacturing.[4] Results from one study found states that recently enacted right-to-work laws experienced more growth in total manufacturing employment than non-right-to-work states.[5]

Anecdotal evidence supports the above research, as explained by Kentucky state representative Damon Thayer: "We passed right-to-work. One week later, Amazon announces in Northern Kentucky that they're coming with a $1 billion dollar investment and a few months later here Toyota comes with a $1.3 billion dollar investment, and I still think the best is yet to come."[6]

The PRO Act Restricts Independent Work

A provision of the PRO Act establishes a near statutory prohibition on independent work, a change that could cost millions of individuals the opportunity to earn a living and support their families.

The legislation would consider all workers, even those who currently make their living as contractors, as full-fledged employees unless they can satisfy a stringent three-pronged test, known as the ABC Test:

- The worker must be able to set his/her own schedule, timeline, and be able to dictate how the work is completed.
- The worker must provide a service or product that's outside the normal business of the client. For example, a writer could create content for a hotel website as a contractor but would not be permitted to do freelance writing for a news website.
- The worker has an independently established, professional business that focuses on the service being provided.

In a time of economic recovery, government policy should not discourage individuals from engaging in any form of work, including independent entrepreneurship. Implementing the ABC Test nationwide would reduce independent contracting and slow economic recovery. It would jeopardize the livelihoods of the 38.2 million Americans who engage in some form of independent work to start businesses, earn income, improve skills, or take on passion projects.[7]

Research shows independent contractors greatly contributed to the economic recovery from the last recession: "Between 2010 and 2014, independent contractors

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[1] "Right to Work States Timeline," National Right to Work Committee, accessed July 24, 2021, *https://nrtwc.org/facts/state-right-to-work-timeline-092016/*.

[2] Jeffrey A. Eisenach, Ph.D., "Right-to-Work Laws: The Economic Evidence," NERA Economic Consulting, May 2018, *https://www.nera.com/content/dam/nera/publications/2018/PUB-Right-to-Work-Laws-0518-web.pdf*.

[3] Ron Starner, "Right-to-work laws turn the Southeast U.S. into a factory for the world," Site Selection Magazine, 2004, *https://siteselection.com/issues/2004/jul/p500/*.

[4] Thomas Holmes, "The Effect of State Policies on the Location of Manufacturing: Evidence from State Borders," Journal of Political Economy, August 1998, *https://www.journals.uchicago.edu/doi/abs/10.1086/250026?journalCode=jpe*.

[5] Eunbi Kim, "The impact of right-to-work legislation on foreign manufacturing employment in the United States," International Journal of Urban Sciences, 2021, *https://www.tandfonline.com/doi/full/10.1080/12265934.2021.1919183*.

[6] Josh James "Georgetown Toyota Plant Set for $1.33B Injection, Bevin Says More to Come," WUKY.org, April 10, 2017, *https://www.wuky.org/post/georgetown-toyota-plant-set-133b-injection-bevin-says-more-come#stream/0*.

[7] MBO Partners, "The State of Independence in America," 2020, *https://www.mbopartners.com/state-of-independence/ps://www.mbopartners.com/state-of-independence/*.

grew 11.1 percent (2.1 million workers) and represented 29.2 percent of all jobs added during that time period."[8] Other research indicates work as an independent contractor also offers critical opportunities and earnings for the unemployed while they search for new work.[9]

Furthermore, several individuals became "coronavirus entrepreneurs" over the last 16 months. Independent work was a lifeline for many Americans during the pandemic. Between March 2020 and March 2021, 4.4 million new businesses were started in the United States.[10]

Policy should encourage, not restrict, independent work. Independent contractors make up a significant amount of economic activity in the United States, and this type of work offers significant benefits like flexibility, autonomy, and opportunity to learn new skills. In addition, satisfaction among independent contractors is high. Less than one out of every 10 independent contractors would prefer a traditional employment relationship, according to research from the Bureau of Labor Statistics.[11]

The PRO Act Makes Doing Business More Difficult

The PRO Act is sweeping legislation that makes dozens of substantial changes to the National Labor Relations Act. Such radical legislative change imposes high compliance costs on small businesses, many of which do not have ready access to legal advice or staff responsible for staying up to date on emerging regulatory issues.

Research over the past several decades confirms the cost of regulation disproportionately falls on small businesses. According to a recent study, "Small firms with fewer than 50 employees incur regulatory costs ($11,724 per employee per year) that are 17 percent greater than the average firm. The cost per employee is $10,664 for medium-sized firms and $9,083 for large firms."[12]

The PRO Act exacerbates this problem by increasing regulatory costs on small firms, making job creation and business formation more difficult. For example, the legislation would restore a costly Obama administration rule that greatly expands joint employer liability. The objective of the policy is to hold one company liable for bargaining responsibilities and violations of another employer, a policy that, in practice, would punish large companies for violations of a small company they contract with. This negatively impacts small businesses by discouraging larger employers from outsourcing functions. Bringing more functions in-house at higher labor costs will result in fewer jobs and fewer opportunities for entrepreneurs. Estimates find that the joint employer standard could result in 1.7 million fewer jobs.[13]

Increased regulatory costs are one of many pitfalls for small businesses. Currently, the National Labor Relations Board is a remedial agency with limited authority to issue monetary penalties. But under the PRO Act, job creators would be subject to heavy civil penalties, fines, and punitive damages for minor or merely technical violations of the law, ranging from $500 to $100,000 per violation.

On top of increased monetary costs, employers face a greater likelihood of workplace disruptions under the PRO Act. Currently, striking is only allowed at businesses that have some involvement with a labor union, but the PRO Act would allow secondary strikes and boycotts of completely neutral parties. For example, if a union is involved in a dispute with an auto manufacturer, it could also picket and protest in front of a parts supplier that provides material to the manufacturer, even though the supplier is not involved with the dispute or has no way to solve it.

[8] Ben Gitis, Douglas Holtz-Eakin, and Will Rinehart, "The Gig Economy: Research and Policy Implications of Regional, Economic, and Demographic Trends," American Action Forum and Aspen Institute, January 10, 2017, *https://www.americanactionforum.org/research/gig-economy-research-policy%20-implications-regional-economic-demographic-trends*.

[9] McKinsey Global Institute, "Independent Work: Choice, Necessity, and the Gig Economy," October 2016, *https://www.mckinsey.com/featured-insights/employment-and-growth/independent-work-choice-necessity-and-the-gig-economy*.

[10] Brooke Fox, "The Covid entrepreneurs: Americans start millions of new businesses," *Financial Times*, March 8, 2021, *https://www.ft.com/content/400ae372-0cb2-48bb-8767-7986848ed9a6*.

[11] Bureau of Labor Statistics, "Contingent and Alternative Employment Arrangements News Release," 2018, *https://www.bls.gov/news.release/conemp.htm*.

[12] Mark and Nicole Crain, "The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business," National Association of Manufacturers, September 2014, *https://www.nam.org/wp-content/uploads/2019/05/Federal-Regulation-Full-Study.pdf*.

[13] Ben Gitis, "The NLRB's New Joint Employer Standard, Unions, and the Franchise Model," American Action Forum, April 26, 2017, *https://www.americanactionforum.org/research/nlrbs-new-joint-employer-standard-unions-franchise-business-model/*.

Such strikes, boycotts, and picketing could cause massive disruption of the entire economy and many industries. For example, a regular car contains 30,000 parts that are made by suppliers throughout the world. The supply chain is massive, ranging from the aluminum, steel, and plastics used in the car to the tinting for windshields, boxes for shipping, laminates, nuts and bolts, leather, cleaning products, and so on. The unintended consequences of allowing secondary strikes and boycotts on these neutral parties in the supply chain are unknowable. What is known, however, is the PRO Act would allow unions to severely disrupt the supply chains of most industries. That is not good for the Nation, workers, industries, or consumers.

Thank you, Chair Murray, Ranking Member Burr, and all the Members of the HELP Committee for considering our viewpoint on the PRO Act.

