Perhaps the most fundamental economic freedom Americans possess is the ability to control the provision of their own labor. Americans rightly cherish the freedom to chart their own career paths, to associate with whomever they choose (and be free from being forced to associate with those they do not choose), to pursue the career of their choice, and to negotiate the terms under which they will be employed. While labor unions played an important role in improving working conditions and rebalancing economic power between employers and workers in the first part of the 20th century, modern unions more often inhibit worker freedom and harm economic growth. Not coincidentally, private labor union membership has reached a nadir, declining to a mere 6.3% of the private-sector workforce in 2020 (union membership peaked at 35% in the 1950's)[1].

Rather than attracting members by becoming more responsive to workers' needs and desires, big labor unions are seeking to legally force workers to come back into their fold. To that end, unions are promoting the Protecting the Right to Organize Act (PRO Act)[2] , the most comprehensive re-write of the nation's labor laws in a generation. Currently, the PRO Act is waiting to be heard by the U.S. Senate Committee on Health, Education, Labor and Pensions. It recently passed in the U.S. House of Representatives 225 to 206. The PRO Act threatens states' right-to-work status as well as creating amendments to the NLRA placing new liabilities on employers, while giving unions more power.

WHAT IS A LABOR UNION?

Labor unions are associations allowing workers to negotiate with employers as one voice through collective bargaining. Unions often negotiate on behalf of members for benefits, like liability insurance, better working hours, working conditions and pay. Unions once served an important role in advancing working conditions for the American worker.

Unions are regulated by the National Labor Relations Act (NLRA) and its Board, the NLRB. The NLRA covers most employees regardless of union status and protects their right to unionize, should they choose to. The NLRB adjudicates complaints about unfair labor practices claimed by unions against employers to determine if there are violations of the NLRA. These adjudicated case decisions impact how an employer and a union can relate to each other and the union members/employees.

RIGHT-TO-WORK NO MORE

The PRO Act would eliminate states' right-to-work laws. There are 27 states with a right-to-work law, including Oklahoma. Right-to-work laws empower employees by ensuring they can freely choose whether or not to join a union. In Oklahoma[3], for example, it is illegal to compel a person to join or pay dues to a union as a condition of their employment. In states without right-to-work, union membership can be made mandatory or employees can be compelled to pay "agency fees" to a union—typically an amount nearly identical to union membership dues—to compensate the union for the supposed benefits the non-member employee reaps as a result of the union's collective bargaining efforts. The PRO Act effectively repeals right-to-work laws nationwide by allowing unions to include in their collective bargaining contracts provisions making state right-to-work laws inapplicable. This blocks workers from making their own choice about union representation and infringes on employees' freedom of association, in addition to trampling on the states' ability to set their own labor policies according to what the people of that state desire.

[1] U.S. Department of Labor, Bureau of Labor Statistics Union Members -- 2020
[2] H.R. 842
[3] Oklahoma Constitution Article 23 Section 1A

INCREASED LIABILITY FOR EMPLOYERS

INDEPENDENT CONTRACTORS

The PRO Act modifies the definition of an independent contractor to California's recently adopted (and highly controversial) ABC Test, which defaults workers to an employee status unless all the following apply:

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 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."[4]

The ABC Test upends the "gig" economy by treating independent operators (such as Uber drivers) as though they are employees of the platform through which they operate. By sweeping within its scope an extremely wide swath of independent contractors, the ABC Test will result in the unionization of workers never before thought to be appropriate for unionization. The ABC Test directly threatens the open, robust, and innovative gig economy. As it stands, the change in definition does not change any other independent contractor tests, for example, the IRS's definition, states' definitions, but it presents an opportunity for more interpretations to follow the stricter test.

JOINT EMPLOYMENT

Another section in the PRO Act would grow employer liability through the joint employer provision. The PRO Act would codify the NLRB's *Browning-Ferris* (BFI)[5] test for a joint employer relationship in subcontracting. The 2015 BFI decision reverted to a previous case law test dealing with the right to control: if both entities have some right to control essential working conditions, then there is a joint employer relationship. In 2020, through rulemaking, the Trump Administration redefined joint employer and overturned *BFI* by defining a joint employer as a business that has and exercises control over the conditions of employment. The reversion back to *BFI* would create liability for employers to employees who are not in the employer's employment or workplace.

