STATEMENT OF GLENN M. TAUBMAN
TO THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS
HEARING: March 26, 2019

Chairwoman Wilson, Ranking Member Walberg and Distinguished Committee Members:

Thank you for the opportunity to appear before you today. I have been practicing labor and constitutional law for over 35 years, for individual employees only, at the National Right to Work Legal Defense Foundation. (My vitae is attached). I believe I have a unique perspective that comes from over three decades of representing thousands of private sector employees covered by the National Labor Relations Act (NLRA) and the Railway Labor Act.

The announced topic of this hearing is the need for labor law reform. I agree that federal labor law should be reformed to better protect individual liberty and safeguard individual workers' free choice concerning unionization.

No worker in America should be threatened with discharge from his or her workplace for refusing to pay dues and fees to a private organization he or she may despise. No worker should be forced to be represented by a private organization and its officials who perform poorly in the workplace, or place their own interests above those they purport to represent, or act corruptly to steal from the very employees they claim to represent. No worker should be forced to subsidize, as a condition of employment, the political schemes and candidates of a private organization of which they disapprove.

Yet this is the reality for millions of private sector workers today under the compulsory dues and monopoly bargaining regimes of the NLRA.

Because labor unions under the NLRA do not have to stand for periodic recertification, authoritative estimates show that 94% of workers unionized under the NLRA have never voted for the union representing their workplace. James Sherk, Union Members Never Voted for a Union, Heritage Foundation, August 30, 2016, available at https://www.heritage.org/jobs-and-labor/report/unelected-representatives-94-percent-union-members-never-voted-union. Perpetually encrusting a labor union onto a workplace, with no showing of current employee

support, does not lead to workplace stability and does not protect individual employees' rights of free speech and association.

Several other problems with the current state of American labor law need to be fixed.

1) Current law makes it far easier for employees to form and join a union than it is for those same employees to decertify the union. For example, the National Labor Relations Board maintains a startling array of non-statutory election "blocks" and "bars" that prevent employees from obtaining a decertification election. The NLRB's current "blocking charge" rules effectively halt decertification elections in their tracks, contrary to the Act's fundamental purpose of employee free choice. NLRB statistics show that approximately 1/3 of decertification elections are blocked or delayed by union foot dragging. See NLRB, Annual Review of Revised R Case Rules, https://www.nlrb.gov/sites/default/files/attachments/news-story/node-4680/RCase%20Annual%20Review.pdf.

Other election bars the NLRB concocted over the years include the "successor" bar, the "settlement" bar and the "voluntary recognition" bar. Although all of these bars apply to prevent employees from decertifying a union, none of them apply to prevent employees from certifying a union.

In 2014 the Obama NLRB adopted what has become known as the "Ambush" Election Rules, which force union certification elections to be held in as little as 11 days and allow for no blocks or bars, no matter how threatening or egregious a union's unfair labor practice violations may be. See Representation-Case Procedures, 79 Fed. Reg. 74308, 74430–74460 (Dec. 15, 2014). In contrast, the NLRB's "bars" and "blocking charge" policies deny employees their fundamental NLRA rights, allowing union officials to "game the system" and strategically delay or prevent entirely decertification elections.

In 2013, I testified before this Committee with my client Marlene Felter, who was a victim of an abusive "card check" scheme and a denial of the right to a secret ballot election. I highlighted the NLRB's "bars" and "blocking charge" rules. Sadly, six years have passed and this unequal treatment remains, making it much easier for employees to get into a union than it is for them to get out – even though the NLRA's text guarantees employees the equal right to join or refrain.

Some recent NLRB Members have argued for a revision of the "blocking charge" rules, so far to no avail. E.g., Cablevision Systems Corp., Case 29-RD-138839, *1 n.1 (June 30, 2016) (Order Denying Review); Valley Hosp. Med.

Ctr., Inc. & SEIU Local 1107, 28-RD-192131, 2017 WL 2963204 (Order Denying Review, July 6, 2017); Pinnacle Foods Group, 14-RD-226626 (Order of Feb. 4, 2019). Moreover, the Board's continued practice of delaying and denying decertification elections based upon blocking charges has faced severe judicial criticism for close to 60 years. In NLRB v. Minute Maid Corp., the U.S. Court of Appeals for the Fifth Circuit stated:

> [T]he Board is [not] relieved of its duty to consider and act upon an application for decertification for the sole reason that an unproved charge of an unfair practice has been made against the employer. To hold otherwise would put the union in a position where it could effectively thwart the statutory provisions permitting a decertification when a majority is no longer represented.