Sincerely,

TRACIE SHARP,
PRESIDENT AND CEO STATE,
POLICY NETWORK.

NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS
1325 G STREET N.W., SUITE 1000, WASHINGTON, DC
July 21, 2021.

Hon. PATTY MURRAY, *Chair*,
Hon. RICHARD BURR, *Ranking Member*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

TO CHAIR MURRAY AND RANKING MEMBER BURR, AND MEMBERS OF THE SENATE HELP COMMITTEE::

I am writing today on behalf of the National Association of Wholesaler-Distributors (NAW) to express our strong opposition to S. 420, the "Protecting the Right to Organize (PRO) Act," which the U.S. Senate Committee on Health, Education, Labor, and Pensions (HELP) will be considering during their hearing entitled "The Right to Organize: Empowering American Workers in a 21st Century Economy".

NAW is the "national voice of wholesale distribution," an association comprised of employers of all sizes, and national, regional, state and local line-of-trade associations spanning the $5.94 trillion wholesale distribution industry that employs almost 6 million workers in the United States. Approximately 30,000 enterprises with almost 395,000 places of businesses in all 50 states and the District of Columbia are affiliated with NAW.

You should know that this legislation is not only organized labor's top legislative agenda but that of business as well. S. 420 is an inappropriate and obvious response to organized labor's threat to stay on the sidelines in the 2022 elections unless the Senate Democratic majority passes the PRO Act. As the country begins to turn the corner on the COVID–19 pandemic, Congress should focus on helping businesses stay open and workers employed after the past devastating year and a half. Instead, the Senate HELP Committee is holding a hearing on a bill that would directly benefit their organized labor allies by enacting Federal policies that would increase the number of dues-paying union members at the expense of workers, small and local businesses, and entrepreneurs.

This radical legislation would impose policies that were rejected by the judicial system, opposed on a bipartisan basis in Congress, and/or abandoned by the agencies asked to enforce them. Unions continue to push this legislation to unfairly tip the playing field in their favor at the expense of the fundamental rights of workers to choose for themselves whether to accept or reject union representation.

S. 420 attempts to dramatically change the way labor unions conduct organizing drives by disallowing government-supervised secret ballot elections to certify a union as a recognized collective bargaining agent and replacing it with a zombie reiteration of "Card Check." For more than seventy years, employees have largely decided on unionization through a secret ballot election. This legislation, however, would force reluctant workers to accept union representation, not when a majority of their co-workers vote by secret ballot to accept the union, but when 50 percent plus one of those workers simply acquiesce to union organizers' efforts to obtain their public signature on a card. This provision is intended to ensure that labor unions win organizing campaigns by removing a worker's right to vote "no" or "yes" without fear of recrimination by either the union or employer. As a Member of the Senate who was elected to your position by a secret ballot, you understand that

eliminating the fundamental right to vote by secret ballot would expose voters—in this instance workers—to intimidation and possible harassment.

The PRO Act would also quash employees' rights to privacy by mandating that employers provide the contact information for all employees without prior approval from the employees themselves. Furthermore, employees would not have the right to opt-out of this disclosure of their personal information nor would they have a say in which contact information is provided. These are basic privacy rights afforded by acts of Congress to American citizens, which this bill would deny to workers solely to advantage union organizers.

This legislation would also codify many requirements of the Department of Labor's 2016 "persuader" regulation, including the provisions that would force a breach of attorney-client confidentiality, which was struck down by the courts when it was found to be "defective to its core" and "undermine[d] the attorney-client relationship and the confidentiality of that relationship."

S. 420 also eliminates Right-to-Work protections nationwide, superseding the Right-to-Work laws passed in twenty-seven states, forcing workers to fund union activity they may not support and removing their protection from being fired if they decline to pay union dues. The bill would remove existing law that limits unions to thirty days of picketing unless they file a representation petition, which could allow unions to engage in recognition picketing indefinitely. Additionally, the legislation would permit unions to engage in so-called secondary boycotts, which have been unlawful since 1947, exposing consumers, employers, suppliers, vendors, franchisors, franchisees, and all other businesses to picketing, boycotts, and similar tactics, regardless of whether they have any dispute with the union.

The PRO-Act would also codify the National Labor Relations Board's controversial *Browning-Ferris Industries* joint-employer standard that threatens small and local businesses; curb opportunities for people to work independently through traditional independent contractor roles or gig economy platforms, and prohibit arbitration agreements in employment contracts.

Union "density" has fallen dramatically in recent years, but rather than address that decline by persuading workers of the merits of union representation, labor unions are asking Congress to put its thumb on the scale in their favor. If Congress kowtows to the demands of labor by passing this legislation the idea of fair elections and due process rights for workers and employers alike will be systematically dismantled.

NAW urges you to reject S. 420, the PRO Act, and instead focus on helping America recover from the Coronavirus pandemic instead of trying to rob workers of their right to a secret ballot and silence the voice of employers.

Sincerely,

SETH M. WAUGH,
ASSOCIATE VICE PRESIDENT,
GOVERNMENT AFFAIRS.

COALITION FOR A DEMOCRATIC WORKPLACE
July 21, 2021.

Hon. PATTY MURRAY, *Chair*
Hon. RICHARD BURR, *Ranking Member*
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIR MURRAY AND RANKING MEMBER BURR:

The Coalition for a Democratic Workplace (CDW), a broad-based coalition of hundreds of organizations representing hundreds of thousands of employers and millions of employees in various industries across the country, and the 280 undersigned organizations write in opposition to the Protecting the Right to Organize (PRO) Act, S. 420.

This radical legislation would violate workers' free choice and privacy rights, jeopardize industrial stability, cost millions of American jobs, threaten vital supply chains, and greatly hinder our economic recovery from COVID–19. The PRO Act includes dozens of provisions that would boost union membership and dues revenue streams at the expense of the rights of workers, employers, and consumers alike. Forbes Tate Partners (FTP) conducted a survey of over 1,000 registered voters and

found that respondents overwhelmingly were concerned with the various policies of the bill, some of which are explained below. [1]

The PRO Act would infringe on worker privacy and freedom of choice. The bill requires employers to give union organizers employees' personal information without prior approval from the employees themselves. This includes home addresses, phone numbers, email addresses, work shifts and locations, and job classifications. Employees couldn't opt out of this requirement or choose which information is shared, exposing them to potential harassment, intimidation tactics, stalking, and online bullying. FTP's survey found that 75 percent of respondents were concerned with this policy.

The PRO Act would also destabilize US industrial operations and the economy and threaten supply chains by reversing current bans on intermittent strikes and secondary boycotts. Under the PRO Act, unions would be able to conduct a series of short intermittent strikes to disrupt business operations if an employer doesn't concede to their demands, potentially disrupting the economy and critical supply chains, including those fundamental to our COVID–19 response. One of the fundamental goals of the National Labor Relations Act is to help ensure industrial peace. Intermittent strikes, however, would leave unionized and nonunionized employers alike in constant fear of work stoppages—further threatening the already fragile stability of our economy.

The PRO Act would also rescind all restrictions against "secondary boycotts," or activity used by unions to impose economic injury on neutral third parties, including consumers, companies, or other unions, that do business with a company involved in a labor dispute with the union. These activities were banned in the 1940's and 1950's after unions engaged in excessive and abusive tactics. Allowing secondary boycotts will once again expose all consumers, unions, and businesses to coercion, picketing, boycotts, and similar tactics.

Additionally, the bill drastically shortens the timeframe between union organizers petitioning for a union representation election and the holding of that election, ensuring employees do not have adequate time to hear both sides of the debate over whether union representation is right for them. The PRO Act would greatly expand the National Labor Relations Board's power to force union representation on employers and employees without an election, depriving workers of their right to a vote.

