Testimony of Angela Thompson, General Counsel,
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Hearing on "Protecting Employees' Rights: Ensuring Fair Elections at the NLRB"
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Good morning Chairman Good, Ranking Member DeSaulnier, and members of the subcommittee. Thank you for the opportunity to testify before you today. My name is Angela Thompson and I am General Counsel for the Communications Workers of America (CWA).

Before I became a labor lawyer, I was a proud member of CWA as a customer sales and service representative for Bell Atlantic. During my time at Bell Atlantic, I was able to use the educational benefits under our union contract to get a master degree in labor and employment relations, which helped set me on the path to my current career. But even before that, I was a little Black girl living in poverty in a housing project in rural Illinois. My mom got a union job and our lives were forever changed. I'm not sure I would be here testifying before you today were it not for the stability and opportunity that my mom's union job provided to me and my family. So, the importance of fair representation elections to ensure that workers have the chance to choose whether or not to organize and form a union free from employer intimidation is very personal to me.

I want to start by noting that the NLRA is designed to "encourag[e] the practice and procedure of collective bargaining and by protecting 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," in order to remedy the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers."

I am grateful to see that a wave of workers across the country, in different sectors, from different backgrounds, are all seeking to organize to better their lives and utilize the rights guaranteed to them by the NLRA. From Apple retail workers to YouTube Music contract workers to Wells Fargo branch workers to Verizon Wireless retail workers, all of whom are organizing to form unions as members of CWA, to workers at Starbucks, Amazon and countless more companies, it is inspiring to see workers advocating for themselves, even in the face of employer intimidation and numerous other hurdles in the way.

The NLRB's ongoing actions are designed to fulfill the intent of the NLRA as enacted by Congress to protect these workers' rights.

We need to respect Congress' intent to give workers the opportunity to come together, form a union in their workplace, and collectively bargain to improve their lot. I am concerned by the misguided idea that somehow the NLRB's efforts to fulfill its statutory mission as directed by Congress to enable workers to organize in a fair and efficient way are invalid or wrong—to the contrary, we need to make the process of forming a union easier, not harder.

What we really need to deal with is how the NLRB has been hindered in its ability to carry out the Act by underfunding, adoption of policies that undermine the intent of the Act, and willful misreading of the statute. And I think that it is wrong that some special interests want to make it harder for workers to come together in a union because they fundamentally disagree with the statute and its purposes.

I want to now turn to some of the specific actions that the NLRB is taking to ensure that employer interference and bureaucratic red tape do not stand in the way of workers' efforts to decide whether or not to organize.

Since the National Labor Relations Act was passed, workers have always been able to designate a representative of their own choosing and to obtain union recognition based on a showing of majority support within their workplace and not exclusively through a Board election.

Under the statute, employers too have always had the ability—if not the duty—to recognize and bargain with a union based on a showing of majority support among its employees.

A showing of majority employee support to form a union could be signatures on a petition, union membership cards, or even, in one case, was based on a majority of employees walking into their boss's office and stating they wished to be represented by a union.[1]

Of course, workers can also petition the NLRB to hold a vote and, if a majority votes in favor, to formally certify a union as their bargaining representative. This ability of workers to use simple ways to show majority support for forming a union and collective bargaining is firmly rooted in the text of the Act itself.

The text of Section 9(a) defines a bargaining representative as "designated or selected" rather than "certified," demonstrating that certification through the Board's election process is not required for a bargaining obligation to arise.

Meanwhile, Section 8(a)(5) of the Act makes it an unfair labor practice (ULP) for an employer to fail to bargain in good faith with a designated Section 9(a) representative.

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[1] *Brown & Connolly, Inc.,* 237 NLRB 271 (1978) *enfd.* 593 F.2d 1373 (1st Cir. 1979); *see also Lamons Gasket Co.*, 357 NLRB 739, 741 (2011).

It is crystal clear that the NLRA at the very minimum allows for voluntary recognition, and doesn't require a Board-run certification election. If a majority of the workforce wants a union, that's it.

