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Hearing on *The Future of Work: Preserving Worker Protections in the Modern Economy*

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Madam Chair Wilson, Madam Chair Adams, Ranking Members Walberg and Byrne, and members of the Subcommittees, thank you for this opportunity to testify today. I am a professor at Temple University law school, a visiting professor at Georgetown University Law Center, and a fellow at the Roosevelt Institute. I am here today in my capacity as a scholar. My research focuses on issues confronting low-wage workers, including the challenges they face in seeking to unionize and bargain collectively in today's economy.

I have been asked to testify about two topics. The first is whether we should reform our labor laws to enable more centralized forms of bargaining. Parts I and II, below, summarize the enterprise bargaining model that dominates in the United States and contrast it with more centralized bargaining models that are common in Europe. Part III then argues that legal reforms to enable more centralized bargaining or standard setting would help ensure worker voice and would encourage economic equality. Part IV discusses two possible reforms to advance that goal. The first would amend the Fair Labor Standards Act (FLSA) to create an "industry committee" system in which an administrative agency would empower workers and employers to jointly set wages and other basic terms within particular sectors. The second would amend the National Labor Relations Act (NLRA) to enable or require more centralized or "sectoral" collective bargaining.

I want to emphasize in advance the importance of the Protecting the Right to Organize Act (PRO Act) to restoring worker voice in today's economy. The reforms I'll discuss would not be a substitute for the PRO Act. Instead, they would complement and supplement the PRO Act. Industry committees would ensure some collective representation for workers who will find it difficult to unionize under the PRO Act, while sectoral bargaining would amplify the power of workers who have already unionized or who are seeking to unionize.<sup>1</sup>

The second topic I have been asked to discuss is benefits portability. Part V argues that any reforms to encourage portable benefits should not relieve companies of duties under labor and employment laws and should give workers a voice in plan design and administration.

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<sup>1</sup> This argument is developed in detail in KATE ANDRIAS AND BRISHEN ROGERS, REBUILDING WORKER VOICE IN TODAY'S ECONOMY, ROOSEVELT INSTITUTE (August 2018). In that report, Prof. Andrias and I propose four reforms to rebuild worker voice: ensuring NLRA coverage to all vulnerable workers, enabling enterprise-level organizing and bargaining, restoring the right to strike, and enabling sectoral bargaining and standard-setting.

## I. Enterprise Bargaining in the United States: An Overview

Three aspects of United States labor law and industrial relations are especially important and unusual in comparative perspective. First, our labor law encourages “enterprise bargaining,” or bargaining at the worksite or firm level. This emphasis is written into the NLRA itself, section 9(b) of which provides that:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the *employer unit, craft unit, plant unit, or subdivision thereof*. (Emphasis added.)

In practice, that has often meant that bargaining units are limited to a single job classification within a particular worksite.<sup>2</sup> Notably, given the difficulties of organizing under the NLRA, unions themselves often seek small bargaining units, since it is easier to build and maintain majority support within those units. The NLRB has also interpreted that language to prohibit it from mandating “multi-employer” bargaining units. While multi-employer bargaining has been common at various times and in various industries, it “is and always been consensual in nature.”<sup>3</sup> If an employer refuses to join a multi-employer unit, the union has no legal power to compel them to do so, and a strike on that issue will be “unprotected,” meaning workers who take such action are subject to discipline or even dismissal.<sup>4</sup>

Second, collective bargaining in the United States is understood, in law and practice, as a private matter. The NLRB’s role is limited to that of “administrator and supervisor, rather than negotiator.”<sup>5</sup> It can find that an employer (or union) is not bargaining in good faith and order the parties back to the table, but it has no power to impose contract terms. Indeed, there is no requirement that the parties reach any agreement at all. The outcome of the bargaining process is left to the parties, and to their respective economic weapons, i.e., the strike and the lockout.<sup>6</sup>

These first two aspects of our labor law reflect the historical origins of the NLRA in the early 20th century, when heavy industries dominated our economy and employed tens of millions. Employers’ refusal to deal unions prior to the NLRA led repeatedly to major strikes, and to

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<sup>2</sup> See ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING § 5.1, at 76–84, 103–104 (2d ed. 2004) (discussing emphasis on single-employer, localized bargaining in U.S.).

<sup>3</sup> *Kroger Co.*, 148 N.L.R.B. 569, 575 (N.L.R.B. August 27, 1964) (Members Leedom and Jenkins, dissenting). See also *Pacific Metals Co.*, 91 N.L.R.B. 696, 699 (1950) (“the essential element warranting the establishment of multiple-employer units is clear evidence that the employers unequivocally intend to be bound in collective bargaining by group rather than individual action.”)

<sup>4</sup> Unions have been able to build larger units through “after-acquired store” clauses in collective bargaining agreements, under which the employer agrees to accrete newly organized shops into the overall bargaining unit. See *Houston Division of Kroger Corp.*, 219 NLRB 388 (1975).

<sup>5</sup> Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016).

<sup>6</sup> See Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972) (“Two fundamental ideas lie at the core of the national labor policy: (i) freedom of employee self-organization; and (2) the voluntary private adjustment of conflicts of interest over wages, hours, and other conditions of employment through the negotiation and administration of collective bargaining agreements.”)

dangerous and low-paid work, both of which threatened economic stability. At the time, protecting workers' rights to unionize seemed sufficient to encourage stable and peaceful collective bargaining. What's more, the worksite was a natural site for bargaining, since factories and mines brought together tens of thousands of workers. Workers could also exercise power effectively at industrial facilities by striking. By using these new rights to organize and bargain collectively, workers and unions built this nation's middle class after World War II.<sup>7</sup>

The third important aspect of our labor law developed more recently. As revised by Congress in 1947, and interpreted by the NLRB and courts, that law tolerates and even encourages employer resistance to unionization. As these issues were discussed in hearings on the PRO Act,<sup>8</sup> I will reiterate them only briefly. Employers can resist unionization lawfully, for example by requiring employees to attend meetings during working time, on pain of termination, at which they campaign against unionization.<sup>9</sup> Companies can also ban union organizers from talking to workers on their property, or on publicly accessible parking lots.<sup>10</sup> Workers' rights to strike or picket for recognition are limited.<sup>11</sup> What's more, the NLRB's weak remedial powers encourage employers to violate the law by retaliating against workers for seeking to unionize. Such workers may then face a years-long battle to reclaim their jobs,<sup>12</sup> after which their typical remedy is only reinstatement with back pay, minus any wages earned in the meantime.<sup>13</sup> Employers in some cases view such damages as a cost well worth paying to avoid unionization.

