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Chairman Good, Ranking Member DeSaulnier, and Members of the Subcommittee, thank you very much for the opportunity to testify today concerning the labor legislation you are considering. These proposed bills are anti-worker and anti-union, would move national labor policy in the wrong direction, and I urge you not to adopt them.

My name is Richard F. Griffin, Jr. I have practiced labor law for 42 years and am currently Of Counsel at the Washington, DC law firm of Bredhoff & Kaiser, where I represent unions, benefit funds, and employees, as well as serving as a mediator. I began my career at the National Labor Relations Board (NLRB) in 1981 as a staff counsel, first to then-Board Member John Fanning and subsequently to NLRB Chairman Donald Dotson. Leaving the Board in 1983, I joined the in-house legal department of the International Union of Operating Engineers, where I stayed for the next 28 years, the last 18 of which I served as the International Union's General Counsel.

In December 2011, President Obama nominated me to be a Board Member of the National Labor Relations Board and appointed me in January 2012. I was subsequently nominated to be the Board's General Counsel, I was confirmed by the Senate for that position, and I took office on November 4, 2013. My four-year term as General Counsel concluded at the end of October 2017. My testimony today draws upon my varied experiences throughout my career as a labor lawyer and is specifically informed by my tenure as an NLRB Board Member and as the Board's General Counsel.

I want to start by strongly affirming the central importance of the primary rights protected by the National Labor Relations Act (NLRA/Act): workers' right to join together to form unions and act together

for their mutual aid and protection, and to bargain collectively to distribute the proceeds of an enterprise fairly among those responsible for the enterprise's success. These rights—to form a union and to bargain collectively—are fundamental, but often go unexercised out of fear or ignorance of the rights. As a result, the gap between what workers earn and what management takes home has grown ever wider, and our economic system fails those who do the real work of the enterprise.[1] Section 7 of the current NLRA clearly states those crucial rights, but the Act's other provisions, and those provisions cramped interpretation by the Board and the courts, have not fulfilled Section 7's promise as the Magna Carta for America's workers.

I testified before this Subcommittee in 2019 in support of the PRO Act because NLRA reform is needed so that workers will be able to exercise their rights effectively, free from retaliation, with strong remedies to deter unlawful conduct. However, the bills you have under consideration will not work to workers' advantage or help the economy as a whole. Rather, these bills would further weaken the system of workers' protections that are currently in place, cut back on the number and types of workers who are covered by the Act's protections, and exacerbate the inequality of bargaining power between workers and their employers that the NLRA was designed to address—the bills also would do damage to the Fair Labor Standards Act (FLSA), the law that requires that both minimum wages and time-and-a-half overtime after forty hours be paid, and protects America's most vulnerable workers from exploitation. At a time when public support for unions is at an all-time high, when workers are seeking to be represented by unions at a historic rate, and when unrepresented workers' real earnings continue to fall behind, these anti-worker, anti-union bills are bad national labor policy, harmful economic policy, and should not be enacted.

[1] Bivens, et al. 2023. "What to Know About this Summer's Strike Activity." Economic Policy Institute. August 30, 2023.

My testimony will briefly address four bills—HR 2700, HR 2826, HR 5513, and HR 3400—in turn.

HR 2700. HR 2700 is the most extensive, and most pernicious, of the bills under consideration. It would amend many provisions of the National Labor Relations Act and the Fair Labor Standards Act to: eliminate voluntary recognition as a lawful means for unions to obtain exclusive representative status; limit the employee contact information employers are required to provide to unions during the NLRB representation election process and place limitations and penalties on the union's use of that contact information to communicate with employees; impose unprecedented limitations on the union's use of member dues; narrow the FLSA's coverage by applying the common law of agency "employee" definition to that statute; provide a narrow joint employer definition for both the NLRA and FLSA and limit the factors that may be considered in making a franchisor/franchisee joint employer determination; and, finally, exclude tribal enterprises from NLRA jurisdiction. The bill is quite a panoply of harmful changes and ill-considered policy—I will briefly address each of them.