What this NLRB and its General Counsel are doing is actually fulfilling the purpose of the statute—facilitating collective bargaining—by making it easier to designate a union representative if that's what a majority of workers want.

One way the Board is making it easier is by considering undoing the Board's 2019 supposed election integrity rule. That rule undermined employee free choice and labor peace by inviting a MINORITY of employees to trigger a decertification election after the majority of employees had already designated their union representative and achieved union recognition from their employer. The current Board is considering returning to a standard that would give collective bargaining a chance to bear fruit after a majority of employees decide to form a union.

Attacks on voluntary recognition are also an attack on the ability of responsible employers to run their businesses as they see fit.

Let's take Microsoft as an example. Unlike other video game and tech corporations, Microsoft made a public commitment around its labor principles which included respecting its employees' right to form a union. When employees of Zenimax—a Microsoft subsidiary—announced that they were organizing a union in December, Microsoft agreed to remain neutral and allow workers to make their own decision about whether or not to join the union. The company swiftly recognized ZeniMax Workers United/CWA after a neutral third party confirmed that a majority of workers favored joining the union.

The suggestion that the NLRB should establish policies designed for no purpose other than to deter employers like Microsoft from taking action like this to respect the rights of their employees is not only a strangely intrusive way of micromanaging how companies choose to run their businesses, but is also contrary to the commands of the NLRA. There are many reasons why a company might choose to voluntarily recognize a union–for example, union workplaces have long been shown to have lower turnover[2] and higher employee satisfaction.[3] The idea that the NLRB should rig the rules to essentially force employers into pursuing a union busting

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[2] https://www.researchgate.net/profile/Steven-Abraham-2/publication/226530917_The_Impact_of_Union_Membership_on_Intent_to_Leave_Additional_Evidence_on_the_Voice_Face_of_Unions/links/56c7804708aee3cee5394e97/The-Impact-of-Union-Membership-on-Intent-to-Leave-Additional-Evidence-on-the-Voice-Face-of-Unions.pdf

[3] https://www.researchgate.net/profile/Ariel-Avgar/publication/24096434_The_Impact_of_Unions_on_Job_Satisfaction_Organizational_Commitment_and_Turnover/links/5410b9ed0cf2df04e75d65ec/The-Impact-of-Unions-on-Job-Satisfaction-Organizational-Commitment-and-Turnover.pdf

strategy that is likely to increase turnover and employee dissatisfaction makes no sense on its face and is inconsistent with Congress' intent.

Furthermore, the voluntary recognition process is democratic, and protracted anti-union campaigning isn't.[4] The purpose of union recognition is to choose who sits on the other side of the table from management, but in an election many employers seek to influence that choice by legal and illegal means. I urge the subcommittee to support democratic procedures, rather than outside interference by bosses.

Also, the NLRB and its General Counsel are currently reassessing the legality of coercive mandatory captive audience meetings that employers often hold and force employees to attend in order to disseminate aggressive anti-union propaganda. If it moves forward, this reassessment will go a long way to restoring freedom for workers in representation elections.

Mandatory captive audience meetings are one of the most frequently used actions that employers use to deter union organizing–one study found that management held captive audience meetings in 89% of NLRB elections.[5] These meetings are extraordinarily intimidating to workers, as they are lectured–often by their bosses, or even more senior corporate executives, who have disciplinary and firing power over those workers–about why they should oppose forming a union. Most workers in the U.S. who are not covered by collective bargaining agreements are "at-will" employees who can be fired for any non-discriminatory reason. As such, it requires a great deal of courage for workers to oppose the interests of their bosses–including regarding formation of a union–given the power that their bosses have over their livelihoods.

The NLRA not only guarantees workers the right "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," it also guarantees workers "the right to refrain from any or all of such activities."