Due to these weaknesses of our law, there is a broad and longstanding consensus among labor law scholars that the NLRB-supervised elections process insufficiently protects employees' rights to unionize.<sup>14</sup> Indeed, the weakness of our labor law is striking in comparative and international

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<sup>7</sup> The federal government's labor policy during World War II also boosted unions' power. In order to avoid strikes that would hamper the war effort, the government "invited labor and corporations into tripartite bargaining over national wage and economic policy." Andrias, *New Labor Law*, *supra* note 5 at 17, citing Nelson Lichtenstein, *From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era*, in *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980* (Steve Fraser & Gary Gerstle eds., 1989).

<sup>8</sup> United States Cong., House Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, *Hearing on The Protecting the Right to Organize Act: Detering Unfair Labor Practices*, May 8, 2019, 116th Cong. (testimony of Mark Gaston Pearce, former Chairman, NLRB); *see also id.*, (testimony of Richard L. Trumka, President, AFL-CIO). United States Cong., House Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, *Hearing on Protecting the Right to Organize Act: Modernizing America's Labor Laws*, July 25, 2019, 116th Cong. (testimony of Richard F. Griffin, Jr., former General Counsel of National Labor Relations Board); *see also id.*, (testimony of Prof. Charlotte Garden).

<sup>9</sup> *See Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953) (holding that captive audience meetings are prohibited only if held within 24 hours of an election).

<sup>10</sup> *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

<sup>11</sup> 29 U.S.C. § 158(b)(7) (2018).

<sup>12</sup> *See Benjamin I. Sachs, Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 684-85 (2010) (summarizing empirical evidence on incidence of retaliatory terminations, and their effect on union campaigns).

<sup>13</sup> *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (workers terminated in retaliation for union activity must mitigate their losses by finding other jobs).

<sup>14</sup> *See generally* ROBERT A. GORMAN, MATTHEW FINKIN, & TIMOTHY P. GLYNN, *COX & BOK'S LABOR LAW* 81-87 (16th ed. 2016) (summarizing current elections process, criticisms of it, and proposals for reform); *Sachs, Enabling Employee Choice*, *supra* note 12; Cynthia L. Estlund, *The Ossification of American Labor Law*, 102

perspective. The United States has not ratified various fundamental conventions of the International Labour Organization (ILO). Those include the Convention 87 on Freedom of Association and Protection of the Right to Organize, and Convention 98 on the Right to Organize and Collective Bargaining.<sup>15</sup> The ILO's Committee on Freedom of Association has also found that our labor law conflicts with core principles of workplace freedom of association.<sup>16</sup>

These aspects of our labor law can harm employers as well as workers. Most employers want to act responsibly toward their workers, respecting their rights and working collaboratively with them. Unionization can also benefit employers by helping to ensure a highly skilled and motivated workforce and by providing a mechanism for workers and management to discuss and resolve common concerns.<sup>17</sup> But our labor law often punishes responsible employers, since a union contract will raise their labor costs relative to their competitors. As a result, even otherwise responsible employers may resist unionization, and any gains made by unions can be quickly eroded by competition from non-union employers. Indeed, there is evidence that employers in the U.S. get trapped in a low-wage, low-productivity equilibrium; unable to raise wages, they focus on reducing labor costs to an absolute minimum, which can undermine the customer experience and harm their bottom line.<sup>18</sup>

The difficulty of organizing has led to a long-running decline in private sector unionization, from a high of almost 35 percent in the 1950s, to less than 7 percent today—even as Americans' opinion of unions has become quite favorable.<sup>19</sup> During the same period, economic inequality has risen significantly, as illustrated in Figure 1, which appears on the following page.<sup>20</sup>

The PRO Act would remedy many of these shortcomings. It would bolster the NLRB's power to deter and remedy unfair labor practices; streamline the union certification process; grant workers and unions full First Amendment rights to protest and boycott; and limit employers' powers to

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COLUM. L. REV. 1537 (2002); Paul Weiler, *Promises to Keep: Securing Workers Rights To Self-Organization Under the National Labor Relations Act*, 96 HARV. L. REV. 1769 (1983).

<sup>15</sup> NORMLEX Information System on International Labour Standards, *Up-to-date Conventions and Protocols not ratified by the United States*, INTERNATIONAL LABOUR ORGANIZATION, (last checked Oct. 18, 2019), available at [https://www.ilo.org/dyn/normlex/en/F?p=NORMLEXPUB:11210:0::NO::P11210\\_COUNTRY\\_ID:102871](https://www.ilo.org/dyn/normlex/en/F?p=NORMLEXPUB:11210:0::NO::P11210_COUNTRY_ID:102871)

<sup>16</sup> See, e.g., ILO Committee on Freedom of Association, Case No. 2683, *Complaint Against the United States*, Report No. 357, *Report in Which the Committee Requests to be Kept Informed of Developments*, (June 2010) (considering activities of Delta airlines); ILO Committee on Freedom of Association, Case No. 2227, *Complaint Against the United States*, Report No. 332, *Report in Which the Committee Requests to Be Kept Informed of Developments* (Nov. 2003) (finding that *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2001), holding that undocumented workers are ineligible for backpay under NLRA, is inconsistent with fundamental principles of freedom of association). See generally LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (2004).

<sup>17</sup> See generally RICHARD FREEMAN AND JAMES MEDOFF, WHAT DO UNIONS DO? (1984).