Voluntary recognition. Currently, the law provides two paths for a union to obtain the status of collective bargaining representative of a group of employees—an NLRB-conducted representation election or voluntary recognition based on an agreed-upon method for the union to demonstrate it has the support of the majority of the employees in the bargaining unit. Voluntary recognition pre-dates the passage of the NLRA and has been approved by the Supreme Court. *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 600 (1969). Despite this long history and legal approval, HR 2700 would make such agreements unlawful. Our collective bargaining system is predicated upon the reaching of agreements between employers and unions and there is simply no meritorious policy reason to single out voluntary recognition agreements for prohibition. Moreover, such a prohibition would throw into disarray the thousands of existing collective bargaining agreements achieved pursuant to voluntary recognition and disrupt the industrial stability obtained through those agreements. And, even voluntary recognition

achieved pursuant to a privately conducted election—an election conducted by the American Arbitration Association, for example—would be insufficient under HR 2700.

Employee contact information. In the context of an NLRB-conducted representation election, NLRB regulations currently provide, so that the union will be able to contact employees and inform them about the union and the election, that the employer must provide the employees' names and home addresses, and, if they are available to the employer, employee personal phone numbers and email addresses. 29 CFR §102.67(l). HR 2700 would limit the required contact information to only the employee's name and just "one additional form of personal contact information." HR 2700 would also require that the particular type of additional personal contact information be chosen by the employee in writing.

This provision would limit the ability of unions to communicate with employee-voters in an NLRB-conducted election. It opens a new venue for intimidation and interference with employees' right to organize. An employee's choice of contact information may be used to determine how open the employee is to voting for the union, so employees, knowing their employer will see their choice, may choose the least convenient form of contact information to avoid appearing pro-union. Moreover, given that the employees must consent in writing, an employee might be compelled to not consent in writing at all for fear of retaliation from the employer for consenting to any contact. The employer's collection of these consent forms opens up a new avenue of surveillance of employees' union preferences.

By limiting the amount of contact information to only one form of contact (even if an employee wanted to consent to more than one), the provision makes the NLRB election process more undemocratic. The "vote no" employer already has all of the voters' contact information and can require the voters, under penalty of getting fired, to attend on-worksite anti-union captive audience meetings, and can campaign 24/7 in the workplace, the one place where voters gather every day. The "vote yes" union may only receive one form of contact information and cannot require anyone to attend meetings and cannot enter the workplace. In addition, if there is no common workplace, i.e., the employees work remotely

across a state or the country, having only one form of contact information may render it impossible for all voters to actually receive information or effective contact from the "vote yes" side. It will certainly render it extremely difficult. No politician worth his or her salt would consent to a political election on this type of an uneven playing field; HR 2700 seeks to make the field unions play on even more uneven.

Moreover, HR 2700, in an excess of burdensome regulation, would create a new union unfair labor practice—"(8) to fail to protect the personal information of an employee received for an organizing drive, to use such information for any reason other than a representation proceeding, or to use such information after the conclusion of a representation proceeding."—penalizing unions for the way they use the employee contact information. The provision would penalize unions for failing to protect the personal information of an employee. If the concern with protecting personal information is about identity theft, unions are already subject to the same rules as other entities when it comes to protecting individuals' personal information. This provision is thus redundant, and there is certainly no need to single out unions of all institutions that come into contact with personal information.

However, the rest of the provision makes clear that its intent is to limit the ability of workers' organizations to communicate with workers, not protect their information. This provision says that the information gathered for the organizing drive cannot be used for any other reason than a representation proceeding. In the course of an organizing drive, a union will acquire workers' phone numbers and email addresses, not simply from the voter list provided by the employer just before the election, but from the act of organizing, talking to people, networking, holding meetings, etc. All of that information appears covered by this provision. Moreover, it is unclear what falls under the umbrella of a "representation proceeding." The union could reach out to fellow workers for all sorts of purposes unrelated to the representation proceeding. This provision would make it an unfair labor practice if, during a natural disaster, a union reaches out to its contacts to find out if they are ok or need anything. This provision would make it an unfair labor practice if, in the course of an organizing drive, rampant wage theft is uncovered, a complaint is filed with the Department of Labor (DOL), and the union calls its contacts to

