Written Testimony of

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Worker-Management Relations:

Examining the Need to Modernize Federal Labor Law

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Introduction

Good Morning, Chairman Walberg, Ranking Member Sablan, and distinguished members of the Subcommittee. My name is Anne Marie Lofaso. I am the Arthur B. Hodges Professor of Law at West Virginia University College of Law, where I have taught labor and employment law for 11 ½ years and serve as the Director of the Labor and Employment Law Certificate Program. I am also a former Senior Attorney of the National Labor Relations Board (NLRB), where I served for ten years in the Appellate and Supreme Court Branch. Relevant to my testimony, I have a doctorate in jurisprudence and comparative labor law from Oxford, a law degree from the University of Pennsylvania, and a bachelor's degree in modern Anglo-American history and science from Harvard University. Thank you for inviting me to testify regarding *Worker-Management Relations: Examining the Need to Modernize Federal Labor Law*. I am testifying on behalf of myself and not as part of these or any other institution with which I have been, may be, or will be affiliated.

Overview

The National Labor Relations Act (NLRA), the primary U.S. labor law at the federal level to regulate private-sector labor relations, has not been significantly modernized since just after World War II. The last significant amendments, the Labor Management Relations Act of 1947, popularly known as the Taft-Hartley Act,[1] have had the effect of significantly reducing union bargaining power and density, thus resulting in the type of imbalance that precipitated the Seventy-fourth U.S. Congress to enact the NLRA. This effect, in turn, has amplified the imbalance of power between labor and management, augmented economic inequality among workers, and undermined the American middle class. I, therefore, agree that the NLRA needs to be modernized. But recent legislative proposals, such as the inaptly named Employee Rights Act, are headed in the wrong direction. What is needed is the type of modernization established by the Workplace Action for a Growing Economy Act of 2017 (Wage Act). Finally, attacks on Worker Centers are erroneous and misplaced. Worker Centers are not labor organizations under either the NLRA or Labor-Management Reporting and Disclosure Act (LMRDA). Moreover, their growth is a symptom of diminished and imbalanced bargaining power possessed by workers. A diminished middle class is both a symptom and cause of greater economic inequality.

A. Congress Passed the Wagner Act to Equalize the Balance of Power Between Business and Employees by Encouraging the Practice and Procedure of Collective Bargaining

As part of President Franklin D. Roosevelt's New Deal, the Seventy-fourth United States Congress passed the National Labor Relations Act (NLRA)[2] in 1935, when the United States was amid the Great Depression. It was a time when business had failed us and when government saved us. The purpose of the Wagner Act, as it was popularly known, was to balance the power between workers and business. The great men of the Seventy-fourth U.S. Congress understood that organized labor was necessary to check the coercive power of organized capital. And indeed, it

[1] 29 U.S.C. §§ 141-197, 80 H.R. 3020, Pub. L. 80–101, 61 Stat. 136, enacted June 23, 1947.

[2] 29 U.S.C. § 151 *et seq*.

was believed that protecting the fundamental right of workers to band together for mutual aid or protection would "diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce."

In the meantime, the United States and the world faced an even greater existential crisis. Fascist dictatorships, particularly Nazi Germany, sparked a second world war in the span of a generation. Unions were indisputably instrumental in winning that war. As Congress warranted, "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection,"[3] unions advanced industrial peace and domestic peace by extension. Peace in turn promoted commerce by removing labor unrest as both a symptom and cause of economic inequality. Our country banded together in political, economic, social, and military unity to win the single greatest threat to our existence. Unions and their members contributed to this effort on the home front not only by manufacturing weapons and other items needed on the war front,[4] but also by maintaining and strengthening the domestic and economic peace and resolve through a no-strike pledge by the American Federation of Labor (AFL) and the Congress of Industrial Organizations (CIO). In consideration for that pledge, President Roosevelt, by Executive Order, created the National War Labor Board,[5] which in turn provided for quasi compulsory arbitration for resolving industrial disputes.

The system worked—well. We mobilized for war, lifted ourselves out of the Great Depression, and created a prosperous middle class, which held all the hopes for our future. That future was built on a solid foundation of good jobs and a college or vocational education for all – not only for those privileged few who could pay for such luxuries. Americans began to view jobs and education together with social security, disability, and health care as necessities – not luxuries.

B. Congress Enacted Taft-Hartley In a Misguided Attempt to Reset the Balance of Power

1. Overview: The Post-War Balance of Power Between Labor and Management

The Eightieth Congress came to elected power at this watershed moment. Rather than understanding that hope remained in that Pandora's box of technological achievement, members of the Eightieth Congress sought to turn back time as if they could return what they viewed as the excesses of progress, while maintaining what they viewed as progress. For them, progress was measured purely in the growth of bottom-line corporate profits rather than broadly shared social and economic opportunity.

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[3] 29 U.S.C. § 151.

