# Written Testimony of

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**Subcommittee on Health, Education, Labor, and Pensions**

**Hearing on Protecting Workers from Big Labor Abuses**

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## Introduction

Good Morning, Chairman Good, Ranking Member DeSaulnier, and distinguished members of the Subcommittee. My name is Anne Marie Lofaso. I am a law professor at West Virginia University, teaching labor and employment law and serving as the Faculty Advisor for the Labor and Employment Law Certificate Program. I am also a member of the bipartisan College of Labor and Employment Lawyers and a former Senior Attorney at the National Labor Relations Board, serving for ten years in the Appellate and Supreme Court Branches.

Thank you for inviting me to testify regarding notices to union members of their right to know their labor rights, their right to religious accommodations, and their *Beck* objector rights.

## I. Background

As you know, in 1935, in the National Labor Relations Act, Congress "declared" it the "policy of the United States" to "encourage[e] the practice and procedure of collective bargaining" and "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[1]

The purposes of that statutory policy are five-fold: (1) eliminate obstructions to interstate commerce;[2] (2) enhance worker voice through a system of workplace democracy;[3] (3) augment workplace justice by providing for collective-bargaining rights,[4] which will almost always result in a grievance-arbitration process;[5] (4) increase equality of bargaining power by collectivizing the labor market to match the collective strength of the capital market;[6] and (5) promote workplace peace by promoting workplace democracy and justice, thereby eliminating most of the reasons for strikes.[7] The NLRA is, therefore, a civil rights act that embodies the economic policy of making the labor market run more efficiently—a free market solution to a free market problem, as my labor law professor, the legendary Clyde Summers, used to say.

Notwithstanding significant legal repression of unions since 1947,[8] unions have recently witnessed a renewed interest in union organizing. For example, workers have successfully organized hundreds of Starbucks stores. As of June 12, 2024, "440 Starbucks stores in 44 states

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[1] 29 U.S.C. § 151.
[2] *See* 29 U.S.C. § 151.
[3] *See* 29 U.S.C. § 159.
[4] *See, e.g.*, 29 U.S.C. §§ 157, 158(a)(5), 158(b)(3).
[5] *See, e.g.*, BLOOMBERG LAW, PRACTICAL GUIDANCE, *Labor Relations, Clause Description – Grievance Procedures* (stating that "[v]irtually all contracts discuss procedures for handling grievances").
[6] *See* 29 U.S.C. § 151.
[7] *See* 29 U.S.C. § 151.
[8] *See infra*, § IIB, C; *see generally* Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199 (2010)

have won union elections."[9] Moreover, in 2022, union approval reached a near-record high of 71%—the highest level since 1965.[10] This is part of a solid upward trend since 2009, when union support reached a record low of 48%.[11]

History tells us that union organizing drives start with a grievance, and union support rises as working conditions worsen.[12] Today is no exception. Workers—especially the working poor—emerged from the pandemic disillusioned with their work situation.[13] Many were forced to work in unsanitary conditions, without personal protective equipment, accelerating the spread of the COVID-19 virus.[14]

Unions offer a solution. When workers band together for mutual aid or protection, they can demand workplace change without risking job loss. Historically, unions have an excellent track record for improving working conditions for all workers—members and nonmembers alike. Unions represent employees by bargaining for living wages, hours of work, holidays, vacation time, health and welfare benefits, pensions, safety and health requirements, seniority rights, and job security.[15] They also represent employees in grievances and arbitration proceedings. And in right-to-work states, unions are legally required to do all this without charging employees for those services.[16] But this is just the visible work they do. Unions also lobby Congress and other political bodies for legislation to protect their constituency—the working class—whether or not those workers are unionized. Unions, among other progressive advocates, were behind the eight-hour day, the five-day work week, legalized break times, health and safety legislation, and much more. These laws become a floor of rights, below which employers are prohibited from bargaining.[17] This means unions do not have to bargain for those rights but can take them as a

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[9] *See* MORE PERFECT UNION, *Map: Where Are Starbucks Workers Unionizing?*, https://perfectunion.us/map-where-are-starbucks-workers-unionizing/.