find out if they have information relevant to the DOL complaint, which is not part of the NLRB representation proceeding. There is no cogent policy reason for hampering the ability of an organization of mutual aid and protection (the union) to engage in mutual aid and protection. At the same time that the bill does not limit in any way the employer's ability to require employees to listen to employer's anti-union communications, it draws complicated lines around the union's freedom to legitimately communicate with workers about all sorts of things.

Finally, under this provision, once the election is over, the union cannot use the personal information acquired for the organizing drive for any purpose. Even if the union won the election and now represents the employees, it cannot use the personal information already acquired from the employees during the organizing drive to communicate with them. Conceivably, the union would then need to go back to recollecting the contact information so that it can communicate with the bargaining unit it now represents, or it could send the employer a request for information, asking the employer to send the names and contact information of the employees again. But this provision would insist on such a wasteful use of resources and create roadblocks in communications between the union and the people it represents.

Union expenditures. By law, unions are voluntary unincorporated associations, free and democratic organizations. No employee can be forced to join a union—the closed shop has been outlawed for many years and now all that can be required under a union security clause in a collective bargaining agreement is that an employee must tender to the union the monetary equivalent of dues and fees. Under current law, a non-member who objects to the amount he or she must tender to the union is entitled to be charged for only those expenditures germane to collective bargaining, contract administration, and grievance adjustment. *CWA v. Beck*, 487 U.S.735 (1988). However, once an employee voluntarily joins the union and becomes a member, the employee is bound by the union's constitution and bylaws and the dues the member pays are those set by the union, and the union's expenditures are governed by the internal procedures of the union. Historically, Congress and the courts have been loathe to interfere in the internal organizational relations between a union and its members, or to dictate union expenditures,

recognizing the significant First Amendment freedom of association considerations that would be implicated if the government sought to tell a voluntary association how it should relate to its members or spend its money.

HR 2700 shows no such compunction, explicitly providing, for the first time, limitations not just on how unions spend non-members' money but limitations on how a union can spend money received from members, and interposing a government-mandated individual approval process to substitute for the voluntary association's own rules and regulations. Endorsing government control of the spending activity of voluntary organizations representing workers is a violation of our democratic traditions, and more akin to the type of government-mandated procedures one associates with totalitarian governments.

Application of the common law employment definition to the FLSA. The bill would change the definition of employment under the FLSA, resulting in fewer workers being covered by the FLSA. The FLSA's defines "employee" as "any individual employed by an employer," 29 U.S.C. 203(e)(1), and "employer" as including "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. 203(d). The FLSA's definition of employ includes "to suffer or permit to work." 29 U.S.C. 203(g). This "suffer or permit" concept is critical to determining whether a worker is an employee and, thereby, protected by the Act. In adopting the "suffer or permit' to work language, Congress drew from nineteenth century child labor laws to construct a broad employment test. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947). This standard was specifically designed to ensure as broad a scope of statutory coverage as possible, to include work relationships that were not within the traditional common law definition of "employee." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

An "entity" 'suffers or permits' an individual to work if, as a matter of *economic reality*, the individual is dependent upon the entity. *Antenor v. D&S Farms*, 88 F.3d at 929. The Supreme Court and Circuit Courts of Appeals have developed a multi-factor "economic realities" test to determine employee status under the FLSA. See, e.g., *Tony & Susan Alamo Foundation v. Sec. of Labor*, 471 U.S. 290 (1985); *Goldberg v. Whitaker House Co-op, Inc*. 366 U.S. 28 (1961). The factors typically include: the extent to

which the work performed is an integral part of the employer's business; the worker's opportunity for profit or loss depending on his or her managerial skill; the extent of relative investments of the employer and the worker; whether the work performed requires special skills and initiative; the permanency of the relationship; and the degree of control exercised or retained by the employer. In the analysis, courts examine and analyze each factor and no single factor is determinative. The application of the economic realities factors is guided by the overarching principle that the FLSA should be liberally construed to provide broad coverage for workers.