[4] The relationship among national security, organized labor, and government regulation of labor relations was reviewed in law journals during World War II. *See, e.g.*, Ralph S. Rice, *The Wagner Act: It's Legislative History and It's Relation to National Defense*, 8 OHIO ST. L. J. 17 (Dec. 1941) ("But the nation is now at war. In preparation for defense efforts during the past months, the impact of employer-employee relationships upon the public welfare has been more and more keenly called to the attention of all the people by recent labor disputes affecting the production of materials vital to the national defense program.").

[5] Executive Order 9017—Establishing the National War Labor Board, dated January 12, 1942.

Twelve years after passage of the Wagner Act and a world war later, in 1947, at the commencement of the Cold War, the Eightieth U.S. Congress passed the Taft-Hartley Act. My predecessor, West Virginia University Labor Law Professor, Guy Otto Farmer, writing shortly after Taft-Hartley went into effect but before he was appointed as a Republican Board member under the Eisenhower administration, described the Eightieth Congress's legislative efforts as maintaining "a proper balance of power between conflicting interests." Farmer added:

> [D]emocracy consists of the interplay and clash of opposing forces, each attempting to gain dominance on an economic, social or political plane. . . . It is perfectly natural and normal that there should be *differences between capital and labor since the one is interested in high profits and the other in high wages*; but it is dangerously false to assume that their differences are irreconcilable. The area of conflict is in fact small and these two groups have more interests in common than in conflict, the chief one being a mutual interest in maintaining volume production of goods and thus insuring plenty and prosperity for all. . . . Nevertheless, the conflict does exist on a short-run basis and it is wise to recognize it. We have seen it manifested from time to time in strikes and work stoppages and in other kinds of industrial strife. And the conflict is one which the public cannot afford to view with indifference. . . . *In the clash between capital and labor, the public has too much at stake to view the scene as an isolated sports spectacle. We cannot afford to permit either of these powerful opponents to be utterly defeated and carried from the ring. They are the twin economic supports of our democratic society. Without both of them, real democracy cannot exist*.[6]

In this article, Farmer made the following prediction: "[T]he real test of [Taft-Hartley]," that which "will determine whether its enactment was good or bad for our democratic system" is what impact it will have on "the *balance of power* in labor relations."[7] Building up one, only to destroy the other, was not a productive option. Although the article defends Taft-Hartley as necessary to restoring balance of power to labor-management relations, I submit to you today that, whether the members of the Eightieth U.S. Congress, Guy Farmer, and others correctly believed that reform was needed to tinker with the balance of power between capital and labor, Taft-Hartley and its legislative and adjudicatory progeny ultimately stripped unions of so much power as to marginalize the vital role they played in building a strong middle class necessary for economic growth and prosperity. Taft-Hartley fails Guy Farmer's test.

2. Taft-Hartley Tipped the Balance of Power in Favor of Business Thus Leaving the Middle Class Weak and Angry and Creating Great Inequality That Has the Effect of Destabilizing Our Democracy and Our Economy

Taft-Hartley tipped the balance of power toward business primarily by effectuating three main changes: by narrowing the NLRA's coverage, by narrowing the definition of what conduct constitutes protected concerted activity.[8] As a threshold matter, Taft-Hartley added two broad

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[6] Guy Farmer, *The Taft-Hartley Act and the Balance of Power in Labor Relations*, 51 W. VA. L. Q. 141, 142–43 (1949).

[7] Farmer, *supra* n. 6, at 141.

[8] To be sure, Taft-Hartley made some important improvements: It created the office of the General Counsel, 29 U.S.C. § 153(d); and obliged unions to bargain collectively with management, 29 U.S.C. § 158(b)(3), a duty already imposed on employers via the

exemptions to the definition of employee[9] – supervisor[10] and independent contractor[11] – which significantly narrowed those working-class people who possess labor rights, thereby punching a gaping hole in the NLRA's protective cover.[12] Taft-Hartley also removed powerful economic weapons from the union's arsenal. Most prominently, it prohibited secondary activity, making it unlawful for a union that has a primary dispute with a company, Employer P, to pressure a third-party neutral, Employer N, to stop doing business with Employer P.[13] For example, a newspaper union involved in a labor dispute with a newspaper might find it highly effective to picket a papermill thereby discouraging it from selling raw paper to the newspaper. Stripped of its power to engage in most secondary activity, a union is limited to publicizing its dispute or putting direct pressure on its own employer. Those weapons have proven ineffective in counterbalancing the coercive power of big business. Finally, notwithstanding the proviso to Sections 8(a)(3),[14] which allows union-security agreements, Taft-Hartley added Section 14(b),[15] allowing states to legislate the question whether private-sector employees who are represented by a union, which by law has a duty of fair representation[16] to all whom it represents, may refuse to pay all dues, even those dues that support the union's representative, grievance-arbitration, and contract administration functions. Those states that opt to regulate that question are called right-to-work states.[17]

These and other changes, individually and collectively, have weakened unions. This is true both logically and empirically. First, as a matter of internal logic, these legislative moves would predictably weaken unions as institutional players sufficiently strong to balance the power wielded by business in an advanced capitalist society. If Congress removes a wide band of working class people from the NLRA's coverage and thus removes those individuals as potential union members,

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Wagner Act, 29 U.S.C. § 158(a)(5). But at its core, Taft-Hartley gutted union power to effectuate social change for ordinary working-class people.