[10] *See* Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP, Aug. 30, 2022, https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx.

[11] *See* Lydia Saad, *More in U.S. See Unions Strengthening and Want It That Way*, GALLUP, Aug. 30, 2023, https://news.gallup.com/poll/510281/unions-strengthening.aspx.

[12] For example, TriNet, a professional employer organization, quoting Hugh F. Murray, III, chair of McCarter & English's Labor & Employment practice, explains that employees' desire to organize "'is always a reflection of something in the company's culture, although not uniformly a reflection of something bad in the company's culture. . . . The fact that employees feel that a [union] would be helpful indicates that there is something missing from the status quo.'" TriNet, *HR Headaches: My Employees Are Talking About Unionizing — Should I Encourage This?*, May 24, 2022, https://www.trinet.com/insights/hr-headaches-my-employees-are-talking-about-unionizing-should-i-encourage-this.

[13] *See, e.g.*, Dave Lievens, *How the Pandemic Exacerbated Burnout*, Harvard Business Review, https://hbr.org/2021/02/how-the-pandemic-exacerbated-burnout.

[14] *See, e.g.*, Thomas P. Krumel, Jr. & Corey Goodrich, *COVID-19 Working Paper: Meatpacking Working Conditions and the Spread of COVID-19*, USDA, ECON. RES. SERV., https://ers.usda.gov/publications/pub-details/?pubid=102205 (Sep. 2021).

[15] *See generally* ANNE MARIE LOFASO, DRAFTING THE UNION CONTRACT (Matthew Bender 2024).

[16] *See* § III, *infra*.

[17] *See* Anne Marie Lofaso, *Workers' Rights As Natural Human Rights*, 71 U. MIAMI L. REV. 565, 598 (2017) (discussing workers' floor of rights); Kacie Whaley, *WVU Professor Explains Why Worker's Rights Should Involve Natural Human Rights*, WV Record, Jun 13, 2017, https://wvrecord.com/stories/511126222-wvu-professor-explains-why-worker-s-rights-should-involve-natural-human-rights.

starting point. This also means that nonunion workers benefit from a raised floor of rights, which the employer cannot dip below.

In short, unions have augmented and enhanced the voice of the working class, which would otherwise have gone unheard. Their voice has facilitated change, significantly affecting the lived experiences of workers and their families.

## II. Congressional Responses To Concerns About Worker Voice and Union Democracy: Wagner Act (1935), Taft-Hartley Amendments (1947), Landrum-Griffin Act (1959)

### A. Step One: Congress Enacts the Wagner Act Granting Significant Labor Rights To Workers

Today, we focus on worker voice and union democracy—concerns about which Congress has been responsive. The first step, taken in 1935, was the passage of the National Labor Relations Act.[18] Congress enacted the NLRA, also known as the Wagner Act, primarily to check the coercive power of business by granting workers the "fundamental right"[19]

> to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.[20]

However, a right only has meaning if an obligation supports it. Congress made good on those Section 7 rights by imposing five legal duties on employers. Section 8 made it unlawful for employers to (1) "interfere with, restrain, or coerce employees in the exercise of the[ir] [Section 7] rights;" (2) dominate or interfere with worker unions; (3) discriminate against workers because of their support or lack of support for unions; (4) retaliate against workers for filing charges or giving testimony under the NLRA; and (5) "refuse to bargain collectively with [its employees'] representatives."[21] The National Labor Relations Board, an independent federal agency, enforces those rights and duties primarily through adjudication and overseeing secret ballot union elections.

