Statement of

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Chairman Sanders, Ranking Member Cassidy, and Committee Members, thank you for your invitation to participate in this hearing. It is an honor to appear before you today.[1]

I am a partner in the law firm, Morgan, Lewis & Bockius LLP, where I practiced labor law for almost 30 years prior to serving on the National Labor Relations Board ("NLRB" or "Board"). I had the privilege of serving as Chairman from April 2018 to January 2021, and as a Board Member until the end of my term on December 16, 2022. I recently returned to Morgan Lewis and private practice. My law practice has focused on management-side negotiating and administering collective bargaining agreements, mostly in the context of multiemployer bargaining. As I noted during my confirmation hearing in front of this Committee almost five years ago, my career in the labor field started at the International Brotherhood of Teamsters Washington D.C. headquarters, where I worked for nearly seven years during college and law school. That experience offered an important perspective that shaped my law practice, gave me tremendous respect for the collective bargaining process, and informed my overall approach to labor law.

Today I am here to talk about the Protecting the Right to Organize Act ("PRO Act"), S. 567, reintroduced in the Senate last week. This legislation has been introduced in every Congress over the past 10 years and has failed to pass each time, including when both houses of Congress and the White House were controlled by the same party. There is a reason this legislation has failed to be enacted in my view. The PRO Act advances the objectives of a small interest group – labor unions – and represents a compilation of every "wish list" item the labor movement could come up with to change the historic balance between labor and management to favor unionization. It is based on unions' belief that increasing union membership is in the best interest of the country.

[1] My testimony today reflects my own views, which should not be attributed to Morgan Lewis & Bockius or the NLRB. I am grateful to Lauren M. Emery and Gregory B. Nelson for their assistance.

While no one can fault organized labor's desire to pursue legislation that would advance its own self-interest, there are several reasons to step back and take a more serious approach. This is particularly true today where the country faces the challenges of a changing workforce, unprecedented global economic forces, and a highly integrated market economy where we do not have the luxury of approaching issues in isolation. Indeed, given these challenges, we need to be focused not on how we address historic grievances, but on how we build the best labor-management framework for the workforce of the future.

As this Committee considers the PRO Act, I would ask that it take into consideration several points. First, while not perfect, the National Labor Relations Act ("NLRA" or "Act"), as amended over the years, is a unique and carefully crafted law that has done an admirable job over the last almost 90 years of balancing labor and management interests to accomplish its central objectives: promoting workplace democracy and ensuring industrial peace.

Second, before undertaking a radical overhaul of federal labor law, I would suggest that many of the criticisms levied against the NLRA, which the PRO Act is supposed to address, can be fixed through certain relatively easy modifications to the NLRB's enforcement approach.

Finally, as the Committee considers the sweeping and far-reaching changes that will affect every segment of our economy, I would urge the Committee to take a more serious approach. As discuss below, there are many unanswered questions that deserve input and debate from all stakeholders, not just those promoting the PRO Act.

The NLRA: Workplace Democracy and Industrial Peace

Before Congress embarks on an overhaul of the NLRA, it is worth taking stock of the Act's successes and not just focus on its failures. Indeed, the success of the Act should not be underestimated. Although the law is not perfect, it is far from requiring a total rewrite.

The NLRA has been in place for almost a century, and, over that time, has continued to achieve the objectives Congress set: ensuring workplace democracy and industrial peace. As is clear from the statutory language of the Act and its legislative history, the NLRA seeks to ensure industrial peace by affording employees the right to organize while seeking to prevent "strikes and other forms of industrial strife or unrest."[2] As the Supreme Court has recognized, the NLRA "is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved."[3]

No one would claim the NLRA is perfect. As evidenced by a series of amendments over the years, Congress has seen fit to fix some of those imperfections as they have been identified. Both labor and management interests can find fault with the Act for one thing or another. Union interests say that the Act is deficient in supporting their organizing goals and in stopping

[2] 29 U.S.C. § 151 *et seq.*.
[3] *First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 680-681 (1981).

employers from violating the law. Some management interests says the Act throttles their business objectives and denies employees free choice.

Until recently, it was widely understood that the NLRA was created to provide both the employer and the employees a voice – workplace democracy – and to maintain a system that promotes a more productive relationship between labor and management. Until recently, most would say the NLRA has admirably achieved these goals. Now Congress is considering a major overhaul. The real question is whether the Act is not meeting its goals or whether the goals of the Act have changed.