[9] 29 U.S.C. § 152(3).

[10] 29 U.S.C. § 152(11).

[11] In recognizing the independent contractor exemption, Taft-Hartley overturned two Supreme Court cases. *See* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1994) (holding that newsboys were employees under the NLRA, despite contentions that they are independent contractors and should be excepted); Packard Motor Car Co. v. NLRB, 330 U.S. 485, 487-91 (1947) (holding that minor foremen, who were responsible for quantity and quality production control in a mass-production industry, were employees under the NLRA, notwithstanding contentions that these workers were either employers within the meaning of the NLRA or so closely aligned with the employer's interests that it was undesirable to consider them statutory employees). The definition of independent contractor under the NLRA is currently synonymous with the Restatement definition.

[12] *See generally* Anne Marie Lofaso, *The Vanishing Employee*, 5 F.I.U. L. REV. 495 (2010).

[13] 29 U.S.C. § 158(b)(4).

[14] 29 U.S.C. § 158(a)(3).

[15] 29 U.S.C. § 164(b).

[16] Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) (extending the duty of fair representation to the NLRA, and explaining that the union's "statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interest of all . . . without hostility to any."); *accord* Vaca v. Sipes, 386 U.S. 171 (1967) (holding that union conduct that is "arbitrary, discriminatory or in bad faith" violates the duty of fair representation). The duty of fair representation was originally created in the context of the Railway Labor Act (RLA), 45 U.S.C. § 151 et seq. *See* Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944) (striking down under the RLA a seniority system that discriminated against black workers, explaining that the RLA implicitly "imposes on the bargaining agent . . . the duty to exercise fairly the power conferred upon it on behalf of all those for whom it acts without hostile discrimination against them," while, at the same time, "the statutory representative . . . is [not] barred from making contracts which may have unfavorable effects on some members of the craft represented").

[17] A good explanation of these concepts can be found at Ronald Turner, *"Membership" Obligations Under NLRA Section 8(a)(3): A Proposal for Statutory Change*, 17 HOFSTRA LAB. & EMP. L. J. 323 (2000).

shrinks the conduct that the NLRA protects, and limits the extent to which unions can raise money for even its core purposes – organizing, bargaining, and contract administration – then it stands to reason that unions would fail and the middle class would collapse.

Empirically, union density in the private sector was down to 6.5% as of 2017[18] from a high of about 35% in 1954.[19] Since 1954, shortly after enacting Taft-Hartley, union membership in both absolute terms and by density began to decrease. During this same time, the middle class shrunk, and our manufacturing industry has all but left a complete vacuum in the United States. This vacuum is potentially a national security issue – a question that is not the subject of today's hearing but does warrant future attention.

Moreover, since the 1950s, the United States economy has shifted from an industrial manufacturing economy, to a service-based economy, to a knowledge-based economy. The workplace itself has shifted from the factory to, in many cases, a virtual workplace. The workplace is certainly more fragmented and less hierarchical as well. The economy has shifted from one of relatively high union density, especially in certain industries, to one of single-digit union density in the private sector. The middle class continues to shrink. US test scores continue to shift downward compared with many other advanced capitalist countries.[20] Health outcomes are low (and more expensive) when compared with our peer countries[21] and more tellingly health disparities within the United States continue to widen.[22]

C. Any Changes in Labor-Management Relations Law Should Have Two Goals – To Restore the Balance of Power and To Modernize the Law

1. Legal Measures That Achieve These Goals

a. NLRB's Election Rules[23]

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[18] *See* BUREAU OF LABOR STATISTICS, UNION MEMBERS 2017, data released January 19, 2018, available at https://www.bls.gov/news.release/union2.nr0.htm.

[19] To be more precise, "[a]s a percent of nonagricultural employment, union membership peaked at 35.4% in 1945. As a percent of wage and salary employment and a percent of total employment, union membership peaked in 1954 at 34.8% and 28.3%, respectively." *See* GERALD MAYER, G. UNION MEMBERSHIP TRENDS IN THE UNITED STATES. WASHINGTON, DC: CONGRESSIONAL RESEARCH SERVICE12 (2004).

[20] *See* Drew DeSilver, *U.S. Students' Academic Achievement Still Lags that of Their Peers in Many Other Countries*, Feb. 15, 2017, http://www.pewresearch.org/fact-tank/2017/02/15/u-s-students-internationally-math-science/.