### B. Step Two: Congress Passes Taft-Hartley Amendments To Curb Government Overreach and Union Power

Congress then amended the Act in 1947 to check what it viewed as the government's (i.e., the Board's) coercive power to overreach by extending Section 7 rights to too many types of

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[18] National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), codified at 29 U.S.C. § 151 et seq.
[19] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).
[20] 29 U.S.C. § 157.
[21] 29 U.S.C. § 158(1)–(5), now codified as 29 U.S.C. § 158(a)(1)–(5).

workers.[22] Under the 1947 Taft-Hartley amendments,[23] Congress exempted supervisors and independent contractors from the Act's protection, thereby curbing the Board's power to oversee the employer's relationship with those types of workers concerning labor rights and concerted activity.[24] Moreover, Congress added Section 8(c) to clarify that the Board could not use employers' speech as evidence of an unfair labor practice so long as "such expression contains *no* threat of reprisal or force or promise of benefit."[25] Those amendments not only considerably narrowed the number of employees whom the Act would protect against industry abuse of workers, but it also ultimately led the Board to hold that employers could make captive audience speeches during which employers could compel their employees to listen to anti-union speech without providing employees with the opportunity to hear the benefits of unionization.[26]

Under Taft-Hartley, Congress also amended the Act to check what it viewed as union coercion. Most significantly, Congress added Section 8(b), which regulated and limited unions' freedom to engage in secondary boycotts.[27] Those regulations significantly curbed unions' economic power.[28] Declines in union density can be directly traced to the Taft-Hartley amendments, as those declines have strongly correlated with the erosion of the middle class.

### C. Step Three: Congress Passes Landrum-Griffin Act To Tighten Taft-Hartley Provisions and To Grant Union Members Rights Against Unions

The next and last significant set of amendments to the Act came with the 1959 Labor Management Reporting and Disclosure Act (LMRDA or Landrum-Griffin Act).[29] This act had two primary purposes. First, Landrum-Griffin tightened the secondary boycott provisions and

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[22] *See* Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947) (foremen are statutory employees even if they can be classified as supervisors); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944) (newspaper boys are statutory employees even if they can be classified as independent contractors). Taft-Hartley legislatively overruled these cases.

[23] Labor Management Relations Act (LMRA, Taft-Hartley Act, or Taft-Hartley amendments), 61 Stat. 136 (1947), codified at 29 U.S.C. § 151 et seq.

[24] 29 U.S.C. § 152(3).

[25] 29 U.S.C. § 158(c).

[26] *See* Babcock & Wilcox Co., 77 N.L.R.B. 577, 578, 583–95 (1948) (compelling employees to listen to anti-union speeches during working hours does not violate the NLRA). The Board in Babcock & Wilcox expressly cites Section 8(c) as the reason for overturning *Clark Brothers Co.*, 70 NLRB 802, 803–04, 806–07 (1946) (holding anti-union captive audience speeches unlawful).

[27] 29 U.S.C. § 158(b)(4) (1947), as amended (1959).

[28] "[T]he Taft-Hartley and Landrum-Griffin amendments added important substantive provision, [which] were primarily limitations on the exercise of economic power that unions were either employing or were deemed likely to employ in the collective-bargaining process." Charles J. Morris, *How the National Labor Relations Act Was Stolen and How it Can Be Recovered: Taft-Hartley Revisionism and the National Labor Relations Board's Appointment Process*, 33 BERKELEY J. EMP. & LAB. L. 1, 15 (2012).

[29] Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 519–546 (1959), codified at 29 U.S.C. §§ 401–531. Since 1959, Congress has amended the NLRA, to include acute-care hospitals for example, but none of those amendments are relevant to the issues here.

added a section to limit unions' freedom to engage in recognitional picketing.[30] These provisions extend Taft-Hartley's theme of weakening unions' economic power.

The second purpose of this act, which my labor law professor, Clyde Summers, drafted in large part when he worked for then-Senator John F. Kennedy,[31] was to guarantee democratic rights to union members by creating a bill of rights for union members.[32] Rights expressly granted under Title I include rights to

- participate in union activities, including the right to nominate candidates for union office, vote in an internal union election, and attend and participate in membership meetings;
- free speech and assembly;
- voice in setting rates of dues, fees, and assessments;
- have safeguards against improper discipline;[33]
- sue unions;[34]
- receive and inspect the collective bargaining agreement;[35]
- examine documents such as the union constitution and its bylaws;
- examine forms and information filed with the Department of Labor, including initial information forms, which identify the union and its officers and provide detailed information about union dues, member discipline, member discipline, officer removal, funds disbursement,
- run for union office, and
- protest the conduct of an internal election.

