

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

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I appreciate the opportunity to testify at this hearing on three anti-union bills, H.R. 2776, H.R. 2775, and H.R. 2723, all with Orwellian titles: the Workforce Democracy and Fairness Act (WDFFA), the Employee Privacy Protection Act (EPPA), and the Employee Rights Act (ERA), respectively.

I've been asked to analyze these bills for the subcommittee. Deceptively short, these bills are chockfull of malicious intent to render elections absurdly undemocratic, strip workers of rights, take control of unions away from union members, drain union treasuries, and otherwise destroy labor unions. These bills don't reflect sound policy or an attempt at consistent application of rules – but are a naked political assault on labor unions and nothing more. The subcommittee should reject them.

Here is what the bills do, in nine insidious steps:

**Step One: Block Voter Access to Union Information**

Two of the bills – EPPA and ERA – seek to make it as difficult as possible for a worker to speak with a union organizer before a union certification election.

A key element of any free and fair election is equal access to voters by the contending parties. Current law already fails to provide anything approaching equal access in a representation election administered by the National Labor Relations Board (NLRB). Employers may block union organizers from accessing the workplace – the one place where all voters congregate. Meanwhile, employers have total access to voters in the workplace and may compel voters under threat of discipline to attend anti-union captive audience meetings. Current law's attempt at providing a modicum of access is the provision of the Excelsior list – a list of voter names, job classifications, work locations, shifts, and contact information provided to the union within two days after the bargaining unit determination.

The authors of EPPA want the union to receive this list of voters as late as possible, to limit the union's access to voters ahead of an election. EPPA provides that the voter list may only be turned over “*not earlier than 7 days after a final determination by the Board of the appropriate bargaining unit.*” This minimum waiting time is not coupled with a maximum waiting time. EPPA

does not limit how long the union may be forced to wait for this basic information. The union could receive the list of voters the night before the election under EPPA.

EPPA and ERA would restrict what the list may contain. EPPA provides that the list may not provide any more than the voter's name and one form of contact information (telephone, email, or mailing address), chosen by the employee in writing. Even if an employee wanted to provide more than one way to be contacted, so that they might be sure to obtain information from the union before voting, the bill prohibits it. Moreover, since employees make their choice in writing to the employer, this procedure is ripe for intimidation and coercion. Supervisors collecting the employees' choices may pressure employees into providing the least useful form of contact information for the union.

ERA goes a step further than EPPA in this regard. Under ERA, the list may only include employee names and home addresses. Even if an employee wanted to provide an email address or telephone number, the bill does not permit it. ERA also allows employees to "elect to be excluded from such list by notifying the employer in writing." Again, this procedure is ripe for intimidation and coercion, with supervisors pressuring employees to exclude themselves from the list altogether, or workers excluding themselves due to the inherently coercive nature of this process. In that event, the union would not know the names of the voters, let alone how to contact them before the election. Meanwhile, the employer has had those names all along - and has had constant access to those voters in the workplace.

The point of these provisions is not to ensure a fair election or employee privacy. Both the ERA and EPPA couch these provisions as giving employees a choice on what or whether to disclose while making sure employees cannot choose freely. First, they cannot choose freely because the choices are arbitrarily limited (only home addresses, nothing else, in the case of ERA, or only one form of contact and no more, in the case of EPPA). Second, they cannot choose freely because the employees must provide their choice to their employer, who controls their working lives and who will frown upon the wrong choice or strongly encourage another. Third, they cannot apply those same choices toward what information they provide to their employers; nothing in these bills prevents employers from requiring their employees to provide them all of their contact information as a condition of employment and then using that information to further the employer's anti-union campaign.

The knife-twisting doesn't stop there. ERA allows employers to pressure voters into keeping their existence, let alone their contact information, secret from the union altogether. EPPA allows employers to provide the list of voters and contact information to the union as late as possible before the election. The point of these provisions is to deprive one party - the union - of the opportunity to speak to voters in a timely way - even if the voters want to allow as much opportunity as possible for communications with the union.