[21] *See* Karen Davis, Kristof Stremikis, David Squires, and Cathy Schoen, *Mirror, Mirror on the Wall, 2014 Update: How the U.S. Healthcare System Compares Internationally*, THE COMMONWEALTH FUND, June 2014, http://www.commonwealthfund.org/publications/fund-reports/2014/jun/mirror-mirror (ranking the U.S. last (11th) in healthcare performance as compared with the U.K. Switzerland, Sweden, Australia, Germany, the Netherland, New Zealand, Norway, France, and Canada, using metrics that included quality of care, access to care, efficiency, equity, and healthy living).

[22] *See, e.g.*, Joachim O. Hero, Alan M. Zaslavsky, and Robert J. Blendon, *The United States Leads Other Nations In Differences By Income In Perceptions Of Health And Health Care*, 36 HEALTH AFFAIRS, June 2016, https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2017.0006.

[23] These points are nearly verbatim to the points I made at the Public Meeting on Proposed Election Rule Changes, held at the National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C., on July 18, 2011.

The NLRB Election Rules achieve the goal of empowering workers primarily by modernizing the election procedures. They modernize outdated rules and make them more readable; make government run more efficiently by liberalizing information and by addressing the main problem of delay, while still allowing ample time for full debate; and deliver better service to the public. These amendments strengthen the secret-ballot election process, a process that the Chamber of Commerce itself has fought to maintain.

First, these amendments modernize the election rules by permitting the electronic filing and transmission of documents. These changes are consistent with the efforts of other tribunals to modernize their own rules, such as the Electronic Case Filing initiative of the federal courts. The Board's efforts to make the rules more readable are also consistent with the efforts of other tribunals, such as the federal courts' Restyling Project, an effort to rewrite all federal rules in plain English.

Second, these amendments also make government more efficient in two ways. First, they liberalize information available to all parties, thus making government more transparent. The basic requirement for an efficient process is greater initial information. The amendments require parties to release information readily within their control no later than the pre-election hearing. Information such as the names, addresses, telephone numbers, and email addresses of employees is information that is well within an employer's control. This, too, is consistent with the recent developments of mandatory initial disclosure under the federal rules.

Similarly, the amendments require the parties to submit position statements no later than the pre-election hearing. To make it easier for the parties to comply with this requirement, the Board has offered the assistance of its Hearing Officer. This amendment provides a mechanism for quickly identifying the issues. This, too, is consistent with the trend in federal pleading requirements, especially after *Iqbal v. Ashcroft*.[24] The purpose of raising issues in the early stages is to resolve issues as quickly as possible so that non-meritorious issues do not go any further, which would result in lost resources. These requirements do not favor either party. Instead, they make the first steps in the process clear and more efficient.

These amendments also make government run more efficiently by streamlining election procedures. The amendments eliminate unnecessary bureaucratic delay, thereby diminishing opportunities for unscrupulous parties to take advantage of systemic delay. By eliminating pre-election voter eligibility challenges that are unlikely to affect the election and pre-election request for review; by giving the Board the discretion to deny post-election rulings thereby allowing the Regional Director to make a prompt final decision; and by consolidating review of the Regional Director's rulings through a single, post-election request, the Board's efforts are, once again, consistent with the federal rules under which litigants get only one pre-answer motion.

Third, these amendments deliver better service to the public, not only by modernizing the system and making it run more efficiently, but also by creating uniformity, which leads to predictability. Predictability is always good for business. Uniform standards also leave less room for unscrupulous parties to game the system.

[24] 574 F.3d 820 (2009). *See also* Twombly v. Bell Atlantic Corp., 425 F.3d 99 (2005).

Opponents of the rule inaccurately contend that the rules cut off debate. These amendments deal only with the time between the election petition and the election itself. Employers and unions have ample time to make their views known during this period as well as prior to the filing of an election petition. Indeed, many employers now show, as part of their first-day orientation, short films claiming that unions are unnecessary. *If some employers are truly concerned with full debate, I suggest that they give unions access to their property and debate the pros and cons of unionization*.

b. The Workplace Action for a Growing Economy Act of 2017 (WAGE Act)

The purpose of the WAGE Act is to strengthen unions so that they bolster the middle class, which will facility economic growth from the middle outward. The Wage Act purports to do this in the following five ways.

First, the WAGE Act requires employers to post notices of workers' rights under the NLRA. As I discussed in a previously published White Paper,[25] publishing laws increases transparency, which creates, maintains, and builds the "inner morality of the law."[26] Moreover, it helps to educate and create an informed citizenry, a prerequisite for a strong democracy that is able to withstand foreign challenges to our political system.[27]

Second, the WAGE Act strengthens the NLRA's weak enforcement mechanisms by penalizing those who violate federal labor law. The bill guarantees penalties equal to twice the amount of an employee's backpay, plus fines up to $50,000, for each violation resulting in discharge or serious economic harm.

Third and relatedly, the WAGE Act strengthens remedies for workers who are retaliated against for exercising their NLRA Section 7 rights. The bill compels the Board to petition the district court to grant an injunction for temporary reinstatement while that worker's case is pending. The bill also brings NLRB orders in line with the orders of other federal agencies by making them self-enforcing. And the brings the NLRA in line with other civil rights laws by granting workers the right to seek private relief in federal court.