Significantly and relevant to this hearing, unions must inform their members of their LMRDA Title I rights.[36]

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Simply put, the Wagner Act successfully checked industry coercion. By contrast, Taft-Hartley and Landrum-Griffin removed many of those checks, ostensibly to curb union abuse, but weakened unions' capacity to protect workers. Although Landrum-Griffin also created numerous workers' rights to ensure internal union democracy, it failed to address the weakening of democracy and voice in the workplace and workers' interactions with their employers.

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[30] 29 U.S.C. § 158(b)(7). The Board has summarized other Landrum-Griffin amendments on its website. *See* NLRB, *1959 Landrum-Griffin Act*, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1959-landrum-griffin-act.
[31] Steven Greenhouse, *Clyde Summers, Advocate of Labor Union Democracy, Is Dead at 91*, N.Y. TIMES, Nov. 11, 2010, https://www.nytimes.com/2010/11/12/business/12summers.html.
[32] 73 Stat. 522, codified at 29 U.S.C. § 411.
[33] 29 U.S.C. § 411. *See* U.S. DEP'T OF LABOR, Union Member Rights Poster (Union Member Rights Poster), https://www.dol.gov/sites/dolgov/files/olms/regs/compliance/unionmemrightsposter.pdf (summarizing those rights).
[34] 29 U.S.C. §§ 411–412. *See* Union Member Rights Poster, *supra* note 33.
[35] 29 U.S.C. § 414. *See* Union Member Rights Poster, *supra* note 33.
[36] 29 U.S.C. § 415. *See* Union Member Rights Poster, *supra* note 33.

## III. No Workers Can Be Compelled To Become Union Members; Employees In Right-to-Work States Are Never Required To Pay Union Dues Unless They Agree; LMRDA Title I Applies Only to Union Members

The law is exceedingly clear. No worker can be compelled by an employer, a union, or the government to become a union member. No public-sector worker can be forced to pay union dues. No employee can be compelled to pay for a union's political activities. Under the NLRA, employees in non-right-to-work states may opt to pay only agency fees—their fair share of the cost of collective bargaining, contract enforcement, and representation. Employees in right-to-work states cannot be compelled to pay union dues—even their fair share for services provided—unless they agree.

### A. Union Security Clauses Vary By State

Taft-Hartley amended the NLRA to allow individual states to adopt right-to-work rules,[37] which makes unlawful any union security clause in a collective bargaining agreement.[38] In right-to-work states, workers are not required to join the union or pay union dues or fees.[39] Today, twenty-six states have passed right-to-work laws,[40] two states have limited right-to-work laws;[41] and the remaining states are non-right-to-work states.[42]

### B. No Private or Public-Sector Worker Can Be Compelled To Join a Union

Taft-Hartley amended the NLRA to prohibit closed shops—agreements requiring employers to hire only union members.[43] Section 7 now contained the following "right to refrain" language: "Employees . . . shall also have the right to refrain from any or all of such activities" followed by "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."[44] Congress amended Section 8(a)(3) to include the following language:

> nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require

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[37] 29 U.S.C. § 164(b).

[38] *See* NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION (NRTW), *Employees in Right to Work States*, https://www.nrtw.org/employees-in-right-to-work-states/ for a thorough explanation of those rights.

[39] *See id*.

[40] Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, Wyoming. *See* NRTW, *Employees in Right to Work States*, *supra* note 38.

[41] Ohio has a narrow right-to-work law and Delaware allows for local right-to-work laws.

[42] Alaska, California, Colorado, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Washington, DC.