Nevertheless, it is important to recognize that the NLRA has largely done what Congress intended. It does not establish involuntary sectoral bargaining or a European-type model of works councils. It doesn't force unions on employees or impose economic terms on employers. Rather, it affords employees the right to form, join or assist a union, or not do so, based on the circumstances of their individual workplace. In making that decision about whether to be unionized, the Act provides for robust American-style democratic debate, one that has always included all voices including that of the employer.

It is only through an employee's ability to hear all arguments – from a union, their employer, and their coworkers – that they can make an educated decision about whether or not they wish to be represented. The NLRA offers employees a voice and the ability to collectively decide upon representation while, at the same time, allowing employers to lawfully communicate with its employees in a non-coercive manner. From its inception, the NLRA has struck the delicate balance between empowering employees, while allowing employers to present their arguments to workers.

In fact, in the creation of our federal labor law, there was clear "congressional intent to encourage free debate on issues dividing labor and management."[4] The Supreme Court has "characterized this policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.'"[5]

The NLRA also offers employees the rights and related protections to act on a concerted basis for their mutual benefit. Employees may decide to act concertedly without joining a union, and the Act protects that activity. In those workplaces where employees indicate their interest in a union, the Act establishes a procedure for determining support that is anchored in the most fundamental American democratic ideal: the right to a secret vote. Further grounded in another of our nation's founding principles of capitalism, the Act establishes a system of collective bargaining that offers union and management the ability to negotiate a labor contract based on the relative economic strength of each party.

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[4] *Linn v. United Plant Guard Workers of Am., Loc. 114*, 383 U.S. 53, 63, (1966).

[5] *Chamber of Com. of U.S. v. Brown*, 554 U.S. 60, 67 (2008) (citing *Letter Carriers v. Austin,* 418 U.S. 264, 272–273, (1974)).

Congress further ensured that there would be compliance with the Act, creating the NLRB and unique enforcement procedures and remedies that advance the public interests underlying the statute. Under the NLRA, parties can pursue a charge or petition for a union election without the need for an attorney or legal representation. This is a rare system when compared to most other federal and state employment statutes.

Additionally, the NLRB annually processes thousands of charges and petitions. In 2022 alone, the Agency oversaw 1,522 representation elections, reviewed almost 18,000 unfair labor practices ("ULP"), achieved $51.6 million in monetary remedies, and secured offers of reinstatement for almost 1,000 employees. And while these enforcement achievements are notable, a hallmark of the NLRB's success has been the ability to resolve labor disputes at their early stages. In 2022, the Agency brokered 5,587 ULP settlements and adjustments, and out of the almost 18,000 charges filed, the General Counsel issued complaints in only approximately 4% of cases, a testament to the Agency's ability to review, dismiss and settle a large majority of charges.

With this basic structure, the NLRA has produced enormous benefits for millions of Americans, including employees, unions, employers and the U.S. economy, for almost nine decades. In recent years, however, and particularly as the PRO Act has dominated the conversation, some have decided that the NLRA is outdated and in need of overhaul. In my view, before we jump to such a conclusion, we should take account of the effectiveness and accomplishment of our current federal labor law. Given its successes, the Act is worth preserving.

NLRA Fixes Without PRO Act Overhaul

The NLRA undeniably has produced enormous benefits to the country. However, having recently completed my term on the NLRB and after serving for almost three years as Chairman, I am convinced that there are undoubtedly ways to make it better. And before undertaking such a substantial overhaul of the NLRA, Congress should consider whether certain modifications could be made to the Board's enforcement of the Act. Doing so could go a long way toward achieving many of the goals of the PRO Act.

First, the NLRB should be able to process its cases – from start to finish – faster. Nowhere is the old adage "justice delayed is justice denied" more apt than with the NLRB. Employees willing to exercise their rights under the Act should not have to wait years for a decision. Second and relatedly, the NLRB should recommit its focus to its core union-related mission. In my view, the Board should stop distracting itself from traditional matters in order to achieve peripheral objectives. Time and again in recent years, the Board has spent countless resources and racked up untenable case delays seeking to advance new and imaginative legal theories at the expense of its core collective bargaining mission. Third, the NLRB should end the destructive practice of policy and case precedent oscillation.

