

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

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

**The NLRA has as among its fundamental purposes the encouragement of collective bargaining and the protection of the worker’s right to organize.**

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

Section 1 of the NLRA declares that it shall be the policy of the United States to encourage “the practice and procedure of collective bargaining” and to protect “the exercise by workers of full freedom of association, self-organization, and 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.”<sup>1</sup>

**The NLRA was Established in 1935 to Achieve Workplace Democracy**

Historic employer practices of union-busting and refusals to bargain collectively agitated workers, leading to strikes and increased industrial unrest and burdening commerce in the process. The drafters

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<sup>1</sup> 29 U.S.C. § 151.

of the Wagner Act believed that improved industrial democracy, achieved by codifying the rights to bargain collectively and organize for mutual aid or protection, would “eliminate the causes of certain substantial obstructions to the free flow of commerce.”<sup>2</sup>

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

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

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

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

**The NLRA has not been meaningfully amended since 1947 and is in dire need of reform.**

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<sup>2</sup> 29 U.S.C. § 151.

<sup>3</sup> 29 U.S.C. § 151. See also Kenneth G. Dau-Schmidt, et al., *Labor Law in the Contemporary Workforce* 40, 47 (3rd ed. 2019).

<sup>4</sup> Dau-Schmidt, et al., at 48.

<sup>5</sup> *NLRB v. Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>6</sup> *Id.* at 33.

<sup>7</sup> *Id.* at 22.

<sup>8</sup> *NLRB v. Washington Aluminum*, 370 U.S. 9, 17 (1962).

<sup>9</sup> [www.jwj.org/collective-bargaining-101](http://www.jwj.org/collective-bargaining-101).

<sup>10</sup> 465 U.S. 822 (1984).

*Core provisions of the NLRA have been eroded by overly narrow NLRB and court interpretations which frustrate the Congressional intent behind the creation of the NLRA.* The right to engage in protected concerted activity has withered away over decades of judicial attack and the policies of labor hostile NLRB majorities. From 1980 until its recent 2018 temporary spike<sup>11</sup>, the worker's statutory right to strike over working conditions and for mutual aid and protection has been curtailed almost to the point of ineffectiveness by policies that allow employers to permanently replace economic strikers without a showing of exigency. Recent interpretations of the NLRA law by NLRB majority of the previous administration has resulted in a findings that has substantially narrowed the rights of workers to engage in protected concerted activity. In the 2019 case, *Alstate Maintenance*,<sup>12</sup> an NLRB comprised of a majority of Trump appointees held that employer lawfully terminated a sky cap who engaged in a group work stoppage in protest of an employer's failure to address the airport tipping practice of a team of athletes. The Trump NLRB found that the activity was not protected concerted activity, but rather conduct stemming from unprotected "gripes."

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

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

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

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<sup>11</sup> <https://www.marketwatch.com/story/strikes-are-up-but-union-membership-is-down-and-that-could-be-a-good-sign-for-the-economy-2020-02-13>.

<sup>12</sup> *Alstate Maintenance* 367 NLRB No. 68 (2019).

<sup>13</sup> 362 NLRB 1599 (2015).

<sup>14</sup> 365 NLRB No. 156 (Dec. 14, 2017).

<sup>15</sup> See <https://www.nlr.gov/news-outreach/news-story/board-vacates-hy-brand-decision>.

<sup>16</sup> *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

<sup>17</sup> See <https://www.govinfo.gov/content/pkg/FR-2020-02-26/pdf/2020-03373.pdf>.