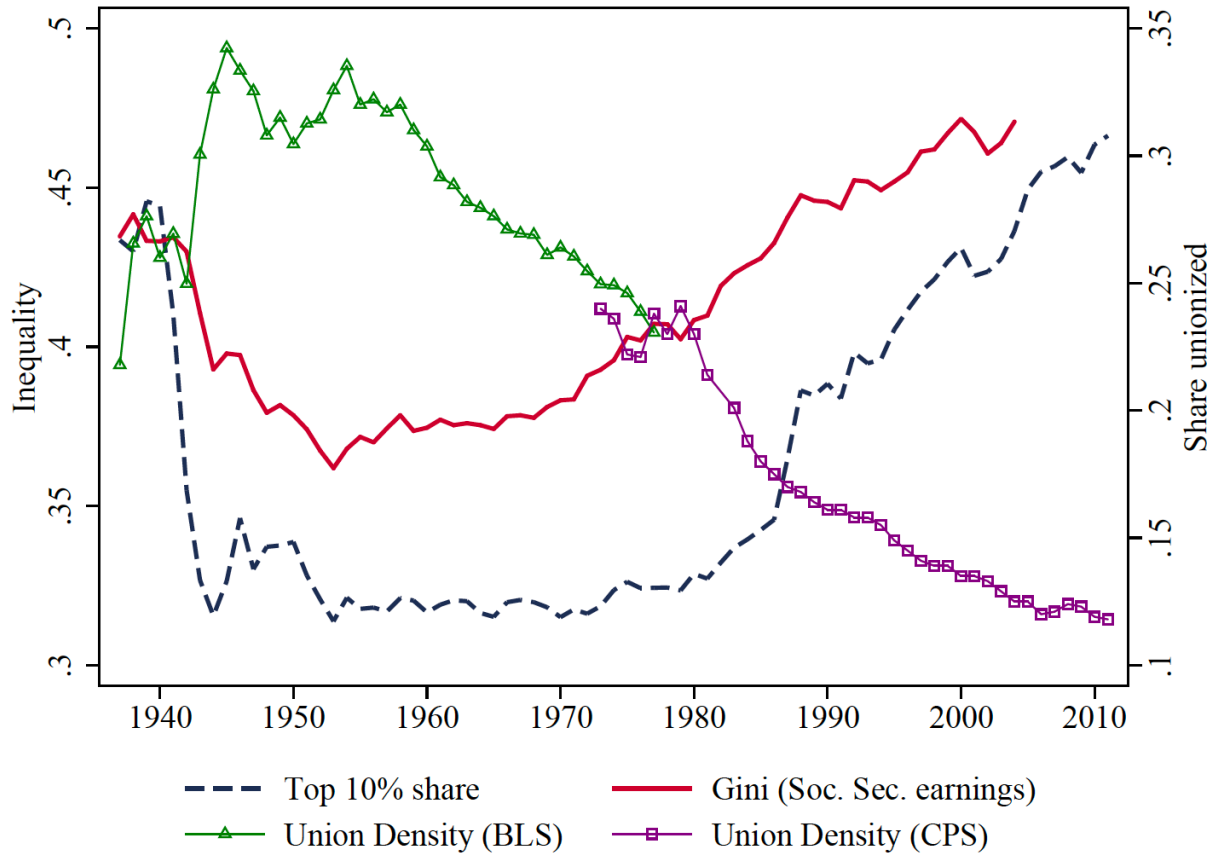
<sup>18</sup> See generally ZEYNEP TON, THE GOOD JOBS STRATEGY (2014).

<sup>19</sup> See Jeffrey M. Jones, *As Labor Day Turns 125, Union Approval Near 50-Year High*, GALLUP.COM., (Aug. 28, 2019), <https://news.gallup.com/poll/265916/labor-day-turns-125-union-approval-near-year-high.aspx> (finding that 64 percent of Americans had favorable view of unions).

<sup>20</sup> Source for Figure 1: Henry S. Farber, Daniel Herbst, Ilyana Kuziemko, and Sursh Naidu, *Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data* at 39, NBER Working Paper No. 24587 (May 2018).

deter unionization. Those are essential reforms. Additional reforms should nevertheless also be considered, for reasons I'll discuss in Part III.

**Figure 1: Union Membership and Economic Inequality Since 1937**



## II. Centralized Bargaining in Continental Europe: An Overview

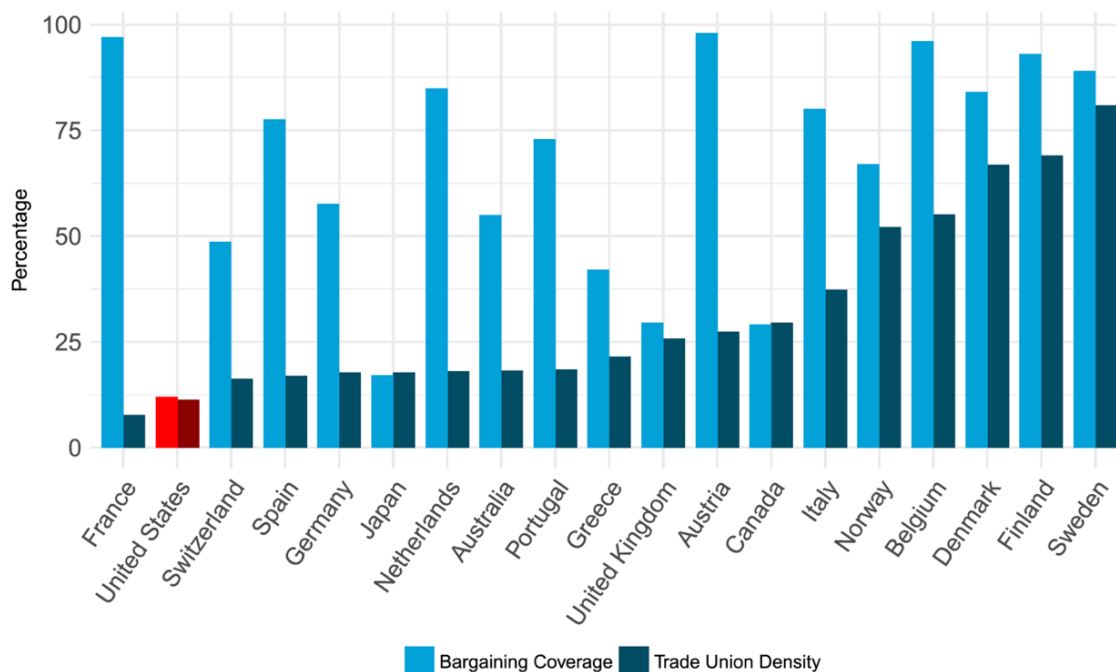
Responding in part to the weaknesses of U.S. law, a number of labor unions and scholars have suggested that the U.S. should borrow elements of industrial relations systems in Europe and other countries, where bargaining and standard setting are often more centralized. The term “sectoral bargaining” has become a shorthand for such proposals, despite the fact that they vary considerably. For clarity, I’ll save the term “sectoral bargaining” for a particular form of centralized bargaining I discuss in Part IV.