Considering case processing delays, the NLRB has long been criticized for the time it takes to issue its cases.[6] One of the accomplishments of which I am most proud from my time as NLRB Chairman is the work we did to reduce case processing time and nearly eliminate the Board's case backlog. When I arrived at the NLRB in 2018, there were cases that had been pending almost 10 years and many were 3 to 5 years old. In my view, this was appalling. We immediately initiated a series of process management changes. A majority of Board Members at the time committed to this initiative, collectively affirming the critical importance of timely case processing to the mission of the Act. This was a relentless focus, particularly in representational matters.

Based on our efforts, the median age of all cases pending before the Board was reduced from 233 days in FY 2018 to 157 days at the end of FY 2019, an almost 33% reduction. The next year, FY 2020, the median age of cases before the Board was reduced further from 157 days to 85 days, a 46% reduction. At the end of FY 2020, the number of cases pending before the Board is at its lowest level in over 40 years.[7]

I am pleased that the Board has continued many of the reforms we initiated. But I know there is more that can be done. In my view, before Congress embarks on efforts to overhaul our labor laws, particularly changes that would allow individuals to bypass the Board if it does not act promptly, it should find ways to build on the process improvements in case processing that we began. As our efforts showed, case processing can be improved, and the advantages to all NLRB stakeholders is tremendous.

Some case-processing delays could be addressed by another change in the Board's enforcement approach that I would strongly recommend. In recent years, the Board has periodically embarked on a number of ill-fated efforts to test the boundaries of its statutory authority. In 2014, for example, the Board took the position for the first time that the Act prohibited mandatory arbitration agreements. This new interpretation not only expanded the historic understanding of Section 7 rights, it placed the NLRA squarely in conflict with the Federal Arbitration Act. There were immediately legal challenges, but the Agency continued to prosecute hundreds of cases under the new interpretation of the Act. After more than five years of litigation, the Supreme Court resoundingly rejected the Board's overreach in *Epic Systems*.[8]

In the end, the NLRB wasted countless resources, flooded the dockets at the Board and in the Regions and diverted attention from its core mission. Indeed, many of these cases contained other charges of violations under established precedent that were left unresolved for years while

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[6] See e.g., GAO Report to Congressional Requesters, The National Labor Relations Board Action Needed to Improve Case-Processing Time at Headquarters (Jan. 1991). *see also,* Miller, An administrative appraisal of NLRB, Industrial Research Unit, Wharton School, University of Pennsylvania Related Series: Labor relations and public policy series; no. 16 (1977).

[7] NLRB Press Release: NLRB Closes Out FY 2020 With Favorable Case Processing Results https://www.nlrb.gov/news-outreach/news-story/nlrb-closes-out-fy-2020-with-favorable-case-processing-results (Oct 30, 2020); NLRB Press Release: NLRB Closes Out FY 2019 With Positive Case Processing Results https://www.nlrb.gov/news-outreach/news-story/nlrb-closes-out-fy-2019-with-positive-case-processing-results (Oct 7, 2019).

[8] *Epic Systems Corp. v. Lewis*, 584 U.S. ___ , 138 S.Ct. 1612 (2018).

the mandatory arbitration issue was litigated. This all was entirely predictable.[9] And it is safe to say, nothing in this diversion helped organize one union member or achieve one successful collective bargaining outcome.

As another example (and there are many others), the Board in 2004, began a new aggressive enforcement policy toward ordinary employer rules, policies and handbook provisions.[10] The maintenance of commonplace, facially-neutral rules – imposing innocuous requirements like civility in the workplace – were now being found unlawful. Like the mandatory arbitration cases, there were hundreds of these rules cases that flooded the docket and distracted the Board. And because these rules cases came at around the same time the NLRB was pursuing its mandatory arbitration theory, the backlog only worsened.

With a change in majority, the NLRB in December 2017 adopted a more commonsense approach to enforcing employer rules, policies and handbooks that eliminated these cases.[11] This change allowed the Board to better focus on the core mission but, unfortunately the damage was already done. There was a backlog of these rules cases when I arrived at the Board, many of which contained other violations that went unresolved for years. This, of course, is particularly unfortunate when those violations involved representational issues or employees discharged for engaging in activity protected by the Act. I was pleased that we were able to clear the backlog of these cases, but the problem was one created by the Board and totally avoidable.