Fourth, the WAGE Act expands coverage of the NLRA. The bill prevents employers from misclassifying their employees as supervisors or independent contractors, and prevents workers from being denied backpay because of their immigration status. The bill also makes the employer

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[25] *See* Anne Marie Lofaso, *We Are in This Together: The Rule of Law, the Commerce Clause, and the Enhancement of Liberty Through Mutual Aid*, in AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, TOWARD A MORE PERFECT UNION: A PROGRESSIVE BLUEPRINT FOR THE SECOND TERM (Jan. 2013), https://www.acslaw.org/sites/default/files/Lofaso_-_We_Are_in_this_Together.pdf.

[26] The idea of the inner morality of law comes from Lon Fuller's eight canons of law – characteristics features of laws developed in a well-functioning democracy. They are: generality, publicity, clarity, consistency, feasibility, constancy, prospectivity, and congruence. *See* Lofaso, *supra* n. 25, at 12 (citing LON L. FULLER, THE MORALITY OF LAW 33–39 (revised ed. 1964) and David Luban, *The Rule of Law and Human Dignity: Reexamining Fuller's Canons*, 2 HAGUE J. RULE L. 29, 31 (2010)).

[27] *See id*.

jointly and severally liable respecting violations affecting temporary or subcontracted employees acting within the employer's usual course of business.

Fifth, the WAGE Act streamlines the process for workers to organize a union and negotiate a first contract – a proposal first endorsed by the Republican NLRB General Counsel Ron Meisburg. The bill authorizes the Board to issue a bargaining order when an employer's unlawful conduct prevents a fair representation election and if a majority of workers have designated the union as their representative in writing.[28] For newly certified unions, the bill facilitates mediation and arbitration procedures to help parties reach a first contract.

c. Repeal or the Modify the Supervisory and Independent Contractor Exemptions

As discussed above, the supervisory and independent contractor exemptions have deprived countless working-class men and women of their labor rights. Yet, these worker classifications do not account for the modern workplace. Industrial America was hierarchical. The modern workplace is more diverse. It often has a flatter organizational structure in which workers collaborate in groups rather than taking responsible direction from superiors. This collaborative atmosphere is at the heart of American innovation, creativity, and ingenuity. But that organization, while often deeply egalitarian, does not readily fit into the hierarchical organizational structure assumed by the NLRA. Rather than removing the labor rights of increasingly more workers, which these exemptions do, relaxing these exemptions achieves the twin goals of restoring workers' labor rights and modernization.

d. Apply the NLRA to the Fragmented Workplace

When Congress passed the Wagner Act, the workplace was concrete. It looked like a factory or a plant or a store or a hospital. The modern workplace might still resemble a factor or a store. But it might also resemble a telecommunication work station or a virtual workplace. In many cases, it is unclear who the employer even is. In legal terms, this is a duty-holder problem. Members of Congress state that they want to extend labor rights to workers, but by definition, a right implies a legal duty imposed on a person who owes something— usually protection of that right—to the rights' holder. It is important for policymakers, which include members of Congress and the Board, to think through the nuances of this duty-holder problem rather than throwing up their hands merely because the problem is difficult to untangle. A prime example of this problem can be seen in the joint-employer/franchise context, where some have argued that a franchisor who controls terms and conditions of employment are not employers because the franchisee also controls some of those terms.[29]

e. Repeal or Modify Section 8(b)(4)

[28] This is currently the law as interpreted by the NLRB with the endorsement of the United States Supreme Court. *See NLRB v. Gissel Packing Co., Inc*., 395 U.S. 575 (1969).

[29] *See* Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co., 365 NLRB No. 156 (2017) (*Hy-Brand I*) (overruling *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery* (*Browning-Ferris*), 362 NLRB No. 186 (2015)). *But see* Hy-Brand Industrial Contractors, Ltd., (vacating *Hy-Brand I* considering the Board's Designated Agency Ethics Official determination that Member Emanuel should have been disqualified from participating in the proceeding) (Feb. 26, 2018).

Section 8(b)(4) severely limits a union's ability to bring so-called neutral employers into the union's labor dispute, thus removing one the most powerful arrows from the union quiver. But more importantly, Section 8(b)(4) severely restricts employee speech and expressive conduct. Imagine you are a mammal rights activist who is disturbed that tuna fishers' purse-seine bycatch of dolphins has resulted in the deaths of over six million dolphins. Your most effective method of communicating that message is by refusing to purchase tuna caught using the purse-seine method where dolphins and tuna swim together. This is a secondary boycott. Government action meant to outlaw its citizens from engaging in this secondary boycott would have grave first amendment consequences. Yet those very same values are at stake under Section 8(b)(4)'s prohibition of secondary boycotts.[30] Congress should be more sensitive to these values and consider relaxing speech restrictions on employees – whether that speech is pro-union, antiunion, probusiness, antibusiness, or whatever the content of that speech.[31]