Collective bargaining in Continental Europe is quite different than in the United States. Basic economic terms are negotiated by unions and employer associations that represent entire

industries, industrial sectors, or even the entire economy.<sup>21</sup> In Germany, for example, most collective bargaining agreements are sectoral and are negotiated at the regional level. In Italy, sectoral agreements typically cover the entire nation, but regional agreements are also permitted. In both countries, additional terms may be negotiated at the company level.<sup>22</sup>

Also, in both countries, the terms of such agreements can be applied to all firms in the sector through “extension” mechanisms. Germany extends many agreements through an administrative process, while in Italy workers can sue in labor courts to ensure that their employers pay wages established in collective bargaining.<sup>23</sup> The Scandinavian countries do not have extension laws, but their employer associations are large enough that the resulting agreements cover nearly all workers. As a result, while unionization rates and bargaining coverage are basically identical in the U.S., those numbers diverge in most European countries, as evident in Figure 2.<sup>24</sup> Canada, the United Kingdom, and Japan—which also emphasize enterprise bargaining—are the only nations on the figure other than the United States where coverage and density are basically identical.

**Figure 2: Union Membership and Collective Bargaining Coverage**



<sup>21</sup> See generally ANDRIAS AND ROGERS, *supra* note 1 at 7, 26-29; DAVID MADLAND, THE FUTURE OF WORKER VOICE AND POWER, CENTER FOR AMERICAN PROGRESS (October 2016).

<sup>22</sup> *Living and Working in Germany*, EUROFOUND (last checked Oct. 17, 2019), <https://www.eurofound.europa.eu/country/germany>; *Living and Working in Italy*, EUROFOUND (last checked Oct. 17, 2019), <https://www.eurofound.europa.eu/country/italy>.

<sup>23</sup> *Living and Working in Germany*, *supra* note 22;

<sup>24</sup> Source for Figure 2: Kathleen Thelen, *Presidential Address: The American Precariat: U.S. Capitalism in Comparative Perspective*, 17 PERSPECTIVES ON POLITICS 5, 18 (2019).

There is powerful evidence, across countries and time periods, that bargaining centralization correlates with higher wages for low-skill workers and greater income equality overall.<sup>25</sup> One reason is that centralized bargaining takes wages out of competition. This inherently strengthens unions, since they are not constantly fighting to protect their gains. Another reason is that bargaining in such countries is often a tripartite or quasi-public process rather than a private ordering process. The government is sometimes involved in the negotiations; and therefore may press employers for generous wages during prosperous times and press unions to mitigate wage demands during downturns.

Unions and employers in the United States have also built centralized bargaining structures. The United Automobile Workers' "pattern bargaining" strategy is an example. For decades, the union has negotiated an agreement with one of the "big three" automakers (GM, Ford, and Chrysler) and then pushed the other two to match terms. Because each company signs substantially the same agreement, none of them is put at a competitive disadvantage. The Teamsters' National Master Freight Agreement similarly covered the entire long-haul trucking industry, and numerous construction unions have used multi-employer and multi-worksites bargaining frameworks. More recently, the Service Employees International Union (SEIU) has built multi-employer bargaining units of janitors in many cities.<sup>26</sup> However, these efforts have increasingly become the exception rather than the rule: As unions have lost power, it has become much harder for them to build centralized bargaining.

Centralized bargaining can also benefit employers. As noted above, responsible employers want to pay good wages and provide good benefits; but in the absence of well-enforced minimum standards, they cannot do so without losing market share. By establishing minimum terms that apply across the board, centralized bargaining can enable employers to compete on other grounds, including productivity and quality of goods or services. Indeed, where centralized bargaining increases wages for less-skilled workers, it encourages employers to train them and enhance their productivity. Employers are also less likely to lose employees to competitors (and be unable to recoup training costs) where a wage floor has been set. These factors help to stabilize centralized bargaining structures once they are in place. There is also significant evidence that moving wage-setting decisions outside of the firm can encourage more harmonious labor relations, as unions and employers can then focus on production challenges and other issues that require collaboration.<sup>27</sup>

### **III. The Case for More Centralized Bargaining in Today's Economy**

The long-running shift from manufacturing to services has limited workers' ability to build and exert collective power—and therefore to take wages out of competition. Below, I first provide

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<sup>25</sup> See, e.g., Jelle Visser & Daniele Checchi, *Inequality and the Labor Market: Unions*, in THE OXFORD HANDBOOK OF ECONOMIC INEQUALITY (Nolan et al, eds., 2011) (arguing that unions' power, coverage, and level of bargaining coordination in particular nations correlates with economic equality in those nations); Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, VARIETIES OF CAPITALISM 21-22 (2001) (noting tendency toward more equal distributions of wealth and income in "Coordinated Market Economies" with more centralized bargaining compared to "Liberal Market Economies" with more decentralized bargaining). See also Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws"*, 1990 Wis. L. Rev. 1 (1990) (connecting these trends to basic structure of labor laws in U.S. and Germany).

<sup>26</sup> Andrias, *supra* note 5, at 19-20, 46-47 (discussing these models and difficulty of replicating them); NELSON LICHTENSTEIN, *THE MOST DANGEROUS MAN IN DETROIT* 271-98 (1995) (describing pattern bargaining).

<sup>27</sup> Hall & Soskice, *supra* note 25; Rogers, *supra* note 25.

basic data on today's low-wage workforce and then discuss the structural and legal impediments they face to organizing and collective bargaining, especially at scale.

*The size and composition of the low-wage workforce:* Today, there are around 12.9 million manufacturing workers in the U.S., with a unionization rate just over 10 percent, and median wages of around \$22 an hour. They still represent a substantial proportion of the workforce, and a healthy manufacturing sector is essential to national economic performance. But there are far more low-wage service workers, many of whom work for major corporations. For example, there are now over 13 million nonsupervisory retail workers—including 8.6 million salespeople, stock clerks, and cashiers—whose median wages are around \$11.50 per hour. According to the Department of Labor's (DOL) Bureau of Labor Statistics (BLS), other large groups of low-wage workers include:

- 11 million food service workers, including 3.65 million in fast food;
- 4.2 million hand laborers, which includes warehouse workers;
- 3.2 million home health aides and personal care aides;
- 2.4 million janitors; and
- 1.8 million hotel and hospitality workers.