283 F.2d 705, 710 (5th Cir. 1960); see T-Mobile USA Inc. v. NLRB, 717 F. App'x 1, 4 (D.C. Cir. 2018) (Sentelle, J., dissenting) (noting the Board's blocking charge policy causes "unfair prejudice"); Surratt v. NLRB, 463 F.2d 378 (5th Cir. 1972) (rejecting application of the blocking charge policy); Templeton v. Dixie Printing Co., 444 F.2d 1064 (5th Cir. 1971) (same); NLRB v. Gebhardt-Vogel Tanning Co., 389 F.2d 71, 75 (7th Cir. 1968) (quoting Minute Maid Corp., 283 F.2d at 710).

In short, it is way past time for Congress and the NLRB to ensure that any election rules apply equally to certification and decertification elections.

2) Another major problem is that of forced union dues and forced exclusive representation. It is neither fair nor constitutional to force employees into paying dues to a private organization upon pain of discharge, as the Supreme Court held just last term in Janus v. AFSCME, 138 S. Ct. 2448 (2018). Similarly, forcing an individual to be represented by a private organization is antithetical to American values of free speech and free association. Just as few on this Committee would approve of being forced to be represented against their will by a lawyer or accountant purporting to serve as their exclusive representative for purposes of dealing with the government, few employees want to be forced into an exclusive agency relationship with a labor union for purposes of negotiating their wages and working conditions. Indeed, over 90% of the American private sector workforce has chosen to not be represented by a labor organization.

Union officials fought tooth and nail for the abusive power to force their so-called "representation" on all workers. By exercising this monopoly power, they

forbid individual workers from representing themselves. Then, rubbing salt in the wound, these same union officials turn around and falsely complain that since they've forced those workers to accept their representation, they should also be able to force those workers to pay for it. This is like being kidnapped by a cab driver, driven all over town against your will, and then being forced to pay the driver an exorbitant fare for the "services" he allegedly rendered.

3) Even in Right to Work states – where employees have free choice to join or refrain from union membership – it is usually very difficult for employees to stop paying dues. Union officials write dues checkoff cards in microscopic fonts, and in language designed to be as confusing as possible. Moreover, these checkoffs are usually irrevocable for up to a year, and often contain confusing, short window periods and certified mail requirements, all designed to block the exit of even the most steadfast employee. See, e.g., Stewart v. NLRB, 851 F.3d 21 (D.C. Cir. 2017). (A copy of one such typical union dues checkoff card is attached). With one easy legislative change to NLRA Section 302, 29 U.S.C. § 186(c)(4), Congress could make all such dues checkoffs revocable at will, allowing employees to vote with their pocketbooks and freely change their minds. No one likes to be forced to pay for unwanted cable TV service or a gym membership because they misread the fine print in a contract crafted to mislead them, and the same should hold true for union dues deduction authorizations.

4) Thirty years after the Beck decision, CWA v. Beck, 487 U.S. 735 (1988), union officials continue to thumb their noses at that decision and collect and use forced dues for political advocacy and candidates over the objections of nonmembers. This leaves nonmembers like registered nurse Jeanette Geary with little choice but to fight decade-long legal battles to protect their free speech rights in the workplace.

Not surprisingly, in 2012 President Obama's NLRB ruled in Jeanette Geary's case that unions were legally permitted to charge nonmember Beck objectors for union lobbying expenditures because they were allegedly "germane" to collective bargaining, contract administration, or grievance adjustment. United Nurses & Allied Professionals (Kent Hospital & Jeanette Geary), 359 NLRB 469, 474-75 (2012) ("The fact that the activity occurs within the political sphere does not change our core analysis. So long as lobbying is used to pursue goals that are

germane to collective bargaining, contract administration, or grievance adjustment, it is chargeable to objectors").

Besides adopting this completely amorphous "germaneness" test for what is chargeable to nonmembers, and despite being completely wrong on the law of chargeability as established in Beck and the Supreme Court's Railway Labor Act cases, that 2012 decision by the Obama NLRB was wrong for another fundamental reason: the Board Members who issued the decision were illegally appointed, because President Obama violated the constitution by making purported "recess appointments" when the Senate was not in recess. Thus, the initial 2012 decision in Jeanette Geary's case, Kent Hospital, was void ab initio under NLRB v. Noel Canning, 573 U.S. 513 (2014).

In 2013, the NLRB achieved a quorum of validly confirmed members, and Jeanette Geary's case was ready to be re-decided. However, instead of issuing a new decision promptly, the case languished for more than 5 years with no decision – presumably, at least in part, because Board members appointed by President Obama agreed with the constitutionally void 2012 decision. The Board did not issue a decision until after Jeanette Geary filed a mandamus petition in the D.C. Circuit to force the issuance of a decision and the court ordered the Board to respond to the petition. In re Geary, D.C. Cir. No. 19-1001.

