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TESTIMONY BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

HEARING ON BIG LABOR LIES: EXPOSING UNION TACTICS TO UNDERMINE FREE AND FAIR ELECTIONS.

WEDNESDAY, MAY 22, 2024

Chairman Good, Ranking Member DeSaulnier, and Members of the Subcommittee:

Thank you for the opportunity to testify today. I am the Vice President and Legal Director of the National Right to Work Legal Defense Foundation. Since its founding in 1968, the Foundation has provided free legal aid to employees who want to exercise their right to not associate with unions and to not finance their agendas. Foundation attorneys, including myself, have represented thousands of employees in cases that concern protecting employees' right to a secret ballot election or protecting employees from the abuses of top-down union organizing.[1]

Before discussing how to best protect employees' ability to make collective decisions about whether to associate with a union, I should first note that this should not be a collective decision at all. Each employee should have the right to make an individual decision on whether to accept union representation. This individual choice should not be subject to the tyranny of majority rule because the First Amendment guarantees to each individual a right to choose with whom he or she associates. As the Supreme Court held over eighty years ago in *West Virginia State Board of Education v. Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[2]

This fundamental constitutional principle applies equally to a citizen's right to associate or not associate with special interest groups like unions.

The National Labor Relations Act deviates from normal precepts of free association by mandating that an employee must accept a union's representation if,

[1] *See, e.g.*, *Lamons Gasket*, 357 NLRB No. 72 (2011); *Mulhall v. Unite Here*, 667 F.3d 1211 (11th Cir. 2012).

[2] 319 U.S. 624, 638 (1943).

at one moment in time,[3] a majority of employees in his or her workplace supported the union's representation.[4] The NLRA further allows employees to be forced to either join or financially support that union upon pain of losing their jobs.[5] Individuals fortunate enough to work in the nation's Right to Work states can escape the second impingement on their associational rights. But not the first. Even in Right to Work states, the federal government quashes each employee's individual freedom to choose or reject union representation in favor of a collectivist approach.

If the federal government is going to persist with this collectivist policy, at the very least it should provide employees with something akin to a democratic process for choosing or rejecting union representation. At a minimum, this means secret ballot elections conducted in an atmosphere of free and open debate. On its face, though not as currently applied, the NLRA provides for such a process.

Unfortunately, even these minimal democratic protections are denied to many employees by union organizing agreements and by officials at the National Labor Relations Board. Employees are often stripped of their ability to vote in the privacy of a voting booth in favor of a practice in which union organizers collect "votes" from employees by soliciting them to sign union cards. Employees also are often deprived of information they need to make informed decisions about unionization by gag-clauses and NLRB censorship of speech about the actual or possible downsides unionization. In short, many American workers are being subjected to a union selection process that bears no semblance to a democratic process.

A. Union Organizing Agreements Replace Secret Ballot Elections and Free Speech with Card Checks and Gag-Clauses.

In the traditional, or "bottom up," organizing process favored under the NLRA, a union tries to gain employees' support and become their representative before attempting to deal with their employer. If thirty percent of employees support a union, it can petition the NLRB for a secret ballot election, which is "the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support."[6] To foster informed employee decisions about unionization, NLRA Section 8(c) guarantees employers and unions can express their views so long as "such expression contains no threat of reprisal or force or promise of benefit."[7] With this

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[3] Once a union becomes an exclusive representative, it presumptively retains that status forever unless employees affirmatively decertify it or another union supplants it. The NLRA does not require that union representatives periodically stand for reelection. As a result, the vast majority of private sector union member—93% according to one study—have never voted on the union that exclusively represents them. *See* James Sherk, *Unelected Unions: Why Workers Should Be Allowed to Choose Their Representatives*, Heritage Found. Backgrounder, No. 2721 (Aug. 27, 2012).

[4] 29 U.S.C. § 159(a).

[5] 29 U.S.C. § 158(a)(3).

[6] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969).

[7] NLRA Section 8(c) states "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an

provision, Congress sought to encourage "'uninhibited, robust, and wide-open debate in labor disputes.'"[8]

To avoid the secret ballot elections and open debates about unionization the NLRA favors, unions often turn to "top-down" organizing tactics, This tactic involves a union coercing or inducing an employer to enter into an organizing agreement that requires the employer to assist the union's organizing campaign against its employees. Although the terms of these agreements vary, common features include a ban on secret ballot elections, a requirement that the employer recognize the union based on union collected cards, a gag-clause that prohibits employers from speaking about unionization, and a requirement that employers give union organizers confidential information about their employees and access to employer property for campaigning.[9]

Unsurprisingly, this employer assistance boosts a union's chances of organizing targeted employees. For example, "unions in one study prevailed in 78% of the situations in which they attempted to organize [under an organizing agreement], compared to only a 46% success rate in contested elections."[10]

To obtain employer assistance with organizing, unions employ both the carrot and the stick. The "stick" is a "corporate campaign" in which a union tries to harm a company so much that it will enter into an organizing agreement to make the union relent.[11] These union campaigns involve a wide range of "legal and potentially illegal tactics" including "litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state and federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public."[12]

The "carrots" unions dangle in front of employers to induce them to accept an organizing agreement vary. Unions sometimes promise to wage political campaigns

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unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

[8] *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008) (citation omitted).

