

TESTIMONY BEFORE THE HOUSE COMMITTEE ON EDUCATION AND LABOR,
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The Protecting the Right to Organize Act: Modernizing America's Labor Laws

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Madame Chair Wilson, Ranking Member Walberg, and Members of the subcommittee, thank you for the opportunity to testify today about the need to expand the protections of labor law, and to ensure that workers and unions can robustly exercise their First Amendment rights to engage in peaceful collective action.

My name is Charlotte Garden, and I am an Associate Professor at Seattle University School of Law, where I teach labor law and constitutional law. My research focuses mainly on labor law, including the treatment of unions' and of workers' collective action under the First Amendment.¹

I. Introduction

As this subcommittee has already heard during previous hearings on the PRO Act, the National Labor Relations Act has fallen short of its promise to restore to workers equality of bargaining power and full freedom of association. My testimony today focuses on two reasons the NLRA falls short of those ideals. First, the NLRA curtails workers' and unions' rights of free speech, association, and assembly by prohibiting certain "secondary" protests – that is, picketing, boycotts, and strikes aimed at pressuring businesses and individuals not to do business with an employer with whom the union has a labor dispute.² Second, it allows businesses that exercise meaningful control over employees' wages and working conditions to escape responsibility for bargaining over those conditions by defining too broadly who is an independent contractor, and too narrowly who is a joint employer.

These two problems are illustrated by a single case recently decided by the National Labor Relations Board – *Preferred Building Services*.³ The events that gave rise

¹ See Charlotte Garden & Joseph Slater, *Comments on Restatement of Employment Law (Third), Chapter 1*, 21 EMPLOYEE RTS. & EMP. POL'Y J. 265 (2017); Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205 (2017); Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323 (2016); Charlotte Garden *Meta Rights*, 83 FORDHAM L. REV. 855 (2014); Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1 (2011); Charlotte Garden, *Labor Values are First Amendment Values: Why Union Comprehensive Campaigns are Protected Speech*, 79 FORDHAM L. REV. 2617 (2011).

² See Howard Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962).

³ 366 NLRB No. 159 (Aug. 28, 2018). The facts in this section are drawn from the decision of the NLRB, and the decision of the Administrative Law Judge, which the NLRB ultimately reversed. This case is currently pending review in the United States Court of Appeals for the Ninth Circuit, Case No. 19-70334.

to *Preferred* began when a small group of janitors who worked cleaning office buildings in San Francisco sought to improve their working conditions. They began by meeting with leaders of a workers' advocacy group, and then with a labor union. During those meetings, they disclosed that the owner of the company they worked for, Rafael Ortiz, had made sexually explicit comments, including suggesting to one employee that he would pay her more if she would have sex with him.⁴ The workers also explained that while their work was very physically demanding, they were paid the minimum wage.

Ortiz's company, OJS, was the entity that issued the workers' paychecks. But all of OJS's work was subcontracted from Preferred Building Services, a larger janitorial company that had significant involvement in and influence over OJS's operations. The employees involved in this case were assigned to clean an office building that was managed by a third company, Harvest.

To call attention to their situation, the OJS employees picketed outside the building where they worked. They held signs with slogans such as "We Prefer No More Sexual Harassment." They also distributed handbills that explained their situation in more detail, and called on a building tenant "to take corporate responsibility in ensuring that their janitors receive higher wages, dignity on the job, respect, their rights to sick pay and workers compensation, and full legal protections against sexual harassment and retaliation for asserting their rights."⁵

Unsurprisingly, the building manager (Harvest) and some of the tenants were concerned or upset about the workers' allegations, and later testimony before an administrative law judge reflected that Harvest asked Preferred to investigate the allegations, and to exclude Ortiz from the building while the investigation was ongoing. In response, Preferred cancelled its contracts with both Harvest and OJS. Soon thereafter, Ortiz fired the workers who had protested their treatment by him.

The workers filed a complaint with the NLRB, alleging that they were fired because of their protected concerted activity. The Administrative Law Judge agreed; her recommendation was that the Board should find that Preferred and OJS were joint employers of the workers, that both had violated the NLRA, and that at least two of the workers should be immediately reinstated, among other remedies.

The NLRB disagreed. It concluded that even though it did not "condone the abhorrent conduct in which the picketers alleged Ortiz engaged," the employees lost the NLRA's protection because their picketing violated the NLRB's bar on secondary conduct. That is, the Board thought the employees' goal "was to pressure Harvest, a neutral employer, to cease doing business with Preferred, unless it increased wages for janitorial employees working in that building and removed Ortiz."⁶

To say the least, it is counterintuitive that labor law would not protect workers' picketing to improve fundamental working conditions, such as the right to work free from sexual harassment. But it is generally an unfair labor practice for a union to picket or use other tactics that the Board deems to be "coercive" where the union's goal is "forcing or

⁴ Ortiz denied making these comments, but the Administrative Law Judge who heard the case credited the employee's allegations, and did not credit Ortiz's denial. 366 NLRB No. 159 at *16 notes 31 & 33.

⁵ Id. at *2.

⁶ Id. at *5 note 21.

requiring” any person to stop dealing with an employer with which the union has a labor dispute. And while statutory language like “coerce,” “force,” and “require” may sound like high bars, those terms are sometimes interpreted to cover even persuasive union speech that should be at the core of First Amendment protections for picketing and protest.

