Statement of

Aaron Solem
Staff Attorney, National Right to Work Legal Defense Foundation, Inc.

Before the

House Committee on Education & Workforce
Subcommittee on Health, Employment, Labor, and Pensions
June 11, 2025

Chairman Allen, Ranking Member DeSaulnier, and distinguished subcommittee members:

Thank you for the opportunity to appear before you today. I have been practicing labor and constitutional law for thirteen years, on behalf of individual employees, at the National Right to Work Legal Defense Foundation. Since 1968, the Foundation has provided free legal aid to employees who wish to exercise their rights to refrain from joining or assisting labor organizations and their right to freely choose whether or not to be represented by such organizations. I have a unique perspective on the National Labor Relations Board (NLRB or Board) because I have represented hundreds of employees who are subject to the National Labor Relations Act (NLRA).

The purpose of the NLRA is to protect employee free choice regarding unions and union representation. Unfortunately, the NLRA fails to protect employee free choice in one major respect: it authorizes forced fee arrangements that compel employees to pay union fees or be fired. That is why the single most effective way to bring balance and fairness to the Act would be to pass the National Right to Work Act (H.R. 1232) and outlaw forced union fees across the country.

Separate from this Congressional action, the NLRB can also do its part to promote employee free choice by refocusing on eliminating election blocks and bars and by strengthening the right of employees to refuse to pay for union political expenditures.

The heart of the NLRA is in two parts of the Act: Sections 7 and 9. Section 7 grants employees a right to join or organize a union and an equal right for employees

to refrain from these activities.[1] Section 9(a) provides that only a union with majority support may be designated as the exclusive representative of employees in a workplace.[2]

When properly enforced, these two provisions, working together, ensure that employees' choice to be represented or not is governed by the democratic principle of majority rule. "[U]nder Section 9(a), the rule is that the employees pick the union; the union does not pick the employees."[3]

Yet for the past four years, the Biden Board deviated from this principle by preventing secret ballot elections that allow employees to decide whether they want to be represented by a union. For example, the Biden Board made it harder to oust an unpopular union by bringing back the heavily criticized "blocking charge" policy. Similarly, the Biden Board barred employees from seeking elections after an employer recognizes a union through a so-called "card check" process.

These are anti-employee policies because they cancel worker choices and replace them with decisions made by unions and the government. Blocking charges prevent workers from voting in elections that they themselves have requested. The "voluntary recognition bar" prevents workers from seeking an election on the grounds that the government knows, better than the employees, how much support a union has based solely on the abuse-prone "card check" process.

These policies are not just inconsistent with employee free choice—the primary purpose of the Act—but they run against the political winds. President Trump won reelection because he was the candidate who listened to employees. The

---

[1] 29 U.S.C. § 157 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all such activities . . . ." *See also Baltimore Sun Co. v. NLRB*, 257 F.3d 419, 426 (4th Cir. 2001) (the NLRA "guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all.").

[2] 29 U.S.C. § 159(a) provides: "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit."

[3] *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (D.C. Cir. 2018).

Board should follow in those footsteps by pursuing a truly pro-employee agenda. This agenda would put power in the hands of workers—not unions or employers—— to decide whether they want to be represented by a labor union.

The Board can accomplish this goal by ending the blocking charge policy, eliminating or reforming non-statutory election bars, and strengthening the right of employees to refuse to pay for union political expenditures by mandating employees opt-in to paying for union politics, rather than force them to opt-out.

I. The Board should reinstate and improve the Trump I Election Protection Rule.

For years, the Board adhered to a "blocking charge" policy of refusing to conduct decertification elections if a union filed almost any unfair labor practice charge against an employer.[4] This policy incentivized unions to file frivolous unfair labor practice charges against employers because merely alleging a violation would unilaterally halt the decertification election process until the unfair labor practice charge was adjudicated. Even the Obama Board recognized that "at times, incumbent unions may abuse the policy by filing meritless charges in order to delay decertification elections."[5]

In 2020, the Trump I Board, under Chairman Ring's leadership, modified the blocking charge policy with the "Election Protection Rule."[6] This modification of the blocking charge policy was extremely successful. From my personal experience,

---

[4] In 2014, the Board issued rulemaking codifying its blocking charge policy. 79 Fed. Reg. 74308-74490 (Dec. 15, 2014). Prior to 2014, the policy was set out in Section 11730 of the Board's Casehandling Manual for Representation Proceedings.

[5] 79 Fed. Reg. at 74419.