The median wage for each of those groups is under \$15 an hour, with the exception of hotel workers, where the median is just over \$15 an hour. Notably, while the so-called “gig economy” of Uber and Lyft gets a great deal of press, the BLS estimates that there are only around 370,000 taxi drivers, ride-hail drivers, and chauffeurs in the U.S. today.<sup>28</sup>

Women and people of color are significantly overrepresented here. In some sectors and occupations a majority of workers are women of color, and in the aggregate more than half of Black workers, and nearly 60 percent of Latinx workers, earn less than \$15 an hour today.<sup>29</sup> That reflects legacies of discrimination in the labor market and elsewhere, as well as the exclusion of many low-wage workers from the NLRA.<sup>30</sup> It also reflects the decline of union representation. For example, two sociologists have estimated that “among women, black-white weekly wage gaps would be between 13 [percent] and 30 [percent] lower if union representation remained at high levels.”<sup>31</sup>

*The declining power of strikes:* Our labor law significantly restricts workers' rights to strike. Restrictions on recognitional strikes were noted above.<sup>32</sup> Workers are also largely forbidden from picketing or inducing strikes at companies other than their primary employer;<sup>33</sup> and if they strike to obtain higher wages or benefits, they can be permanently replaced.<sup>34</sup> The PRO Act would

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<sup>28</sup> All data from U.S. Dept. of Labor, Bureau of Labor Statistics, bls.gov (last checked October 13, 2019).

<sup>29</sup> IRENE TUNG, YANNET LATHROP, & PAUL SONN, NATIONAL EMPLOYMENT LAW PROJECT, THE GROWING MOVEMENT FOR \$15 (Nov. 2015).

<sup>30</sup> 29 U.S.C. § 152(3) (2018) (excluding agricultural workers, domestic workers, and independent contractors from protection).

<sup>31</sup> Jake Rosenfeld and Meredith Kleykamp, *Organized Labor and Racial Wage Inequality in the United States*, 117 AM. J. SOC. 1460 (2012).

<sup>32</sup> See note 11, *supra*, and accompanying text.

<sup>33</sup> 29 U.S.C. § 158(b)(4) (2018).

<sup>34</sup> *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938).



reverse those doctrines. But service workers are also easier to replace than industrial workers in many cases, since they have less specialized training, and perform less specialized tasks.

*Smaller workplaces:* Service workers also work in small workplaces, which are spread out across the country. That makes it nearly impossible for most service workers to build a UAW-style pattern bargaining system today. Consider how a union would pursue such a strategy in retail. Walmart alone has around 4,000 stores nationwide and would be essential to such an effort. The union may try to gain certification among Walmart workers within individual stores and then merge those into a larger bargaining unit. Doing that at the store level is no small task, however, since night-time and irregular work is common, and since workers often have multiple jobs, turn over quickly, and are easily replaced. Due to these factors, as well as Walmart's sophisticated union avoidance efforts, Walmart workers have been unable to unionize at a single location in the United States.<sup>35</sup>

Plus, in the event that a union did petition for an election, the company would likely argue that a different bargaining unit is appropriate, such as all of its stores within the state or nationwide.<sup>36</sup> If a nationwide bargaining unit were approved, the union would face the enormous logistical challenge of organizing millions of workers all at once. What's more, even if a union did succeed against those odds, it would only have rights to bargain with Walmart. It would need to run a similar campaign against the company's competitors in order to establish pattern bargaining.

Fast food workers, hotel workers, building service workers, and others would confront similar challenges. Some groups of low-wage workers are still worse off, as they have no common workplace at all. Home health aides and personal care aides work in individual homes, caring for elderly individuals and people with disabilities. Ride-share drivers, other gig economy workers, and various delivery drivers may never meet a co-worker in person, given the nature of their work. While some such workers have organized, it has been a very difficult process.

*Fissured work arrangements:* These challenges are compounded by the prevalence of "fissured" work arrangements, in which a third party sits between workers and the companies that utilize and profit from their labor.<sup>37</sup> Fissuring is legitimate and entirely lawful in many cases, but it can also be used to evade legal obligations. Examples include the misclassification of workers as independent contractors, which denies them rights under the NLRA and FLSA; certain forms of subcontracting, in which a larger company hires a contractor to perform tasks such as cleaning, security, or landscaping but pays so little that the contractor cannot comply with labor and employment laws; and franchising arrangements where a franchisor exerts control over terms and conditions of employment for franchisees' workers, as has been alleged in litigation against McDonald's. In each case, the principal firm rather than the workers' legal employer may control their wages, benefits, and other working conditions, and yet the workers have no rights to strike

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<sup>35</sup> The United Food and Commercial Workers and some other unions have been able to build density within retail in certain geographical areas, but overall unionization rates are below 5%.

<sup>36</sup> See, e.g., *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570 (1st Cir. 1983).

<sup>37</sup> See generally DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

against, picket, or bargain with the principal firm.<sup>38</sup> In the case of subcontracting, our labor law even allows a principal to terminate a subcontractor because its employees have unionized.<sup>39</sup> That creates incentives to pit subcontractors against one another, driving down wages.

Consider what a union of fast food workers would need to do to develop a pattern bargaining structure. According to public data, McDonald's alone has around 14,000 locations in the United States, 80 percent of which are operated by franchisees, and the average fast food location has around fifteen employees.<sup>40</sup> To build a large bargaining unit, the union would need to organize restaurants one at a time and then merge those stores into a multi-employer unit. As noted above, employers have no duty to join such a unit.<sup>41</sup> The alternate strategy of organizing at the regional level is foreclosed by the NLRB's inability to order an election in a multi-employer bargaining unit.<sup>42</sup> Plus, even if the workers succeeded in building a unit including most or all McDonald's restaurants at the regional or national level, they would only have rights to bargain with McDonald's.

Fast food workers are not alone. Many hotels now operate on a franchise model, so a franchisee rather than the brand attached to a hotel manages the building. Many franchisees further subcontract cleaning and other tasks, which adds an additional contractual layer between workers and parties with economic power. Janitors and security guards, similarly, work for subcontractors of buildings managers, who in turn contract with building owners. Subcontracting (via temporary labor agencies) is also increasingly common in manufacturing, and in warehouse work.

*Employment at will and non-enforcement of statutory protections:* Low-wage workers are also especially vulnerable to wage theft, unsafe working conditions, sexual harassment, and discrimination. McDonald's workers, for example, struck in various cities last year to demand the company implement better protections against sexual harassment, and unionized hotel workers have requested panic buttons to protect themselves against sexual assault by guests.<sup>43</sup>

Harassment, discrimination, and wage theft are of course illegal under modern employment law statutes, but enforcement of those rights can be very difficult without a union. This is one effect of the "employment-at-will" rule, under which either party to an employment contract may terminate it at any time, for any reason. Employment at will leaves workers who complain about lawbreaking vulnerable to retaliation or even termination, often with little hope of a remedy. Plus, when an employer may terminate an employment contract at any time, it may also change that

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<sup>38</sup> 29 U.S.C. § 152(2) (2018) (defining "employer" for purposes of the NLRA); 29 U.S.C. § 158(b)(4) (2018) (prohibiting most concerted action against parties other than the employer).