That interpretation of the statutory language, to reach picketing that the Board thought would merely “pressure” Harvest to end its contractual relationship with Preferred,⁷ drove the Board’s analysis in that case. But the NLRA’s secondary activity ban impedes effective union organizing and protest, and it is in tension with the First Amendment even when it is interpreted to cover a smaller range of union activity. Further, while *Preferred* involved an employer’s affirmative defense to an unfair labor practice charge, engaging in unlawful secondary activity is also a union unfair labor practice that carries the risk of fines and injunctions.⁸

The *Preferred* case also illustrates how workplace “fissuring”⁹ stymies labor organizing.¹⁰ Consider a counterfactual scenario in which Harvest employed its janitors directly – a practice that was more common in the past than it is now – and one of those janitors was harassed by a supervisor. In that scenario, the employees could have decided to picket in front of the building where they worked without any suggestion that they were engaged in unlawful secondary activity; in that case, the NLRA would have protected them from employer retaliation. In other words, it is only because Harvest decided to contract for janitorial services instead of hiring janitors directly that the NLRA’s secondary activity provision was implicated in *Preferred Building Services* at all.

Over recent decades, it has become more common for large companies to divest themselves of employment relationships with workers who provide services that are crucially important, but that are not the core of the enterprise’s business – janitorial and transportation services are often fissured, but they are far from the only examples.¹¹ This trend has a host of bad consequences for workers (and especially for low-wage workers), including that labor law often does not recognize as the employer of a group of employees the entity with the most power over their wages and working conditions. In my remaining testimony, I discuss these issues in more detail.

II. Workers’ Collective Action & Secondary Activity

⁷ Id. at *5 (“[t]he fact remains that an object of the picketers was to pressure Harvest, a neutral employer, to cease doing business with Preferred unless it increased wages for janitorial employees working in that building and removed Ortiz”).

⁸ 29 U.S.C. § 160(l).

⁹ This term was coined by former Department of Labor Wage & Hour Administrator David Weil in his book, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

¹⁰ The workers who were eventually fired for protesting sexual harassment and low pay were employed by OJS, but Preferred exercised enough control over their day-to-day working conditions for the ALJ to conclude that Preferred qualified as a “joint employer” that could be held responsible for remedying unfair labor practices. The NLRB declined to decide whether OJS and Preferred were joint employers of these workers, but it has attempted to cut back on the scope of joint employer liability in other cases. See *Hy-Brand Industrial Contractors*, 362 NLRB No. 186 (2015).

¹¹ David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 *ECON. & LAB. RELATIONS REV.* 33 (discussing fissuring in different industries).

Since 1947, the National Labor Relations Act has placed significant constraints on workers' and unions' abilities to engage in collective action in solidarity with each other – so-called “secondary” activity. The NLRA’s current prohibition on secondary activity is contained in section § 8(b)(4).¹² This statutory language is not a model of clarity – the NLRB’s own website calls it “mind-numbing” – but it contains two main prohibitions. First, it is an unfair labor practice for a labor union to “engage in, or to induce or encourage” anyone to strike in support of a prohibited goal. Second, it is also an unfair labor practice for a union to “threaten, coerce, or restrain any person engaged in commerce” in support of a prohibited goal. Prohibited goals include “forcing or requiring any person to . . . cease doing business with any other person.”¹³

It is possible to read § 8(b)(4) as restricting a significant amount of union speech. Some of the most restrictive possible readings are foreclosed by three “provisos” contained within the Act itself – these state that § 8(b)(4) does not “make unlawful, where not otherwise unlawful, any primary strike or primary picketing,” nor does it “make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved [by a certified union],” nor does it cover “publicity, other than picketing” that is aimed at “truthfully advising the public” of a primary labor dispute.

In general, then, one can think of § 8(b)(4) as covering two types of union protest. First, it prohibits secondary strikes – those in which employees strike to pressure their employer to stop doing business with another employer with whom a union has a labor dispute – plus speech that could be construed as inducing or encouraging a secondary strike. Second, it prohibits unions from calling for secondary boycotts using tactics that qualify as “coercion” or “restraint.” The Act does not define either of these words, but its text and legislative history indicate that Congress viewed at least some picketing as coercive. As a result, whether a particular union protest tactic qualifies as “picketing” continues to take on outsize importance in NLRB and court cases.

A. Section 8(b)(4) Raises Serious First Amendment Questions

The Supreme Court has recognized that § 8(b)(4) implicates unions’ First Amendment rights. For that reason, the Court has on multiple occasions construed the statute narrowly to avoid having to decide whether it is unconstitutional, either on its face or as to particular applications.¹⁴ But even with these limiting interpretations, § 8(b)(4) is

¹² 29 U.S.C. § 158(b)(4).

¹³ Other prohibited goals include “forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into [a hot cargo agreement]”; and “forcing or requiring any other employer to recognize or bargain with a labor organization . . . unless such labor organization has been certified as the representative” of the employer’s employees.