The Board has for some time recognized that the right "to receive aid, advice, and information from others" or not to do so is an integral part of the rights guaranteed under the NLRA for workers to determine whether or not to engage in concerted activities.[6]

As such, there is an implicit right ensured by the NLRA to refrain from receiving information supporting or opposing the decision to engage in collective bargaining. Because the NLRB has

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[4] See 2 Sisters Food Group, 357 NLRB 1816, 1825 n.1 (2011) (Member Becker, dissenting in part) (noting that in nearly 90% of organizing campaigns "employers required employees to attend captive audience meetings during work time and that the majority of employees attended at least five [captive audience meetings]" during their organizing campaign).

[5] https://files.epi.org/page/-/pdf/bp235.pdf

[6] Clark Bros. Co., 70 NLRB 802, 805 (1946).

determined that workers supporting the formation of a union have the same right to refrain as those who oppose collective bargaining,[7] it is evident that pro-union workers have the inherent right to refrain from being compelled to receive anti-union propaganda during the course of an election.

In turn, I believe that the NLRB's General Counsel is entirely correct in finding that it is inherently coercive and unlawful for employers to force workers to attend anti-union meetings and to discipline them for failing to do so. Moreover, if the Board agrees with that assessment and provides basic protections for workers' right to refrain from being subject to anti-union propaganda, it will be a major victory to protect the right to free and fair representation elections, as workers will be able to decide for themselves without hearing threats and misleading propaganda.

The NLRB has also acted recently to update considerations to guide Regional Directors in using their discretion to determine if an election should be conducted by mail ballot to protect workers.

Mail-in ballots are a well established procedure as a secure and efficient method for conducting elections, including union representation elections. In many federal, state and local elections, voters have the option to mail in their ballots–many members of this subcommittee were elected in part by mail ballot. Furthermore, the National Mediation Board (NMB), which plays an essential role in the facilitation of labor-management relations in the aviation and rail industries, successfully conducted elections via electronic voting for almost two decades. And, notably, research has shown that mail-in ballots spur significantly higher turnout and participation in elections. This includes union elections.

In the early stages of the COVID-19 pandemic, workers across the country were forced into horrifying circumstances like unemployment, underemployment, or working in dangerous conditions, often without proper safety equipment and standards. Union representation became all the more important for workers across the country as they faced unsafe conditions, layoffs and intense uncertainty. During this time, the NLRB conducted an unprecedented number of elections by mail because the need for physical distancing wherever possible made it impractical for in-person representation elections to take place in many situations.

The NLRB established guidelines to permit mail-ballot elections under an "extraordinary circumstances" exception to the manual ballot preference in response to the COVID-19 pandemic.[8] In FY 2022, out of a total of 1,545 representation election cases, 1,199 were

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[7] NLRB v. Magnavox Co., 415 U.S. 322, 326 (1974)

[8] https://www.nlrb.gov/news-outreach/news-story/nlrb-establishes-standards-for-mail-and-manual-ballot-representation

conducted by mail, demonstrating the widespread usefulness of this process to hold elections safely and efficiently.[9]

It makes all the sense in the world to ensure that workers have safe, efficient and flexible processes for participating in representation elections. Unfortunately, an outdated rider in appropriations for the NLRB prevents the Board from even exploring electronic voting; that rider should be discarded and Congress should encourage more safety, efficiency and flexibility in conducting elections, not less.

One of the most important actual problems standing in the way of the NLRB conducting free and fair representation elections is a simple lack of funding enabling the NLRB to carry out its mission, including representation elections, in a timely and efficient way.

The Board's budget was frozen for nearly a decade prior to the December passage of the omnibus appropriations bill, leading to major cuts in real terms. Although the increase in funding will allow the NLRB to continue its critical operations and prevent furloughs, the Board still remains understaffed after almost a decade of flat funding.