[9] *See* Zev J. Eigen & David Sherwyn, *A Moral/Contractual Approach to Labor Law Reform*, 63 Hastings L.J. 695, 721-22 (2012); James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. Cal. L. Rev. 731-32, 740-42 (2010); Mark A. Carter & Shawn P. Burton, *The Criminal Element of Neutrality Agreements*, 25 Hofstra Lab. & Emp. L.J. 173, 175-77 (2007); Charles I. Cohen, et al., *Resisting Its Own Obsolescence-How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 522-23 (2006).

[10] Eigen & Sherwyn, 63 Hastings L.J. at 722.

[11] Brudney, 83 S. Cal. L. Rev. at 737-44; *see infra* at 34.

[12] *Smithfield Foods v. UFCW,* 585 F. Supp. 2d 789, 795-97 (E.D. Va. 2008) (quoting *Food Lion, Inc. v. UFCW*, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997)); *see also Pichler v. UNITE,* 228 F.R.D. 230, 234-40 (E.D. Pa. 2005) (describing corporate campaign for an organizing agreement); Daniel Yager & Joseph LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 Empl. Rel. L.J. 21 (Spring 1999) (same).

for employer-favored legislation in exchange for an organizing agreement.[13] More commonly, unions secretly promise to compromise employees at the bargaining table as a quid pro quo for the employer's assistance with unionizing more employees. This includes "bargaining to organize," where a union makes wage and benefit concessions at the expense of employees the union already represents in return for an organizing agreement. It also includes "prerecognition bargaining," where a union commits to make wage and benefit concessions at the expense of any employees it organizes under the organizing agreement.[14]

An ugly example of both tactics are agreements the UAW made with Freightliner, a truck manufacturer, in 2002. In exchange for Freightliner entering into an organizing agreement, the UAW made concessions at the expense of Freightliner employees it already represented: the UAW agreed to a three-year wage freeze, to cancel the employees' profit-sharing bonus, and to increase employee benefit costs. In addition, the UAW also secretly agreed to make wage, benefit, transfer rights, severance, overtime, and other concessions at the expense of Freightliner employees it later unionized under the organizing agreement.[15]

A union secretly agreeing to sacrifice employee interests to receive their employer's assistance with gaining more dues-paying members is a shameful breach of fiduciary duty. It is as wrongful as an attorney sacrificing a client's interests in exchange for an opposing party's assistance with recruiting more paying clients. That unions often are willing to sell their integrity for organizing agreements shows how far unions are willing to go to avoid secret ballot elections and suppress free speech about unionization.

2. The Biden NLRB is also pursuing both objectives. In its 2024 decision in *Cemex Construction Materials Pacific*, the Biden NLRB departed from decades of precedent by decreeing it unlawful under the NLRA for an employer to refuse to recognize a union that claims to have collected union cards from a majority of employees.[16] *Cemex* purports to give employers the option to request an NLRB election within two weeks after a union demands recognition. But this option may be chimerical because *Cemex* decrees that any such election will be nullified, and the union installed as the employees' representative, if the employer engages in almost any conduct the NLRB deems an unfair labor practice. *Cemex* thus allows a union to become employees'

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[13] *See, e.g.*, *Mulhall*, 667 F.3d at 1213.

[14] *See*, *e.g.*, *Patterson v. Heartland Indus. Partners,* 428 F. Supp. 2d 714, 716 (N.D. Ohio 2006), (employer "receive[d] the union's assurance of no strikes and other guarantees related to wages in return for providing the defendant union with worker addresses and by making plant facilities available to the union"); *Dana Corp.,* 356 NLRB 256, 269-70 (2010) (UAW agreed to benefit concessions in exchange for organizing assistance).

[15] *Adcock v. Freightliner*, 550 F.3d 369, 372 (4th Cir. 2008)

[16] 372 NLRB No. 130 (2023).

monopoly representative based on union cards even if employees vote against that union in a secret ballot election.