<sup>18</sup> **369 NLRB No. 139 (July 2020)**: The Board found that retroactively applying any clarified version of the new joint-employer would be "manifestly unjust." The Board elaborated that *Browning-Ferris* changed old, reasonably clear law in a way that substantially affected reasonable expectations under the Act. So, the Board concludes that the new standard should not have been applied to *Browning-Ferris*. The old standard was applied, and it does not seem that the new standard was clarified in any meaningful way. **370 NLRB No. 86 (Feb. 2021)**: The Board denied

The Trump Board continued its trend of using rulemaking as a way to entrench its position on contentious policy questions in its NPRM on students' status as employees under the Act. Under the proposed rule, students who perform services at a private college or university related to their studies will be held to be primarily students with a primarily educational, not economic, relationship with their university, and therefore not "employees" within the meaning of Section 2(3).<sup>19</sup> This rule was intended to overrule the Board's decision in *Trustees of Columbia University*,<sup>20</sup> and reinstate the rule of *Brown University*<sup>21</sup>) on a more permanent basis. The Trump Board, without the direction of the Supreme Court or an analogous doctrinal argument about the need for statutory consistency, sought to usurp the role of Congress and use rulemaking to modify the statutory scheme of the NLRA by excluding students from employee status. Similar to the tack in the joint employer rule, the goal of this proposed rule was clearly to change a standard that the Board was unable to achieve through adjudication. After the change of administrations, the Board on March 9, 2021 abandoned this rulemaking effort.<sup>22</sup>

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

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

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the Charging Party's Motion for Reconsideration of the above decision since there was not (a) any material error or (b) extraordinary circumstances warranting reconsideration. **May 2021:** Court Petitioner filed to have the order reviewed.

<sup>19</sup> 29 U.S.C. 152(3).

<sup>20</sup> 364 NLRB No. 90 (2016).

<sup>21</sup> 342 NLRB 483 (2004).

<sup>22</sup> [Federal Register :: Jurisdiction-Nonemployee Status of University and College Students Working in Connection With Their Studies.](#)

<sup>23</sup> 367 NLRB No. 75 (2019).

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

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

<sup>26</sup> *Kroger Limited Partnership and UFCW Local 400*, 368 NLRB No. 64 (2019).

<sup>27</sup> *UPMC Presbyterian Shadyside (UPMC)*, 368 NLRB No. 2 (2019).

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

significant precedents, as it does in each of these cases. The end results of stripping workers of Section 7 access rights seem to justify that majority's means.

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

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

### **There is a Need for Stable and Consistent Union Election Reform**

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

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

Despite these favorable court decisions, a newly configured Trump Board issued a request for information (RFI) seeking public input on how the 2017 rule was operating as one of its first orders of

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

<sup>30</sup> [GAO-21-242, NATIONAL LABOR RELATIONS BOARD: Meaningful Performance Measures Could Help Improve Case Quality, Organizational Excellence, and Resource Management](#)

<sup>31</sup> [Unprecedented: The Trump NLRB's attack on workers' rights | Economic Policy Institute \(epi.org\)](#)

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

business. The RFI prompted thousands of statements from unions and employers alike, including praise from NLRB Regional Directors experienced in its implementation and operation.<sup>33</sup> Nevertheless, in 2019, the Republican-majority Board, while explicitly disclaiming any reliance on the RFI or the information the Board gathered during that extensive process, rolled back substantial portions of the 2014 rule without notice and comment or empirical data to support its modifications.<sup>34</sup> The final rule was found, in pertinent part, to have violated the Administrative Procedure Act and made “radical changes” to the election procedures without opportunity for notice and comment. Substantial portions of the rule were struck by Judge Ketanji Brown Jackson in litigation before the U.S. District Court for the District of Columbia.<sup>35</sup> It is noteworthy that the several 2019 modifications to the 2014 rule deemed procedural by the court were retained and will be subject to change at any time by any succeeding Board without notice and comment. This does little to provide the public with policy stability.

### **The Need to Strengthen Protections during the Bargaining Process**

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

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

### **Procedural Obstacles to Relief**

During my tenure with the NLRB’s regional office as well as my period of private practice, I spent a significant amount of my time advising the public and clients who had been subjected to unfair labor practices. I would advise workers of their rights under the NLRA and the consequences of their employers’ conduct. In every instance, I encouraged workers to rely on the Act’s protections despite employer intimidation, misrepresentation, and abuse. All too often, because of a protracted process and virtually toothless respondent sanctions for unfair labor practices, victimized workers seeking and awaiting justice would pay the heavy price of retaliation and job loss. Workers might be blackballed and forced to go through extended periods without income. They would lose the support of their friends. Their families would suffer and become dysfunctional. Ultimately, these victimized workers lose hope.