Unfortunately, the NLRB appears to be reverting to its prior course. Both the Board and General Counsel are once again pursuing issues that either are outside the core mission or involve dubious statutory interpretations that will result in litigation unlikely to prevail. For its part, the Board looks like its reupping its mandatory arbitration agreement and employer rules legal battles. Recently asking for public briefing on these issues, the Board appears poised to devote its limited resources to protecting matters that have nothing to do with unionization and collective bargaining. Making this argument, among others, Member Marvin Kaplan and I, as minority members of the Board at the time, dissented to these latest diversions.[12]

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[9] See *Murphy Oil*, 361 NLRB 774, 830 (2014) ("My colleagues in the majority embark on this course in good faith, motivated by the goal of enforcing the Act as they understand it. Their good intentions, however, cannot change the fact that both *D. R. Horton* and today's decision are steering the agency on a collision course with the Supreme Court. This might be understandable if these cases involved the core employee-to-employee concerted activity that lies at the heart of the Act. As shown, that is not the case. What is at stake here, instead, is merely an increase in the utilization of class and collective action procedures established by other Federal laws and administered by the Federal courts according to decades of their own precedent—all areas where this agency has no expertise. In these circumstances, the likely outcome is a regrettable but completely predictable, understandable diminution of deference to the Board's orders, as various courts continue to reject *D. R. Horton*'s reasoning and this agency's attempt to interfere with their management of their own cases. And, unfortunately, in the interim, reviewing courts will be less and less likely to defer to the Board's construction of Section 7 in other contexts after dealing with *D. R Horton*'s unjustified refusal to apply the FAA as the courts have directed. Finally, and most importantly, this unfortunate conflict will almost certainly end with the inevitable reaffirmation by the Supreme Court that the Act, too, must yield to the federal policy of enforcing arbitration agreements according to their terms. The prospect of victory is too slight, and the possible rewards are too limited to justify *D. R. Horton*'s extraordinary cost in diverted resources and lost judicial deference, in my view.") (Member Johnson dissenting) (footnote omitted).

[10] *See Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

[11] *The Boeing Co.*, 365 NLRB No. 154 (2017).

[12] See Stericycle, Inc., 371 NLRB No. 48 slip op at 8 (2022) ("The Supreme Court recently reminded us that 'Section 7 focuses on the right to organize unions and bargain collectively.' In keeping with this observation, the

And this appears to be just the start of the NLRB's efforts to distract itself once more from its core mission. Just a few weeks ago, for example, the Board issued a decision effectively invalidating all private sector severance agreements that contain confidentiality or non-disparagement provisions affecting largely non-union settings. If the past is any indication of how this will play out, the Board's decision to police all severance agreements will result in another drawn-out legal battle that drains agency resources and clogs the Board's docket. And, of course, this comes at the expense of the Board's ability to timely process pending organizing petitions and unfair labor practices.

The harm done to the Agency's core mission by these types of distractions is real and cannot be overstated. For example, while the NLRB has been focusing on mandatory arbitration agreements, employer handbooks and severance agreements, a group of 86 maintenance technicians at a Nissan plant in Mississippi recently waited almost two years for their case to be decided. The Board ultimately ruled in the union's favor on February 2, 2023, but the delay caused potentially irreparable damage to the employees' organizing effort.[13]

In a statement provided to the press following the decision, the Machinists Union said: "It is unfortunate that a broken and painstakingly long NLRB process has again allowed a company to put the brakes on workers obtaining a voice on the job without delay. The IAM will discuss the ruling and its consequences with this group of skilled tool and die maintenance technicians at Nissan to determine the best path forward."[14] It seems the Board's message to those like the Nissan mechanics is that protecting non-union employees against mandatory arbitration, employer handbooks and severance agreements is more important than them.