The PRO Act would also eliminate right-to-work protections across the country, including in the twenty-seven states whose populations and representatives voted for and implemented such laws. Right-to-work laws allow workers to choose not to pay union dues to a labor organization whose policies and advocacy efforts do not align with their own beliefs. These laws ensure workers can continue to work without being forced to join a union. According to the FTP survey, 57 percent of registered voters believe workers should not be forced to join a union as a condition of employment, while 67 percent were concerned with the bill's efforts to eliminate right-to-work protections and force workers to choose between paying union dues or losing their jobs.

Furthermore, the PRO Act would impose nationwide California's recently adopted and failed "ABC test" to determine whether a worker is an employee or independent contractor. The ABC test makes it very difficult to qualify as an independent contractor, so nationwide application would result in many workers losing their independent contractor status. This is at odds with what independent contractors actually want. Time and again, these workers explain that they choose independent work for the flexibility and autonomy it offers. Additionally, the ABC test will force businesses that contract with such workers to no longer use them for various services out of fear of the liability such contracts could trigger. This would threaten small businesses that rely on those contracts. This policy was concerning to 70 percent of FTP's survey respondents.

Finally, the PRO Act would codify into law the NLRB's controversial 2015 *Browning-Ferris Industries (BFI)* decision that expanded and muddled the standard for determining when two separate entities are "joint-employers" under Federal labor law. Joint-employers are mutually responsible for labor violations committed against the jointly employed workers as well as bargaining obligations with respect to those workers, so the liability associated with joint-employer status is immense. The *BFI* decision overturned decades of established labor law and undermined nearly every contractual relationship, from the franchise model to those between contractors and

[1] Survey results can be viewed at *http://myprivateballot.com/wp-content/uploads/2021/06/PRO-Act-National-Survey-Summary-6.28.21.pdf*.

subcontractors and suppliers and vendors. The *BFI* standard also hampered businesses' efforts to encourage "corporate responsibility" throughout their supply chains and business partners. In FTP's survey, 65 percent of voters were concerned about the bill upending the franchise business model, a business ownership structure that attracts first time small business owners from a diverse range of backgrounds and experiences.

These are only a few of the dangerous policies included in the PRO Act. CDW and the 280 undersigned organizations urge the Committee to reject this radical legislation and protect the rights of America's workers, small businesses, and consumers.

Sincerely,

The Coalition for a Democratic Workplace,
AGC Florida East Coast
AGC Maine
AGC of California
AGC of Kansas
AGC of Kentucky
AGC of Metropolitan Washington DC
AGC of Minnesota
AGC of Ohio
AGC of South Dakota, Highway-Heavy-Utility Chapter
AGC of Wyoming
Air Conditioning Contractors of America
Alabama AGC
Alabama Restaurant & Hospitality Association
Alaska Cabaret, Hotel, Restaurant & Retailers Association
American Bakers Association
American Foundry Society
American Home Furnishings Alliance
American Hotel & Lodging Association
American Mold Builders Association
American Pipeline Contractors Association
American Rental Association
American Seniors Housing Association
American Society of Employers
American Staffing Association
American Supply Association
American Trucking Association
Americans for Tax Reform
Arizona Builders Alliance
Arizona Restaurant Association
Arizona Rock Products Association
Arkansas Hospitality Association
Arkansas Ready Mixed Concrete Association
Arkansas State Chamber of Commerce
Asian American Hotel Owners Association
Associated Builders and Contractors
Associated Builders and Contractors Alabama Chapter
Associated Builders and Contractors Alaska Chapter
Associated Builders and Contractors Arkansas Chapter
Associated Builders and Contractors Carolinas Chapter
Associated Builders and Contractors Central California Chapter
Associated Builders and Contractors Central Florida Chapter
Associated Builders and Contractors Central Ohio Chapter
Associated Builders and Contractors Central Pennsylvania Chapter
Associated Builders and Contractors Central Texas Chapter
Associated Builders and Contractors Chesapeake Shores Chapter
Associated Builders and Contractors Connecticut Chapter
Associated Builders and Contractors Cornhusker Chapter
Associated Builders and Contractors Cumberland Valley Chapter
Associated Builders and Contractors Delaware Chapter
Associated Builders and Contractors Eastern Pennsylvania Chapter
Associated Builders and Contractors Empire State Chapter
Associated Builders and Contractors Florida East Coast Chapter
Associated Builders and Contractors Florida First Coast Chapter
Associated Builders and Contractors Florida Gulf Coast Chapter
Associated Builders and Contractors Georgia Chapter
Associated Builders and Contractors Greater Baltimore Chapter

Associated Builders and Contractors Greater Houston 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 Heart of America 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 Iowa Chapter
Associated Builders and Contractors Keystone Chapter
Associated Builders and Contractors Maine Chapter
Associated Builders and Contractors Massachusetts Chapter
Associated Builders and Contractors Metro Washington Chapter
Associated Builders and Contractors Minnesota/North Dakota Chapter
Associated Builders and Contractors Mississippi Chapter
Associated Builders and Contractors Nevada Chapter
Associated Builders and Contractors New Hampshire/Vermont Chapter
Associated Builders and Contractors New Jersey Chapter
Associated Builders and Contractors New Mexico 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 California Chapter
Associated Builders and Contractors of Louisiana
Associated Builders and Contractors of Michigan
Associated Builders and Contractors Northern Ohio Chapter
Associated Builders and Contractors Ohio Valley Chapter
Associated Builders and Contractors Oklahoma Chapter
Associated Builders and Contractors Pacific Northwest Chapter
Associated Builders and Contractors Pelican Chapter
Associated Builders and Contractors Rhode Island Chapter
Associated Builders and Contractors Rocky Mountain Chapter
Associated Builders and Contractors San Diego Chapter
Associated Builders and Contractors South Texas Chapter
Associated Builders and Contractors Southeast Texas Chapter
Associated Builders and Contractors Southeastern Michigan Chapter
Associated Builders and Contractors Southern California Chapter
Associated Builders and Contractors Texas Coastal Bend Chapter
Associated Builders and Contractors Texas Gulf Coast Chapter
Associated Builders and Contractors Texas Mid-Coast Chapter
Associated Builders and Contractors Utah Chapter
Associated Builders and Contractors Virginia Chapter
Associated Builders and Contractors West Tennessee Chapter
Associated Builders and Contractors West Virginia Chapter
Associated Builders and Contractors Western Michigan Chapter
Associated Builders and Contractors Western Pennsylvania Chapter
Associated Builders and Contractors Western Washington Chapter
Associated Builders and Contractors Wisconsin Chapter
Associated Equipment Distributors
Associated General Contractors of America
Associated General Contractors of America, Nebraska Chapter
Associated General Contractors of Michigan
Associated General Contractors of NH
Associated General Contractors of Virginia
Associated General Contractors of Wisconsin
Associated General Contractors South Texas Chapter
Associated Industries of Arkansas, Inc.
Bidgesource, LLC
Brick Industry Association
California Restaurant Association
Carolinas AGC
Carolinas Ready Mixed Concrete Association
Catapult, Formerly CAI & TEA
CAWA—Representing the Automotive Parts Industry
Center for the Defense of Free Enterprise
Coalition of Franchisee Associations
Colorado Restaurant Association
Connecticut Restaurant Association