H.R. 2700 would supplant the well-established "economic realities" test with the narrower "common law" rules for determining employment. The "common law" definition focuses on the right to control. While those factors are relevant and useful if present in the relationship, their absence does not mean that work was not suffered or permitted. It is not an overstatement to say adopting the "common law" rules for determining employment would be a betrayal of the FLSA and would result in fewer workers having basic minimum wage and overtime protections.

Joint employer and special franchisor-franchisee rules. There has been no more controversial issue in labor law over the past 10 years than what standard should be applied to determine whether two entities constitute joint employers. Both the NLRB and the Department of Labor's Wage and Hour Division have gone back and forth over what is the appropriate standard, and these developments have occasioned much spilling of ink, furious lobbying activity, and much proposed legislation, of which HR 2700 [and HR 2826, which I will discuss subsequently] is the latest iteration.

There is no question that, currently, the NLRB is obligated to apply the common law "right to control" test to the question of who is an employer, and, where there are arguably two or more entities that co-determine employees' terms and conditions of employment, to the question of whether those entities are joint employers. See generally *Browning-Ferris Industries of Cal., Inc., v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018). The fight that has consumed the NLRB over the past 10 years or so has been what does the common law require. Rather than allow for consideration of whether the putative joint employer

retains reserved control or exercises indirect control over employees' terms and conditions of employment, HR 2700 follows the view, expressed previously in 2020 in the then-NLRB rule on joint employer, *Joint Employer Status Under the National Labor Relations Act,*85 FR 11184 (Feb. 26, 2020),[2] that the putative joint employer must "directly, actually, and immediately, and not in a limited and routine manner, exercise[s] significant control over the essential terms and conditions of employment of the employees of the other employer." The bill goes on to give specific examples of such control: "such as hiring such employees, discharging such employees, determining the rate of pay and benefits of such employees, supervising such employees on a day-to-day basis, assigning such employees a work schedule, position, or task, or disciplining such employees." The proposed standard specifically does not include reserved or indirect control, two aspects the D.C. Circuit's *Browning-Ferris* decision states need to be considered under the common law "right to control" test, and that have been successfully addressed in the NLRB's most recent promulgation of the joint employer rule.

By not allowing for consideration of reserved control, the joint employer standard supplied by the bill would find that an employer that contractually reserves the right to hire, fire, and determine the wages and hours of another employer's employees—essentially to control the working lives of those employees— is not a joint employer if the reserved authority is not exercised, but is a joint employer once that reserved authority is exercised. It would hardly result in a satisfactory collective bargaining relationship if a union sat down and negotiated an agreement with Employer A, only to have Employer B,

[2] On October 26, 2023, the NLRB issued a Final Rule rescinding the 2020 joint employer rule and replacing it with a new joint employer rule. "Under the new standard, an entity may be considered a joint employer of a group of employees if each entity has an employment relationship with the employees and they share or codetermine one or more of the employees' essential terms and conditions of employment, which are defined exclusively as: (1) wages, benefits, and other compensation; (2) hours of work and scheduling; (3) the assignment of duties to be performed; (4) the supervision of the performance of duties; (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; (6) the tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees." https://www.nlrb.gov/news-outreach/news-story/board-issues-final-rule-on-joint-employer-status. On November 16, 2023, the Board extended the effective date of the rule to February 26, 2024 "to facilitate resolution of legal challenges with respect to the rule." https://www.nlrb.gov/news-outreach/news-story/board-extends-effective-date-of-joint-employer-rule-to-february-26-2024

which had reserved contractual authority to determine Employer A's employees' terms and conditions of employment, subsequently exercise its contractual authority and unilaterally change the employment conditions the union had just bargained with Employer A. This failure to include consideration of reserved authority is a fatal defect in HR 2700, and certainly does nothing to promote stability or predictability in business relations.