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<sup>33</sup> See *Representation-Case Procedures*, 82 Fed. Reg. 58783 (Dec. 14, 2017).

<sup>34</sup> *Representation-Case Procedures*, 84 Fed. Reg. 69524, 69558 (Dec. 18, 2019) (Member McFerran, dissenting).

<sup>35</sup> See *AFL-CIO v. NLRB*, Civ. No. 20-cv-0675 (KBJ), 2020 WL 3041384 (D.D.C. June 7, 2020)

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

<sup>37</sup> 1621 Route 22 West Operating Co., LLC d/b/a Somerset Valley Rehabilitation and Nursing Center v. NLRB, 3d Cir. No. 12-1031, March 14, 2018.

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

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

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

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

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

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

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<sup>38</sup> See <https://www.nlr.gov/news-outreach/graphs-data/remedies/reinstatement-offers> (last accessed 4/30/19).

<sup>39</sup> 29 U.S.C. § 160(j).

<sup>40</sup> See <https://www.nlr.gov/sites/default/files/attachments/basic-page/node1674/nlrpar2018508.pdf> (last accessed 4/30/19).

<sup>41</sup> See 29 U.S.C. § 160(l).

<sup>42</sup> 138 S. Ct. 1612, 584 U.S. \_\_\_ (2018).

<sup>43</sup> 357 NLRB 2277 (2012).

<sup>44</sup> 361 NLRB 774 (2014).

<sup>45</sup> 29 U.S.C. § 158(a)(1).

The many cases involving mandatory arbitration agreements that followed in the wake of *D. R. Horton* and *Murphy Oil* stood as a testament to the prevalence of employers' efforts to preemptively stifle concerted activity. And though the Seventh and Ninth Circuit Courts of Appeals agreed with the NLRB's view that arbitration agreements that require employees to forego their Section 7 rights are invalid under the Federal Arbitration Act's saving clause,<sup>46</sup> the Supreme Court read the Federal Arbitration Act differently. As dissenting Justice Ruth Bader Ginsburg recognized, the "inevitable result of [the majority's] decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers." By restoring employees' rights to pursue their employment claims on a class or collective basis, the PRO Act would empower workers to join together to protect themselves and each other and to seek vindication when they have been wronged at work.

### **Inadequate Remedies for Violations**

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

Consistent with Devki Virk's observations, I have found that the lack of effective remedies under the NLRA is of obvious importance for individual workers who are fired for organizing a union or engaging in other protected activity under Section 7 of the NLRA. Because employers often calculate that noncompliance is less costly, the Board's limited remedies stand in the way of its ability to fulfill its statutory mission to "encourage[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[.]"<sup>48</sup>

I recall a particular example of a respondent's flagrant pattern of flouting the NLRA in light of the NLRB's inadequate remedies was the 2014 case *Pacific Beach Hotel*.<sup>49</sup> In that case, the Respondents had engaged in egregious unfair labor practices over the span of 10 years. The Board found that the Respondents had violated multiple provisions of the Act and engaged in objectionable conduct that interfered with elections on two occasions. In addition, the Respondents were subject to two Section 10(j) injunctions and had been found to be in contempt of court for violating a Federal district court's

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<sup>46</sup> See *Ernst & Young LLP v. Morris*, 834 F.3d 975 (9th Cir. 2016); *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016).

<sup>47</sup> Devki K. Virk, Bredhoff & Kaiser, P.L.L.C., *Testimony before the Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, United States House Of Representatives*, March 26, 2019.

<sup>48</sup> 29 U.S.C. § 151.

<sup>49</sup> *HTH Corp., Pacific Beach Corp., and KOA Mgmt., LLC, a single employer, d/b/a Pacific Beach Hotel*, 361 NLRB 709 (2014).



injunction. Nevertheless, in 2014 the Board in faced Respondents which still had not complied with the remedial obligations imposed on them after the Board's prior decisions.