[43] *See* NLRB, *1947 Taft-Hartley Substantive Provisions*, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1947-taft-hartley-substantive-provisions.

[44] *See* 29 U.S.C. § 157.

> as a condition of employment membership therein . . . [within thirty days of employment] . . . .[45]

Reading Section 7 in conjunction with Section 8(a)(3), the Act's plain language seemed literally to allow employers and unions to enter into union-security clauses compelling union membership (union shops) within thirty days as a condition of employment.

The Supreme Court has foreclosed that meaning of the Act. In *NLRB v. General Motors Corporation*,[46] the Supreme Court held that the union shop is technically legal but explained that "membership" for purposes of a union shop does not literally mean membership. Instead, membership means only the payment of initiation fees and monthly dues. The Court further explained that "the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. . . . 'Membership' as a condition of employment is whittled down to its financial core."[47]

The Court went further in defining membership in *Communications Workers v. Beck*.[48] There, the Court held that "financial core membership" does not "include[] the obligation to support union activities beyond those germane to collective bargaining."[49] The rule is the same for employees covered by the Railway Labor Act.[50]

The public sector contains the same rule. Indeed, in *Janus v. AFSCME Council 31*,[51] the Court went even further. In addition to affirming that neither the state as an employer nor a union can compel a state employee to join a union, it held that a public employer's collective bargaining agreement could not even require non-members to pay an agency fee–their pro rata share of the union's costs of representing the bargaining unit—because that involuntary transfer of funds violated the non-members' First Amendment right of free speech. Effectively, all public employees are covered by right-to-work policies whether or not their state is right-to-work. Finally, no federal employee can be compelled to join a union. This right to refrain is statutorily guaranteed.[52]

In summary, no worker can ever be forced to join a union. However, as discussed below, employees in non-right-to-work states can be required to pay their fair share of the cost of

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[45] 29 U.S.C. § 158(a)(3).
[46] 373 U.S. 734 (1963).
[47] 373 U.S. at 742–43.
[48] 487 U.S. 735 (1988).
[49] 487 U.S. at 745.
[50] *See* International Association of Machinists v. Street, 367 U.S. 740 (1961). There, the Court interpreted the Railway Labor Act as not empowering unions "over the employee's objection, to spend [that employee's] [dues] for political causes which [the employee] opposes. *Id*. at 750. See also 45 U.S.C. § 152 Eleventh (permitting employers and employees to enter into union security clauses and dues check-off agreements). Accordingly, employees under the Railway Labor Act are not subject to state right-to-work rules because Taft-Hartley never amended the Railway Labor Act.
[51] 138 S. Ct. 2448 (2018).
[52] 5 U.S.C. § 7102 (federal employees generally); 39 U.S.C. § 1209(c) (postal employees).

collective bargaining, contract enforcement, and representation. No employee can be required to pay full union dues unless they agree.

### C. No Worker Can Be Compelled To Pay Union Dues For Their Unions' Political Activities; Workers in Right-To-Work States Are Not Even Required To Pay For Their Fair Share of the Cost of Collective Bargaining, Contract Administration, or Representation

*Beck*, *Street*, and *Janus* all support the proposition that union membership, in the sense of joining a union, can never be compelled in the private sector under the NLRA, under the Railway Labor Act, or in the public sector.

These cases also explain the extent to which the law can require nonmembers to pay union dues. These cases can be summarized as follows:

- Under *Beck*, employees who work in right-to-work states cannot be compelled to pay any dues or fees, even the cost of representation, unless they agree;
- Under *Beck*, employees who work in non-right-to-work states can only be required to pay their fair share of the cost of representation;
- Under *Street*, employees governed by the Railway Labor Act cannot be required to pay dues going to political causes but can be required to pay agency fees per statute; and
- Under *Janus*, all public employees are now essentially right-to-work employees who cannot be compelled to pay any dues or fees unless they agree.