Similarly, the proposed bill's exclusion from the joint employer analysis of direct and immediate control over substantial terms and conditions of employment if such control is exercised in a "routine" manner denies industrial realities. In most workplaces, workers' work lives are largely controlled by a series of daily, "routine," regular, repeated decisions made by their front-line supervisors. As a simple example, in a supplier employer/user employer situation where a temporary agency supplies perma-temps to an industrial workplace, the "routine" mandating of overtime on a regular basis for supplied employees may be considered by some a minor aspect of the authority of the user entity's front-line supervisors. However, in today's workplace, where people hold multiple jobs, spouses are frequently both working, commuting distances are often great, and child and elder care responsibilities paramount, there are few more disruptive or more essential determinations than whether a worker has to work longer hours on a particular day than he or she planned. In this factual context, a union representative seeking to bargain voluntary overtime provisions, set schedules, the equitable rotation of overtime, or advance notice of schedule changes is on a fool's errand if she is limited to seeking such provisions from the supplier employer.

Moreover, a number of relationships where the joint employer issue arises—user-supplier, contractor-subcontractor, franchisor-franchisee, for example—generally are between a smaller business entity and a larger business entity. In each one of the cited relationships, the employees are clearly employed by the smaller entity and the putative joint employer is the larger entity. To the extent that it is more difficult to demonstrate joint employer status, employer liabilities will end up falling solely on the small business, and the larger business will escape any responsibility for the consequence of its exercise

of authority with respect to the terms and conditions of employment of the employees. So, the consequence of the rule proposed in the bill will be that some large entities that might have previously shared joint and several liability with a smaller entity under the common law standard will now not share that liability, and the smaller employer's more limited resources will be required to satisfy any judgment.

This result is plain, it is purposeful, and it may well come as a surprise to the many small businesses, such as franchisees, who have been affirmatively misled by their Washington trade associations into believing that the common law standard somehow represents an untoward intrusion into their contractual relationships, rather than an effort to appropriately assign responsibility between co-determining entities. By insulating large corporate entities from responsibility for their actions, the rule will undoubtedly earn the praise of its large corporate beneficiaries. However, that rule will disadvantage small businesses. This result is exacerbated in the franchisee-franchisor situation, where the bill specifies certain franchisor interventions in franchisee operations which may not be considered in making the joint employer determination. This is simply another example of the larger entity (the franchisor) having its cake and eating it too—the franchisor is the "Bad Samaritan," controlling the franchisee's actions but insulated from the consequences of that control.

The bill would also apply the same heightened control requirements for a joint employer finding to the FLSA; as described in the prior section of this testimony, such heightened requirements would deprive numerous currently covered workers of the minimum wage and overtime protections of the FLSA.

Tribal enterprises. Finally, HR 2700 would remove tribal enterprises from NLRA jurisdiction. Currently, under the judicially approved approach adopted in the *San Manuel Indian Bingo & Casino*[3] case, the Board asserts jurisdiction on a case-by-case basis over tribal enterprises, and has applied that

[3] 341 NLRB 1055 (2004), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007). For details on the state of the Board law with respect to tribal enterprises and the history of the current precedent's development, see my testimony, while NLRB General Counsel, before the U.S. Senate Indian Affairs Committee on April 29, 2015.

standard to tribal-operated casinos on tribal property.[4] The Board's approach, while sensitive to considerations of tribal sovereignty, recognizes that where a tribe is reaching out to participate in the national economy through a commercial enterprise employing many non-Indian employees, catering largely to non-Indians, and competing with non-Indian businesses, the balance of considerations favors Board jurisdiction, because the tribe's activity affects interstate commerce in a significant way. HR 2700 would do away with the Board's current nuanced standard in favor of depriving all tribal enterprise employees—both tribal member employees and non-tribal member employees alike—of their right to form a union and collectively bargain. The better approach, should the tribe wish to retain tribal jurisdiction over the tribal enterprise's labor relations, is for the tribe to adopt its own tribal labor relations statute and then, pursuant to the proviso to Section 10(a) of the NLRA[5] which allows the Board to cede jurisdiction, reach a cession agreement with the Board ceding jurisdiction over the tribal enterprise to the tribe.

