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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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