Consumer Technology Association
Delaware Restaurant Association
Education Market Association
Florida Restaurant & Lodging Association
FMI—The Food Industry Association
Foodservice Equipment Distributors Association
Franchise Business Services
Gases and Welding Distributors Association
Georgia Restaurant Association
Global Cold Chain Alliance
Global Market Development Center
Hawaii Restaurant Association
Heating, Air-conditioning, & Refrigeration Distributors International
Hospitality Maine
Hospitality Minnesota
Hospitality Tennessee
HR Policy Association
IAAPA, the Global Association for the Attractions Industry
ICSC—Innovating Commerce Serving Communities
Idaho Lodging & Restaurant Association
Illinois Restaurant Association
Independent Electrical Contractors
Independent Electrical Contractors Atlanta Chapter
Independent Electrical Contractors CenTex Chapter
Independent Electrical Contractors Central Ohio Chapter
Independent Electrical Contractors Central Pennsylvania Chapter
Independent Electrical Contractors Chesapeake Chapter
Independent Electrical Contractors East Texas Chapter
Independent Electrical Contractors Florida West Coast Chapter
Independent Electrical Contractors Fort Worth/Tarrant Co. Chapter
Independent Electrical Contractors Georgia Chapter
Independent Electrical Contractors Greater Cincinnati Chapter
Independent Electrical Contractors Indy Chapter
Independent Electrical Contractors Kentucky & So. Indiana Chapter
Independent Electrical Contractors Lubbock Chapter
Independent Electrical Contractors Midwest IEC Chapter
Independent Electrical Contractors Montana Chapter
Independent Electrical Contractors New England Chapter
Independent Electrical Contractors New Jersey Chapter
Independent Electrical Contractors Northern New Mexico Chapter
Independent Electrical Contractors Northwest Pennsylvania Chapter
Independent Electrical Contractors Oregon Chapter
Independent Electrical Contractors Texas Gulf Coast Chapter
Independent Electrical Contractors Wichita Chapter
Independent Professionals and Self Employed Association
Indiana Restaurant & Lodging Association
Industrial Fasteners Institute
Interlocking Concrete Pavement Institute
International Foodservice Distributors Association
International Franchise Association
International Warehouse Logistics Association
Iowa Association of Business and Industry
Iowa Restaurant Association
Kansas Chamber of Commerce
Kansas Restaurant & Hospitality Association
Kentucky Concrete Association
Kentucky Restaurant Association
Leading Builders of America
Littler Workplace Policy Institute
Louisiana AGC
Louisiana Restaurant Association
Manufactured Housing Institute
Maryland Ready Mix Concrete Association
Massachusetts Restaurant Association
Metals Service Center Institute
Michigan Concrete Association
Michigan Restaurant & Lodging Association
Mid-South Independent Electrical Contractors

Mississippi Hospitality & Restaurant Association
Missouri Restaurant Association
Modular Building Institute
Montana Contractors Association
Montana Restaurant Association
Motor & Equipment Manufacturers Association
National Apartment Association
National Association of Chain Drug Stores
National Association of Chemical Distributors
National Association of Home Builders
National Association of Manufacturers
National Association of Mutual Insurance Companies
National Association of Sporting Goods Wholesalers
National Association of Wholesaler-Distributors
National Club Association
National Council of Chain Restaurants
National Federation of Independent Business
National Franchisee Association
National Grocers Association
National Lumber & Building Material Dealers Association
National Marine Distributors Association
National Multifamily Housing Council
National Ready Mixed Concrete Association
National Restaurant Association
National Retail Federation
National Roofing Contractors Association
National Small Business Association
National Stone, Sand & Gravel Association
National Tooling and Machining Association
National Utility Contractors Association
NATSO, Representing America's Travel Plazas and Truck Stops
Nebraska Restaurant Association
Nevada Chapter AGC
Nevada Restaurant Association
New Jersey Motor Truck Association
New Jersey Restaurant & Hospitality Association
New Mexico Restaurant Association
New York State Restaurant Association
North American Die Casting Association
North Carolina Restaurant & Lodging Association
North Dakota Hospitality Association
Ohio Hotel & Lodging Association
Ohio Restaurant Association
Oklahoma Aggregates Association
Oklahoma Restaurant Association
Open Competition Center
Oregon Restaurant & Lodging Association
Outdoor Power Equipment
Pennsylvania Restaurant & Lodging Association
Pet Industry Distributors Association
Petroleum Equipment Institute
Plastics Industry Association
Portland Cement Association
Power & Communication Contractors Association
Precision Machined Products Association
Precision Metalforming Association
PRINTING United Alliance
Promotional Products Association International
Puerto Rico Restaurant Association
Restaurant Association of Maryland
Restaurant Association of Metropolitan Washington
Retail Industry Leaders Association
Rhode Island Hospitality Association
SNAC International
South Carolina Restaurant & Lodging Association
South Dakota Retailers Association
Southern Illinois Builders Association
Texas Restaurant Association

TEXO, The Construction Association
The Associated General Contractors of Texas
The Coalition for a Democratic Workplace
Tile Roofing Industry Alliance
Truck Renting and Leasing Association
U.S. Chamber of Commerce
United Motorcoach Association
Utah Restaurant Association
Virginia Manufacturers Association
Virginia Ready Mixed Concrete Association
Virginia Restaurant, Lodging & Travel Association
Virginia Trucking Association
West Virginia Hospitality & Travel Association
Western Carolina Industries
Western Electrical Contractors Association
Western Growers
Wisconsin Ready Mixed Concrete Association
Wisconsin Restaurant Association
Workforce Fairness Institute
Wyoming Lodging & Restaurant Association

APP-BASED WORK ALLIANCE

The PRO Act and Worker Reclassification: Myths vs. Facts

Myth: Most app-based workers want to be reclassified as employees instead of independent contractors.

Fact: In poll after poll over the past decade, the overwhelming majority of app-based workers have consistently said they *do not* want to be reclassified as employees and want to remain independent contractors. The vast majority of app-based workers choose to work less than 40 hours a week and like app-based work because it is flexible and allows them to set their own schedule.

- **MAY 2021 POLL**: More than 90 percent of app-based workers said they wouldn't be able to continue with app-based work if they didn't have the flexibility they currently have. More than 70 percent of app-based workers, including 69 percent of workers of color, say they do not support measures to reclassify drivers as employees.
- **APRIL 2021 POL**L: 77 percent of app-based workers would rather be independent contractors than employees, and 91 percent said they would stop working with the app-based companies if they lost the flexibility they currently enjoy.
- **FEBRUARY 2021 POLL**: Nationwide, 79 percent of app-based workers want to remain independent contractors, with only 13 percent expressing a desire to become employees.
- **AUGUST 2020 POLL**: Both drivers and workers overwhelmingly support plans to remain independent contractors while having access to benefits.

Myth: The ABC Test in the PRO Act won't hurt independent workers or lead to a loss of earning opportunities.

Fact: The ABC Test could lead to the elimination of earning opportunities for millions of independent workers who choose to work on their own terms. The ABC Test is an outdated legal standard that determines who is an employee and who isn't. It does not take into consideration the changes that have taken place in the workforce since some states adopted ABC tests in the 1930's and is not compatible with the 21st century economy. This isn't a theoretical argument—we know that the ABC Test will hurt workers because it's the same language that was included in California's failed Assembly Bill 5, which resulted in uncertainty and *lost jobs for California workers*.

- It's why the core of AB5 was rejected by a *17 percent margin* in California with Proposition 22 last year, but that option won't exist for a Federal law like the PRO Act, which would lock-in AB5-style inflexibility nationwide.

- AB5 caused *so many problems* that California had to exempt 100+ occupations to make it work. Even then, it disrupted thousands of businesses and caused some companies to move work out of state.
- The PRO Act, by contrast, contains no exceptions. Doctors, lawyers, journalists—all of them would have to pass the ABC test to avoid reclassification. The PRO Act would therefore disrupt an even broader swath of the economy—not just in California, but across the Nation.

Myth: The PRO Act only affects the National Labor Relations Act and does not apply to the IRS or Wage/benefit law in the FLSA. It won't impact how other state and Federal agencies, such as the Department of Labor, view independent contractors' employment status.

Fact: This is a disingenuous argument. Once the test for classifying a worker as an employee is established for one Federal agency, it sets a precedent for other agencies, as well as states and courts who are deciding cases on this issue, to follow suit and do the same. That's what will happen if the PRO Act passes with California's ABC test.

Myth: The ABC test in the PRO Act simply gives workers the ability to unionize, and means that app-based workers and others can stay independent contractors if they choose.