2. Legislative Attempts That Would Fail To Achieve These Goals

In the recent past, three legislative measures have been introduced in the name of workers' rights but which would, in reality, continue the backward trend of squeezing the middle class.[32] Together and separately, these bills craft eight steps toward destroying workplace democracy.[33] *One*, the bills block employee access to information about the benefits of unionization. *Two*, they create anti-democratic voting measures cloaked in the language of democracy. *Three*, they eliminate the longest-standing and most basic way for workers to form unions – by card check – while inventing creative ways for employers to bust unions. *Four*, the bills delay union certification. *Five*, they gerrymander voting districts by trying to compel the Board to add employees, who do not wish union representation, to petitioned-for bargaining units to create a majority non-union block. *Six*, they augment penalties for unions (but not employers) that violate the NLRA, notwithstanding the fact the unions are much less likely to violate the Act than are employers. *Seven*, they drain union treasuries. *Eight*, the bills grant nonunion members control over unions. *Nine*, they create one-sided criminal penalties for unions, but not for managers or replacement workers, to engage in or threaten violence. Below I highlight some of these issues.

a. Employee Rights Act (H.R. 2723)

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[30] Professor Jack Getman makes the very same point in his article, Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B. C. L. REV. 125, 140 (2003).

[31] *See* Edward DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 576 (1988) (concluding that a union secondary appeals to customers through handbills that "pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace," were a type of constitutionally protected political speech).

[32] *See* Legislative Reforms to the National Labor Relations Act: H.R. 2776, "Workforce Democracy and Fairness Act," H.R. 2775, "Employee Privacy Protection Act," H.R. 2723, "Employee Rights Act," 115th Cong., 1st Sess. (Jun. 14, 2017).

[33] For an in-depth analysis of these steps, *see* Testimony of Guerino J. Calemine, III, General Counsel, Communications Workers of America Before the U.S. House of Representatives Subcommittee on Health, Labor, Employment, and Pensions Legislative Hearing on H.R. 2776, 2775, and 2723, June 14, 2017, testimony available at http://democrats-edworkforce.house.gov/imo/media/doc/Calemine%20Testimony.pdf .

H.R. 2723, if passed, would take *four* prominent steps backwards in recent efforts to augment workers' labor rights and efforts to modernize rules governing the workplace. *First*, the bill would interfere with employees' rights of self-determination by restructuring workplace representation procedures making it difficult to secure representation—the hard-in approach—while simultaneously making it easy to destabilize the union-employee relationship. It would prohibit employers from voluntarily recognizing a union based on a majority showing of employee support on properly authenticated authorization cards. This anti-democratic move would thereby reverse the historically grounded and longest-standing practice of employees for determining their representatives by card check. The bill would also modify the way votes are counted in union elections by counting non-voters as "no" votes, contrary to how ballots are typically counted in U.S. elections, in which the majority of those who vote prevails.[34] Because failure to vote counts as a no-vote, detractors of this provision call this – stuffing the voting box with no votes. Decertification ballot counts, by contrast, would remain American style. The bill would also require recertification elections under certain circumstances, thereby further destabilizing the representative relationship.

It is worth pausing on the contrasting approaches that the bill takes to certification and decertification procedures. It eliminates card check (and mail ballots) and voluntary recognition. For certification votes, it reverses American-style vote counting for union certification thereby converting a failure to vote into a vote against the union. By contrast, the recertification/decertification vote would require American-style majority of votes cast. While it does not place term limits on unions, it does convert American-style democracy – terms based primarily (though not exclusively) on a contract bar of up to three years – into a parliamentary style vote of no-confidence. The bill would thus require recertification elections every time there is turnover or change affecting more than 50 percent of the bargaining unit, thereby presuming that turnover indicates lack of support. This turnover trigger has no correlation with employee choice – the recertification vote is triggered whether or not a single employee actually wants the vote of no confidence.

Second, H.R. 2723 would abolish the modest steps that the NLRB made toward modernizing its election procedures in ways which obstruct workplace democracy. The bill both reinserts needless delay into the election procedures at several stages and limits contact information to home addresses. If Congress were serious about making government more efficient and modernizing government processes, surely it would not build redundancy into government procedures (which waste taxpayer money and delay the vindication of statutory rights) or interfere with modern forms of communication.

Third, H.R. 2723 would interfere with the union's internal procedures necessary to preserve self-determination primarily by allowing employees who choose not to become union members to vote on collective-bargaining agreements bargained by the union and to vote on strikes called by the union. The government is thus dictating to an organization that it must allow those who choose not to become members and who choose not to pay for that organization's service to have a voice

[34] To put into focus the baselessness of the democratic-deficit problem that this measure is supposed to resolve, consider this. Not one member of Congress received the majority of votes of those he or she represents. Indeed, the current U.S. President did not even receive the majority of those who voted in the election. And this problem with the electoral college is neither unique nor rare. If Congress is concerned about democratic deficits, surely it would resolve these significantly more impactful problems.

in how that organization is managed. This would be akin to requiring Republicans to give Democrats a say in the Republican platform, simply because the Republican candidate, if successful, would also represent the Democrats in his or her district.