In the two decades prior to FY 2023, there was a 39% drop in overall staffing levels and staffing in the Field Offices has shrunk by 50%.[10] During the same period, the number of covered workers per NLRB staff member increased by 50%, from one full-time employee per 74,809 workers to one full-time employee per 112,201 workers. Further, staffing levels at regional offices, which handle petitions for elections and conduct those elections, dropped by 33% between 2010 and 2019.[11] Chronic understaffing at the agency puts a strain on the Board and regional staff, especially as they have seen an increase in filings for union elections and unfair labor practices in the last several years.

An underfunded and understaffed Board is disastrous for workers who rely on the NLRB to fairly oversee their efforts to unionize and hold employers accountable for violating their rights. Workers across the country are organizing at a historic rate because they know together they can bargain for better wages, benefits, and working conditions. At the same time, employers spend massive amounts of money on anti-union campaigns, which often involve unlawful retaliation or termination for employees participating in an organizing effort. Workers do not have the luxury to wait for long periods for a decision to be made by an underfunded and understaffed NLRB, especially since part of the reason why they may be organizing could be a lack of decent wages

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[9] GC 23-06. "Report on the Midwinter Meeting of the Practice and Procedure Under the National Labor Relations Act Committee of the American Bar Association Labor and Employment Law Section."

[10] https://www.nlrb.gov/news-outreach/news-story/election-petitions-up-53-board-continues-to-reduce-case-processing-time-in

[11] https://www.epi.org/blog/congress-should-boost-nlrb-funding-to-protect-workers-well-being/#:~:text=NLRB%20funding%20has%20remained%20flat&text=The%20number%20of%20full%2Dtime,1%2C320%20between%202006%20and%202019.

or vital health and safety protections in the workplace. Understaffing at the NLRB that leads to untimely decisions by the NLRB can have a chilling effect on organizing efforts, since workers might not want to move forward with organizing campaigns if an election is not conducted promptly or there is no timely remedy for an unfair labor practice.

And the NLRB's workload continues to increase. During the first six months of FY 2023, workers filed 1,200 representation petitions with the NLRB -- an increase from 1,174 over the same period last year. The burden on the NLRB is exacerbated because this increase comes alongside an increase in ULP charges, which have increased 16%—from 8,275 to 9,592.[12]

I was heartened by the increase in the 2023 omnibus, but I am alarmed by some suggestions in Congress that would reverse this progress. While the specific cuts are not outlined, H.R. 2811, the Default on America Act, would result in a 22% cut in non-defense discretionary funding. Cutting NLRB funding by that magnitude would wipe out the increase that Congress allocated last year twice over and would leave the NLRB in even worse shape–resulting in immediate layoffs and dragging out the time needed to hold elections and adjudicate unfair labor practice charges.

But the biggest problem standing in the way of free and fair representational elections is employer interference with worker decisions. Prior decisions have improperly expanded the protection of free speech contained in the Taft-Hartley Act of 1947, permitting[13] increasingly brazen and often unlawful union busting campaigns by employers that have prevented the statute from fulfilling its intended function.

Employers are charged with violating the law in nearly 42 percent of all union organizing campaigns–a truly astounding frequency.[14] These violations of the law generally make it completely and totally impossible to have a free and fair election. For example, if a union supporter is unlawfully terminated, or an employer has told employees that it will close a facility if workers elect to organize, workers clearly cannot freely exercise their right to choose.

To give you an example, Apple, one of our nation's most prominent and profitable employers, has retaliated against workers who support organizing a union and engaged in other brazen unfair labor practices. In March, Apple illegally fired five workers who supported a union organizing drive at the company's Country Club Plaza store in Kansas City. This came on the heels of Apple individually interrogating workers regarding their support of their union, promising improved working conditions if they declined to support the union, and threatening that workplace

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[12]https://www.nlrb.gov/news-outreach/news-story/unfair-labor-practices-charge-filings-up-16-union-petitions-remain-up-in

[13] Some of them deliberately so, see e.g., https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2569&context=mjlr

[14] https://www.epi.org/publication/unlawful-employer-opposition-to-union-election-campaigns/

conditions would get worse if workers continued to organize. Apple has engaged in similar practices at numerous other stores where workers are organizing. And these acts are only the latest in a lengthy string of unfair labor practices committed by Apple since worker interest in organizing has become public in recent years.