	Current Law	EPPA	ERA
Does the employer have total access to the voters everyday at work?	Yes	Yes	Yes
May the employer require voters to attend anti-union captive audience meetings?	Yes	Yes	Yes
Does the union have the right to access the voters inside the workplace, the one place they congregate everyday?	No	No	No
How may the union access the voters?	Outside of work	Outside of work	Outside of work
Is the union guaranteed to receive a complete list of voter names?	Yes	Yes	No
Will the union receive the voters' job classifications, work locations and shifts?	Yes	No	No
Is the union guaranteed to receive some sort of contact information for each voter?	Yes	Yes	No
May the union receive more than one form of contact information?	Yes	No	No
What form of contact information may the union receive, if any?	Home address and, if the employer has any of them, personal email addresses and personal cell and telephone numbers.	Only one of the following: Telephone number OR email address OR mailing address	Home address, unless employer obtains written request from employee to be excluded

### Step Two: Stuff Ballot Boxes with No Votes

The sponsors of ERA set rules for union elections that they wouldn't set for their own elections. Under ERA, in a union certification election all non-votes are considered no votes. Under current law, the majority of ballots cast determine the outcome of any election under the

National Labor Relations Act (NLRA). Those voters who choose not to cast a ballot simply do not count one way or another; they have opted to allow co-workers who cast ballots to decide the question of unionization. This should sound familiar to members of the Subcommittee, as it is the way congressional elections are conducted.

ERA, however, seeks to stuff the ballot box with no votes. Under ERA, for a union to win a certification election, it must obtain yes votes from a majority of the employees in the bargaining unit, not just the majority of the employees who cast ballots.

We don't run political elections this way in the United States. People are free to not cast ballots without their decision to not vote counting as a vote for one candidate or another. Indeed, if the ERA's election rules were applied to congressional elections, none of the original cosponsors of this bill would have been elected, per a recent study by the Economic Policy Institute.<sup>1</sup> None of the bill sponsors won a majority of all eligible voters in their congressional districts. Just as such a rule would severely hamper the ability of members of this Subcommittee to win elections, the ERA's stuff-the-ballot-box provision is designed to severely hamper unions' ability to win elections.

Tellingly, ERA does not apply this rule to its new process for automatic decertification elections – employer-triggered elections to get rid of a union. Under that provision, ERA is very explicit that anti-union forces do not need a majority of all eligible voters in order to eliminate an incumbent union: “If a majority of the votes cast in a valid election reject the continuing representation by the labor organization, the Board shall withdraw the labor organization’s certification...” What’s good for the goose is not good for the gander because the sponsors of ERA are trying to put the law’s thumbs on the scale against unions and workers. Fairness and uniformity are utterly foreign concepts in this bill.

Under ERA, if your shop is...	Then you need to meet this standard...	In order to...
Non-union	Majority of <b>all eligible voters</b> to vote for the union	Certify a union, triggered by an employee petition
Union	Majority of <b>just those casting ballots</b> to vote against the union	Decertify a union, triggered by employer’s alteration of the bargaining unit

<sup>1</sup> <http://www.epi.org/blog/under-new-bills-election-standard-unions-would-never-win-an-election-and-neither-would-the-bills-cosponsors/>

Notice the standard changes depending on whether the election is for a non-union shop to become union, or a union shop to become non-union. ERA greases the skids for deunionizing and makes the mountain even steeper than it already is for unionizing.

**Step Three: Eliminate ways for workers to form a union and create new ways for employers to bust unions**

ERA eliminates a key method by which employees win union representation while creating a new method just for employers to strip workers of union representation.

First, ERA prohibits employers from voluntarily recognizing a union based on a showing of majority support from the employees. Voluntary recognition has been permitted under the NLRA since its inception. It is the preferred way of organizing because it minimizes the strife of the election process, and voluntary recognition usually comes by way of agreements that also require the employer to be neutral or provide the union with actual access to the voters in the workplace. In these cases, there is no NLRB election because an outright majority of the workforce has already signed cards seeking recognition of their union and the employer has agreed to recognize. ERA does not abide voluntary recognition because voluntary recognition agreements are the means by which the bulk of workers are organized in the workplace today.

Just to be clear, ERA's prohibition of voluntary recognition is not because secret ballots are a sacred principle for ERA. ERA does not touch the withdrawal of recognition doctrine, which is the anti-union mirror of voluntary recognition. Under this doctrine, an employer may withdraw recognition from a union without an election if there is a showing that a majority of the employees no longer support the union. ERA is fine with this doctrine, even though it does not involve a secret ballot election, because it is a way of eliminating a union.

