Testimony of Richard L. Trumka
President, AFL-CIO
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On
The Protecting the Right to Organize Act: Deterring Unfair Labor Practices

On behalf of the 12.5 million members and 55 unions of the AFL-CIO, thank you for inviting me to testify on the Protecting the Right to Organize (PRO) Act (H.R. 2474). The AFL-CIO strongly supports the PRO Act, and I personally want to commend Chairman Scott and the many co-sponsors of this bill for taking a bold step to restore fairness to the economy by strengthening the rights of working people to negotiate with our employers for better wages and working conditions.

Congress recognized that unions benefit all workers, not just union members, when it passed the National Labor Relations Act more than 80 years ago. The act's stated purpose is to encourage the practice of collective bargaining and protect the right of workers to form unions. In the depths of the Great Depression, Congress concluded that giving workers the power to form unions and bargain collectively would strengthen our economy and safeguard our democracy.

Unfortunately, since the act's passage, corporations and their political supporters have pushed America in the wrong direction. Almost every amendment to the NLRA has made it harder for workers to form unions. Every year, union-busting consultants have taken more and more corporate money to prevent workers from coming together to form unions and, when an election is won, to undermine the process of collective bargaining. State "right to work" laws, promoted by a network of billionaires, super PACs and special interest groups, have given even more power to big corporations at the expense of working people.

Today, unions represent the smallest share of the private sector workforce since before passage of the NLRA. As the density of unions has declined, income inequality has skyrocketed. Although income inequality is seen as one of the most intractable economic problems facing our nation, we know how to reverse it. The simple truth is that when a greater share of workers were in unions, our economy and society were more equal. According to the Economic Policy Institute, the decline in union density accounts for one-third of the rise in wage inequality among men and one-fifth among women.

Unions win better wages and benefits for all types of working people. Union members earn, on average, 13% higher pay than nonunion members in the same occupation with the same level of experience and education. The union advantage is even greater for people of color and those without a college degree. Similarly, hourly wages for women in unions are more than 9% higher on average than for nonunion women with comparable characteristics.

Union members also have the power to negotiate for better, quality health insurance and retirement security, as well as paid sick and family leave. For example, 94% of workers with a union contract receive employer-provided health insurance versus 67% of workers without a union, and our plans tend to be better. Some 90% of union members participate in a retirement plan compared to 75% of nonunion members. Eighty-seven percent of union members have access to paid sick days versus 69% of nonunion members.

Unions also help workers without a union get ahead. In 2016, worker wages in states with lower union density lagged behind states with higher density by more than $100 a week. Unions also provide upward mobility for low-income families. Researchers at Harvard University found that children born to low-income families typically ascend to higher incomes in metropolitan areas where union membership is higher.

So it is little surprise that workers in every sector and every region are embracing the transformational power that comes from joining together in common cause. The year 2018 was the biggest for collective action in three decades and that surge is defining 2019 and shaping the early contours of the 2020 presidential election. Programmers at Google, school teachers in West Virginia and manufacturing workers at Volkswagen in Tennessee are standing up and speaking out.

Today, public support for unions is at a more than 15-year high. Importantly, the people who make up labor unions, our members and families, are the most supportive, but even a majority of nonunion members favor unions. Equally important, the strongest support for unions is from those ages 18–29, and the biggest jump in favorable attitudes toward unions has come from 30–39-year-olds.

Working people want union representation. A growing number of workers see unions as the preeminent source of power that will give them a voice on the job and a say in their own futures. Professor Thomas Kochan and colleagues at MIT and Columbia University found in their 2017 Worker Voice Survey that 48% of nonunion members would vote for a union if an election were held at their workplace, a 50% jump from similar studies conducted in 1977 and 1995. Some 48% of nonunion members want a union—that's more than 60 million people. But only 11.7%—or 14.7 million—were actually represented in 2018. Something is wrong. And that something is the law.

Our current labor law is frustrating workers' clear and growing desire to be represented. In too many ways, it's giving employers the power to decide whether or not their workers can unionize. This is a gross violation of the NLRA's stated mission, and it's why labor law reform is an urgent national necessity.

So what are workers up against? Let me give you just four examples and apply them to your experience as elected officials.

First, when you campaign for office, you have to talk to voters. You engage with them at town halls, coffee shops and worksites. For workers wanting to form a union, that communication is greatly restricted. Conversations about unionization must be done on

breaks, and representatives from unions can be denied access to worksites altogether.

Yet employers can force employees to listen to their anti-union rhetoric in forced "captive audience meetings." Employers can fire workers who simply stand up and leave such meetings and even those who have the audacity to express their own opinions after being told their role is only to listen.