¹⁴ Portions of the discussion on this page and the next are drawn from my forthcoming law review article. Charlotte Garden, *Avoidance Creep*, – PENN. L. REV. – (forthcoming 2019). Many other law review articles have also analyzed and called into question the constitutionality of § 8(b)(4). See, e.g., Michael J. Hayes, *It’s Now Persuasion, Not Coercion: Why Current Law on Labor Protest Violates Twenty-First Century First Amendment Law*, 47 HOFSTRA L. REV. 563 (2018); Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845 (2018); Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277 (2015); Kate L. Rakoczy, *On Mock Funerals, Banners, and Giant Rat Balloons: Why Current Interpretation of Section 8(B)(4)(II)(B) of the National Labor Relations Act Unconstitutionally Burdens Union Speech*, 56 AMERICAN U. L. REV. 1621 (2007); James G.

in tension with more recent First Amendment cases in which the Supreme Court has made clear that speaker- and content-based restrictions on speech are presumptively invalid.¹⁵

In the 1964 case *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760* (“*Tree Fruits*”),¹⁶ the Court considered whether § 8(b)(4) prohibited union picketing in support of a call for consumers not to buy a specific product (apples grown in Washington state) when shopping at the grocery store, where the union was clear that it was not calling for a boycott of the store as a whole.¹⁷ The Court concluded that while the picketing may have fallen “literally within the statutory prohibition,”¹⁸ the statute should be read to allow the union’s picketing in order to avoid First Amendment concerns.

More than twenty years later, the Court held that the statute did not prohibit a union’s secondary handbilling for much the same reason. In *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,¹⁹ the Court decided § 8(b)(4) did not prohibit a building trades union from distributing handbills to mall customers, asking them to boycott the entire mall in reaction to a department store’s decision to employ non-union contractors.

However, between *Tree Fruits* and *DeBartolo*, the Court upheld the basic constitutionality of § 8(b)(4). In 1980, the Court held in *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*,²⁰ that the *Tree Fruits* exception for picketing in support of a consumer boycott of a struck product did not apply when the product constituted “substantially all” of the picketed store’s business. Although there was not a majority opinion in the case, six justices agreed that § 8(b)(4) was constitutional.²¹ In a later case, a unanimous Court agreed that the statute was constitutional because the “labor laws reflect a careful balancing of interests”²²

Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189 (1982).

¹⁵ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (“[i]n the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint discriminatory”).

¹⁶ 377 U.S. 58 (1964) (holding that “[t]he prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(i) carries no unconstitutional abridgment of free speech”).

¹⁷ *Id.* at 59. The Court treated the sandwich boards, worn by union members at Safeway stores in Seattle, WA, as pickets. They read “TO THE CONSUMER: NON-UNION WASHINGTON STATE APPLES ARE BEING SOLD AT THIS STORE. PLEASE DO NOT PURCHASE SUCH APPLES. THANK YOU. TEAMSTERS LOCAL 760, YAKIMA, WASHINGTON.” *Id.* at 60 n.3.

¹⁸ *Id.* at 71.

¹⁹ 485 U.S. 568 (1988).

²⁰ 447 U.S. 607 (1980).

²¹ In an opinion joined by Chief Justice Burger and Justices Stewart and Rehnquist, Justice Powell wrote that there was a “well-established understanding” that § 8(b)(4) was constitutional, relying in part on *Tree Fruits* and writing that secondary picketing “spreads labor discord by coercing a neutral party to join the fray.” 447 U.S. at 616. Justice Blackmun concurred, writing that he was “reluctant to hold unconstitutional Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.” *Id.* at 617-18. Justice Stevens also concurred, stating that § 8(b)(4) was a restriction on “the conduct element [of picketing] rather than the particular idea being expressed.” *Id.* at 619.

²² *International Longshoremen’s Ass’n v. Allied International, Inc.*, 456 U.S. 212, 226 (1982) (citing *Safeco*, 447 U.S. at 617 (Blackmun, J., concurring)).

However, the Court has also held that secondary consumer boycotts are protected by the First Amendment. *NAACP v. Claiborne Hardware Co.*²³ involved a civil rights group rather than a labor union: a group of African Americans living in and around Claiborne County, Mississippi, backed by the NAACP, voted to maintain a boycott of local businesses in order to pressure local government to proceed with desegregation of schools and other public facilities, among other demands. In response, merchants sued the NAACP and several individuals, alleging violations of state statutory and common law, including a state prohibition against secondary boycotts. The Supreme Court held that “the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments.”²⁴ And, the Court continued, “[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.”²⁵

The *Claiborne Hardware* Court distinguished § 8(b)(4), citing the “delicate balance” rationale.²⁶ But that rationale is increasingly out-of-step with the Court’s approach to the First Amendment. While the Supreme Court has not addressed the constitutionality of § 8(b)(4) in the three decades since *DeBartolo*, it has repeatedly affirmed that picketing is at the core of the First Amendment’s protection, striking down restrictions on picketing and public protest in other contexts. In *Snyder v. Phelps*,²⁷ eight justices agreed that the Westboro Baptist Church’s highly offensive picketing at a soldier’s funeral was pure speech at the very heart of the First Amendment, writing that “picketing peacefully on matters of public concern . . . occupies a ‘special position in terms of First Amendment protection.’”²⁸ Later, in *McCullen v. Coakley*,²⁹ the Court emphasized that the government’s authority to regulate protests in traditional public fora, including sidewalks, was “very limited,” and that laws that regulated protest based on its content or viewpoint should be subject to strict scrutiny.³⁰ And in *Virginia v. Black*, the Court wrote that even cross-burning could qualify as “core political speech,” although it also allowed that states could criminalize cross burning with an intent to intimidate.³¹

In addition, the Supreme Court has recently emphasized that speech restrictions are suspect when they turn on the identity of the speaker. For example, in *Sorrell v. IMS Health*, the Court struck down a Vermont law prohibiting the use of information about physicians’ prescribing practices by pharmaceutical marketers, but not by other speakers.³² The Court in *Citizens United v. FEC* also condemned “categorical distinctions based on the corporate identity of the speaker and the content of the political speech.”³³

²³ 458 U.S. 886 (1982).