[6] The Election Protection Rule consisted of three alterations to the Board's Regulations. First, it amended 29 C.F.R. §103.20, overturning the prior "blocking charge" policy in order to streamline and prevent undue delay in representation elections. Second, it added 29 C.F.R. § 103.21, requiring unions and employers who seek to utilize the "voluntary recognition bar" to notify employees of a forty-five day window period to seek an election to challenge the union's allegation of majority support. This rule revived the Board's landmark decision in *Dana Corp*., 351 NLRB 434 (2007), which the Obama Board had overruled. Third, it added 29 C.F.R. § 103.22, which required employers and unions in the construction industry to obtain objective proof of majority support beyond mere contract language if the employer recognizes the union as a Section 9(a) representative without an election.

during the four years the rule was in effect, employees seeking to change or remove their union representative were far more likely to get a prompt secret-ballot election than before the Rule was enacted.

Despite this success, in August 2024, the Biden Board repealed the Election Protection Rule and revived the blocking charge policy. Returning to the "bad old days," this current policy allows unions to unilaterally block decertification elections just by filing a charge against an employer, no matter how meritless it may be.

While the current rule purports to require unions to file an "offer of proof" in support of their blocking charge, in practice such offers require little hard evidence. Often times no more than the names of the potential witnesses and a summary of each witness's anticipated testimony is needed to block an election.[7] In my experience, Regional Directors reflexively block elections in all such cases, even when the underlying offers of proof are weak and the charges are frivolous, minor, or false.

The Trump II Board should immediately repeal the blocking charge policy and return to and improve the Election Protection Rule. As discussed below, the blocking charge policy conflicts with the Act, undermines employee free choice, incentivizes frivolous charges, and causes widespread delays whenever employees seek elections to change or remove a representative.

A. The blocking charge policy conflicts with the text of the Act.

Section 9(c) of the NLRA states "whenever a petition shall have been filed," if the Board finds "a question of representation exists, it *shall* direct an election by secret ballot."[8] The Board's blocking charge policy defies this statutory command by substituting "shall not" for "shall."

Over the decades many courts have criticized the Board's blocking charge policy.[9] The Fifth Circuit found the policy conflicted with the Act in two separate

[7] 29 C.F.R. §103.20(a).
[8] 29 U.S.C. § 159(c)(1) (emphasis added).
[9] *NLRB v. Hart Beverage Co.*, 445 F.2d 415, 420 (8th Cir. 1971); *NLRB v. Midtown Serv. Co.*, 425 F.2d 665, 672 (2d Cir. 1970); *NLRB v. Minute Maid Corp.*, 283 F.2d 705, 710 (5th Cir. 1960); *Pacemaker Corp. v. NLRB*, 260 F.2d 880, 882 (7th Cir. 1958); *TMobile v. NLRB*, 717 Fed. App'x 1, 3-5 (D.C. Cir. 2018) (Sentelle, J., dissenting).

cases. In *Templeton v. Dixie Color Printing Co.*, a majority of employees filed a petition seeking to decertify their union.[10] The Region dismissed the petition on the basis of a seven-year-old unfair labor practice charge filed against their employer. The employees sued the Board, seeking an election. Relying on the mandatory language of Section 9(c), the Fifth Circuit found the "Board has ignored its responsibility contrary to a specific mandate of the Act and thereby worked injury to the statutory rights of the employees."[11] Dismissing the petition was "tantamount to castrating § 7, the heart of the Act."[12]

In *Surratt v. NLRB*, the Fifth Circuit again relied on the mandatory language of Section 9(c) to uphold an injunction commanding the Board to reinstate a decertification petition.[13] It found the Board had a "clear duty under § 9(c)(1) of the Act to consider, investigate, and act upon the decertification petition."[14] By ignoring that clear duty "the employees were disarmed" of their rights by a "mechanical application of [the] blocking charge [policy]."[15]

B. The blocking charge policy offends the Act's structure and purpose.

The blocking charge policy does not only contravene a clear Congressional command, it offends the entire structure and purpose of the Act: employee free choice. "The *raison d'etre* of the [NLRA]'s protections" are to "empower *employees* to freely choose their own labor representatives."[16]

Section 7 permits exclusive union representation only if a majority of employees support the union.[17] In fact, "[t]here could be no clearer abridgment of § 7 of the Act," than "grant[ing] exclusive bargaining status to an agency selected by a minority of its employees, hereby impressing that agent upon the nonconsenting