While blocking workers from voluntary recognition of their union, ERA creates new, undemocratic ways for employers to eliminate a union.

Under ERA, an employer can manipulate its workforce through turnover, expansion, or some other alteration, such that the change in the workforce exceeds 50 percent of the original bargaining unit size, and trigger an automatic decertification election. This election would happen even if not a single employee wants it. It is an election that may be triggered entirely on the employer's initiative.

Interestingly, for all their talk about "ambush elections," the anti-union forces behind this bill appreciate speed when it comes to an employer-triggered election. Under this process, speed counts. Because of employer alterations, there are brand new workers in the bargaining unit, so ERA does not want to give the union workers time to talk to their new brothers and sisters. So a petition need not be filed. No hearing is called for. Unfair labor practices cannot stall the election date. The election must happen within a *maximum* 30 day timeframe from the date of the employer's alteration of the bargaining unit when there is no collective bargaining agreement in place. Otherwise, in cases where there is a collective bargaining agreement in place, ERA requires the

election to happen within a particular 10-day window (between the 120<sup>th</sup> and 110<sup>th</sup> day prior to contract expiration). This entire decertification process happens even if not a single employee wants to alter his union representation. The automatic decertification election is an open invitation to employers to manipulate their workforces to trigger votes and decertify the union. Again, unlike certification elections for new unions, which are designed to be as difficult as possible for the union to win, this employer-triggered decertification process requires only a majority of those casting ballots to change the status quo and eliminate the incumbent union.

Moreover, this new decertification process would undermine the NLR's emphasis on stability in collective bargaining relationships. The process could be triggered by an employer who does not even mean to trigger it or simply because of persistently high turnover. Depending on the workplace, decertification elections could be happening on a near-constant basis, even though neither the employer nor employees want one. They will stop, however, once the anti-union vote wins. None of the bills require periodic elections in non-union workplaces to determine whether workers now want a union.

#### **Step Four: Delay a Union Certification Election When Workers Want One**

Recall that ERA's new employer-triggered method for elections requires elections within a *maximum* of 30 days of whenever the employer has changed the composition of the bargaining unit, wherever there is no collective bargaining agreement. Do you think these bills would impose a maximum waiting period when workers trigger an election? Of course not. WDFA requires, when the workers trigger an election to win union representation, a *minimum* 35-day waiting period before the election may occur. When employers trigger the election, the vote must happen fast. When workers trigger the election, the vote must be stalled. These bills ensure that, when the employer is not the party triggering the election, this pre-election time period is long enough for some serious employer campaigning. At least one study found that this period between petition and election is when employers are most likely to commit unfair labor practices. It's a critical period for unionbusting.

But would a minimum of 35 days always be long enough for the employer to bust the union drive? If not, there are plenty of other delays built into the bills. While current law aims to hold pre-election hearings on petitions within 8 days of the petition filing, both ERA and WDFA require a two-week waiting period before a pre-election hearing about the bargaining unit, voter eligibility, and other issues. After that initial delay, the bills diverge on their approaches to creating further needless delay. Under ERA, after the Regional Director issues his decision, the employer may appeal any or all of the decisions to the full National Labor Relations Board, and the Board must rule on all of those appeals before the election may occur. By challenging one employee's eligibility to vote in the election – arguing, for example, against all reason that the employee is a supervisor – would provide months of delay for a high-paid unionbuster to kill the organizing drive ahead of the election. This massive delay opportunity must be why ERA does not even bother with WDFA's 35-day minimum waiting period. Meanwhile, under WDFA, more delay is built into the pre-election hearing itself by requiring the Regional Director and the Board not to just determine *an* appropriate

bargaining unit but *the* appropriate bargaining unit, a novel concept which will be discussed later in this testimony. Incidentally, it appears that under both bills, even if the union and the employer agree on every pre-election issue, the government must waste taxpayer money holding a hearing anyway. (ERA is clearest about this requirement: “No election shall take place... unless and until... a hearing is conducted before a qualified hearing officer... ”)

	<b>If you're employees petitioning for an election to win a union...</b>	<b>If you're an employer triggering a decertification election by altering a bargaining unit...</b>
<b>Minimum Delay Required</b>	At least 35 days from the date of the petition.	None.
<b>Maximum Delay Permitted</b>	No limit.	30 days where there is no collective bargaining agreement; as little as fewer than 10 days where there is a collective bargaining agreement, depending on how soon the agreement expires.