Despite the long and tortured history of Jeanette Geary's case, the NLRB finally ruled on March 1, 2019, that union lobbying is never chargeable to nonmembers. The Board relied on a host of Supreme Court and court of appeals cases to recognize that lobbying is pure political activity, which is outside of a union's representational responsibilities and duties. In other words, the Board recognized that a monopoly bargaining representative is certified to represent employees vis-a-vis their employer, not to serve as a political spokesman, even where legislation is closely related to a collective bargaining topic and might directly affect bargaining or contract administration.

The bottom line is that a single dedicated employee, Jeanette Geary, was forced to wage a nine-year legal battle against well-funded union officials before the NLRB would finally draw a clear line to protect her right to not fund any political activity.

But none of this legal battle should have been necessary. At the least, nonmember employees like Jeanette Geary should be automatically "opted out" of paying for union political activities, rather than being automatically "opted in" and

then being forced to fight a nine-year legal battle to cease paying the political dues she should never have been charged in the first place. Knox v. SEIU Local 1000, 567 U.S. 298, 312 (2012) ("Shouldn't the default rule comport with the probable preferences of most nonmembers? And isn't it likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues? An opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree.").

In short, the ruling in Jeanette Geary's case is fully consistent with Beck and the First-Amendment-type interests that underlie all of the Supreme Court's compulsory dues cases. Members of Congress should applaud this result, not attempt to overrule it legislatively. Indeed, they should do much more to protect employees' rights to not fund organizations and causes they abhor.

5) Another recurring labor law issue is the lack of financial disclosure and transparency about how union officials actually spend dues money. The financial disclosures unions must make under the Labor Management Reporting and Disclosure Act (LMRDA) are woefully inadequate to actually disclose how union officials spend workers' dues money. There are many recent and well-documented instances of union officials' corruption that go undetected via the LMRDA reporting documents. See, e.g., Feds suggest UAW/Fiat Chrysler scandal was wider conspiracy, https://www.freep.com/story/money/cars/chrysler/2018/06/13/uaw-fiat-chrysler-scandal-conspiracy/697774002/; Former UAW vice president charged in U.S. corruption probe, https://www.reuters.com/article/us-fiat-chrysler-corruption-uaw/former-uaw-vice-president-charged-in-u-s-corruption-probe-idUSKCN1QZ1RD; Philly union boss and councilman indicted in corruption probe, https://www.nbcnews.com/politics/justice-department/philly-union-boss-councilman-indicted-corruption-probe-n964731; Why Johnny Doc's indictment is a problem for all Philly unions, https://www.philly.com/news/johnny-doc-dougherty-indictment-philadelphia-unions-ibew-20190204.html. For the same reason that the LMRDA was enacted in the first place – widespread union corruption – the reporting requirements should be strengthened and vigorously enforced.

Finally, I have several other suggestions for labor law reform:

1) Pass the National Right to Work Act (S.525). This simple bill would end the problem of forced unionism. It would not add a single word to federal law. It would simply repeal the provisions of federal law that authorize union officials to force workers to pay union dues or fees to keep a job.
2) Pass the Secret Ballot Protection Act, to guarantee access to a secret ballot for union elections. "Card Check" is a corrupt means of attaining exclusive representation status without a secret ballot vote, in which unions intimidate or deceive individual workers one at a time, often in their own homes, into filling out a so-called "union authorization card," which then counts as a "vote" for the union. This bill would end that process, so workers could vote their consciences in a secret ballot election, free from the in-your-face coercion they often experience today.
3) Pass the Freedom from Union Violence Act, to criminalize union threats and violence. Since the Supreme Court's infamous 1973 Enmons decision, union bosses have been able to coordinate campaigns of violence and extortion, free from prosecution under the Hobbs Act, if their violence and extortion is in pursuit of so-called "legitimate union objectives." This bill would close this obscene loophole and let the law punish the union bosses who coordinate the violence, in addition to the thugs who physically perpetrate it.
4) Pass legislation requiring unions to periodically stand for recertification in a secret ballot vote. This would place the burden of proving continued majority support on union officials, rather than forcing individual employees to thread the complex and stumbling block laden decertification process. This and other provisions I have mentioned are included in the Employee Rights Act.

In closing, I wish to reiterate that the NLRA needs serious and prompt reform to protect employee free choice and increase union transparency. For too long union officials have been empowered by federal law to gain representational rights without a secret ballot election, and force employees to accept union representation and pay unwanted union dues or be discharged from their jobs. This is neither fair, appropriate or constitutional. Thank you for your attention, and I look forward to answering any questions the Committee Members may have.

Respectfully submitted,

/s/ Glenn M. Taubman