<sup>39</sup> *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

<sup>40</sup> Figures from Statista, [www.statista.com](http://www.statista.com) (last checked Oct. 15, 2019).

<sup>41</sup> When particular locations are owned and operated by an individual franchisee who owns only that store, then the franchisee can simply shut down the store without legal consequence rather than dealing with a union. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1980).

<sup>42</sup> The PRO Act may hold McDonald's to such a duty as a joint employer of the franchisee's workers. The NLRB during President Obama's terms developed a new test for joint employment that may have had that effect; the Trump NLRB has begun rulemaking which would narrow that standard again by requiring that both joint employers exercise direct control over working conditions. National Labor Relations Board, Notice of Proposed Rulemaking, The Standard for Determining Joint-Employer Status, 83 Fed. Reg. 46691 (Sept. 14, 2018).

<sup>43</sup> Sarah Jones, *The 'Me Too' Movement Hits McDonald's*, THE NEW REPUBLIC, Sept. 17, 2018.

contract at any time. An employer may, for example, circulate a written agreement to arbitrate employment disputes and to forego class action claims, and tell workers that unless they quit, they are bound to its terms.<sup>44</sup> Unionization can substantially improve enforcement by giving workers collective voice and power to resist violations, as well as access to legal services.

*Corporate concentration:* Even as workplaces have become smaller, and fissuring has become far more common, many industrial sectors have become highly concentrated in recent decades. Leading economists have documented this trend,<sup>45</sup> and they've suggested that it helps explain wage stagnation.<sup>46</sup> Such concentration is apparent in various low-wage sectors. In fast food, for example, a small number of brands dominate the market, including McDonald's, Yum! Brands (parent of Taco Bell and Pizza Hut, among others), Burger King, and Wendy's. Similar trends are clear in retail (due largely to the growth of Walmart and other big box retailers), hotels (due to mergers), and in pharmacies (again due to mergers). When companies in those sectors operate through franchisees and subcontractors, they are exercising both legal and economic power over workers without bearing responsibility toward them. The sheer size of those companies also suggests that continental-scale unions will be necessary to counterbalance their power.

*Summary:* The long-term shift away from manufacturing and toward services has made it exceptionally difficult for workers to organize new bargaining units, since service workers are not concentrated in one place but rather dispersed among hundreds, thousands, or even millions of disparate worksites. Those challenges are compounded by extensive "fissuring" of employment, which leaves workers without a real counterparty if and when they do organize. And they are still further compounded by the enterprise bargaining model. The result is that even unionized workers today are frequently atomized and weak, undermining their voice at the workplace and in the broader economy.

#### **IV. Policies to Encourage Centralized Standard-Setting and Bargaining**

Congress can help workers organize and take wages out of competition by encouraging more centralized bargaining and standard setting. I outline two ways to advance that goal below.<sup>47</sup> To reiterate a point made above, such reforms are intended to supplement and bolster enterprise bargaining, not to replace it. To that end, any reforms would need to be carefully designed to ensure that they integrate with enterprise bargaining structures.

***Proposal 1: Industry Committees.*** The first option would be to set minimum terms at the sectoral level through an administrative process. As law professor Kate Andrias has documented,

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<sup>44</sup> *E.g., Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino*, 640 F.3d 471 (1st Cir. 2011); *see also Lucht's Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058 (Colo. 2011) (continued employment can bind at-will employee to non-compete agreement); *see generally Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (Ginsburg, J., dissenting) (detailing how mandatory arbitration, especially of class claims, undermines worker rights).

<sup>45</sup> *See, e.g., Sam Peltzman, Industrial Concentration Under the Rule of Reason*, 57 J. L. & ECON. S101 (2014).

<sup>46</sup> *See, e.g., David Autor, David Dorn, Lawrence W. Katz, Christina Patterson, and John Van Reenan, Concentrating on the Fall of the Labor Share*, 107 AM. ECON. REV. 180 (2017).

<sup>47</sup> The discussion in this section draws extensively, at times verbatim, from ANDRIAS AND ROGERS, *supra* note 1

the United States has done this before.<sup>48</sup> The Fair Labor Standards Act of 1938 created “industry committees,” populated by representatives of labor, management, and the public, with the power and obligation to raise minimum wages at the sectoral level, up to a statutorily specified target wage. Those committees (colloquially known as “wage boards”) were constituted and operational for a number of years, but the relevant provision of the FLSA was repealed in 1949 as part of Congress’ retrenchment of the New Deal labor legislation. Various state departments of labor can also establish such committees under state law, as New York recently did for fast food workers.<sup>49</sup>

As was the practice under the early FLSA, legislation could mandate the establishment of committees in the largest low-wage sectors. Committees ideally would have equal representation of workers and employers.<sup>50</sup> Worker seats could be allocated to unions and other membership-based worker organizations active in the sector, while employer seats could be allocated to leading employer associations and firms.<sup>51</sup> Following the process under the early FLSA, committees could take public and expert testimony, deliberate, and recommend minimum wages for the sector to the DOL, consistent with clearly defined statutory goals. Those recommendations could vary based on geography or other statutorily determined factors. Committees could also be empowered to set other minimum standards, such as scheduling policies (to encourage full-time work or predictable hours), benefits including health care (perhaps provided through a sectoral benefit fund), health and safety standards, training and paid leave policies, policies around sexual harassment, etc.

The DOL would then assess such recommendations and provide opportunity for public comment. Ultimately, if the recommendations were found to be consistent with the statutory mandate, the DOL would adopt them as regulations, making them binding on all firms within the sector and enforceable through administrative processes or private rights of action.<sup>52</sup>

Industry committees’ standard setting would not be a collective bargaining processes as we typically understand it, and participating unions would not necessarily be certified as bargaining agents for all affected workers. They could nevertheless serve as a catalyst to worker-organizing

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<sup>48</sup> See generally Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616 (2019).

<sup>49</sup> Andrias, *Forgotten Promise*, *supra* note 48 at 83-86. See also Sharon Block, *Sectoral Approach for Domestic Workers*, ONLABOR.ORG (July 16, 2019) (arguing that proposed federal Domestic Worker Bill of Rights provides for a similar sort of bargaining by creating a Domestic Worker Wage and Standards Board with equal numbers of representatives from workers and employers of domestic workers).