#### **Step Five: Gerrymander the voting districts.**

One of the most confounding complaints of anti-union forces in recent years is their concern about a 2011 case called *Specialty Healthcare*.<sup>2</sup> In that case, certified nursing assistants (CNAs) filed a petition for a union election at a nursing home. They asked for a bargaining unit of just CNAs – all 53 of them. But the operator had other ideas. The operator demanded that 33 maintenance assistants, cooks, data entry clerks, business office clericals and receptionists be added to the bargaining unit. The Board told the operator that it could not pack an otherwise appropriate bargaining unit with voters who were not asking for an election unless the operator could show that there is an “overwhelming community of interest” between all of these workers the employer wants to add to the unit and the petitioned-for unit. The “overwhelming community of interest” language is drawn from a decision of three Republican-nominated judges on the D.C. Circuit Court of Appeals.<sup>3</sup> Seven other federal circuit courts have upheld the Board’s application of *Specialty*

<sup>2</sup> 357 NLRB 934 (2011).

<sup>3</sup> *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008).

*Healthcare*.<sup>4</sup> These circuit courts have acknowledged that the Board's *Specialty Healthcare* standard is not a departure from its precedents, but simply a clarification. Therefore, the *Specialty Healthcare* decision is nothing radical, but simply stands for the proposition that an employer cannot displace the employees' petitioned-for unit without showing that the employees it seeks to add to the unit share an overwhelming community of interest with those in the proposed unit.

Nevertheless, the anti-union groups have been screaming "micro-units" ever since the Board's 2011 decision. That is, they say that, thanks to *Specialty Healthcare*, unions would petition to represent tiny units of workers, which would be a hassle for the employer to deal with. But would unions actually do that? Generally speaking, unions have little incentive to expend their limited resources on bargaining for countless "micro-units." Data has borne out that, in 2011, the year that "micro-unit" hell was unleashed by the Board, the median size of bargaining units in NLRB elections was 26 employees. In 2016, after five years of *Specialty Healthcare*, the median size for bargaining units was still 26 employees.

So the "micro-unit" nightmare is not grounded in reality. But was the fear of micro-units even genuine? Think about it. Unionbusters often tell employees that they don't need a union because they can cut their own great deals with management, without a "third party" involved. Would that not be an extreme version of micro-unit hell, bargaining with thousands of micro-units consisting of one employee each at the same large employer? Yes, of course, it would be. Maybe the employer would even favor a single bargaining representative for efficiency's sake, if this individualized bargaining was a reality in a nonunion workplace. But it's not real. In the non-union workplace, very little bargaining, if any, takes place with any particular employee. Employees are expected to accept whatever the employer deigns to offer them and nothing more. If they don't like it, they can quit.

So what's really behind the attack on *Specialty Healthcare*? The case limited an employer's ability to pack the voter rolls with workers who had hitherto no involvement in the union organizing drive. After all, workers petitioning for an election are likely to petition for a bargaining unit consisting of workers who share a community of interest from the outset – say, all the assembly line workers but not the warehouse workers with whom they rarely interact. It's to the employer's advantage, however, to be able to add groups of workers who do not closely share the organizing workers' interests and probably have not been involved in the organizing drive. As the WDFB lays out, "employees shall not be excluded from the unit unless the interests of the group seeking a separate unit are sufficiently distinct from those of other employees to warrant the establishment of

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<sup>4</sup> See *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013) (enforcing the original *Specialty Healthcare* case); *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784 (2d Cir. 2016); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432 (3d Cir. 2016); *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489 (4th Cir. 2016); *Macy's, Inc. v. NLRB*, 824 F.3d 557 (5th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 839 F.3d 636 (7th Cir. 2016); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515 (8th Cir. 2016).



a separate unit.” The W DFA puts the presumption in the voter-packing employer’s favor and against the desires of the employees who undertook the petition in the first place. Again, this preference in favor of the employer is understandable once you accept that unionbusting, not employee self-determination, is the animating force behind these bills.