To suppress speech unfavorable to unions, the Biden NLRB operates the most repressive regime of government censorship in the nation. Even though Congress sought to foster free speech and debate about unionization with NLRA Section 8(c)—which provides that speech cannot be evidence of an unfair labor practice "if such expression contains no threat of reprisal or force or promise of benefit"—the Biden NLRB flouts that limitation by declaring employer utterances unfavorable to unions, or even just questions about unions, to carry unspoken and implicit threats or promises of benefit. To offer just one recent and egregious example, the NLRB General Counsel alleges, and an NLRB administrative law judge found, it is illegal for the CEO of a company to opine, in response to questions from news reporters, that he believes: employees are better off without a union; that employees will lose their direct relationship with managers if they unionize; and that a union may make it harder for employees to get things done quickly since unions are slow and bureaucratic.[17]

Cemex itself is designed to muffle speech critical of unionization. The Biden NLRB's rationale for nullifying secret ballot elections if an employer engages in speech or conduct NLRB officials consider wrongful, and installing the union as the employees' representative without an election, is to dissuade employers from engaging in such speech or conduct.[18] This rationale is perverse—the agency plans to deprive employees of their right to vote if their employer says or does something NLRB officials disapprove of. This is like a kidnapper threatening to harm innocent hostages if his victim does not comply with his extortionate demands. The Biden NLRB's purpose for holding employee elections hostage in this way is unmistakable—to coerce employers to censor their speech during union organizing campaigns.

B. Secret Ballot Elections and Free Speech Are Superior to Card Checks Conducted Under a Regime Of Censorship.

To state the obvious, a secret ballot election in which all parties may speak freely is a far more democratic process for determining employee preferences than a union card-collection campaign in which speech unfavorable to the union is censored. A hypothetical illustrates the point. If the ruling party of a foreign nation replaced free and open elections for political office with a system that bans campaigning by opposition parties and that calls for the ruling party's cadres to personally collect "votes" from citizens in their homes and workplaces, no one would call that system democratic. Yet that is the very type of system unions seek to impose on employees in organizing agreements.

1. Almost every American instinctively understands that secret ballot elections are the cornerstone of any democratic system of governance. The reason is that

[17] *Amazon.com Servs. LLC*, No. JD(SF)-12-24, 2024 WL 1928644 (May 1, 2024).

[18] 372 NLRB No. 130 at *27.

individuals are more apt to vote their conscience when they can make their decisions in private and those decisions are secret.

A union card-collection campaign is inferior to a secret ballot election because employees do not make their choice in private and that choice is not secret. In a card collection campaign, employees usually are solicited by union agents to sign cards in the presence of those agents. The union knows who signed a card and who did not. Moreover, unlike in an election where an employee's decision to cast a vote against a union is final, union organizers can continually solicit and harass employees who refuse to sign union cards to change their "vote."

Unions engage in conduct during card collection campaigns that would invalidate the results of any NLRB conducted election. The NLRB has held the following union or employer actions interfere with employee free choice in an election: electioneering at the polling place or among employees waiting in line to vote;[19] making a list of employees who have voted as they enter the polling place;[20] and handling employees' ballots.[21] In a union card-collection campaign, the place where a union solicits an employee to sign a card is the functional equivalent of a polling place. Union agents almost always electioneer to persuade employees to sign a card, keep lists of who signed cards and who did not, and handle employee signed cards. Conduct that would invalidate a NLRB-conducted election is integral to union card-collection campaigns.

Worse, union agents can use deceitful tactics to mislead and cajole employees to sign union cards. The reason is the NLRB presumes employee-signed union cards are valid unless there is clear and convincing evidence the card was obtained through a material misrepresentation or coercion.[22] This burden is difficult to meet because most union misrepresentations will not invalidate a card. For example, union agents falsely telling employees that signing a card is necessary to have a meeting or to get more information about the union will not invalidate a card.[23] Union agents have every incentive to tell employees almost anything to get them to sign a card.

2. Almost every American also understands that free speech and open debates are a hallmark of any democratic system. The free speech provisions of the First Amendment were enacted largely for that reason. As the Supreme Court reiterated in *Knox v. SEIU, Local 1000*: "the central purpose of the Speech and Press Clauses

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[19] *See Alliance Ware, Inc*., 92 NLRB 55 (1950); *Milchem, Inc.*, 170 NLRB 362 (1968); *Bio-Medical Applications*, 269 NLRB 827 (1984)

[20] *Piggly-Wiggly*, 168 NLRB 792 (1967).

[21] *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004); *Professional Transp., Inc.*, 370 NLRB No. 132, *1 (June 9, 2021).

[22] *See Photo Drive Up*, 267 NLRB 329, 364 (1983).