Moreover, in *Pattern Makers v. NLRB*, the Court held that a union member may resign at any time without notice.[53] This means that in non-right-to-work states, a union member can resign and stop paying all but agency fees anytime they do not like union activity or absent their agreement to the contrary. In right-to-work states, a union member can stop paying dues and fees altogether absent their agreement to the contrary.

### D. Landrum-Griffin Regulates the Relationship Between Union Members and Their Unions Only

Title I of the Landrum-Griffin Act provides union members with a bill of rights to enforce against their unions. It does not apply to nonmembers. Nor can it. These rights deal with the internal workings of a union, which do not affect nonmembers.

Nevertheless, all union-represented workers have rights against those unions, and unions have duties to all workers they represent, including the duty to disclose employees' LMRDA Title I rights. Those rights are discussed below.

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[53] 473 U.S. 95 (1985).

## IV. Union Duties To All Bargaining Unit Members Regardless of Union Membership

The law has granted workers rights enforceable against unions whether or not those workers choose to become union members.

### A. Duty of Fair Representation

All unions have a duty of fair representation. This means that the union must represent fairly and non-discriminatorily all employees in the bargaining unit, whether or not those employees are union members. The Court held in *Vaca v. Sipes*[54] that a union violates its duty to fair representation when its conduct is "arbitrary, discriminatory, or in bad faith."[55] The types of conduct that typically fall into these categories are precisely the ones at issue here: failure to accommodate religious objectors is discriminatory by nature, and refusal to comply with bargaining unit members' requests for information to which they are legally entitled is usually arbitrary or in bad faith.

### B. *Beck* Rights

As discussed above, in *Beck*, the Supreme Court held that employees in non-right-to-work states need only pay agency fees. Recall that in right-to-work states, non-member union-represented employees do not have to pay any fees. However, as discussed above,[56] the union still must represent those non-paying employees.

Most pertinent to this hearing, *Beck* rights are the only employee rights under the NLRA about which employers must inform their members. Under *California Saw & Knife Works*, the Board, with court approval, concluded that

> when or before a union seeks to obligate an employee to pay fees and dues under a union-security clause, the union should inform the employee that he has the right to be or remain a nonmember and that nonmembers have the right (1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections. If the employee chooses to object, he must be apprised of the percentage of the reduction, the basis for the calculation, and the right to challenge these figures.[57]

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[54] 386 U.S. 171 (1967).
[55] 386 U.S. at 190.
[56] *See* § IV.A., *supra*.
[57] California Saw & Knife Works, 320 N.L.R.B. 224, 233 (1995), *enforced sub nom.* Int'l Ass'n of Machinists & Aerospace Workers v. NLRB, 133 F.3d 1012 (7th Cir. 1998).

### C. Rights of Religious Objectors

Religious objectors have at least five avenues of recourse if their union acts in a manner that violates their religious beliefs.

First, the NLRA expressly provides that religious objectors are not required to join the union or to pay any dues but may be required to donate to a nonreligious, nonlabor Section 503(c) charity in the same amount that they would have paid in union dues. Section 19 provides that employees:

> shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employee's employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under [26 U.S.C. § 501(c)(3)] . . . . [58]

Accordingly, if a union member is unhappy with their union's political positions that touch upon religious beliefs, that union member can resign from the union[59] and pay no dues in right-to-work states or agency fees only in non-right-to-work states. Or, more importantly, under NLRA Section 19, the religious object can resign from the union and pay no fees regardless of where that person resides and donate the same amount of money it would have paid in dues to a "nonreligious, nonlabor organization [501(c)(3)] charitable fund." Federal suits over this provision are rare, with less than twenty cases ending in a court decision over the fifty years since Congress amended the Act to include Section 19.[60] This likely shows that there is very little union noncompliance with Section 19.

Second, the religious objector could file unfair labor practice charges or even a lawsuit against the union, alleging a violation of the union's duty of fair representation. This could arise if, for example, the union refuses to process grievances of only Jewish employees.