That said, employer intimidation of workers is not limited to those (extraordinarily frequent) incidents in which employers violate the law. Existing NLRB interpretations of the law allow for a wide range of intimidating conduct by employers consistent with the law, notwithstanding the NLRA's clearly-stated goal of "encourag[ing] the practice and procedure of collective bargaining." That is to say, despite the intent of the statute to allow workers to organize free from employer intimidation, in most cases the opposite is the case and workers face extreme intimidation from employers and hired anti-union consultants.

All of this translates into a reality in which 70 percent of non-union skilled and hourly workers would consider joining a union if given the opportunity,[15] and yet only 6 percent of private sector workers belong to a union.[16]

As such, the most important thing that Congress can do to ensure free and fair representation elections is to act to prevent this epidemic of employer intimidation by passing H.R. 20, the Protecting the Right to Organize (PRO) Act.

The PRO Act is a comprehensive effort to restore the NLRA to fulfill its purpose of protecting the rights of workers to combat power imbalances by engaging in collective bargaining. For the purposes of this testimony, I will focus on a couple of key provisions in the PRO Act that are relevant to the conduct of NLRB representation elections.

First, the PRO Act would discourage the proliferation of unlawful employer intimidation by establishing a system of civil penalties under the NLRA. Drafters of the NLRA could not possibly have imagined a circumstance like that in which we find ourselves, where some of the most prominent companies in the country engage in willful, knowing and routine illegal acts to deny basic civil rights to their employees. At the time of drafting, it may have made sense to think that simply making it illegal to discipline or fire a worker in retaliation for union activity would be sufficient to deter that unlawful conduct, but we now know that that is not the case.

The PRO Act would correct this problem by establishing civil penalties for violations of the NLRA including significant fines for direct violations of employees' rights.

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[15] https://www.hrdive.com/news/most-hourly-workers-would-join-union/629367/#:~:text=Dive%20Brief%3A,union%20if%20given%20the%20opportunity.

[16] https://www.bls.gov/news.release/pdf/union2.pdf

Second, the PRO Act also would codify the position currently advocated by the NLRB's General Counsel that employers can't force their employees into attending anti-union propaganda sessions. While I believe that it's clear that the statute already lets the Board ban this type of meeting because they are coercive, the PRO Act would provide added certainty to prevent misinterpretation of the statute going forward. And, again, doing so would greatly enhance the ability of workers to engage in free and fair union representation elections free from intimidation.

Third, the PRO Act would remove employer standing in representation cases. Under current NLRB procedures, when employees file a petition for a representation election, the employer is deemed a "party" to the case, which does not make sense, given that the decision of whether or not to organize is actually one for employees to make and the employer is neither a voter nor a candidate. This would also make the NLRB's processes more consistent with those of the National Mediation Board, which appropriately denies standing to employers in representation proceedings for workers covered under the Railway Labor Act.

Fourth, the PRO Act would codify into law the NLRB's 2014 rule updating the NLRB's 1966 ruling in *Excelsior Underwear*[17] ensuring that unions have access to prospective voters' contact information. Modern communications methods obviously have changed quite a lot since 1966, so it is only sensible that the information available to unions be updated to reflect that. Moreover, because union organizers generally do not have access to speak with workers at their worksites, providing accurate contact information is truly the only way that workers can have meaningful access to hear information about why collective bargaining might serve their interests.

In closing, I urge the subcommittee to support the NLRB's ongoing efforts to fulfill its statutory mission as mandated by Congress, and to provide the NLRB with the resources and tools needed to better ensure that the rights of all workers to decide whether or not to organize free from employer intimidation are protected.

Thank you for the opportunity to testify before you today. I look forward to any questions that you may have.

[17] 156 NLRB 1236.