Fourth, H.R. 2723 would change *Beck*[35] objectors from opt-out to opt-in. In a post-*Citizens United*[36] world, in in which money is speech, this measure is designed to weaken unions as a counterweight to corporate power and speech. If balance is desired, then this measure must be debated in light of *Citizens United* and in light of the question whether shareholders should also be granted opt-out options.

It is worth clarifying some myths that tend to misinform the discussion of *Beck* fees. The law already prohibits compelled union membership and union shops. No one is required to join a union or pay union dues. In right-to-work states, a nonmember bargaining-unit employee does not have to pay any union fees, even though the union must represent that employee under the duty of fair representation doctrine. In all other states (commonly known as fair-share states), a nonmember bargaining-unit employee is required to pay only an agency fee – that portion of the union fee that covers the costs of representing him but has the right to object to any portion of that fee paying for anything not "germane" to the union's duties as bargaining agent. Under the Employee Rights Act, however, a union member already paying dues would be required to give annual consent – after 35 days written notice each year – for the union to use any portion of that member's dues for anything other than union organizing, collective bargaining, or contract administration. Accordingly, this provision does not create a "Right Not to Subsidize Union Non-Representational Activities," as the bill suggests. Moreover, while current law allows agency fee objectors to make a "continuing objection" that does not have to be renewed each year and permanently restricts his fees from being used for anything non-germane to collective bargaining, the ERA bill prohibits the correlative automatic renewal of a member's consent for the union to use his dues for non-germane activities.[37]

b. Workplace Democracy and Fairness Act (H.R. 2776)

As with H.R. 2723, the Workplace Democracy and Fairness Act primarily attacks those advances that the Board made to modernize and streamline election procedures vis-à-vis its April 2015 election procedures. H.R. 2276 would impose certain requirements throughout the election process that will unduly complicate and delay the process. For example, the bill requires the NLRB to wait at least two weeks before holding any pre-election hearing.

c. Employee Privacy Protection Act (H.R. 2775)

[35] *See* Communications Workers of America v. Beck, 487 U.S. 735 (1988) (holding that, under a union security agreement, unions are authorized by statute to collect from non-members only those fees and dues necessary to perform its duties as a collective bargaining representative).

[36] *See* Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

[37] The analysis of *Beck* and related issues summarizes the more sophisticated analysis provided in Testimony of Guerino J. Calemine, III, General Counsel, Communications Workers of America Before the U.S. House of Representatives Subcommittee on Health, Labor, Employment, and Pensions Legislative Hearing on H.R. 2776, 2775, and 2723, June 14, 2017, testimony available at http://democrats-edworkforce.house.gov/imo/media/doc/Calemine%20Testimony.pdf.

Once again, H.R. 2775 targets the NLRB's April 2015 election procedures by placing obstacles between workers and union representatives' communications prior to a representation election. In contrast with the Board's current rules, which require employers to provide available telephone numbers and e-mail addresses within two business days, H.R. 2775 would limit and delay that information. It particular, H.R. 2775 would allow employers to provide only one form of employee contact information, and would not require employers to provide this information until seven days after the NLRB rules on the appropriate bargaining unit.

3. The Attack on Worker Centers Is Baseless Because They Are Not Labor Unions and Do Not Engage in Collective Bargaining

Worker Centers are community-based nonprofit organizations that provide various services to low-wage workers in the communities they serve.[38] Many, but not all, of these organizations center around immigrant groups who work in low-wage jobs, thus shaping the type of services offered.[39] Such services include providing English-language classes, job-readiness training, and occupation-safety training to community members, assistance applying for unemployment benefits or filing a claim for unpaid wages, or help opening bank accounts or obtaining loans. It is universally understood by members of both major political parties and labor law experts that worker centers are not labor unions.[40]

Worker centers are not labor organizations under either the NLRA or Labor-Management Reporting and Disclosure Act (LMRDA). The NLRA defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[41] The NLRB has clarified that the definition of "labor organization" is not limited to labor unions.[42] Board cases often turn on whether the organization "deal[s] with employers." The Board has explained that "'dealing' . . . ordinarily entails a pattern or practice in

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[38] *See generally* JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 2 (Economic Policy Institute 2006).

[39] *Compare* Casa Latina, http://casa-latina.org/about-us, and Latino Worker Safety Center, https://www.latinoworker.org/ *with* The National Black Worker Center Project, https://nationalblackworkercenters.org/affiliates/.