Fact: This is false. If the PRO Act passes, it could reclassify thousands of independent contractors as traditional employees, even those who have said overwhelmingly they don't want to be. This would come as a direct result of the ABC Test in the bill. The ABC Test is a word-for-word copy of California's AB5, and just like AB5, this provision could lead to independent workers being reclassified as employees. Under the PRO Act, even those workers who don't want to be part of a union would still be bound by all of the conditions negotiated by unions on their behalf, even if they disagree with those conditions.

Myth: App-based companies want to keep the status quo so they don't have to give benefits or protections to the workers who drive, deliver, and grocery shop with their platforms.

Fact: App-based companies support and have advocated for an "independence plus benefits" model that would allow earners on their platforms to keep their independent status while having access to important benefits and protections.

Myth: The employee classification debate is a Democratic vs. Republican issue, and Democratic voters support classifying drivers as employees.

Fact: An overwhelming majority of voters across the political spectrum, including Democratic voters, support keeping app-based workers as independent contractors with benefits. In one recent *poll*, 88 percent of Democratic voters and 89 percent of all young voters aged 18–34 said they support an "independence plus benefits" proposal that would keep app-based workers classified as ICs. Another *poll* found that 78 percent of Democratic voters from every region of the country support an "independence plus benefits" model.

NATIONAL ASSOCIATION OF MANUFACTURERS
733 10TH STREET, NW SUITE 700 WASHINGTON, DC.
July 21, 2021.

Hon. PATTY MURRAY, *Chair*
Hon. RICHARD BURR, *Ranking Member*
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIR MURRAY AND RANKING MEMBER BURR:

On behalf of the National Association of Manufacturers, the largest manufacturing association in the United States representing 14,000 manufacturers in every industrial sector and in all 50 states, I write in response to today's public hearing, "The Right to Organize: Empowering American Workers in a 21st Century Economy." Manufacturers remain committed to protecting employees' freedom to associate and their choice to accept or reject labor union representation but strongly oppose S. 420, the Protecting the Right to Organize Act.

Manufacturers are united in their opposition to S. 420 because the legislation will dramatically alter a carefully balanced equilibrium guiding labor and management relations. In March 2021, 97 percent of respondents to the NAM Manufacturers' Outlook Survey said the PRO Act would negatively impact business operations and

damage relationships with employees.[1] Further, the PRO Act would lead to long-lasting damage to manufacturing workers' rights and their privacy by shifting the long-established role of the employer away from a company supervisor to a union shop steward.

The PRO Act goes beyond supporting a worker's right to organize and advances a workplace environment that could lead to privacy violations, employee intimidation and suppression of communications from employers. An individual's free and confidential choice to join a union will be lost in this new labor-management paradigm. Further, 27 states will lose their right-to-work status if this legislation is enacted, representing a significant Federal overreach that harms employers and individuals alike.

As our Nation emerges from the depths of the COVID–19 pandemic and confronts new challenges, manufacturers cannot afford to become more restrictive and less competitive by the hand of our Federal Government. I appreciate your attention to these concerns and look forward to working with you on proposals that instead support manufacturing and its workers.

Sincerely,

ROBYN BOERSTLING

NATIONAL READY MIXED CONCRETE ASSOCIATION,
NATIONAL STONE, SAND AND GRAVEL ASSOCIATION,
PORTLAND CEMENT ASSOCIATION.
July 20, 2021.

Hon. PATTY MURRAY, *Chair*
Hon. RICHARD BURR, *Ranking Member*
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC.

DEAR CHAIR MURRAY AND RANKING MEMBER BURR:

On behalf of the National Stone, Sand & Gravel Association (NSSGA), the National Ready Mixed Concrete Association (NRMCA), and the Portland Cement Association (PCA), we write to share our views on proposed legislation as you prepare for the upcoming hearing to examine the "*Right to Organize: Empowering American Workers in a 21st Century Economy*".

The aggregates, cement, and concrete industries are paramount to our Nation and quite literally building the foundation of the U.S. economy, as our products are used to construct almost any type of infrastructure project, building, or home. Cement and concrete products manufacturing employs over 600,000 people—directly and indirectly—in our country and contributes over $100 billion to our economy. America's stone, sand and gravel industry is responsible for 100,000 direct jobs and over $25 billion in economic impact. The vast majority of our membership in the ready mixed and aggregates sectors are family owned, small businesses. Across all industries, we are proud to provide meaningful, stable long-term careers with many opportunities for growth and advancement. Our industries support high paying jobs, with average compensation over $75,000.

Our member companies support the right of workers to choose to organize, and many of our employers across the country partner with labor organizations to provide high-earning jobs to the men and women responsible for producing construction materials. We are proud of our strong relationship with labor organizations to address the Nation's infrastructure challenges.

However, legislative proposals like the misleadingly named "Protecting the Right to Organize" (PRO) Act is an unprecedented attempt to fundamentally change dozens of well-established labor laws at a time of tenuous economic recovery. While there have been no reported barriers with workers seeking to consider unionizing in our industry, this legislation would disrupt the rights of workers and employers and add unworkable mandates that would severely impact the ability to efficiently produce and deliver construction materials. It is a solution in search of a problem.

The PRO Act would effectively eliminate right-to-work laws that have been democratically adopted in 27 states, undermining numerous state constitution and our workers constitutionally protected rights. This is a dramatic overreach by the Federal Government.

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[1] *https://www.nam.org/wp-content/uploads/2021/03/NAM-Outlook-Survey-Q1-2021.pdf.*

Further, the PRO Act would hinder opportunities for individuals to work through traditional independent contractor roles, which are critical in the transportation of construction materials to job sites. Specifically, the legislation would amend the National Labor Relations Act (NLRA) to include the California Supreme Court's recently adopted and failed "ABC test," which makes it very difficult to qualify as an independent contractor. This would result in many workers, who play a critical role in transporting aggregates and concrete to job sites, losing their independent contractor status. This will lead to confusion, increased costs and uncertainty as we are working to supply the growing demand for construction materials across the country. Further, *data shows* that implementing the so-called "ABC Test" standard could threaten as much as 8.5 percent of the Nation's gross domestic product (GDP).

Finally, we have great concerns with other provisions included in the PRO Act that would hinder employers and employees' rights and privacy, including:

- shortening the time window for a union election;
- employers would not be able to challenge union misconduct during union elections;
- codifying the "quickie" election rules, limiting employees' opportunity to consider information about the union seeking to represent them;
- right to counsel on complex labor laws would be practically eliminated; and
- employers would be forced to disclose employee's personal information without employees consent or their ability to opt out, 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.

Many of these provisions would be particularly burdensome on small employers who do not have the resources to confront new regulatory challenges. This is especially troubling as Congress is working feverously with the Biden administration to advance a long-awaited, bipartisan infrastructure proposal. Unnecessary mandates proposed under the PRO Act would lead to delays and cost increases as our members supply the materials needed to improve our outdated infrastructure.

For these reasons, as you examine labor rights in today's workplace, we implore you to oppose this misguided legislation and work with us to ensure unnecessary Federal mandates are not included in any infrastructure package that advances through the Congress.

Thank you for your consideration of our member's views and please do not hesitate to contact us we may be of any further assistance.

Sincerely,
National Ready Mixed Concrete Association,
National Stone, Sand & Gravel Association,
Portland Cement Association.

AMERICAN COUNCIL OF LIFE INSURERS,
March 4, 2021.

Hon. NANCY PELOSI *Speaker*
Hon. KEVIN MCCARTHY *Minority Leader*
U.S. House of Representatives,
H–222, H–204, U.S. Capitol,
Washington, DC.

DEAR SPEAKER PELOSI AND MINORITY LEADER MCCARTHY:

As the Chief Executive Officers of trade associations that collectively represent more than 100,000 individual small business owners, broker-dealers and insurance companies providing financial services to more than 112 million American families, we are writing to express our members' strong concerns with H.R. 842, The Protecting the Right to Organize (PRO) Act. This legislation seeks to change the definition of "independent contractor" in a way that would cause significant disruption to the independent financial services and property casualty insurance industries and the customers we serve.