²⁴ *Id.* at 907.

²⁵ *Id.* at 910.

²⁶ *Id.* at 912 (quoting *Safeco*, 447 U.S. at 617-18 (Blackmun, J., concurring in part)).

²⁷ 562 U.S. 443 (2011).

²⁸ *Id.* at 456 (quoting *US v. Grace*, 461 U.S. 171 (1983)).

²⁹ 573 U.S. 464 (2014).

³⁰ *Id.* at 477.

³¹ 538 U.S. 343, 365 (2003).

³² 564 U.S. 552, 564 (observing that “the statute disfavors specific speakers, namely pharmaceutical manufacturers”).

³³ 558 U.S. 310, 364 (2010).

Yet § 8(b)(4) discriminates based on the identity of the speaker, as well as the content or viewpoint of the message being expressed. A hypothetical, constructed by Professor James Pope, illustrates why this is true.³⁴ In this hypothetical, there are three people holding picket signs outside a store. The first two signs bear nearly identical messages, asking customers to boycott the store because it sells a toy produced by non-union labor in exploitative working conditions – but one sign is held by a union organizer, and the other by a human rights activist. The third sign, carried by a store employee, urges customers to buy the toy by advertising its low price – a price that is likely possible because of the exploitative working conditions. In this situation, only the unionist risks liability under § 8(b)(4); the human rights activist has engaged in core First Amendment activity similar to that in *Claiborne Hardware*, and the store employee’s sign is protected under the Court’s commercial speech doctrine.

As the *IMS Health* Court indicated, speaker- and content-based speech restrictions must at least survive “heightened” scrutiny, which requires that “the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.”³⁵ Viewpoint-based discrimination requires even more rigorous review.³⁶

But the legislative justification for § 8(b)(4) that was advanced when it was enacted in 1947 is anachronistic today. As the Supreme Court has described, § 8(b)(4) was enacted “to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict: the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusal to handle goods.”³⁷ As Professor Catherine Fisk has explained, Congress might reasonably have viewed unions’ calls for secondary strikes as coercive when it was true that “[c]rossing a picket line could result in a worker losing union membership and, consequently, the ability to work in a densely unionized industry.”³⁸ But today (and for the last several decades), union density is considerably lower than it was when Congress adopted § 8(b)(4), and in any event, “[n]o worker can lawfully be prevented from working for crossing a picket line or refusing to serve picket duty.”³⁹ Instead, today’s labor protest is exemplified by the OJS workers, who relied on the persuasiveness of their message about fair treatment and respect at work.

³⁴ James Gray Pope, *the First Amendment, The Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 950-50 (1999).

³⁵ 564 U.S. at 572; *see also* Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015) (“Content-based laws – those that target speech based on its own communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

³⁶ Town of Gilbert, 135 S.Ct. at 2230 (“Government discrimination among viewpoints . . . is a ‘more blatant’ and ‘egregious form of content discrimination’”) (citation omitted).

³⁷ Local 1976, United Bhd. of Carpenters & Joiners of America v. NLRB, 357 U.S. 93, 100 (1958).

³⁸ Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2080-81 (2018).

³⁹ *Id.* at 2081.

Moreover, the Taft-Hartley Congress’s description of neutral employers as “the helpless victims of quarrels that do not concern them at all”⁴⁰ is inapt in today’s world of interconnected supply chains and contracting arrangements.⁴¹ Instead, as *Preferred Building Services* illustrates, secondary employers can wield significant control over working conditions of their contractors’ employees. For example, consider a janitorial contractor that has one large contract with a hotel chain. If the hotel chain threatens to find a new janitorial service unless it can renegotiate its contract at a lower price, the service may acquiesce – and then in turn cut its workers’ pay, or lay some workers off and demand that others pick up the slack by working faster. In this situation, it is the hotel chain that has the most power to improve the workers’ situations. Yet as *Preferred Building Services* shows, the hotel could be deemed a secondary target, restricting the janitorial workers’ abilities to engage in peaceful picketing aimed at hotel guests or employees.

B. Recent NLRB Decisions Interpreting § 8(b)(4) Exacerbate the Statute’s Fundamental Problems

As the Supreme Court has become increasingly protective of First Amendment rights, including those of corporations and unions, the constitutionality of § 8(b)(4) is even more doubtful than it was when the Court decided *DeBartolo* more than thirty years ago. Given that reality, some recent NLRB cases have proceeded carefully when deciding whether particular instances of union conduct violate § 8(b)(4). For example, in cases decided in 2010 and 2011, the NLRB held that stationary banners and large inflatable rats were not equivalent to “pickets,” nor were they inherently coercive.⁴² Similarly, in *Sheet Metal Workers’ International Association v. NLRB*,⁴³ the DC Circuit relied on recent First Amendment cases to hold that a mock funeral procession was not coercive.