HR 2826. HR 2826 limits itself to the standard for joint employer under the NLRA and FLSA; it largely tracks HR 2700, but does not include the requirement that the putative joint employer's exercise of control not be limited or routine. Nonetheless, this modification does not save HR 2826 from the same defects of HR 2700; the failure to include consideration under the common law right to control of reserved and indirect control means that all of the entities that co-determine workers' terms and conditions of employment will not be at the bargaining table or responsible for payment of minimum wages and overtime.

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[4]See *Little River Band of Ottawa Indians Tribal Government*, 361 NLRB 436 (2014)(asserting jurisdiction); *Soaring Eagle Casino & Resort*, 361 NLRB 769 (2014)(asserting jurisdiction); *Chickasaw Nation Operating Winstar World Casino*, 362 NLRB 942 (2015)(declining jurisdiction based on treaty provision).

[5] "Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith."

HR 5513. HR 5513 would modify the Fair Labor Standards Act to adopt an extremely broad definition of a certain type of independent contractor, and then amend the National Labor Relations Act to adopt the same FLSA definition for independent contractor. In effect, this would exclude numerous professional employees from the protection of both Acts. There are large numbers of professional employees—for example, registered nurses, doctors, faculty members, librarians, engineers, and pharmacists— who, under certain circumstances, are currently considered to be NLRA employees, and explicit existing statutory provisions which clearly contemplate their inclusion—for example, the NLRA, at Section 2(12) has a definition of "professional employee"[6] and, at the first proviso in Section 9(b),[7] has special provisions entitling professionals to a vote as to whether they want to be included in a bargaining unit with non-professionals. Moreover, the Supreme Court has made clear that the Taft-Hartley Congress which excluded independent contractors from the NLRA statutory definition of "employee" intended for the Board to apply the common law of agency to the determination of independent contractor status. "…Congress passed an amendment specifically excluding 'any individual having the status of an independent contractor' from the definition of 'employee' contained in § 2(3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act. And both petitioners and

[6] "(12) The term "professional employee" means-- (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

[7] "Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit…"

respondents agree that the proper standard here is the law of agency. Thus there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor." *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). It is unclear how the proposed bill intends to reconcile the multi-factor common law agency test for determining employee vs. independent contractor status, with its new provisions directed at certain types of employees.

Without addressing these statutory provisions which clearly contemplate the inclusion of professional employees under the NLRA, the bill would seek to exclude them. Similarly, they would be excluded under the FLSA. Having stripped these workers of employment status under the FLSA, there is a domino effect in federal law. The Equal Pay Act (29 USC § 206(d)) and the Family and Medical Leave Act (29 USC § 2611(3)) directly rely upon the FLSA's definition of an employee. Thus, this bill also would also, by indirection, strip professional workers of their protections against sex discrimination in pay and of their right to unpaid maternity/paternity or medical leave.

Having redefined these workers as independent contractors under the FLSA and NLRA, the bill begs the question whether that definition of an independent contractor affects what the ADEA, ADA, Title VII, or other nondiscrimination laws means by "employee." Courts could begin applying this statutory definition of an independent contractor more broadly, excluding professional workers from those statutes. The end result would be that the excluded employees will no longer be protected from race, sex, age, religious, disability, or other forms of federally prohibited discrimination because they lack employment status under this bill. I cannot believe the bill's sponsor intended such devastating consequences, but, in light of those, perhaps unintended, consequences, the bill should be withdrawn and certainly not adopted.