The current model provides financial services professionals with multiple avenues for advising and helping American families and businesses build secure financial futures and protect their assets. Some choose to engage in this work as employees, while many others prefer the freedom and independence that comes from operating

their own business utilizing the independent contractor status. Many have substantial relationships with one or more insurance companies, broker dealers, or registered investment advisors, which allows them to offer expanded options to their customers. These small business owners enter into written agreements with insurance companies (or general agents of insurance companies), broker dealers or registered investment advisors that carefully set forth the terms of the independent contractor status. It would be enormously disruptive to negate these agreements through Federal legislation.

By effectively reclassifying independent contractors as employees, the PRO Act would create unintended consequences for the industry, and specifically insurance producers and independent financial advisors. These individuals are vital to ensuring that Main Street Americans have access to the important advice, products and services necessary to achieve their financial goals and protect their homes, families and businesses. In times of catastrophe, insurers engage independent contractors to provide a faster response for consumers experiencing loss. The PRO Act's "ABC test" could eliminate the choice a majority of practitioners have made to serve clients independently. In turn that could drastically reduce clients' ability to access high quality advice for their insurance, investment and retirement security needs.

Additionally, affiliated financial advisors have a long history of appropriate classification as independent contractors and are not involved in the worker classification problems found in other industries. They are not employees for purposes of determining applicability of Federal (ERISA and EEO1) reporting requirements and State wage and benefit provisions. Compensation practices in the securities industry are carefully recorded, with IRS Form 1099 reporting universally required. As a result, the problems of cash payments and unreported income that may exist in other industries do not exist in the securities and insurance professions. Furthermore, the insurance industry and independent broker dealers are highly regulated.

As you consider H.R. 842, we hope that you will be mindful of the negative impact that this legislation will have on customers, agents and advisors working to ensure that their clients have the resources to make wise financial decisions and ensure financial security for themselves and their families.

Sincerely,

SUSAN K. NEELY,
AMERICAN COUNCIL OF LIFE INSURERS.
DAVID A. SAMPSON,
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION.
CHRISTOPHER A. IACOVELLA,
AMERICAN SECURITIES ASSOCIATION.
MARC CADIN,
FINSECA.
KEN A. CRERAR,
COUNCIL OF INSURANCE AGENTS AND BROKERS.
DALE BROWN,
FINANCIAL SERVICES INSTITUTE.
BOB RUSBULDT,
INDEPENDENT INSURANCE AGENTS
AND BROKERS ASSOCIATION OF AMERICA.
WAYNE CHOPUS,
INSURED RETIREMENT INSTITUTE.
JIM HODGES,
NATIONAL ALLIANCE OF LIFE COMPANIES.
CHUCK DIVENCENZO,
NATIONAL ASSOCIATION FOR FIXED ANNUITIES.
JANET TRAUTWEIN,
NATIONAL ASSOCIATION OF HEALTH UNDERWRITERS.
KEVIN M. MAYEUX,
CAE,
NATIONAL ASSOCIATION OF INSURANCE AND FINANCIAL ADVISORS.
CHUCK CHAMNESS,
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES.
KENNETH E. BENTSEN, JR.,
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION.

QUESTIONS AND ANSWERS

RESPONSE BY HEIDI SHIERHOLZ TO QUESTIONS OF SENATOR LUJAN AND SENATOR CASEY

SENATOR LUJAN

My family raised me to understand that our communities are stronger when workers are protected and empowered. My grandfather was a union carpenter, my dad was a union ironworker in Local 495, and my mom worked for the public schools. My brother is IBEW and my nephew was just accepted into an IBEW apprenticeship.

I've said this before, but I believe that everybody in America should have the same opportunity my grandfather, father and siblings have had: to work hard, to build real economic security, and to pass something better on to your children and grandchildren. Those are the values I learned growing up, and ones I continue to fight for in Congress. The testimony we heard today from our witnesses includes a number of troubling statistics.

Question 1. Ms. Shierholz, between 1979 and 2020, how much did the union coverage rate drop?

Answer 1. Between 1979 and 2020, the share of workers covered by a collective bargaining agreement dropped from 27.0 percent to 12.1 percent.[1] This means the union coverage rate is now less than half where it was four decades ago.

Question 2. Ms. Shierholz, would you agree that as union membership declines are correlated with increased income inequality?

Answer 2. Yes.

Question 3. Ms. Shierholz, and how much of the growth in inequality between typical workers and the rich can be explained by de-unionization?

Answer 3. Recent research shows that de-unionization accounts for one-third of the growth in inequality between typical workers and workers at the high end of the wage distribution in recent decades.[2]

Question 4. Ms. Shierholz, what is the share of workers in 2020 who said they would join a union if given the opportunity?

Answer 4. Research shows that nearly half (48 percent) of all nonunion workers who say they would vote for a union if given the opportunity—a 50 percent higher share than when a similar survey was taken in 1995.[3]

In addition, a 2020 Gallup poll finds that 65 percent of Americans approve of labor unions—the highest percentage in 16 years.[4]

Question 5. Ms. Shierholz, why should we make it easier to organize and form unions if we want to reduce economic inequality?

Answer 5. When workers are able to come together, form a union, and collectively bargain, their wages, benefits, and working conditions improve.[5] Further, when union density is high, *nonunion* workers benefit, because unions effectively set broader standards—including higher wages—that nonunion employers must meet in order to attract and retain the workers they need. The combination of the direct effect of unions on union members and this "spillover" effect to nonunion workers means unions are crucial in raising wages for working people and reducing income inequality.[6]

SENATOR CASEY

Dr. Shierholz, in your testimony, you state that on average, a worker covered by a union contract earns 10.2 percent more in wages than a peer with similar edu-

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[1] Economic Policy Institute, "*Union Coverage*," *The State of Working America Data*, last updated February 2021.

[2] Lawrence Mishel, *The Enormous Impact of Eroded Collective Bargaining on Wages*, Economic Policy Institute, April 8, 2021.

[3] Thomas A. Kochan et al., "*Worker Voice in America: Is There a Gap Between What Workers Expect and What They Experience?*" *ILR Review* 72, no. 1 (January 2019): Figure 3, *https://doi.org/10.1177/0019793918806250*.

[4] Megan Brenan, "*At 65 percent, Approval of Labor Unions in U.S. Remains High*," Gallup website, September 3, 2020.

[5] Josh Bivens et al., *How Today's Unions Help Working People: Giving Workers the Power to Improve Their Jobs and Unrig the Economy*, Economic Policy Institute, August 2017.

[6] Jake Rosenfeld, Patrick Denice, and Jennifer Laird, *Union Decline Lowers Wages of Nonunion Workers*, Economic Policy Institute, August 2016.

cation, occupation, and experience in a nonunionized workplace in the same sector, and that more than nine in ten workers covered by a union contract have access to paid sick days. You also state that as union membership has declined, income inequality has increased.

Question 1. Can you discuss how declines in unionization over time have impacted wages and benefits, like paid sick leave and health care, for American workers as a whole?

Answer 1. When union density is high, workers with strong unions have been able to set industry standards for wages and benefits that help all workers, both union and nonunion. For instance, recent research finds the erosion of collective bargaining lowered the median hourly wage by $1.56, a 7.9 percent decline from 1979 to 2017. These losses from de-unionization are the equivalent of $3,250 annually for a full-time, full-year worker. [1]

Unions have also been a key part of efforts to pass laws that provide economic security, strong communities, and dignity on the job for all workers. The labor movement helped pass and defend the Occupational Safety and Health Act, the Civil Rights Act, the Social Security Act, Medicare and Medicaid, and numerous other laws benefiting all workers and their communities. Further, cities and states that have adopted paid sick days laws, $15 minimum wage, and other progressive legislation have some of the highest union density and strongest labor movements. [2]

Response by Gracie Heldman to questions of Senator Lujan

SENATOR LUJAN

Question 1. Ms. Heldman, what would having the opportunity to join a union mean to you and your coworkers?