Incidentally, let’s not forget to read these bills as a whole. Thanks to the voter-packing rules in these bills, the employer will have added voters to the rolls that had no involvement in the organizing drive, did not want to be part of a bargaining unit, and are not part of the original unit that the organizing employees sought. Thanks to the manipulation of the Excelsior Lists, under EPPA, the union may not find out who these voters are until shortly before the election – and certainly “not earlier than seven days” after the Board has defined the bargaining unit. And under ERA, the union may not find out who some of these voters are... ever, thanks to supervisors pressuring the workers to opt out of the Excelsior list altogether. Great system!

The W DFA does provide for one instance in which smaller units are favored: when a union seeks to accrete additional employees to an existing unionized bargaining unit. The W DFA is very clear about this double standard: “Whether additional employees should be included in a proposed unit shall be determined based on whether such additional employees and proposed unit members share a sufficient community of interest, with the sole exception of proposed accretions to an existing unit, in which the inclusion of additional employees shall be based on whether such additional employees and existing unit members share an overwhelming community of interest and the additional employees have little or no separate identity.” In other words, small unionized units are bad, and making a small unionized unit a bigger unionized unit is also bad.

For anyone who is confused at this point by these bills’ efforts to address *Specialty Healthcare*, here’s a table to help decipher:

Arrangement	Desirability for W DFA
A “micro unit” of all 53 certified nursing assistants at a nursing home getting a union	Too small!
Once unionized, a “micro unit” of all certified nursing assistants at a nursing home that seeks to become a bigger unit	Too big!
159 million micro units consisting of one employee each, without a union	Just right!

Per these bills, no matter what size the bargaining unit is, if it’s unionized, it’s not the right size!

### **Step Six: Play a Gotcha Game so Employers Have Carte Blanche to Undermine Elections**

ERA includes new penalty provisions in the NLRA directed at unions. If a union is found to have interfered with, restrained, or coerced employees in the exercise of their Section 7 rights or to join a union or refrain from joining a union, the union is liable for wages lost and union dues or fees collected unlawfully as well as an unspecified “additional amount as liquidated damages.” It’s unclear what problem this provision seeks to solve. The last year for which the NLRB issued statistical data on the types of unfair labor practices filed shows that there were 10 times as many formal actions taken for charges filed against employers as against labor organizations.<sup>5</sup> But despite the far higher likelihood that an employer commits an unfair labor practice than a labor organization does, ERA does not seek liquidated damages from employers.

ERA also plays a game of gotcha with unions: Any union “found to have [committed an 8(b)(1) violation] in connection with the filing of a decertification petition shall be prohibited from filing objections to an election held pursuant to such petition.” In other words, once a shop steward or union activist makes any mistake during a decertification drive, the employer is given carte blanche to render the decertification election as unfair as possible, and the union cannot object to the unfair conditions. So the point of this provision is not to ensure a fair election. After all, most unfair labor practices are committed by employers – but ERA does not strip employers of their right to object to unfair election conditions simply because the employer itself has committed unfair labor practices. As with all the previous provisions, the point of this penalty provision is to help employers eliminate unions.

### **Step Seven: Drain Union Treasuries**

ERA contains a number of amendments to the Labor Management and Disclosure Act (LMRDA) designed to simply drain union treasuries.

First, ERA requires all internal union elections – such as for union officers, setting dues, authorizing strikes, or ratifying contracts – to be conducted “in the privacy of a voting booth.” This might sound innocuous to the average person. But here’s the problem: any particular local union or bargaining unit may have members scattered over very wide geographic areas. Depending on the situation, the only feasible, affordable, franchising way to conduct an election is by mail ballot – or in some cases via internet or telephonic voting. But the phrase “in the privacy of a voting booth” appears to specifically prevent anything other than in-person voting. The end result will be to either force unions to conduct elections in multiple physical places at once, with all of the election judges and observers present at each polling location, or simply disenfranchise geographically dispersed members. A single bargaining unit may have members scattered in locations with just a couple employees across many states. After a few elections, a geographically dispersed local union or

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<sup>5</sup> FY2010 NLRB Annual Report.

bargaining unit won't have much resources left to fight for its members, which is the point of this provision.