<sup>50</sup> A strategic consideration here is whether to also give the DOL a seat at the table. This may not be necessary either practically or legally, since the DOL would also have the power to review agreements, as discussed below.

<sup>51</sup> In some low-wage sectors, there are fewer major employers. Those include domestic work and childcare, where many individuals are employed by individuals. In those sectors, the administrative agency charged with developing and populating committees would need to determine how to ensure employer representation. This issue has been briefed in the past by the Domestic Workers’ Alliance. Rachel Homer, *An Explainer: What’s Happening with Domestic Worker’s Rights*, ONLABOR.ORG (Nov. 6, 2013).

<sup>52</sup> An agency should have the power to do so without triggering a non-delegation problem so long as the its review is subject to specific constraints written into the statute. Longstanding doctrine permits Congress to delegate discretion to the Executive branch so long as the relevant statute provides “an intelligible principle” that the Executive must follow. *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). For example, the statute could provide that the Secretary must reject the agreement if it fails to advance goals such as ensuring all workers a living wage, reasonable working hours, or a rising standard of living.

efforts by enabling unions to engage workers in the process.<sup>53</sup> Such mobilization could be encouraged by protecting workers' rights to strike and take other concerted action to influence committees' deliberations; indeed, without such protections there is a risk that committees could be used by companies and state officials to thwart rather than encourage worker voice.<sup>54</sup> But if carefully designed, industry committees could provide workers some voice and could substantially improve wages and working conditions, even in heavily fissured industries. If the DOL set and enforced minimum standards for janitors, security guards, or other maintenance workers, for example, principal firms would have less power to force subcontractors to reduce wages.

Before beginning this process, the DOL would need to define sectors.<sup>55</sup> This would involve some difficult line-drawing at times, but that makes it classically suited for an administrative agency.<sup>56</sup> Sometimes this will be relatively straightforward, especially in concentrated markets like fast food. The major brands in that space often compete with one another for customers and workers, so it makes sense for them to be at the table together. In other major low-wage sectors, the line-drawing may be more complicated. For example, luxury hotels do not compete with motels, and different standards may be appropriate for workers in the two. At the same time, some major hotel companies operate both luxury and budget properties, so it may make sense for a master agreement to cover all properties but to differentiate among them as necessary.

***Proposal 2: Sectoral Bargaining.*** As a second option, the NLRA could be revised to encourage or mandate collective bargaining between unions and all firms at the sectoral level. Right now, various labor unions, labor lawyers, and scholars are developing detailed sectoral bargaining proposals, so I will simply sketch how such a new system might work and highlight some of the questions Congress and the NLRB would need to address in designing it.<sup>57</sup>

To encourage sectoral bargaining, Congress could draw lessons from the European examples

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<sup>53</sup> Depending on how broadly their missions are defined, they could also help facilitate participation by worker organizations in a host of other labor policy decisions—including questions of health care, childcare, paid family leave, and the design and provision of employee benefits systems.

<sup>54</sup> This is one reason why worker organizations such as Rideshare Drivers United rejected Uber and Lyft's proposal for what the companies termed a "sectoral bargaining" system in California. See Alexia Fernandez Campbell, *California Just Passed a Landmark Law to Regulate Uber and Lyft*, VOX.COM (Sept. 18, 2019).

<sup>55</sup> A related issue is the geographic scope of bargaining, *i.e.*, whether it will take place at the national level, the state level, the local level, or some combination of the three. Given substantial variance in the cost of living in different areas, it may make sense for any national agreements to simply set a floor, which lower-level agreements could supplement, particularly where workers organize enterprise bargaining units.

<sup>56</sup> For example, the Census Bureau and the Bureau of Labor Statistics use NAICS codes to determine employment levels and wages in particular occupations and sectors, OSHA promulgates many industry-specific standards, and the Federal Trade Commission must often determine whether various companies are competitors for purposes of price-fixing and other illegal arrangements. Those tools and methodologies could be adopted to help determine appropriate sectors for bargaining.

<sup>57</sup> Unions have developed various models of sectoral bargaining under state law for home care workers and others who are currently excluded from coverage under the NLRA. In developing a new sectoral bargaining system, Congress could draw lessons from those efforts. As they have been developed under state law, however, and have often involved public sector workers, those initiatives raise issues that are beyond the scope of this testimony. For discussions of the new models and potential future reforms, see IRENE TUNG AND CAITLIN CONNOLLY, UPHOLDING LABOR STANDARDS IN HOME CARE: HOW TO BUILD EMPLOYER ACCOUNTABILITY INTO AMERICA'S FASTEST-GROWING JOBS, NATIONAL EMPLOYMENT LAW PROJECT (Dec. 21, 2015).

discussed above. A straightforward step would be to revise the NLRA to encourage multi-employer bargaining.<sup>58</sup> This would enable unions that have already organized particular shops to build more centralized bargaining structures. Congress could also approximate European “extension laws” in various ways. For example, it could amend Davis-Bacon so that it covers the entire economy, not just public works and publicly funded projects. The DOL could then be given the power to adopt prevailing wages at the sectoral level, and apply them across the sector, once unions represent a certain percentage of workers in a sector.

Since building full-fledged sectoral bargaining units from scratch is basically impossible, Congress could grant unions sectoral bargaining rights in stages, based upon their support among the workforce. To illustrate, a union that has some threshold level of support within a sector (say, 5 percent) could be granted reasonable access to workers, including some rights to enter employers’ physical property to speak with workers, as well as contact lists for workers. A union with more support (say, 25 percent) could have rights to bargain over core issues such as wages and pay scales, benefits, and scheduling. (Such bargaining may overlap with an industry committee process.) Finally, unions with majority support could have rights to bargain over all “mandatory” subjects under current law, including economic terms, work rules, grievance and arbitration procedures, and ideally over various “permissive” subjects including matters of corporate policy.

As with an industry committee system, Congress and the NLRB would need to define sectors to determine which employers and employees are covered by a new sectoral bargaining agreement. Ideally, any agreement that results would end up signed by most of the major players. The DOL could then be empowered to apply it throughout the industry through an administrative process, as discussed above. Congress and the NLRB would also need to decide whether such bargaining would take place in the first instance at the national, state, or even the metropolitan level.