The General Counsel also is focusing on many areas that do nothing for union organizing and collective bargaining, including efforts to expand NLRA coverage for college athletes[15] and

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Board ought to devote the better part of its time and energy to ensuring free and fair elections and to dealing with employers who quell organizational efforts through intimidation or who refuse to bargain in good faith. Scrutinizing facially neutral workplace rules that target unprotected conduct to determine whether they might be construed by labor-law professionals to reach some protected conduct as well consumes resources better devoted to going after the real bad apples. Policing the margins of Section 7 in this way occupied an undue amount of the Board's resources, distracted the Agency from its core mission, and interfered with the Board's ability to issue cases in a timely manner. The majority's decision to issue this Notice and Invitation should prompt concern that those days may soon return.") (Members Kaplan and Ring dissenting); *Ralph's Grocery,* 371 NLRB No 50 slip op at 7 n. 19 (2022) ("Dozens of cases, including this one, were decided under D. R. Horton and Murphy Oil only to have the violation finding denied enforcement by a court of appeals both before and after Epic Systems. The resources expended on the fruitless litigation of those cases contributed significantly to the backlog of pending cases in place at the time we joined the Board. For example, the median age of cases pending at the Board stood at 233 days at the end of FY 2018, shortly after Epic Systems was decided. Thereafter, the median age of pending cases decreased to 157 days at the end of FY 2019, 85 days at the end of FY 2020, and 72 days at the end of FY 2021. Indeed, this case remains pending at the Board even though the court of appeals issued its mandate denying enforcement in part and remanding on August 27, 2018. The likelihood is that the majority's efforts to challenge arbitration agreement will result, once again, in delayed case processing.") (Members Kaplan and Ring dissenting).

[13] *Nissan N. Am, Inc*., 372 NLRB No. 48 (Feb. 2, 2023).

[14] Josh Eidelson, *Nissan Techs Can Vote on Union, US Labor Board Rules*, Bloomberg, Feb 2, 2023.

[15] NLRB General Counsel Memorandum GC 21-08, Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act (Sept. 29, 2021).

for the faculty at religiously-affiliated colleges and universities.[16] She is pushing to expand the definition of protected activity for non-union employees unrelated to union organizing,[17] and to affording so-called Weingarten rights to non-union employees.[18] Assisting other federal and state agencies, the General Counsel has signed various inter-agency coordination agreements,[19] including a memorandum with the Federal Trade Commission to assist that agency with its merger review activities.[20] All these far-flung initiatives, I should note, have being undertaken while the NLRB continues to say it is underfunded and understaffed.

In addition, the General Counsel is urging the Board to make radical changes in well-established precedent that will further divert the NLRB from its core mission. In changes that would fundamentally alter union organizing, the General Counsel has proposed radical interpretations of the Act prohibiting employer communications to employees over matters protected by the Act and abolishing employees' rights to an NLRB secret ballot election. Of course, the argument that these changes are supported by existing statutory authority is belied by their inclusion in the PRO Act and other legislative measures over the years. Nevertheless, neither has any chance of surviving judicial scrutiny.[21] More to the point, these overreaches will result in the same endless litigation, wasted Board resources and distraction from the NLRB's core mission.

The third change in the NLRB's enforcement approach I recommend is an end to the destructive practice of policy and case precedent oscillation. In recent years, the Board has earned the reputation of an unreliable arbiter of labor disputes. The policy swings make it difficult for all the Board's stakeholders – unions, employers and employees – to know the rules,

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[16] NLRB General Counsel Memorandum GC 21-04, Mandatory Submissions to Advice (Aug. 12, 2021).
[17] *Id*.
[18] *Id.*
[19] NLRB General Counsel Memorandum GC 23-03, Delegation to Regional Directors of Section 102.118 Authorization Regarding Record Requests from Federal, State, and Local Worker and Consumer Protection Agencies (Nov. 9, 2022); NLRB General Counsel Memorandum GC 22-03, Inter-Agency Cooperation (Feb. 10, 2022); *see also* NLRB Release, National Labor Relations Board and Department of Justice Announce New Partnership to Protect Workers (July 26, 2022).
[20] NLRB News Release, National Labor Relations Board and Federal Trade Commission Forge New Partnership to Protect Workers from Anticompetitive and Unfair Labor Practices (July 19, 2022).
[21] The General Counsel's new and radical position that employers should be prohibited from union-related speech during paid time is contrary to Section 8(c) of the NLRA and the First Amendment. Section 8(c) affirmatively *protects* the expression of union-related "views, argument, or opinion," and the Supreme Court has held Section 8(c) "implements the First Amendment" and reflects a "policy judgment, which suffuses the NLRA as a whole, . . . 'favoring uninhibited robust, and wide-open debate in labor disputes.'" Chamber of Com. Of US v. Brown, 554 U.S. 60, 67-68 (2008) (citation omitted). Likewise, the General Counsel's proposal to eliminate NLRB secret-ballot elections is without legal support. Although the General Counsel advocates this approach based on *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), *enforced*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951), two subsequent Supreme Court decisions – *Gissel Packing Co. v. NLRB*, 395 U.S. 575 (1969), and *Linden Lumber v. NLRB*, 419 U.S. 301 (1974) – have rejected mandatory union recognition based on authorization cards (absent "outrageous," "pervasive" or other unlawful conduct that would "seriously impede" holding a fair election). The Supreme Court and the courts of appeals have consistently held that authorization cards are "admittedly inferior" to elections, they are subject to "abuses" and "misrepresentations," and employers "concededly may have valid objections to recognizing a union on that basis." Notably, Congress has repeatedly considered amendments to the NLRA which, if enacted, would have required union recognition based on authorization cards; the failure to enact these proposals is compelling evidence that card-check recognition is not available under current law.