Third, during an organizing campaign, if a union or the employer tries to inflame the passions of the employees by dividing them using inflammatory remarks or conduct—such as the union's or employer's public position on the Israel-Hamas War—any party can file objections to the conduct of the election. The Board has held that such inflammatory remarks, including antisemitic remarks, may destroy the laboratory conditions necessary for a free and fair election and, in those cases, a re-run election is the proper remedy.[61]

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[58] 29 U.S.C. § 169.

[59] *See* Pattern Makers v. NLRB, 473 U.S. 95 (1985).

[60] A Westlaw search of "29 U.S.C. § 169" & da(aft 1973)" in the database All Federal brings up nineteen decisions at least one of which is the same case on appeal and several of which have nothing to do with religious objectors. The same search in All States database brings up zero cases.

[61] The seminal case here is *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 71 (1962) (conducting hearing on election objections where employer appealed to racial prejudice by showing pictures of Black union men dancing with white women). Several progeny cases of Sewell deal with inflammatory antisemitic remarks. *See, e.g.*, M & M Supermarkets, Inc. v.

Fourth, a union's refusal to accommodate a religious objector's request to substitute charitable payments for union dues makes out a discrimination case under Title VII. In such cases, an employer may not discharge an employee, at the union's request, for failing to pay dues under Section 19 because an employer is duty-bound under Title VII to provide religious accommodations for employees.[62] This is even more true after the Supreme Court's 2023 decision in *Groff v. DeJoy*.[63]

Fifth, in the public sector, a religious objector may also have constitutional claims against the union. If a union were to compel a religious objector to pay dues, such payment could constitute compelled speech, violating the objector's First Amendment rights per the Court's decisions in *Janus* and *Kennedy*.[64]

## V. Suggestions for Reform

I understand that the subcommittee has been interested in workers' rights to know their rights, as demonstrated in Chairwoman Foxx's bill, "Union Members Right to Know Act."[65] However, the Committee and its subcommittee are presenting a solution in search of a problem, an example of overregulation. The law already requires unions to inform members of the rights this subcommittee is interested in. First, unions must inform their members about their rights under Title I of the LMRDA[66] and their *Beck* rights.[67] Second, unions are legally obligated to accommodate workers' religious objections under the U.S. Constitution, state constitutions, Title VII, state human rights laws, and the NLRA. Third, the only rights under the NLRA that unions must affirmatively disclose to workers are their *Beck* rights. By contrast, the law does not require employers to inform workers of their labor rights under the NLRA.

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NLRB, 818 F.2d 1567, 1569 (11th Cir. 1987) (antisemitic remarks sufficient to overturn election: "The damn Jews who run this Company are all alike. They pay us pennies out here in the warehouse, and take all their money to the bank. The Jews ought to remember their roots. Norton Malaver ought to remember his roots. Us blacks were out in the cotton field while they, the damned Jews, took their money from the poor hardworking people."); NLRB v. Katz, 701 F.2d 703, 705–08 (7th Cir. 1983) (showing movie about the Holocaust during a union meeting and Catholic priest's remarks at the meet—that "Paul and Mrs. Katz [employers] are Jewish and they're getting rich while we're getting poor. The priest said 'we should vote yes and that why should we make them rich because Jewish people are rich and we are poor and killing ourselves for them.'"—sufficient to make out prima facie case to overturn election); NLRB v. Silverman's Men's Wear, Inc., 656 F.2d 53, 57–60 (3d Cir. 1981) (allegations that union secretary-treasurer called employer's vice-president a "stingy Jew," if true, were sufficient to warrant a new election).

[62] *See, e.g.*, Int'l Ass'n of Machinists & Aerospace Workers, Lodge 751 v. Boeing Co., 833 F.2d 165, 167–70 (9th Cir. 1987).

[63] *See* Groff v. DeJoy, 600 U.S. 447, 470 (2023) (holding that "employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business").