Second, ERA really does not want an organization of working people to be free to engage in their communities the way, say, a business organization would be free to engage in its community. In the United States, you can join any organization you want and pay dues however you want and expect that the law won't require you to constantly give consent about how those dues are to be spent. But ERA tolerates the freedom of association only so much. Under ERA, if you are a 100%-committed union member and union supporter, enthusiastically paying dues, attending union meetings, or even becoming union president, ERA requires you to give consent in writing every year for your organization to use your dues for anything "not directly related to the labor organization's collective bargaining or contract administration functions." ERA calls this provision "Right Not to Subsidize Union Non-Representational Activities." Now, such a right already exists under current law. Under current law, no one is required to join a union or pay union dues. In so-called right-to-work states, a nonmember bargaining unit employee does not have to pay a cent to the union, even though the union must represent him. And in freedom-of-contract, fair-share states, a nonmember bargaining unit employee may be required to pay an agency fee to cover 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 ERA, 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 (already sitting in the union treasury) for say, a voter registration drive or sponsoring a Little League team. So this provision does not actually create a "Right Not to Subsidize Union Non-Representational Activities," it restricts and burdens the right to do so. And 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, ERA prohibits the same automatic renewal of a member's consent for the union to use his dues for non-germane activities. Obtaining this consent annually from every full-blown union member in good standing is an expense in and of itself. Someone really does not want unions involved in politics or their communities.

Third, ERA would require unions to conduct, at their own expense, contract ratification votes which they may otherwise not have any reason to conduct. Under ERA, if a union wants to conduct a strike authorization vote, it must first conduct a ratification vote on any outstanding proposed collective bargaining agreement from the employer. The union may know – or at least have very strong reasons to believe – that its members would vote down the particular proposal, which is why the strike vote is necessary in the first place; yet ERA would require the pointless ratification vote – in the privacy of a voting booth – for every member and nonmember employee in the bargaining unit (more on that later).

Fourth, ERA would not allow this contract ratification vote and the strike authorization vote to be conducted by the union – something that unions are very capable of doing. Instead, ERA would require the union to contract with a private third party to conduct these elections. Moreover,

the employer must agree on who that private third party is, even though the union alone must pay for the entire undertaking. Would an employer hellbent on busting the union agree to an affordable third party – or one that will drain the union coffers? There's a business opportunity in ERA for starting an overpriced election services company.

Fifth, ERA apparently creates an obligation for every labor organization to conduct an "independently verified annual audit of the labor organization's financial condition and operations." Unions already provide extensive financial reporting, their officers are bound by fiduciary duties, their officers must be bonded, and their entire governance is subject to democratic elections. While it's obviously a good practice to utilize an independent auditor, not every local union can afford this cost. Typically, a local union with extremely limited resources will appoint a finance committee of members to conduct an audit of its books. It is not independently verified, but it is the best a small union can do. ERA has found yet another way to force a union to spend its resources on something other than smartly advancing workers' interests. It is a wonder the bill's authors did not require the employer to consent to which auditing company the union may use.

**Step Eight: Take control of the union away from dues-paying union members (so maybe they'll stop paying dues)**

Recall that ERA strips union members of their right to freely subsidize their union's activities without annual government interference. The flip side of that coin is that ERA gives nonmembers new rights over the members' union.

Under ERA, nonmembers would be granted the same rights as members to vote on contract ratifications and strike authorizations. This provision is an entirely new level of free-riding. In a so-called right-to-work state, nonmembers would pay zero for the services of the union and be entitled to participate in the union's ultimate decisionmaking. The bill authors know that having a say in contract ratification is one of the strongest incentives to join the union for some workers. So getting that say for free will reduce the chances a particular worker will become a member.

Furthermore, strikes are a big deal. Members are expected to honor picket lines. Members who cross picket lines may be fined. Nonmembers cannot be fined. They can scab without consequence. So, imagine a strike authorization vote in which nonmembers join some number of members to vote for a strike. The strike is called. The members must honor the picket lines, while the nonmembers who forced them to strike may scab. Then, when a possible contract is reached and sent out for ratification, the nonmembers can vote to reject the contract, prolonging the strike for members while the nonmembers have been collecting a paycheck all along. The nonmembers may want the strike to continue to force the company to improve a provision or two, or because they are financially benefiting from the overtime during the strike. After all, it's no skin off the nonmembers' back to prolong the strike, as the members are the only ones who must honor the picket lines.

Union members have contributed and obligated themselves in ways which correctly give them the exclusive right to vote on contract ratifications and strike authorizations. Nonmembers

have not earned such a right. This provision undermines the very concept of a union. It is also an assault on the constitutionally-protected associational rights of the union members.