Captive audience meetings give employers an unfair and often insurmountable advantage over unions in reaching voters with their message, particularly undecided voters. Yet this clearly coercive practice has been held to be lawful since passage of the anti-worker amendments to the Taft-Hartley Act in 1947. In addition, by forcing employees to listen to anti-union propaganda, employers are signaling the threat of consequences for a "yes" vote.

This is not a theoretical practice. It happens time and time again before union elections. A study of more than 200 representation elections found that employers conducted mandatory meetings 67% of the time. A more recent study found that in 89% of campaigns surveyed, employers required employees to attend captive audience meetings during work time and that the majority of employees attended at least five such meetings during the course of the campaign.

Let me give you an example. In late 2017, over 80% of the workers at a Kumho Tire plant in Macon, Georgia, had signed union authorization cards asking to be represented by the United Steelworkers (USW). The workers had been motivated by serious concerns about chemical exposures and inadequate safety training. In the period preceding the National Labor Relations Board election, workers were forced into daily captive audience meetings, grilled by supervisors in one-on-one interrogations and compelled to watch anti-union videos playing repeatedly on monitors in the facility. Ultimately, workers voted narrowly against union representation—164–136—despite 80% having supported the union prior to the employer's pressure tactics.

This PRO Act would ban captive audience meetings and require employers to attract an audience with the power of their ideas, just like candidates for public office. Importantly, it would not limit anyone's freedom to speak. Employers, like unions, would be free to express their views about union representation. The bill would simply ensure that no party can gain an unfair advantage by forcing employees to listen. Freedom of speech and the freedom not to listen would both be protected.

Second, when you run for office, you have no power over individual voters and you certainly would not consider punishing a constituent who voted for your opponent even if you had the power to do so. But in the workplace, employers have the power to terminate or take other adverse actions against employees; and before many union elections, employers abuse that power by firing employees who actively campaign for union representation.

Last year, the NLRB awarded over $50 million to employees the agency found to have been discriminatorily discharged or otherwise punished. More than 1,250 employees were ordered reinstated by the agency. But these numbers do not account for the chilling effect of punishing pro-union workers. There are no doubt thousands of workers

who have been scared out of exercising the right to support unions. And the NLRA's paltry fines have done little to nothing to deter employers from this illegal and destructive practice.

Right now, an employer who fires a union activist to chill an organizing drive faces merely the prospect of paying the employee back pay many years later. In fact, back pay awards only happen after a charge is filed, the General Counsel issues a complaint, a hearing is held, an administrative law judge finds a violation, the NLRB affirms the judge's finding and the board's order is enforced in a federal appeals court. During that typically multi-year period, the illegally fired employee is forced by law and by practical necessity to seek other employment, and any interim earnings ultimately reduce the employer's back pay liability.

Often the back pay award is no more than a couple thousand dollars, and sometimes less. And while the board can order an illegally fired employee reinstated, that order comes far too late to bring the worker back before a union election. In fact, a reinstatement offer often comes so late that most employees have moved on and decline to return. In 2018, only one-third of employees who were granted reinstatement after a board order accepted the offer. So if violating the law chilled the organizing drive, the employer will consider it a good investment. In other words, violating the law just makes good economic sense for many employers, nothing more than the cost of doing business.

And even after organizing drives have resulted in successful elections, union supporters are sometimes subjected to reprisal firings. In May 2018, flight engineers at Boeing's facility in South Carolina voted to form a union, but right before Christmas that year the company fired six pro-union engineers as it continued to appeal and delay the contract bargaining that should have been the immediate result of the election.

The PRO Act would fix these flaws and create a real deterrent by eliminating the reduction of back pay awards for interim earnings, providing for double back pay and permitting the award of civil penalties in an amount up to $50,000 against the employer and responsible owners and managers.

The bill also requires the NLRB to go into District Court to seek temporary reinstatement of a pro-union worker illegally fired during an organizing drive. This will eliminate the unequal treatment of unions and employers under existing law whereby the board is required to seek such relief against a union that merely engages in picketing of the wrong employer, but not against an employer who fires a union supporter.

Third, when you are elected in November, you take office in January. But when employees vote for a union, there is no set timetable, and often, the employer refuses to recognize its employees' chosen representative for years. That is like your opponent holding the seat after you win the election and continuing to occupy it throughout what should be your first term in office. How is that even possible? Again, flaws in current labor law permit this perverse outcome.

Today, when workers vote to be represented by a union, the NLRB certifies the election, but that certification is not enforceable and employers often disregard their employees' wishes and refuse to bargain with the union. The board is powerless to compel the

employer to recognize the union until the union files an unfair labor practice charge and the board finds the employer has violated the law. But even then, the board's order is not immediately enforceable. Rather, the board must proceed to a U.S. Court of Appeals to obtain an enforceable order to bargain.