Finally, Congress or the NLRB would need to determine what the parties may do in the event of an impasse. The right to strike is of course absolutely essential if workers are to exert power at any level, and it should be protected in the sectoral context. But strikes may not be realistic during early stages of sectoral bargaining. To prevent employers from simply going through the motions at the bargaining table, Congress might consider creating a process to set minimum terms in the event of an impasse. This might include interest arbitration, referral of the dispute to a DOL-constituted industry committee, or some similar mechanism.

**Conclusion:** Our labor law and system of collective bargaining was developed in the 1930s. The goals it sought to advance at that time are no less important today: encouraging worker voice, collective bargaining, and a decent standard of living for all. But the means through which our labor law advances those goals reflect the economy of an earlier era. Fundamental, structural changes to our labor law are necessary to restore its promise in today’s economy.

At the same time, neither of the above proposals can stand alone. Each of them would supplement worksite-based representation, which the PRO Act would encourage. The industry committee proposal could apply across the economy but would be most helpful to low-wage workers in sectors with little or no union density. The sectoral bargaining proposal could encourage

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<sup>58</sup> For a set of detailed proposals along those lines see MARK BARENBERG, WIDENING THE SCOPE OF WORKER ORGANIZING: LEGAL REFORMS TO FACILITATE MULTI-EMPLOYER ORGANIZING, BARGAINING, AND STRIKING, ROOSEVELT INSTITUTE (2015).

organizing in sectors where unions cannot build majority support in the short term, while also enabling unions with some density to amplify their voice and power. Either or both reforms could reduce the barriers to worker self-organization under current law and the difficulty unions face in building power at scale.

## V. Portable Benefits

The labor market changes described in Part III, and the decline of unions over the past decades, have also eroded employee benefits. Employers must provide certain benefits to their employees, including health care under the Affordable Care Act (ACA), unemployment insurance, and workers' compensation. But companies are not typically required to provide such benefits to independent contractors. Certain other benefits are available only to full-time employees, not to part-time employees. Those can include employer-sponsored health care under the ACA, employer-sponsored retirement plans, or unemployment insurance.

These developments have led various think tanks and companies to propose that employee benefits should be made portable, particularly for gig economy workers and other workers who move among jobs frequently.<sup>59</sup> To be clear, the idea of portable benefits is not new. Unions in the construction industry, where workers frequently move between jobsites and employers, long ago built health, welfare, and pension funds that are portable for workers. Social security and Medicare are also portable, in that they are provided and administered by public agencies. States and localities have also made it easier for bona fide independent contractors to get benefits recently. The state of Washington's new Paid Family and Medical Leave program, for example, permits self-employed individuals to buy in.<sup>60</sup> But it is far from clear that portable benefits are the best solution for service workers and gig economy workers today. In deciding whether to adopt laws that would encourage benefits portability, several issues would need to be considered.

First and foremost, portable benefits programs should not enable companies to evade legal duties toward their workers. For example, some gig economy companies have proposed a safe harbor provision for benefits, so that providing benefits is not taken as evidence that they employ their workers.<sup>61</sup> But there are powerful arguments that those companies do employ their workers under existing law, given the amount of control they exercise over them,<sup>62</sup> and therefore that they are already required to provide them certain benefits. To eliminate any ambiguity about this question, California recently adopted a broader test for employment known as the "ABC test."<sup>63</sup>

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<sup>59</sup> See, e.g., LIBBY REDER, SHELLY STEWARD, AND NATALIE FOSTER, *DESIGNING PORTABLE BENEFITS: A RESOURCE GUIDE FOR POLICYMAKERS*, ASPEN INSTITUTE (June 2019); Robert Maxim and Mark Muro, *Rethinking Worker Benefits for an Economy in Flux*, THE AVENUE BLOG, BROOKINGS INSTITUTION (March 30, 2018), at <https://www.brookings.edu/blog/the-avenue/2018/03/29/rethinking-worker-benefits-for-an-economy-in-flux/>

<sup>60</sup> Workers, Washington Paid Family & Medical Leave, (checked Oct. 17, 2019) at <https://paidleave.wa.gov/workers>

<sup>61</sup> See, e.g., Lydia DePillis, *This is What the Social Safety Net Could Look Like For On-Demand Workers*, WASHINGTON POST, Dec. 7, 2015.

<sup>62</sup> See, e.g., *O'Connor v. Uber Techs., Inc.*, 58 F. Supp. 3d 989 (N.D. Cal. 2014) (denying defendant's motion for summary judgment given factual question regarding extent of control it exercised over drivers); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015) (same).

<sup>63</sup> California Assembly Bill No. 5 (2019) (adopting "ABC" test for employment, under which a worker providing services for pay is presumed to be an employee, unless the hiring entity demonstrates that the worker (A)

The PRO Act would utilize the same test and would cover ride-hail drivers as well as many other gig economy workers.

Second, lawmakers should prioritize providing benefits through public agencies or through collective bargaining. Where unions are not established, the public sector could develop and manage benefit programs to help ensure accountability to public goals and to workers, as well as reasonable administrative costs. New benefit structures could also require that a certain number of board members be elected by the beneficiaries themselves.<sup>64</sup> Collectively bargained benefits have many of the same advantages: Taft-Hartley funds are jointly administered by unions and employers, which helps ensure that benefit levels are appropriate to workers' needs and that the funds are actually managed with workers' interests in mind. In contrast, some portable benefits plans proposed by gig economy companies are essentially worker-funded forms of insurance. Those may reduce wages and may be inferior to the benefits workers would receive if they were properly classified as employees.

## **VI. Conclusion**

For decades, our labor and employment laws have been a key part of our social contract. But that social contract has been eroded in recent years, due to changes in our economy, to various legal doctrines that have undermined workers' bargaining power, and to employer strategies designed to limit labor costs. To ensure that workers in today's economy can thrive, we need to restore the right to organize, while also considering more fundamental, structural changes to our labor law. We should also ensure that employee benefits are provided to workers as required under law, while encouraging publicly provided or collectively bargained benefits.

Thank you again for this opportunity to testify. I look forward to your questions.

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is free of their control, (B) performs work outside the usual course of the entity's business, and (C) is engaged in an independent trade or occupation.)

<sup>64</sup> REDER, ET AL, *supra* note 59, at 38 (discussing options for worker involvement in benefit fund design and administration). *See also* Sharon Block, *A Missed Opportunity: Worker Voice in Portable Benefits*, OnLabor.org (June 1, 2017).