More recently, however, the NLRB and General Counsel have taken the opposite approach, relying on the statute’s capacious language to assert that a broader range of union activity violates § 8(b)(4). For example, in recent months the Board’s General Counsel has pursued several cases arguing that unions’ use of inflatable rats and other animals either qualifies as picketing or is otherwise coercive, and that these balloons violate § 8(b)(4) when used for a secondary purpose.⁴⁴ In one recent case the General Counsel’s office argued that a “huge, menacing inflatable rat placed near a business entrance thus inherently conveys a threatening and coercive message that will restrain a person.”⁴⁵ To be clear, this effort is unlikely to succeed in the long term; multiple courts

⁴⁰ H.R. Rep. No. 245 (1947) (quoted in *Allied Int’l*, 456 U.S. at 225).

⁴¹ See generally, Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845 (2018).

⁴² United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506 & Eliason & Knuth of AZ, Inc., 355 NLRB 797, 798 (2010) (stationary banners did not violate § 8(b)(4)); *Sheet Metal Workers Int’l Ass’n, Local 15*, 356 NLRB 1290 (2011) (“Brandon II”).

⁴³ 491 F.3d 429, 439 (D.C. Cir. 2007).

⁴⁴ See *King v. Construction & General Building Laborers’ Local 79*, Case No. 1:19-cv-03496, 2019 WL 2743839 (E.D.N.Y. July 1, 2019); *IUOE Local 150*, Case 25-CC-228342, 2019 WL 30739999 (NLRB Div. of Judges, July 15, 2019); *IBEW, Local 98 (Shree Sai Siddhi Spruce)*, Case 04-CC-223346, 2019 WL 2296952 (NLRB Div. of Judges, May 28, 2019). See also NLRB Office of the General Counsel, Advice Memorandum, Case 13-CC-225655 (Dec. 20, 2018).

⁴⁵ Counsel for the General Counsel, National Labor Relations Board, Fourth Region, *IBEW Local 98 & Shree Sai Siddhi Spruce LLC*, Case 04-CC-223346 (July 16, 2019), available at <http://src.bna.com/JZG>.

have already held that the use of inflatable rats is not in itself coercive, and is protected by the First Amendment.⁴⁶ But even an unsuccessful § 8(b)(4) charge can be disruptive, redirecting union resources away from supporting workers and towards defensive litigation.

Similarly, the Board has held that workers' protest violates § 8(b)(4) in cases that are marginal at best – in other words, in cases that should call for the Board to exercise restraint in light of the constitutional values at stake. *Preferred Building Services* is one such case, though it is not the only example.⁴⁷ First, the *Preferred* Board rejected the employees' argument that their picketing was protected because it was consistent with a case called *Moore Dry Dock*.⁴⁸ Under *Moore Dry Dock*, unions are entitled to a rebuttable presumption that their picketing at a job site where both primary and secondary employers are present does not have an unlawful secondary purpose, as long as the picketing satisfies four criteria.⁴⁹ The disputed criteria in *Preferred* was whether the employees' picketing disclosed that their dispute was with Preferred, and not the either the office building's property manager (Harvest), or its tenants. Although the employees' picket signs did state that Preferred was the target of the labor dispute, the Board concluded that the employees' disclosure was not clear because their handbills requested that a building tenant "ensure 'their' janitors obtain better working conditions."⁵⁰ Then, the Board wrote that it would still find a prohibited secondary goal even if the employees had satisfied the *Moore Dry Dock* criteria, because the picketers told a Harvest representative that they wanted Ortiz to stop working in the building for which Harvest was the property manager, and that they would keep picketing until their wages were improved. (This message was conveyed during a meeting; there was no suggestion that the employees or anyone else at the meeting threatened violence.) Finally, the Board's last reason for finding that the employees had a prohibited secondary goal was that "neutral tenants were 'upset'" by the picketing.

⁴⁶ *Tucker v. City of Fairfield, OH*, 398 F.3d 457, 462 (6th Cir. 2005) ("[i]n our view, there is no question that the use of a rat balloon to publicize a labor protest is constitutionally protected expression within the parameters of the First Amendment, especially given the symbol's close nexus to the Union's message."); *Constr. & Gen. Laborers' Local Union No. 33 v. Town of Grand Chute*, 834 F.3d 745 (7th Cir. 2016) (Posner, J., concurring and dissenting) ("[t]here is no doubt that the large inflated rubber rats widely used by labor unions to dramatize their struggles with employers are forms of expression protected by the First Amendment").

⁴⁷ Another example arose in *IBEW Local 357 & Desert Sun Enterprises Ltd.*, 367 NLRB No. 61 at *2 (Dec. 27, 2018). In this case, the Board applied a line of cases to hold that a union violated § 8(b)(4) simply by notifying a neutral employer that it intended to picket a worksite that the neutral shared with an employer with whom the union had a labor dispute. The Board wrote that "such a notice is ambiguous about whether the threatened picketing will lawfully target only the primary employer or will unlawfully enmesh the neutral employer," because "[t]he neutral would understandably question why the union is ending a strike notice to an employer with no role in the dispute." As Member McFerran pointed out in her dissent, this rule "flies in the face of common sense," not least because it can render unlawful a union's advance warning of picketing that itself does not violate the NLRA.

⁴⁸ *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950).

⁴⁹ The criteria are: "(a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer." *Id.* at 549-51.

⁵⁰ *Preferred Building Services*, 366 NLRB No. 159 at *4.