and it undermines confidence in the Board. These policy flip-flops also undermine the confidence of reviewing courts that must enforce the Board's orders. And the NLRB's non-acquiescence policy, which lets the Board ignore individual circuit court decisions, creates additional enforcement inconsistencies.

The Obama-era Board in particular overturned numerous long-standing case precedents in many areas of established Board law. By some estimates, the Board overturned more than 4,000 years of collective precedent in some 91 cases. Much of this was part of what I described above: ill-fated efforts to test the boundaries of its statutory authority in areas such as mandatory arbitration clauses. In other areas, the Board upended the historic balance between employer and employee interests that had been the hallmark of our federal labor law.

While I was NLRB Chairman, the Board worked to restore much of the precedent that had been changed by the prior majority. We returned many of the standards to what they had been for decades, including joint employment, independent contractor and rules governing the conduct of union elections. Notably, we restored much of this precedent; we did not attempt to swing to the other extreme. In a number of cases, we aligned our precedent to the standard set by prior court decisions to ensure consistent enforcement. We also undertook an aggressive rule-making initiative – doing more than any prior Board – to provide better guidance and greater stability in the law.

Now, the current Board and General Counsel has embarked on a mission to undo nearly every case precedent we restored. This, of course, is in addition to pushing for their other new ill-fated precedent changes described above. The current Board is also working to undo the rulemaking we did. And the General Counsel announces a new policy change nearly every few weeks, making compliance with ever-changing Board law nearly impossible.

Industrial peace is best served when everyone knows what the rules are and can have confidence that the NLRB is enforcing those rules in a neutral and consistent manner. The Board's current approach has undermined confidence in the Board and its precedent.

The bottom line is that, before Congress pushes ahead with a major overhaul of federal law, it should first consider what could be done to improve the enforcement efforts under the Act. The NLRB should more expeditiously process all its matters, and particularly representation petitions. If the employer violates the Act during an election, it should be addressed within a matter of months, not years. In the event an employer fails to bargain in good faith for its first contract, the Board must be able to get the parties back to the table in less than two years. None of this is a criticism of the Agency or its personnel; they are working within the current system. I raise these points to say that the NLRA may not be as broken as are its current enforcement methods.

A More Serious Discussion Is Required for an Overhaul of Federal Labor Law

S. 567 is a list of pro-labor changes unions have been seeking for years. It has been presented as the *only* way to update our labor laws in light of the changing economy, a growing

economic gap between labor and management and the need to strengthen employee rights, among other reasons. But is it? I would suggest that there has not been serious consideration of the proposed changes, how they will affect the economy, including job creation and economic growth, and whether the changes will solve – or make worse – the problems they are intended to address.

To date, the PRO Act debate has been one-sided. If Congress is going to consider federal labor law reform, and certainly any reform of the magnitude of the PRO Act, there must be a more serious review of the legislation's impact as well as input from and dialogue among all stakeholders.

Of most serious concerns are the PRO Act changes that would detrimentally affect employee free choice and stifle basic democratic rights to a secret ballot and free debate, impose collective bargaining agreements on parties, wholly change how employers structure their business operations, and incentivize more strikes, picketing and secondary boycotts. These and other proposals in the legislation completely upend federal labor law and will have wide-ranging consequences that need to be fully considered.