Answer 1. As my manager told me, “You have no rights once you walk into the factory.” Joining a union would give us true representation with a real voice and rights. To have the ability and right to negotiate over our wages, benefits and working conditions would mean the world to the majority of us working at the bakery. To have a union contract where we, the workers, have rights and a grievance procedure guaranteed and to be treated with dignity and respect are all my co-workers and I want.

Question 2. Ms. Heldman, what penalties and changes that would be brought about by the PRO Act would improve your workplace?

Answer 2. The PRO Act would eliminate the “mandatory captive audience” meetings management holds every time the workers try to join the BCTGM Union. These meetings are very intimidating where one top manager or union avoidance speaker talks very negatively about the union, threatening us with possible loss of wages and benefits if we vote yes for the union.

While we’re in a large group in the middle of the room the rest of the room is surrounded by supervisors who are staring and observing our reactions to everything that is being said by the Speaker.

The PRO Act would also personally penalize the top corporate officials for violating the law or for discriminating against those of us who support organizing as a union.

The PRO Act would also force the company and the union to reach a first contract. This is another threat managers and union busters tell us during an organizing campaign. If we win, we’ll never get a contract and if we strike, we’ll be permanently replaced.

Response by Mark Gaston Pearce to questions of Senator Lujan, Senator Burr, and Senator Tim Scott

SENATOR LUJAN

Question 1. I am a strong supporter of the PRO Act, which would greatly strengthen workers’ ability to join a union. A Massachusetts Institute of Technology study found that nearly half of all nonunion workers—or more than 60 million people—would join a union today if given the chance, yet today only 12 percent of all

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[1] Lawrence Mishel, *The Enormous Impact of Eroded Collective Bargaining on Wages*, Economic Policy Institute, April 8, 2021.

[2] *See* Table 1 in Economic Policy Institute, *Unions Help Reduce Disparities and Strengthen Our Democracy* (fact sheet), April 23, 2021.

workers, or 16 million, are actually represented by a union. The right to a union and collective bargaining is also directly relevant to our urgent national response to the pandemic. Without unions, many workers are forced to work without personal protective equipment or access to paid leave or premium pay. The Economic Policy Institute recently estimated that workers in low-wage sectors, traditionally with low union representation, were six times less likely to be able to work from home. However, with a union, workers can negotiate additional pay, health and safety measures, paid sick leave, and job preservation. Unionized workers also feel more secure speaking out about hazards. To ensure more workers can join a union and secure safer working conditions in the wake of the pandemic, it is vital we pass the PRO Act. Mr. Pearce, how would passing the PRO Act increase workers' ability to join a union and secure safer workplaces?

Answer 1. Two specific ways that the PRO Act increases workers' ability to form a union is by limiting employer interference in determining the makeup of the bargaining unit and by mandating that pre-election hearings occur no later than 8 days after the NLRB issues a notice of election. Today, when employees present their representation petition to the Board, employers intending to quash their employees' voices can effectively control the timing of the election by challenging the scope of the employees' proposed bargaining unit. This forces a pre-election hearing on the issue, which itself can then be further postponed or dragged out by employers.

A 2011 investigation by the U.C. Berkeley Labor Center found that in cases where pre-election hearings are held, the actual election occurs an average of 124 days after the petition is filed,[7] during which time employees are often subject to the employer's anti-union campaign messaging and intimidation. The same study found a "considerable causal relationship" between the length of election delay and the number of unfair labor practice charges filed against employers,[8] which can further delay the vote and increase rancor between parties. In the worst of these scenarios, employers will target the leaders of the incipient union and discipline or discharge them, resulting in a chilling effect across the whole bargaining unit. By reducing employers' opportunities to suppress union support through a prolonged elections process, the PRO Act will increase the likelihood that workers will navigate the process to a successful end.

With regard to safer workplaces, workplace safety has long been considered a paradigmatic mandatory subject of bargaining. An employer may not unilaterally change a mandatory subject of bargaining without negotiating with the incumbent union. By making the process of gaining union representation less arduous, the PRO Act will increase the number of workers who will get a say in their employer's workplace safety and COVID policies, e.g., social distancing/masking at the workplace, access to personal protective equipment, vaccines, and more.

Question 2. Mr. Pearce, how would passing the PRO Act combat the decline in unionization we have seen over the past several decades?

Answer 2. In addition to the streamlined election procedure making the process of unionization less fraught, the PRO Act will stem the decline in unionization by addressing the perverse incentives employers have to violate their employees' Section 7 rights.

Today, employers are not subject to monetary penalties for retaliating against workers for union support, and workers are only entitled to remedial damages if they are fired in violation of Section 8(a)(3). A study conducted by the Peterson Institute for International Economics concluded that "a typical firm may have an incentive to fire a worker illegally for union activities if this illegal firing would reduce the likelihood of unionization at the firm by as little as 0.15–2 percent."[9] The PRO Act greatly increases the costs for employers who choose to suppress union organizing by engaging in unfair labor practices. Not only does the PRO Act expand the list of employer unfair labor practices to include bans on captive audience meetings, the withdrawal of recognition from a union without certification, and permanent replacement of economic strikers, it also includes monetary penalties of up to $50,000 per unfair labor practice violation, and $100,000 for repeat violators. Employees who win their jobs back may also receive front pay, consequential damages, punitive damages and attorneys' fees.

[7] John Logan, et al., *Research Brief: New Data: NLRB Process Fails to Ensure a Fair Vote*, June 2011, available at *https://laborcenter.berkeley.edu/pdf/2011/NLRB-Process-June2011.pdf*.
[8] *Id*.
[9] Anna Stansbury, *Do US Firms Have an Incentive to Comply with the FLSA and the NLRA?*, June 2021, available at *https://www.piie.com/sites/default/files/documents/wp21-9.pdf*.

For a sense of how just one of those new unfair labor practices will force firms to change their calculus in dealing with unionizing employees, one only needs to read the Hearing Officer's Report on Objections in the Amazon election in Bessemer, Alabama.[10] The report revealed that Amazon "held [captive audience] meetings 6 days a week, 18 hours a day."[11] If each captive audience meeting triggered a penalty as high as $50,000, even the largest companies in the country would be wise to consider a more cooperative approach to their dealing with a unionizing workforce.

But even if a giant company was prepared to absorb the new monetary penalties to sabotage a unionization drive, the PRO Act directs the Board to set aside election results that have been tainted by unfair labor practice violations, and to issue a bargaining order if the employees can show that they had majority support in the previous year (for example, by having a majority of the bargaining unit sign union authorization cards).

By streamlining the election process and addressing the perverse incentives that encourage employers to violate the law to avoid dealing with their employees as equals, the PRO Act will go a long way toward making sure that those 60 million American workers who want a union will have a fair chance at building one.

SENATOR BURR

Question 1. During the hearing, you testified that the ABC worker classification test included in the PRO Act is " . . . not new, it's been done by half of the states in this country for the purposes of wage and hours and other benefits and unemployment insurance."

- My understanding is that some form of the ABC test is used in 21 states. However, 19 of those 21 states use a different and less restrictive version of the test than is used in the PRO Act. Legal experts with the firm Morgan Lewis have written, "Only Massachusetts and California have adopted the PRO Act's strict version of the ABC test to determine employee status . . . " They add that "California adopted 48 industry and occupation exemptions" to its ABC test and that "the majority states" do not use any version of the ABC test "to determine if a worker is an employee for wage and hour purposes."
- Would you please provide the Committee a list of states that use the exact same version of the ABC test in the PRO Act along with a copy of the respective states' statutory language as compared to the statutory language in the PRO Act's ABC test?

Answer 1. I am attaching a chart which reflects states which have adopted an ABC test as of April 21, 2021 but I am not certain this is exhaustive or completely up to date. I have not studied those laws extensively and am not an expert on state employment laws in all fifty states.