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

Faced with a flagrant violator of the Act of such magnitude, the Board, cognizant of its inability to impose punitive remedies, tried to do its best with the authority it had. Among other remedies specific to these violations, the Board ordered the Respondents to cease and desist from engaging in the recidivist behavior described previously and ordered reinstatement with back pay to the affected employees. It also ordered a 3-year notice-posting period and required mailing of the notice, the Decision and Order, and an additional Explanation of Rights to current and former employees and supervisors, as well as provision of the material to new employees and supervisors for a period of three years. These notices had to also be published in local media of general circulation. Because its past orders were not self-enforcing and required the General Counsel and the Charging Party to incur additional litigation costs by seeking federal court enforcement, the Board majority also ordered that the multiple years of litigation costs be awarded to the General Counsel and Union, as well as certain other costs incurred by the Union as a direct result of the Respondents' unfair labor practices. It should be noted that the remedy of litigation costs was, however, struck down by the Court of Appeals for the District of Columbia Circuit because the Board lacked the statutory authority to impose such sanctions.<sup>50</sup> Given the Act's significant remedial limitations, employers are commonly willing to flout the law by intimidating, coercing, and firing workers because they engage in protected concerted activity or attempt to organize a union. As the Board's experience in *Pacific Beach Hotel* shows, when employers discover that the cost of noncompliance is so low, they sometimes violate the law frequently over the course of many years.

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

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<sup>50</sup> *HTH Corp. v. NLRB*, 823 F.3d 668, 678-81 (D.C. Cir. 2016).

<sup>51</sup> Josh Bivens et al., "How today's unions help working people."

<sup>52</sup> National Labor Relations Board, NLRB Performance Reports—Monetary Remedies/Reinstatement Offers, accessed February 2019.

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

While *King Soopers* marked a significant improvement that has helped the Board come closer to making employees who suffer unlawful termination whole, even the prospect of paying a full back pay award is often not a sufficient deterrent for employers. The PRO Act comes even closer to accomplishing a full make-whole remedy by providing that backpay is not to be reduced by interim earnings. And by making including provisions for front pay, consequential damages, and liquidated damages, the PRO Act would help the Board more effectively deter violations by making compliance with the law a more rational decision for employers. I see a particular need for the enhanced remedies the PRO Act would provide when employers violate Section 8(a)(4) of the Act, which makes it an unfair labor practice to discharge or discriminate against employees because they have "filed charges or given testimony" in a Board proceeding.<sup>54</sup>

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

### **Unfair Labor Practices against Undocumented Workers**

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

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

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<sup>53</sup> 364 NLRB No. 93 (2016), enf'd in relevant part, 859 F.3d 23 (D.C. Cir. 2017).

<sup>54</sup> 29 U.S.C. § 158(a)(4).

<sup>55</sup> 467 U.S. 883, 892 (1984).

<sup>56</sup> 29 U.S.C. § 152(3).

<sup>57</sup> 535 U.S. 137 (2002).

articulating the inadequacy of this remedy in *Mezonos Maven Bakery, Inc.*,<sup>58</sup> a post-*Hoffman Plastics* Board decision. Among the concerns former Chairman Liebman and I expressed are the following:

1. *Precluding backpay undermines enforcement of the Act.* Although the primary purpose of a backpay award is to make employee victims of unfair labor practice whole, the backpay remedy also serves a deterrent function by discouraging employers from violating the Act.
2. *Precluding backpay chills the exercise of Section 7 rights.* Provided it is severe enough, one labor law violation can be all it takes. The coercive message—that if you assert your rights, you will be discharged (and, perhaps, detained and deported)—will have been sent, and it will not be forgotten.
3. *Precluding backpay fragments the work force and upsets the balance of power between employers and employees.* Protecting collective action is the bedrock policy on which the Act rests, as was recognized by the Supreme Court when it upheld the Act's constitutionality.<sup>59</sup>
4. *Precluding backpay removes a vital check on workplace abuses.* The very employers most likely to be emboldened by a backpay-free prospect to retaliate against undocumented workers for concertedly protesting their terms and conditions of employment are the ones most likely to impose the worst terms and conditions.

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

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

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<sup>58</sup> 357 NLRB No. 47 (2011).

<sup>59</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) ("Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.") (citing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921)).