Employee's Right to Vote

S. 567 would eliminate one of the most fundamental protections afforded employees under the NLRA: the guaranteed right to a vote on whether to unionize. Instead, the PRO Act calls for the use of "card check" in lieu of a secret ballot election. The secret ballot election, of course, is the way representation elections have been conducted since the inception of the Act. It's how we elect our government officials. And it is the method Congress chose to use when imposing certain labor provisions in the United States-Mexico-Canada Agreement (USMCA) and for organizing of Congressional offices.

As proposed, the legislation also would impose a union on employees – regardless of whether the employees supported it – in the event that the employer engaged in violations during an NLRB election. We cannot overlook employer misconduct during an election and there must be consequences. However, the punishment for the violations should not be imposed on employees and result in workers losing their right to choose or not choose to be represented by a union.

These radical changes – abolishing secret ballot elections and issuing bargaining orders for any employer proven irregularities in an NLRB election – are a significant diminution of employees' rights. There also are a number of questions about how, in the absence of secret balloting, employees can exercise free choice without coercion or influence. PRO Act proponents do not share any of these concerns (and the legislation does not address them) because they assume that all employees should be unionized. There are other views that need to be taken into account and, given the important rights being arrogated here, more serious debate about this proposal is warranted.

Workplace Democracy - Free Speech and Open Dialogue

The PRO Act would substantially reduce important aspects of workplace democracy enjoyed under the NLRA. Specifically, the legislation seeks to eliminate free speech and open dialogue during a union organizing drive. Proponents argue that there should be no role or voice for employer's in organizing campaigns, and the PRO Act would eliminate employers' right to express opinions and provide information to employees regarding union representational issues. S. 567 seeks to further restrain employer free speech by reinstating the Obama-era Department of Labor reporting requirements for entities that provide assistance to employers in union campaigns.

Additionally, to reduce open dialogue, the PRO Act seeks to minimize the opportunity employees have to discuss and debate during an organizing campaign, including hearing from their employer and others that might have a contrary view about unionization. Indeed, one of the justifications for the PRO Act advancing card check and other proposed changes such as a return to the Board's 2014 so-called "quickie election" rules, is to reduce the time employees are given to weigh the pros and cons of union representation.

The cumulative effect of these changes would mean less democratic free speech and exchange of ideas in the workplace. It also would mean less informed decision-making by employees about whether to unionize. These are major changes that require more serious and more balanced deliberation.

Imposition of Initial Collective Bargaining Agreements

The PRO Act would upend another central tenet of federal labor law by imposing on both employees and employers a first contract if an arbitrary time deadline is not met. This proposed change not only takes away employees' right to vote on the terms of their own labor agreements, it removes the parties' ability to exercise their relative economic strength to determine the terms of their contract.

Under current federal labor law, collective bargaining is based on the relative strength of the parties. A union believing it has the economic strength and backing of its members will seek to extract maximum terms in bargaining by applying its leverage. This may include economic pressure through a work stoppage or other job actions to force the employer to meet its demands. Likewise, an employer believing it has the stronger relative position vis-à-vis the union will assert its strength. For example, an employer that does not believe it can remain competitive or in business if it accedes to the union's demands may be willing to withstand damage done to its business from a strike, a lockout or other job action.

This system of collective bargaining, in place since the outset of the Act, puts the terms of the labor contract in the hands of those best able to know the current economic condition of their businesses. Shifting the outcome of a collective bargaining agreement to a third-party arbitrator, as the PRO Act proposes, means that the future of the business and the jobs that depend on that business rest on terms that may not meet the economic realities of the employer. In addition, the agreement may not align with the interests of either party.

Before making such a significant and far-reaching change, one that could affect the operations and viability of many businesses, there should be significant study and analysis of the impact.

Business Structures

Proponents of the PRO Act point to the changing role of workers in today's economy to justify the legislation's redefinition of "employee" and "employer." Among other things, they point to the increased use of so-called gig workers, temporary employees, and independent contractors. While the roles of various types of workers is undoubtedly changing, these challenges require a thoughtful approach.

The PRO Act's solution to this problem, however, is a one-size-fits-all answer: change the law to create more employer- employee relationships so unions can organize more employees. It is not hard to see why labor unions support this, but the approach fails to consider that many workers prefer the flexibility and entrepreneurial opportunities of non-employee status. It also overlooks the important role these workers play in a changing economy. It is not at all clear that the answer to these challenges is simply to create more employer-employee relationships to facilitate greater unionization.