Under ERA, it's not just nonmember employees who obtain inappropriate power over a union's internal affairs. The employer is also granted a ridiculous say over the union. As noted earlier, a union cannot call a strike authorization vote unless the employer has agreed on what private third party will conduct the vote. This employer consent requirement would give the employer-veto power over when and whether a strike vote happens. The strike is the ultimate economic weapon of a union in collective bargaining. The timing of a strike vote is an internal strategic decision of the union. ERA would eliminate the union's prerogative on this issue and eviscerate the right to strike.

**Step Nine: Create a One-Sided Federal Crime Targeting Union Supporters and Fail to Deter Violence by Employers and their Agents**

ERA adds a new criminal provision to the LMRDA: "It shall be unlawful for any person, through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any person for the purpose of obtaining from any person any right to represent employees or any compensation or other term or condition of employment." A person found guilty of this provision shall be fined up to \$100,000 or imprisoned up to 10 years or both.

Let's be clear about the target of this provision: unions. It is unions that seek the right to represent employees or seek terms or conditions of employment in the course of collective bargaining or a strike. Of course, it is old hat to talk of violent union "goons." During a strike, however, especially when emotions run highest, unions have strong incentives to maintain nonviolence and tamp down any violent-sounding rhetoric. Set aside that violence and threats of violence are already illegal and criminally prosecuted under state law. The slightest mistake on the picket line will land the union in a county court within hours, where a judge may enjoin the picket lines, rendering the strike ineffective.

Managers and replacement workers are not covered by this ERA provision. Yet managers and replacement workers have been found engaging in violent, physically threatening, or verbally threatening behavior near picket lines. In fact, CWAers wear red on Thursdays to commemorate a member who was killed on a picket line when a manager's daughter broke through a picket line with a car and struck him. Sometimes this replacement worker or manager behavior is used to bait picketers into responding, perhaps in hopes of obtaining an injunction against the picket lines. And now this behavior can be used to bait picketers into responding so that strikers will spend 10 years in jail. This lopsided provision renders strikers even more vulnerable to violence or threats of violence.

Finally, ERA includes a provision that would apply the Hobbs Act – a federal criminal law outlawing extortion – to unions' legitimate objectives. In *U.S. v. Enmons*, the Supreme Court exempted unions pursuing legitimate objectives from the Hobbs Act. It did so for good reason: the

Hobbs Act broadly defines extortion as inducing a victim to give up property wrongfully using reasonable fear of physical injury or economic harm in a way that actually or potentially affects interstate commerce. Consider a strike. It has a legitimate objective: a collective bargaining agreement. That collective bargaining agreement, however, may involve the employer paying more in wages and benefits to employees than it otherwise would (giving up property). An economic strike or threat of an economic strike may be intended to make the employer afraid of economic harm, if not experience economic harm. And a strike is nearly always going to affect interstate commerce. But because federal law gives unions the right to strike, the Supreme Court found that the use of reasonable fear of economic harm could not be "wrongful" when a union was pursuing legitimate objectives. By specifically stating that the lawfulness of a union's objective shall not remove or exempt its conduct from the definition of extortion, ERA potentially turns otherwise lawful strikes into federal crimes and weakens unions' ability to win higher wages, better benefits, and improved working conditions for workers.

While these three bills are relatively short, they are packed with malicious intent. Their goal is to weaken or eliminate unions, full stop. I've attempted to explain the how. The more interesting question is:

### Why?

Why would anyone want to weaken or eliminate unions altogether from the American landscape? These bills are part and parcel of a coordinated assault by wealthy interests on workers' rights around the country, here in Congress, in state houses, and in the courts. Why the attack?

Is it because unions allow workers to exercise their real bargaining strength so that they may insist on their fair share of the wealth they help create, raising wages, obtaining benefits, protecting health and safety?

Is it because unions are an effective and organized voice for workers' interests in the political and legislative realm, winning or helping win minimum wage increases, health and safety laws, paid leave, civil rights protections, and so on?

Is it because super wealthy interests have ideological dreams of cutting taxes on the rich, eliminating regulatory protections for working people, and eliminating any safety net – and unions tend to stand in the way of that dystopia?

I urge the subcommittee to reject these bills. Thank you for the opportunity to testify.