This convoluted process can delay workers' democratically won first contract for years. And, at the end of it all, all the board is empowered to do is issue an order to bargain. Employees are not entitled to any form of compensation that would have resulted from bargaining had the employer recognized the results of the election in a timely manner—no back pay for lost wages and no compensation for lost pension contributions, for example.

Let me give you just one typical example. On Dec. 3 and 4, 2015, skilled trades workers at Volkswagen's factory in Chattanooga, Tennessee, voted to be represented by the UAW. The vote was 108 to 44 with 95% turnout. The NLRB's regional director certified those results on Dec. 14, 2015. But because the employer exploited every avenue of delay open to it under existing law, appealing to the board, refusing to bargain in order to force the board to cite it for committing an unfair labor practice and appealing that citation to an appeals court, for three and a half years after the vote, the workers' chosen representative was not recognized, bargaining did not begin and the board was powerless to do anything about it. The UAW had now taken matters into its own hands and petitioned to represent all employees at the factory.

The PRO Act would fix this problem in a straightforward manner. When employees vote to be represented, the board would not simply certify the union as the representative but, at the same time, order the employer to bargain. That order would be enforceable by the board in a federal district court after 30 days. Under the bill, when employees vote to be represented, bargaining will commence within a matter of months, just as you took your office shortly after you were elected.

And the PRO Act would take one more sensible step toward preventing delay even before employees are permitted to vote. The act removes the employer as a party to the hearing that often precedes an election. That makes sense because the election is to determine who will represent the employees in negotiations with the employer. The employer should not be given standing to delay that election or shape the voting unit through the preelection hearing. That is like Canada trying to influence your election because it is involved in trade negotiations with the U.S.

Finally, when you are elected and sworn into office, you immediately assume the duties of a sitting member of Congress. In contrast, when employees vote to be represented by a union, overcoming the myriad of obstacles I have just described, the union can be prevented from engaging in the type of workplace governance envisioned by the authors of the NLRA. That is because in far too many cases the employer never enters into a collective bargaining agreement with the workers. In over 30% of successful elections, employees who have voted for representation never receive the benefit of a negotiated agreement covering wages, benefits and working conditions. Can you imagine if 30% of elected officials were never seated?

How can this happen? Again, the answer lies in the weakness of existing law. Under the current NLRA, if an employer engages in surface bargaining, dragging out the process

without a good faith effort to reach a first contract, the NLRB is powerless to provide a remedy. The board cannot order the employer to agree to any contract term. The board cannot award damages to workers for lost wages or other injuries suffered as a result of the employer's failure to bargain in good faith, even in the face of overwhelming evidence that the unlawful conduct caused the injury. All the board can do is order the employer to bargain in good faith—a toothless remedy that does nothing to change these behaviors and tactics.

The PRO Act addresses this flaw by guaranteeing that workers who vote for a union get a collective bargaining agreement. The bill provides that if the parties are not able to reach agreement after 90 days, the Federal Mediation and Conciliation Service will assist the parties to reach agreement. And if there is still no agreement after 30 days, FMCS will appoint a tripartite panel to arbitrate the dispute and arrive at a fair agreement.

The PRO Act also recognizes that employees need the freedom to picket or withhold our labor in order to push for the workplace changes we seek. The bill protects employees' right to strike by preventing employers from hiring permanent replacement workers. It also allows unrepresented employees to engage in collective action or class action lawsuits to enforce basic workplace rights, rather than being forced to arbitrate such claims alone. Finally, the bill would ensure that employees are not deprived of our right to a union because an employer deliberately misclassified us as supervisors or independent contractors.

The PRO Act would go a long way toward bringing U.S. labor law into compliance with international norms. The International Labor Organization has adopted eight conventions containing core labor standards. The U.S. has ratified only two, not including number 87 on Freedom of Association and Protection of the Right to Organize and number 98 on the Right to Organize and Collective Bargaining. Only five other ILO member states have ratified two or fewer core conventions.

In 2007, the U.S. Council for International Business reported that U.S. law had been found to "directly conflict with" five of the core conventions, including both 87 and 98, and was inconsistent with international norms in numerous respects, including failing to cover low-level supervisors, many public employees and other workers, permitting coercive employer interference with organizing and restricting the right to strike. The PRO Act addresses each of those deficiencies.

Our outdated labor laws are making us weaker at home and diminishing our standing in the world. In more cases than not, a free and fair process for forming a union simply does not exist in America today. That must change. And it starts with making the PRO Act the law of the land. Thank you very much.