Whole segments of the economy have been developed under a well-established definition of independent contractors. If adopted, the PRO Act would invalidate decades of legal precedent defining independent contractors and would make it far more difficult for workers to establish independent status.

The one-size-fits-all approach of creating more employer-employee relationships will only lead to more difficulties, evidenced by California's struggle to codify such a standard into law without creating multiple carve outs. Simply because an individual performs a service for a business that is within the scope of the services customarily provided by such entity should not – and has not –automatically established an employer-employee relationship. In light of the evolving nature of the type of work that many individuals do on an independent basis in the evolving "gig" economy, this proposed change could have a devastating impact on such workers and the segments of the economy in which they operate.

Similarly, the PRO Act proposes major changes to the joint-employer standard that would fundamentally change business structuring throughout the economy. The standard calls for joint-employer status under the NLRA based solely on "indirect or reserved control." This standard could potentially destroy the franchisor and franchisee model which has created millions of jobs and established hundreds of thousands of successful small business entities.[22]

[22] For a comprehensive analysis detailing the negative economic consequences of an overly expansive joint employer standard, *see* International Franchise Association, Comment Letter on Proposed Rule on the Standard for Determining Joint Employer Status (Jan. 28, 2019).

The proposed changes to the independent contractor and joint-employer standards would have a significant impact on all segments of the economy. No changes in this area should be undertaken without a study of the many complex issues and a full understanding of their impacts.

Industrial Peace

The PRO Act would make several major changes to core areas of current federal law that have provided decades of industrial peace, a primary objective of the NLRA. First, it would make lawful intermittent strikes, which would allow employees to engage in frequent and on-and-off work stoppages and strikes. It also would allow secondary boycott activities by unions. This would extend lawful strikes, boycotts and picketing beyond the primary employer involved in a particular dispute, and permit picketing, boycotts and strikes at all "neutral" employers. Secondary boycott activity would embroil neutral employers that have nothing to do with the dispute other than doing business with the primary employer.

In addition to potentially having a devastating effect on the supply chain and other aspects of the economy, changes to intermittent strike and secondary boycott law would dramatically change the balance of competing interests that had been carefully constructed by Congress over almost nine decades. These types of radical legislative changes need to be fully understood before being adopted.

Dual-Track Enforcement

Perhaps out of frustration with the NLRB's historically slow case processing discussed earlier, the PRO Act would create a two-track enforcement process allowing employees to circumvent the NLRB. As proposed, employees would be able to pursue a separate civil action in federal district court if the Board failed to initiate an injunction proceeding in federal court within 60 days following the filing of unfair labor practice charges.

Perhaps a quick work-around to a systemic (but fixable) delay problem, establishing this type of dual track enforcement would undermine – not strengthen – the NLRB's ability to establish a consistent labor policy and effectively remedy labor law violations. Federal district courts have had little involvement with labor law matters, and the details of how such a enforcement scheme would work and be coordinated are unclear. Once again, before Congress undermines the NLRB with such a significant change, efforts first should be made to address the underlying problem – delay.

Employer Role in Representation Matters

The PRO Act proposes to eliminate the right of employers to participate as a "party" in Board proceedings in representational cases. Under this approach, only the union would have "party" status, even though representation cases require determinations about whether a particular unit is "appropriate," whether particular individuals are "supervisors" (excluded from the unit as a matter of law), and what individuals are eligible to vote.

It appears that no consideration has been given to the fact that, as to these important issues, the employer is the party most familiar with these types of facts. Before making such a change, Congress should give serious consideration to how these important issues will be resolved without employer participation in a representation hearing.

Conclusion

While the focus has been on the PRO Act and rewriting federal labor law, the current statutory scheme under the NLRA is not perfect, but it has succeeded in establishing robust workplace democracy and necessary industrial peace. Congress should consider several modifications to the NLRB's current enforcement approach that could address many of the criticisms levied against the NLRA. In considering the PRO Act, it is important to seriously consider the sweeping and far-reaching changes that will affect every segment of our economy. There continue to be many unanswered questions that deserve input and debate from all stakeholders, not just those promoting the PRO Act.

This concludes my testimony. I look forward to answering questions from members of the Committee.

JOHN F. RING