NO MORE EMPLOYEE ARBITRATION

The final change that would open employer liability is prohibiting employee-employer arbitration agreements, in so far as it runs counter to collective bargaining. In 2018 in *Epic System v. Lewis*[6] , the Supreme Court held the Federal Arbitration Act superseded the NLRA, undoing the interpretation by the Obama administration that individual arbitration undermined collective bargaining. The PRO Act would codify the Obama-era interpretation of the NLRA, rather than the more recent *Epic Systems* decision. In doing so, employers may face more class-action lawsuits.

MORE POWER TO UNIONS

ELECTIONS

The PRO Act also brings back "card check," a failed effort from the Obama administration that would undermine employees' private ballot elections when deciding if they wish to unionize. The unions would be able to object to the NLRB closed ballot election results and the employer would have the burden to prove whether its actions were unlikely to interfere with the vote. If the employer fails to prove that, the NLRB may certify the union if the union had the majority of employees' signature cards.

Another provision in the PRO Act affecting elections, concerns the election ambush rule. The election ambush rule makes it possible for unions to quickly organize a vote after a petition is filed so that the employer does not have time to create messaging against it. It also requires employers to give the union a list of employee contact information. The PRO Act would perpetuate this by adding a prohibition on employers from speaking about union issues at required meetings.

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[4] H.R. 842 § 101(b)

[5] *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, and* FRP-II, LLC, 362 NLRB 1599 (2015).

[6] Epic Systems Corp v. Lewis, 584 US __ (2018).

CONTRACTING
Once a union is certified, both the employee and employer lose power in their ability to contract. The PRO Act mandates that once employers are notified of a new union, the collective bargaining begins within 10 days. Further, the PRO Act takes the power to contract out of the hands of employers and employees and imposes a one-size-fits all standard. If no contract for employment is agreed upon, the contract negotiations are arbitrated, by a panel created by the PRO Act, where neither the employer nor the employee nor the union have any say on the terms. Instead, the arbitration panel must consider the following in determining the contract provisions:

i. "Employer's financial status and prospects;
ii. The size and type of the employer's operations and business;
iii. The employee's cost of living;
iv. The employee's ability to sustain themselves and their dependents; and
v. The wages and benefits of other employers in the same business provide their employees." [7]

Under this provision, the employer has no say in the wages and benefits given to its workers. Moreover, the employees would not have a vote or a say in the provisions in the contract either.

STRIKES
A cornerstone of collective bargaining and union membership is the act of striking or ceasing to work for a period to exhort power in the renegotiations of contracts. Under the NLRA, it is legal, but some types of strikes can still have reprimands from the employer. One type is the intermittent strike. An intermittent strike is a series of short strikes or walk-outs, instead of not returning to work until the conditions of the strike are met. Currently, employers can take disciplinary actions on intermittent strikers, however, under the PRO Act, any employer disciplinary actions would be prohibited. Under the PRO Act, employees would have the right to not work for several hours then return to work without repercussions.

Another change proposed under the act is the replacement of employees during a strike. It is a longstanding policy that employers can replace unionized workers while they are on strike and retain these workers after the strike is resolved. The PRO Act would change this policy by making a permanent replacement of unionized workers who strike an unfair labor practice.

SECONDARY BOYCOTTS
Unions will gain enormous power and social persuasion if the PRO Act is passed. One such way is the right for unions to engage in secondary boycotts. A secondary boycott targets employers that are not part of the labor dispute but who does business with the employer of its union members. Essentially, the union could persuade the third-party employer to not do business with the union member's employer until the labor dispute ended. Secondary boycotts have not been legal since 1947[8] . The rise of social media and cancel culture may make secondary boycotts a huge tool for unions to leverage businesses who are in the midst of a labor dispute. If a union has direct access to a multitude of consumers through secondary boycotts, the power of unions will grow stronger.

CONCLUSION

The PRO Act, if enacted, will usher in the most radical change in labor relations since the New Deal, and not for the better. The PRO Act seeks to change the relationship between employers and employees by providing unions with newfound power and take away the employer's and employee's right to fully determine the parameters of that relationship. For a right-to-work state like Oklahoma, the impact would cost businesses time and money to adjust to the new demands of unionized workers. Many of the ideas presented in the PRO Act are from the industrialization age when workplace conditions were less regulated. Passing the PRO Act would give unions more power and take away workers' and employers' rights.

[7] H.R.842 § 104(3)(C)(i-v)
[8] U.S. Chamber of Commerce: Labor's Litany of Dangerous Ideas: The PRO Act.