[64] *See* Kennedy v. Bremerton School District, 597 U.S. 507 (2022) (holding that school violated the football coach's free speech and free exercise rights when it restricted him from praying on the fifty-yard line immediately after a football game). *See also* Anne Marie Lofaso & Martin H. Malin, *The Supreme Court, The First Amendment, and The Erosion of Public Employer Managerial Authority*, 101 DENVER L. REV. 521 (2024) (discussing the implications of *Janus* and *Kennedy* on management authority to discipline its employees).

[65] *See* H.R. 8573.

[66] 29 U.S.C. § 415. *See* Union Member Rights Poster, *supra* note 33.

[67] California Saw & Knife Works, 320 N.L.R.B. 224, 233, 235 & n.37 (1995), *enforced sub nom.* Int'l Ass'n of Machinists & Aerospace Workers v. NLRB, 133 F.3d 1012 (7th Cir. 1998).

Accordingly, I ask this subcommittee to put its energy into solving the real problem facing workers, which is employer interference with their right to free association and workers' lack of awareness of the broad spectrum of rights they enjoy under labor laws. For example, few private-sector workers understand that they are protected by the NLRA even if a union does not represent them. Although an employer can fire an employee for asking their employer to ameliorate working conditions, workers are protected if two workers (or even one employee on behalf of themselves and other workers) make those requests. Employees are protected if they discuss how to improve their conditions so long as those discussions occur during break times and in non-working areas. Employees cannot be fired for expressing their support for labor legislation. Workers cannot be fired for invoking their *Weingarten* right to union representation during an investigative hearing at which there is a likelihood of discipline.

Simply put, workers should be informed of all their rights under labor laws—not only LMRDA Title I rights, *Beck* rights, and their right to religious accommodations. One way to do this would be to require employers to post these rights in the workplace alongside other employment rights that must be posted.

Even when workers know their rights, the NLRB is sorely underfunded, making it challenging to conduct union elections and combat unfair labor practices. Costly union avoidance mechanisms exacerbate these problems. Employers who wish to avoid labor laws spend over $400 million a year derailing union-organizing campaigns.[68] Accordingly, Congress should fully fund the NLRB to ensure the enforcement of all workers' rights.

And even when workers know their rights and successfully organize, they are often met with employer resistance to a first contract. Employees are vulnerable to employer unfair labor practices. Given the Act's weak remedial scheme, some employers prefer to pay lawyers to defend unfair labor practice charges, knowing that, even if they lose, the remedy is often a no-cost notice posting. Moreover, the Act is limited to public causes of action, meaning that access to private relief by a court is typically preempted.

This is why the passage of the Protecting the Right to Organize Act (PRO Act) is so important. The PRO Act would strengthen the Act's remedies and require the agency to seek injunctive relief to reinstate employees whenever it has reasonable cause to believe that the employee's job termination was unlawful under the Act. The PRO Act would also create a private cause of action, giving workers access to courts rather than relying on the NLRB's General Counsel to enforce their rights. The PRO Act would also make mandatory captive audience speeches unlawful, thereby diminishing the power of employers to interfere with employee free choice.

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[68] *See* Celine McNicholas, et al. *Employers Spend More Than $400 Million Per Year on 'Union-Avoidance' Consultants To Bolster Their Union-Busting Efforts*, ECON. POL'Y INST., Mar. 29, 2023, https://www.epi.org/publication/union-avoidance/.

To the extent that compliance with the LMRDA's disclosure requirements is problematic, those problems seem to be on the management side.[69] Congress should fully fund the U.S. Department of Labor's Office of Labor-Management Standards to ensure compliance with the LMRDA.

In short, I welcome this subcommittee's support for workers. I ask that the members of this subcommittee better target the problems facing workers so that workers know all their rights and can enforce those rights against all institutions, including the government, business, or labor unions.

Thank you.

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[69] *See* Jeffrey Freund, *Putting 'Management' Back Into the Labor-Management Reporting and Disclosure Act*, U.S. DEP'T OF LABOR BLOG, Jan. 5, 2022, https://blog.dol.gov/2022/01/05/putting-management-back-into-the-LMRDA.