Question 2. In Sept. 2019, California Gov. Gavin Newsom signed AB5, which codified the strict ABC test used in the PRO Act as the legal test in California for determining whether a worker is properly classified as an independent contractor rather than a traditional W2 employee. The test immediately ran into difficulties and a "clean-up" bill needed to be passed to exempt 109 categories of work from the ABC test. More workers such as ride-sharing drivers and delivery providers fought for and won their exemption through a ballot initiative approved by an overwhelming majority of Californians. The PRO Act's ABC test contains zero exemptions.

- Do you believe any such exemptions should exist? If so, please provide the Committee a list of work categories that you believe should be exempted from the ABC test.
- California's Proposition 22, which granted an exemption to ride-sharing drivers as well as others, passed with nearly as big of a majority as President Biden achieved in the state. Do you believe that the backlash the ABC test received in California, likely the most liberal state in the Nation, suggests that the state government went too far?

Answer 2. As noted in my response to the previous question, I am attaching a chart which reflects the states that have passed an ABC test at least as of April

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[10] *Amazon.Com Services LLC*, Hearing Officer's Report on Objections, Case 10-RC–269250, Aug. 2, 2021.

[11] *Id*. at p.6.

21, 2021 but I am not certain this is an exhaustive list. I have not carefully examined all the provisions in each of these state laws and am not an expert on state employment laws in all fifty states and would not venture an opinion regarding statutes I have not carefully reviewed.

SENTOR TIM SCOTT

A-B-C Test

Question 1–5. During the hearing, in a response to a question from Senator Baldwin, you indicated that the ABC test "is not new . . . it's being done by half of the states in this country for the purpose of wage and hours and other benefits and unemployment insurance . . . so, what it does is codify that standard so that it would apply in discerning who is eligible for coverage under the National Labor Relations Act."

Please answer the following with specificity:

I. Please list the states that have enacted the ABC test as outlined in the Protecting the Right to Organize Act. For reference, the text of the provision in the PRO Act is provided below.

II. For instances where states have adopted some form of an ABC test, but it differs from the PRO Act, please provide the Committee with a list of those states.

III. If there are differences between the ABC test provision in the PRO Act and ABC tests at the state level, please provide the Committee with your perspective on the rationale for such differences.

IV. Is there a version of the ABC test that more states have enacted than the ABC test that is included in the PRO Act?

V. Do you believe that the ABC test that is in the PRO Act should extend beyond the National Labor Relations Act to other wage and hour laws, such as the Fair Labor Standards Act?

"(2) EMPLOYEE.—Section 2(3) of the National Labor Relations Act (29 U.S.C. 152(3)) is amended by adding at the end the following: "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."

Answer 1-5. I am attaching a chart which reflects states which have adopted an ABC test as of April 21, 2021 but I am not certain this is exhaustive or completely up to date. I have not studied those laws extensively and am not an expert on state employment laws in all fifty states.

RESPONSE BY JYOTI SAROLIA TO QUESTIONS OF SENATOR TIM SCOTT

SENTOR TIM SCOTT

A-B-C Test/Independent Contractor

Before my time in Congress, I was a businessman. I was a franchisee, I was a direct seller, and I ran multiple small businesses. So when it comes to legislation like the PRO Act, which would be the most sweeping labor legislation in multiple generations, I know exactly what it would do to folks that are small business owners or independent contractors today.

As a someone who worked as a direct seller early in my career—and benefited substantially from being able to work as an independent contractor—I'm deeply concerned by recent efforts to nationalize the so-called "A-B-C" test for worker classification, which represents a staggering departure from decades of precedent.

The Department of Labor estimates that there are 15.6 to 22.1 million individuals who are IC status, and the Bureau of Labor Statistics found that almost 80 percent of independent contractors prefer that arrangement over being an employee.

It's no secret why! It gives them greater flexibility and ownership over their work—and this is true across dozens of sectors, not just within the so-called gig economy.

California has presented us with a case in point of what happens when you attempt to impose the ABC test on a diverse workforce. AB–5, which put in place the new test, had roughly 100 exemptions by the end of the legislative process. When you need that many carve-outs, you know you've got a lousy law.

The people of deep-blue California agreed. Nearly 60 percent voted to support a referendum ensuring that app-based and delivery drivers could continue to operate as independent contractors, which was overwhelmingly their preference.

After seeing the mayhem in California unfold over this disastrous legislation, I don't see how anyone could support nationalizing the exact rule that was voted down by the people of California.

I know folks in South Carolina do not want to be a part of this failed experiment.

Please answer the following with specificity:

Question 1. Do you agree that the PRO Act's ABC test would significantly disturb numerous sectors including freelance journalists, app-based drivers, insurance agents, and more?

Answer 1. The PRO Act's ABC test to determine independent contractor status would have significant implications for many industries, including the franchise business model. First, the ABC test would take away the independence of small franchise owners and mislabel every franchise owner and their employees as employees of the national brand, making franchised businesses no different than corporately owned and operated locations. It would undoubtedly rid franchise business owners like myself of the hard-earned equity and effort we have invested into our hotels and other establishments.

Second, I understand that most app-based driver and freelance workers also prefer the autonomy in their work. Most freelancers and app-based drivers almost always fail prong 'B' of the ABC test. 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.

The flexible nature of their work also allows them to spend more time outside of work with their families, and loved ones.

Question 2. If there is such a high degree of satisfaction among those who choose to earn a living as an independent contractor, then why do we need an ABC test that would force them to be reclassified as employees, or worse lose their jobs, as we saw in California?

Answer 2. Respectfully, we do not need a one-size-fits-all approach to defining who is an employee and/or and independent contractor. When it comes to independent contractor status, an imbalanced approach only serves to needlessly disrupt the economy. Given the potential for chaos, lawmakers must find a better way to assist the minority of workers who engage in alternative work arrangements but would prefer more traditional forms of work.

Under the ABC test, all three elements must be met for a worker to remain independent. Fail one prong, and you must be considered an employee. This is problematic for most industries, including businesses like mine where we would become employees of the brand, rather than staying independent business owners.

Lawmakers in California were forced to amend AB 5 in 2020, creating dozens of additional exceptions. Some of those still working under the ABC test can at least leave California if the burden proves too much. However, if the ABC test becomes Federal law, there is nowhere to escape.

Right-to-Work

South Carolina is one of 27 right-to-work states. Those 27 states protect 61 million workers from being forced to pay mandatory union dues whether or not they want to be represented by a union.

While tens of thousands of South Carolinians are union members, and I fully respect their right to join a union, I also strongly support the right of every worker to keep his or her job without being forced to join or financially support a union.

I believe this issue comes down to a worker's freedom to choose for themselves.

Unfortunately, the PRO Act is not about worker freedom at all. Instead it's more about increasing the amount of money that goes to union bosses.

The PRO Act would take away the right of a worker to choose whether to pay into a union or not—and instead require it, and it would increase dues by $9 billion annually at the expense of workers, small businesses, entrepreneurs, and consumers.

South Carolina enacted its right-to-work law in 1954 and our right-to-work protections for workers have translated into robust growth in jobs, personal income, and economic output for the state.

South Carolina is home to a number of industries and manufacturers that have chosen to locate to the Palmetto State because of our pro-growth, pro-worker policies.

That is what you get when you give workers the right to choose. When you take that choice away, the only winners are the union bosses.

Please answer the following with specificity:

Question 1. Do you think it would be in the interest of workers to repeal state level right-to-work laws and if not why?

Answer 1. California is not a right-to-work state, so I can only speak from my personal experience. That being said, there are several studies published that have found that states with a right-to-work law are associated with higher wages and more economic growth. In addition, studies have also found that an enactment of a right-to-work law increases self-reported current life satisfaction, expected future life satisfaction, and improves sentiments about current and future economic activity among workers. These effects are especially large among union workers. The PRO Act already has several harmful provisions for small businesses and their workers, and repealing dozens of state laws in this area appears to be another one.

[Whereupon, at 12:15 p.m., the hearing was adjourned.]