In other words, the Board interpreted § 8(b)(4) in a way that raises serious First Amendment and other questions. First, whether or not the OJS employees were entitled to the *Moore Dry Dock* presumption apparently turned on their use of the pronoun “their”; perhaps if they had requested that the building tenant take steps to ensure that “Preferred’s” janitors received higher wages, the Board would have found the presumption applied. But workers’ and unions’ collective action is chilled when their rights turn on this kind of post-hoc flyspecking. The Board’s second reason is tantamount to forcing workers and unions into a choice between two permissible tactics – either they can engage in “common situs” picketing as contemplated in *Moore Dry Dock*, or they can non-coercively ask a secondary employer to stop doing business with a struck employer.⁵¹ But under *Preferred’s* reasoning they cannot do both, because then the second tactic will be used as evidence that the common situs picketing actually had an impermissible goal. And the Board’s third reason – that some building tenants who saw the picketing then felt upset – is inconsistent with the recent Supreme Court’s recent observation that “the fear that speech might persuade provides no lawful basis for quieting it.”⁵²

While I believe the Board’s decision in *Preferred Building Services* is incorrect even under current law, it also reflects at least three fundamental and intractable problems with the statute itself:

1. The NLRA’s bar on secondary activity places workers and unions at a profound disadvantage, and that disadvantage is exacerbated when employers divest themselves of labor law obligations to groups of employees through subcontracting arrangements.
2. Even a narrow interpretation of § 8(b)(4) raises serious First Amendment problems, and those problems have only deepened in recent years.
3. Decades of court decisions interpreting the statute – including cases narrowing § 8(b)(4)’s application in an attempt to avoid constitutional problems – mean that workers or unions cannot reliably discern what they may and may not do simply by reading the statute. It is difficult for anyone who is not a labor lawyer to know what is allowed and what is not under § 8(b)(4) – a state of affairs that itself chills workers’ collective action.

Section 8(b)(4)’s problems are too fundamental to be resolved through tinkering with the statutory language. The PRO Act’s approach – excising this provision as well as the restriction on “recognitional” picketing in NLRB § 8(b)(7) – is the correct one.

III. Workplace Fissuring

Companies have available a list of mechanisms that allow them to avoid the legal obligations they would otherwise owe their workforces under laws including the NLRA. These include classifying workers as independent contractors and subcontracting. As David Weil has detailed in his book *The Fissured Workplace*, the fact that a company has engaged in one of these practices does not lessen its former employees’ interests in bargaining collectively with their former employer. To the contrary, fissured companies

⁵¹ NLRB v. Servette, 377 U.S. 46 (1964).

⁵² IMS v. Sorrell, 564 U.S. 552, 576 (2011).

often maintain effective control over the wages and day-to-day working conditions of their former employees.

The PRO Act protects workers' abilities to bargain with the entities that effectively determine their wages and working conditions in at least two ways. First, it prevents worker misclassification by adopting a clear test – the “ABC test”⁵³ – that is aligned with the NLRA’s purpose. Second, it codifies a definition of “joint employer” that asks whether a given company has retained control over employees’ wages and working conditions, irrespective of whether the putative joint employer has already exercised that control, and of whether they exercise control directly or indirectly.

A. Distinguishing Employees From Independent Contractors

The NLRA has explicitly excluded independent contractors from coverage since the 1947 Taft-Hartley Act, but it does not define that term.⁵⁴ In 1968, the Supreme Court held that common-law agency principles – originally developed to assess when a “master” should be held responsible for torts committed by their “servant” – should apply.⁵⁵ This approach calls for the Board to weigh the following non-exhaustive list of factors set out in the Restatement (Second) of Agency § 220:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business

The Restatement does not specify how much weight each factor should receive, and the NLRB and the courts have adopted different (and sometimes contradictory) views

⁵³ Under this test, “[a]n individual performing any service shall be considered an employee . . . and not an independent contractor, unless – (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of the service and in fact; (B) the service is performed outside the usual course of the business of the employer; and (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.”

⁵⁴ 29 U.S.C. § 152(3).

⁵⁵ NLRB v. United Ins. Co. of America, 390 U.S. 254 (1968).

about whether one factor is first among equals since the Supreme Court’s decision in *United Insurance*. However, in its 1998 decision, *Roadway Package System, Inc.*, the NLRB held that no single factor predominated over others; in particular, the Board rejected the contention that the most important issue in distinguishing an employee from an independent contractor was the degree of control that the putative employer exercises over how the putative employee does their work.⁵⁶

The DC Circuit took a different view in its 2-1 decision in *FedEx Home Delivery v. NLRB* (“*FedEx I*”), writing that “while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors . . . is whether the position presents the opportunities and risks inherent in entrepreneurialism.”⁵⁷ Applying this entrepreneurialism lens, the DC Circuit then rejected the NLRB’s conclusion that FedEx drivers were employees. This was in part because drivers could use the trucks they used for FedEx deliveries for other deliveries, “so long as they remove or mask all FedEx Home logos and markings,” and because drivers could hire employees to service multiple routes or help with a single route, or contract their routes to another person. But the dissent in *FedEx Home Delivery* observed that for most drivers, these opportunities were only theoretical because of contractual and practical constraints imposed by the company.⁵⁸