[23] *See Montgomery Ward & Co*., 288 NLRB 126, 128 (1988), rev'd on other grounds, 904 F.2d 1156 (7th Cir. 1990); *Levi Strauss & Co*., 172 NLRB 732, 733 (1968); *see also Mid-East Consolidation Warehous*e, 247 NLRB 552, 560 (1980) (union falsely informing employees that everyone was signing union cards did not invalidate card).

was to assure a society in which uninhibited, robust, and wide-open public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish."[24]

The same principle applies to elections that concern union representation—free speech about the pros and cons of unionization is essential to facilitating informed employee decisions.[25] As the Fifth Circuit eloquently stated:

> The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available.[26]

Or as the Ninth Circuit put it: "[i]t is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right."[27] Indeed, the Supreme Court has found the NLRA implicitly grants employees an "underlying right to receive information opposing unionization."[28]

The gag-clauses at the core of union organizing agreements deprive employees of their "right to receive information opposing unionization" and result in employees hearing only one side of the story during organizing campaigns—that spun by the union. This necessarily degrades employees' ability to make informed decisions about union representation. Indeed, that is the point of this censorship—to keep employees ignorant about the downsides of a union representation so they are less likely to resist it. While that may serve union self-interests, it does not serve employee interests. And it certainly is incompatible with basic democratic norms.

C. Congress and the NLRB Should Protect Employees' Ability to Make Informed Choices in Secret Ballot Elections.

Congress could take a variety of actions to protect employees from the inequities I have discussed. For example, Congress could amend the NLRA to: (1) mandate that a union must prevail in a secret ballot election to become employees' exclusive representative and periodically win elections to retain that status; (2) make clear that, under NLRA Section 8(c), the NLRB cannot declare speech to be an unfair labor practice unless government censorship of that speech satisfies strict First Amendment scrutiny; and (3) clarify that employer assistance with organizing constitutes unlawful employer support to a union under NLRA Section 8(a)(2), 29

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[24] 567 U.S. 298, 308 (2012) (quoting *Buckley v. Valeo*, 424 U.S. 1, 93, n. 127 (1976) (per curiam)).

[25] *See Thomas v. Collins*, 323 U.S. 516, 532 (1945) (recognizing that the right "to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly.").

[26] *Southwire Co. v. NLRB*, 383 F.2d 235, 241 (5th Cir. 1967).

[27] *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971).

[28] *Chamber of Commerce*, 554 U.S. at 68.

U.S.C. § 158(a)(2). At a bare minimum, to protect the liberties of dissenting employees who are subject to unwanted union representation, Congress should pass the National Right to Work Act (H.R. 1200) and guarantee that no employee is forced to pay dues or fees to a union to keep his or her job.

The NLRB could protect employees' right to vote and receive information about unionization by simply changing how the agency enforces the NLRA. *First*, the biggest obstacle to employees voting in secret ballot elections is often the NLRB itself. The agency has created a multitude of policies to stymie employee elections. The NLRB can and should rescind those policies. Among other things, the NLRB should overrule its flawed *Cemex* decision and overrule its decision in *Reith-Reilly Construction,*[29] which denies employees elections if the NLRB's General Counsel pursues certain unfair labor practice allegations against their employer. The NLRB should also rescind the election bars it created from whole cloth to restrict when employees can request decertification elections, such as the recognition bar, successor bar, and contract bar. Employees could vote far more often on union representation if NLRB officials would only let them.

Second, the NLRB should end its wrongful campaign to censor speech critical of unions and unionization. Nothing in the NLRA authorizes, much less requires, this aggressive censorship regime. Congress intended the opposite policy when it enacted NLRA Section 8(c) in 1947—to encourage "uninhibited, robust, and wide-open debate in labor disputes."[30] Of course, the First Amendment's prohibition on the federal government restricting free speech applies in full to the NLRB. NLRB officials could foster greater speech and debate about unionization if they simply removed their boots from the throats of those who want to express views critical of unions.

Finally, the NLRB should curtail abuses emanating from union organizing agreements by enforcing existing provisions of the NLRA along the lines outlined by former NLRB General Counsel Robb in his *Guidance Memorandum on Employer Assistance in Union Organizing*, Memorandum GC 20-13, 2020 WL 5705909, (Sept. 4, 2020). This includes holding it unlawful under the NLRA for employers to provide unions with more than ministerial aid with organizing employees. It also includes prohibiting unions from engaging in pre-recognition bargaining as a quid pro quo for an organizing agreement. While outside the NLRB's jurisdiction, Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, can be (and should be) enforced to prohibit employers from providing unions with things of value that facilitate union organizing—i.e., gag-clauses, confidential information about employees, and use of company property. If the federal government would only enforce laws already on the books, the worst aspects of union organizing agreements could be ameliorated.

[29] 317 NLRB No. 109 (2022).

[30] *Chamber of Commerce*, 554 U.S. at 68.

Chairman Good, Ranking Member DeSaulnier, and Members of the Subcommittee, this concludes my written testimony. I look forward to your comments and to answering any questions.