[40] Neither the National Labor Relations Board (NLRB) or the Department of Labor (DOL) has ever found a worker center to be covered by those laws. The question whether worker centers are labor organizations first presented during the Bush Administration. In cases involving the Restaurant Opportunity Center of New York (http://rocunited.org/), a worker center that has aggressively advocated for workers in the restaurant industry, shining much light on tip theft, the Bush Administration concluded that ROC was not a labor organization covered by either the NLRA or the LMRDA. *See* Memorandum from Barry J. Kearney, Associate General Counsel, Division of Advice, NLRB, to Celeste Mattina, Regional Director, Region 2, NLRB, regarding Restaurant Opportunities Center of New York, Case Nos. 2-CP-1067, 2-CB-20643, 2-CP-1071, 2-CB-20705, 2-CB-20787, 2006 WL 5054727, 2006 NLRB GCM LEXIS 52 (Nov. 30, 2006); Chris Opfer and Jasmine Ye Han, *Worker Centers May Get Closer Look Under Trump*, BLOOMBERGNEWS, Jan. 16, 2017, https://www.bna.com/worker-centers-may-n57982083896/. Secretary of Labor Alex Acosta more recently explained to this Committee that, consistent with the approach taken by his predecessors in both Republican and Democratic administrations, DOL's Office of Labor-Management Standards (OLMS) "handles allegations about worker centers as LMRDA-covered labor organizations on a case-by-case basis." *See Questions for the Record Hearing: Examining the Policies and Priorities of the U.S. Department of Labor*, Response to Question President by Rep. Francis Rooney (R-FL) at pp. 6–9, Wednesday, November 15, 2017. Under that very appropriate evidence-based approach, no administration has ever found a worker center to be covered by the LMRDA.

[41] 29 U.S.C. § 152(5).

[42] *See* Electromation, Inc., 309 NLRB 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

which a group of employees, over time, makes proposals to management [and] management responds to those proposals by acceptance or rejection. . . .[I]f there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing."[43]

While Board cases discussing the statutory definition of "labor organization" often arise in the context of a Section 8(a)(2)[44] violation, the NLRB has provided guidance in the worker center context, in a case where the NLRB General Counsel declined to issue a complaint against the Restaurant Opportunities Center of New York (ROC-NY), on the basis that ROC-NY was not a labor organization.[45] The General Counsel acknowledged that "the parties' discussions stretched over a period of time," but ultimately concluded that, "[a]lthough stretching over a period of time, the parties' dealings were limited to a single context or a single issue – resolving ROCNY's attempts to enforce employment laws," so ROC-NY was not a labor organization for purposes of the NLRA.

As relevant for most worker centers, the LMRDA definition of "labor organization" is narrower than the NLRA definition. The LMRDA defines a labor organization as

> a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of *dealing with* employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.[46]

On top of the "dealing with" requirement, the LMRDA includes the additional requirement that the labor organization be "engaged in an industry affecting commerce." That phrase is separately defined to include, as relevant to worker centers, a labor organization that "is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or [] although not certified, is . . . recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce[.]"[47] This language indicates that only an organization that acts or seeks to act as a bargaining representative within the meaning of the NLRA or the RLA – i.e., as an exclusive representative – is a labor organization within the meaning of the LMRDA.[48]

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[43] *See* E.I. du Pont de Nemours & Co., 311 NLRB 893, 894 (1993).

[44] 29 U.S.C. § 158(a)(2) (making it unlawful for an employer "to dominate or interfere with the formation or administration of any *labor organization* or contribute financial or other support to it . . .") (emphasis added).

[45] *See Restaurant Opportunities Center of New York*, *supra* n. 39.

[46] 29 U.S.C. § 402(i) (emphasis added).

[47] 29 U.S.C. § 402(j).

[48] As explained, *supra* n. 39, OLMS has never found a worker center to be a labor organization covered by the LMRDA. During the George W. Bush Administration, OLMS twice concluded that the Restaurant Opportunities Center was not an LMRDA-covered labor organization.

In short, worker centers are not recognized as the exclusive representatives of the people they serve, do not "deal with" or engage in collective bargaining with employers, and do not represent employees on an ongoing basis in relation to their employer and thus are not covered by either the NLRA or the LMRDA.[49] While worker centers often advocate or assist workers on a variety of issues, some of which include workplace issues, they help with discrete issues with a variety of employers on a variety of topics. That assistance, therefore, never rises to the "pattern or practice" necessary for showing that the Worker Center is "dealing with" the employer within the meaning of the statute.

Conclusion

The NLRA, a federal labor law that has not been significantly updated in over seventy years, is in desperate need of modernization. Legislative and administrative change is especially pressing because the imbalance of power created by Taft-Hartley has served only to deepen economic inequality, shrink the middle class, and leave many working-class people angry. As members of the Seventy-fourth U.S. Congress well understood, that angry will predictably surface in various forms of labor and political unrest. Witness the swath of teachers strikes that have swept our nation in recent months. I urge members of this Congress to reach across the aisle and work together on our nation's problems. Focus on people rather than party loyalty. Focus on solutions rather than ideology. Assume the best in one another and we will keep our nation great.

[49] 29 U.S.C. § 159(a); J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). 29 U.S.C. Section J.