In a later case involving a different set of FedEx drivers (*FedEx II*), the NLRB disagreed with the DC Circuit’s view of Board precedent in *FedEx I*, writing that “the Board should give weight to actual, but not merely theoretical, entrepreneurial opportunity, and it should necessarily evaluate the constraints imposed by a company on the individual’s ability to pursue this opportunity.”⁵⁹ Then, considering the Restatement of Agency factors and drivers’ actual entrepreneurial opportunities, it again concluded that the drivers were employees, and not independent contractors. The DC Circuit denied enforcement, relying on its decision in *FedEx I*.⁶⁰

Earlier this year, the NLRB overruled its earlier decision in *FedEx II*. In *SuperShuttle DFW, Inc.*, the Board adopted the DC Circuit’s reasoning in *FedEx I*, and held that “the Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate.”⁶¹ The Board then held that SuperShuttle drivers were independent contractors, largely because “SuperShuttle has little control over the means and manner of the franchisees’ performance while they are actually driving and that SuperShuttle’s compensation is not related at all to the amounts of fares collected by the franchisees, and conversely, that these facts provide franchisees with significant entrepreneurial opportunity.”⁶² Dissenting, Board Member McFerran emphasized the disconnect between the factors listed in the Restatement of Agency and the Board’s

⁵⁶ 326 NLRB No. 72 (1998).

⁵⁷ 563 F.3d 492, 497 (D.C. Cir. 2009) (*FedEx I*) (citing *Corporate Express Delivery Sys.*, 292 F.3d 777 (D.C. Cir. 2002)).

⁵⁸ Id. at 513-16 (Garland, J., dissenting).

⁵⁹ *FedEx Home Delivery*, 361 NLRB No. 55 (2014) (*FedEx II*).

⁶⁰ *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (2017).

⁶¹ 367 NLRB No. 75 (2019).

⁶² Id. at *14.

reliance on entrepreneurial opportunity – a concept that is not listed among the Restatement factors.

Even if one disregards this disagreement about whether “entrepreneurial opportunity” is somehow contained within the Restatement of Agency factors, the Board’s experience over the last several decades has proven that those factors are an inadequate method of determining which workers will be protected by labor law. The factors are simply too indeterminate, and that reality in turn allows gamesmanship by employers.

The Supreme Court observed in 1944 that “[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.”⁶³ The ensuing decades have not yielded more clarity, as the multi-year tug-of-war about whether FedEx drivers are employees reflects. This is in part because businesses face competing incentives: to avoid incurring obligations under the NLRA and other statutes; and to control how their workers do their jobs. The result is that even some law-abiding employers will structure workers’ jobs so that they will fall close to the line between independent contractor and employee status. (Unscrupulous employers will deliberately misclassify workers, knowing that a combination of weak NLRB remedies and individual arbitration clauses mean that they will be unlikely to face serious consequences.)

The growth of the “sharing” or “platform” economy reflects these dynamics, as well as other difficulties associated with applying the Restatement factors in new contexts. For example, a recent advice memorandum by the NLRB’s General Counsel concludes that UberX drivers are independent contractors.⁶⁴ The General Counsel relied primarily on a determination that “[o]n any given day, at any free moment, drivers could decide how best to serve their economic objectives: by fulfilling ride requests through the [Uber] App, working for a competing ride-share service, or pursuing a different venture altogether.” But while it is true that Uber and similar platforms do not require drivers to drive in particular locations or during set shifts, their fare incentives can make it considerably more profitable for drivers to drive at certain times and in certain areas.⁶⁵ Transportation network companies like Uber also exercise control over drivers in other ways, such as unilaterally setting and adjusting their pay rates, and terminating drivers for reasons including that their average passenger rating has fallen below a certain threshold. Thus, while the General Counsel saw these incentives as opportunities for entrepreneurial judgment, one could also view them as an indirect way of asserting control over drivers, including where and when they work. Other disagreements of this sort abound; judges,

⁶³ NLRB v. Hearst Publications, 322 U.S. 111, 121 (1944).

⁶⁴ NLRB Office of the General Counsel, Advice Memorandum, Cases 13-CA-163062 et al. (Apr. 16, 2019).

⁶⁵ See Noam Scheiber, *How Uber Uses Psychological Tricks to Push its Drivers’ Buttons*, NY TIMES (April 2, 2017) (quoting law professor Ryan Calo’s observation that Uber is “using what they know about drivers, their control over the interface and the terms of transaction to channel the behavior of the driver in the direction they want it to go”).

administrative tribunals, and other commentators have filled hundreds of pages debating drivers' status since Uber and its competitors began operations.⁶⁶

The difficulty of applying the Restatement factors in close cases (and their attendant unpredictability) is not the only problem with the NLRA's current approach to employee classification. There is also the substance of those factors to consider: for example, some factors focus on how much agency workers have, and others on how much risk workers bear. This gives companies an incentive to try to thread the needle by shifting risk onto workers while retaining control for themselves; for example, ride-hail companies like Uber may attempt to offset the fact that they set customer fares with the fact that they require drivers to buy their own vehicles and indemnify the company.⁶⁷

Finally, the NLRA consequences to employers who misclassify workers are minimal, and companies can respond to a conclusion that their workers have been misclassified by adjusting their operations and restarting the litigation cycle. But the risks to potentially misclassified workers are much greater. Workers who wrongly believe that they are misclassified employees will not have access to NLRA reinstatement remedies if they are fired or disciplined for union organizing. Moreover, independent contractors face the possibility of liability under federal antitrust laws if they engage in collective action.⁶⁸

