Statement of

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

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

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

Summary – Doing Good and Doing No Harm

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

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

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

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

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

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

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

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

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

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

I will briefly address each of these topics in order.

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

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

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

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

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

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

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

[4] 361 NLRB 709 (2014).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[12] 88 Stat. 395 (1974).

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

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

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

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

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

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

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

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

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

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

and contrary to Board and court decisions involving employee and independent contractor status.[16]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

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

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

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

PHILIP A. MISCIMARRA

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

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