HR 3400. And, finally, HR 3400 seeks to amend the NLRA's jurisdictional standards so that many fewer employers are covered by the Act and millions of workers are stripped of the Act's protections. By way of background, the National Labor Relations Board's jurisdiction under the National Labor Relations Act extends to enterprises whose operations affect interstate commerce. The Supreme

Court has construed the Board's jurisdiction to extend to all such conduct as might constitutionally be regulated under the Commerce Clause, subject only to the rule of de minimis. *NLRB v. Fainblatt*, 306 U.S. 601, 606-607 (1939). Exercising its administrative discretion, the Board has limited the assertion of its broad statutory jurisdiction to cases which, in its opinion, have a substantial effect on commerce by adopting standards for the assertion of jurisdiction which are based on the dollar volume and character of the business done by the employer. In the Labor-Management Reporting and Disclosure Act of 1959, Congress endorsed the Board's practice of establishing the standards under which it will assert jurisdiction by adding Section 14(c)(1) to the Act. That provision states:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert Jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

Under this provision, the Board may discretionarily decline to assert jurisdiction over enterprises which meet the legal test of "affecting interstate commerce," but it may not so decline jurisdiction over enterprises meeting its jurisdictional standards which were in effect on August 1, 1959.

HR 3400 seeks to amend Section 14(c) to increase the Board's dollar volume thresholds for determining whether the Board will assert jurisdiction, initially by a factor of ten, and then annually by a newly devised Personal Consumption Expenditure Per Capita Index. The provision's effect will be to eliminate the NLRA-protected right to organize and collectively bargain for employees of many employers. As an example, retailers that do annual business of less than $500,000 per year are not currently subject to the NLRB's jurisdiction pursuant to the Board's current jurisdictional standard. This bill would multiply that $500,000 threshold by 10, such that retailers that do less than $5 million in annual business will not be covered. I understand that Chairman Good has stated that "upon implementation of this bill, more than 50 [percent] of retail and non-retail businesses will be exempt and relieved from NLRB jurisdiction." http://good.house.gov/media/press-releases/rep-good-introduces-small-businesses-bureaucrats-act

Not only employees would suffer from this unprecedented deprivation of rights. A substantial number of businesses would not be regulated by the uniform federal statute governing private sector labor relations, and thus would be subject to all kinds of union organizing activity that the NLRA currently limits—there would be no limits on recognitional picketing or secondary boycotts for example. States may well rush in to fill this regulatory void,[8] since there would be no federal preemption of their legislative activity as to those businesses exempt from the NLRA's reach, and businesses would then be subject to a patchwork quilt of various state regulatory measures. Moreover, this bill also indexes the new dollar threshold to a measure of consumer spending (not cost inflation) by multiplying it by the quotient obtained by dividing the new year's personal consumption expenditure per capita by 2023's personal consumption expenditure per capita. Over time, this will create higher and higher thresholds, excluding more and more workers from NLRA protections. However, in any given year, if there is a recession where consumer spending drops, the threshold for exemption from NLRA coverage will also drop, covering more employers and employees who the year before would have been exempt from NLRB jurisdiction. This type of yo-yoing in and out of statutory coverage hardly will provide the type of stable regulatory environment businesses claim they need to thrive. For this reason, and because, most importantly, it will deprive millions of workers of their statutory protections, this bill should not be passed.

The bills the Subcommittee is considering today represent a legislative package that would strip workers of fundamental protections under a number of worker protection laws. They would result in fewer workers being able to organize and bargain collectively. At a time when so many workers are demanding their right to a union and a more just economy, today's hearing seems to ignore those demands and instead focus on legislation that would further exacerbate economic inequality and rob

[8] Section 14(c)(2) of the Act, which the bill would now renumber as Section 14(c)(3), provides: "(2) Nothing in this Act [subchapter] shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

workers of their right to organize. I would encourage the Subcommittee to instead examine legislation like the Richard L. Trumka Protecting the Right to Organize Act (H.R. 20) and the Public Service Freedom to Negotiate Act that respond to the demands of workers in this country for a union and their fair share of economic gains. Thank you, Mr. Chairman for the opportunity to testify before the Subcommittee and I look forward to your questions.