The PRO Act would end the NLRB's reliance on the indeterminate list of factors from the Restatement of Agency, and instead adopt what is commonly known as the "ABC test." There are three main advantages of this test. First, it consists of three relatively clear and easy-to-apply factors, and workers qualify as an independent contractors rather than employees only if each factor applies. This approach is self-evidently more straightforward and predictable than one that calls on the NLRB to balance (at least) ten factors as it sees fit. Second, for similar reasons, the ABC test is less amenable to manipulation by employers than the Restatement factors. Third, the ABC test is better aligned than the Restatement factors with the purpose of the NLRA: ensuring that workers who lack individual bargaining power – "actual liberty of contract"⁶⁹ – can bargain collectively.

B. Joint Employer

Two or more entities that together determine an employee's working conditions are "joint employers" of that employee. Temporary employment is the archetypical example; these workers are jointly employed by the temp agency that issues their paychecks and tells them where to report for work each morning, and the business that has contracted to receive their services and that directs and supervises their work. Joint employer status matters because only employers are required to bargain collectively with the union representative of a group of employees.

⁶⁶See, e.g., Charlotte Garden & Joseph Slater, *Comments on Restatement of Employment Law (Third), Chapter 1*, 21 EMPLOYEE RTS. & EMP. POL'Y J. 265, 295-96 (2017) (accumulating citations).

⁶⁷Id. at 6 ("Drivers' entrepreneurial independence is also apparent in contractual requirements that they indemnify Uber and hold it harmless for liability based on their own conduct.")

⁶⁸See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *Chamber of Commerce of the United States of America v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018).

⁶⁹29 U.S.C. § 151.

Whether an enterprise qualifies as a joint employer of a group of employees depends on whether the enterprise exercises sufficient control over the employees' working conditions. But there is disagreement over whether an entity should qualify as a joint employer if it exercises only indirect control over a group of employees – for example, by acting through an intermediary. A similar dispute concerns the status of entities that have reserved (but not actually exercised) the right to control aspects of employees' jobs.⁷⁰

The NLRB held in *Browning-Ferris Industries of California* that both indirect and reserved control are relevant to whether an entity is a joint employer,⁷¹ and that conclusion was affirmed by the DC Circuit. More recently, however, the NLRB has signaled its interest in reversing *Browning-Ferris*; in fact, the Board already reversed *Browning-Ferris*, but later withdrew the decision that did so.⁷² Second, the Board issued a Notice of Proposed Rulemaking; the proposed rule states that to be considered a joint employer, an entity must “possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment . . . in a manner that is not limited and routine.”

The PRO Act codifies the heart of *Browning-Ferris Industries of California* by stating that two or more entities can qualify as “joint employers” if “each such person codetermines or shares control over the employee's essential terms and conditions of employment. In determining whether such control exists, the Board . . . shall consider as relevant direct control and indirect control over such terms and conditions, reserved authority to control such terms and conditions, and control over such terms and conditions exercised by a person in fact.”

This approach is the right one for at least two reasons. First, it ensures that the “economic employer” – the entity that has practical control over wages and working conditions – is at the bargaining table. Second, if joint employer status were to turn on whether an entity has or has not exercised reserved control, then that entity's joint employer status could change depending on whether it happened to be exercising its control in a given time period, leaving workers to contend with substantial uncertainty.

Browning-Ferris Industries of California itself offers a good illustration of what is at stake for workers. The case involved a group of workers who were hired by a staffing company called Leadpoint Business Services, and assigned to work at a recycling center operated by BFI. Leadpoint signed the workers' paychecks, and hired and fired them, though it was required by its contract with BFI to ensure that the workers met certain qualifications. Leadpoint also scheduled workers, and handled discipline. But BFI determined which recycling conveyor belts would run each day and at what speed, and whether any would run overtime – which in turn determined how many Leadpoint workers would work on a given day. BFI also dictated that no Leadpoint worker should earn more than any BFI worker performing a similar task, and sometimes indicated that Leadpoint should discipline or fire particular workers.

⁷⁰ See *Browning-Ferris Industries of CA, Inc. v. NLRB*, 911 F.3d 1195, 1210 (DC Cir. 2018).

⁷¹ 362 NLRB 1599 (2015).

⁷² *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (Dec. 14, 2017).

In other words, Leadpoint and BFI shared control over many aspects of workers' wages and working conditions; even on issues over which Leadpoint had significant control, such as pay, BFI also exerted influence through how much it paid its own workers. Having both Leadpoint and BFI at the bargaining table meant that the workers could meaningfully bargain over issues of immediate concern to them, such as line speed. Had the Board instead concluded that BFI was not a joint employer of Leadpoint's workers, then bargaining on this point would have been futile: even if Leadpoint were willing to make concessions, it could not guarantee that BFI would agree. The result would have been, at best, a collective bargaining agreement that covered only some of workers' concerns, though the more likely result may have been no agreement at all.

IV. Conclusion

The PRO Act corrects a list of longstanding problems that have prevented workers from exercising their rights under the NLRA. Among them, it responds to modern workplace fissuring, ensuring that workers can meaningfully exercise their rights to engage in collective action both at and away from the bargaining table.

Thank you for the opportunity to testify.