---

[10] 444 F.2d 1064, 1066 (5th Cir. 1971).
[11] *Id.* at 1069.
[12] *Id.* at 1070.
[13] 463 F.2d 378, 381 (5th Cir. 1972).
[14] *Id.*
[15] *Id.*
[15] *Minute Maid Corp.*, 283 F.2d at 710.
[16] *Colo. Fire Sprinkler*, 891 F.3d at 1038.
[17] *See Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737–39 (1961); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring).

majority."[18] Blocking an election based on an incumbent union's unproven allegations effectively permits a minority representative to entrench itself in power. Rule by the minority is an affront to the "philosophy of democratic institutions" embedded in the Act.[19]

Section 9(a)'s "democratic framework" requires the Board to "adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and *speedily*."[20] The Trump I Election Protection Rule was a step towards these laudable goals. The Biden Board's blocking charge policy is a step backwards because it gives unions the ability to "achieve an indefinite stalemate designed to perpetuate the union in power."[21] A single charge can derail an election for months and even years.[22] And if unions file sequential charges, the election may never occur.[23]

The legislative history of the Act demonstrates Congress' intent to prevent procedural delays and gamesmanship in elections. In support of the 1947 Taft-Hartley amendments, Senator Taft emphasized Section 9 of the Act was designed to avoid "dilatory tactics in representation proceedings."[24] Congress reaffirmed this objective in 1959 by enacting Section 3(b), which authorized the delegation of representation matters to Regional Directors. As Senator Goldwater explained, this

---

[18] *Garment Workers*, 366 U.S. at 737 (citation omitted).
[19] *A.J. Tower Co.*, 329 U.S. at 331.
[20] *Id.* (emphasis added).
[21] *Midtown Service Co.*, 425 F.2d at 672.
[22] *Cablevision Systems Corp.*, 367 NLRB No. 59 (2018) (blocking charge followed by regional director's misapplication of settlement bar doctrine delayed processing of petition for over four years).
[23] See *Zev J. Eigen & Sandro Garofalo, Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 Minn. L. Rev. 1879, 1896–1897 (2014) (''Regional directors have wide discretion in allowing elections to be blocked, and this sometimes results in the delay of an election for months and in some cases for years—especially when the union resorts to the tactic of filing consecutive nonmeritorious charges over a long period of time. This is contrary to the central policy of the Act, which is to allow employees to freely choose their bargaining representative, or to choose not to be represented at all.'').
[24] *Boire v. Greyhound Corp.*, 376 U.S. 473, 479 (1964).

amendment aimed "to speed the work of the Board."[25] The blocking charge policy slows it down, sometimes interminably.

C. The blocking charge policy encourages frivolous charges.

Even if the blocking charge policy was consistent with the Act, which it is not, it still is bad policy because it invites gamesmanship and dilatory behavior. Below is just a small (but highly representative) sample of Foundation-assisted cases demonstrating how the blocking charge policy has been employed by unions and NLRB Regional Directors to the detriment of employee free choice.

In *Scott Brothers Dairy/Chino Valley Dairy Products*,[26] Petitioner Chris Hastings filed a decertification petition on August 17, 2010. The union filed blocking charges,[27] claiming the employer was unlawfully involved in the petition. Based on these spurious and unproven charges, the Regional Director blocked the election for several months. Eventually, the charges were either dismissed as meritless or voluntarily withdrawn. The election was finally held on August 10, 2011, a full year after the decertification petition was filed. The union overwhelmingly lost the election by a vote of 54-20, but had managed to retain its exclusive bargaining power and compulsory dues collections for an entire year due to its frivolous and non-meritorious charges.

In *ADT Security Services (IBEW Local 110)*,[28] Petitioner Lance Oelrich filed a decertification petition with signatures he collected in a hotel parking lot following a regularly scheduled employer quarterly meeting. Oelrich collected other signatures on his own time, away from work. IBEW Local 110, however, filed a blocking charge alleging that the decertification petition was circulated during a company-wide mandatory meeting. The Region immediately blocked the petition. Oelrich and other employees filed a Request for Review, providing affidavits stating the petition was collected without employer support or encouragement. IBEW eventually withdrew its unfounded charges against ADT, presumably to avoid their dismissal.

---

[25] *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 141 (1971) (quoting congressional record).

[26] Case No. 31-RD-001611.

[27] Case Nos. 31-CA-029944 (filed Sept. 21, 2010) and 31-CA-030024 (filed Nov. 10, 2010).

[28] Case No. 18-RD-206831 (Dec. 20, 2017) (order denying review).

Yet even though its blocking charges were not meritorious, the union's tactics managed to prevent an election for several months.[29]

In *Arizona Public Service Co. (USPA, Local 08)*,[30] Petitioner Wayne Evans filed a decertification petition on March 13, 2017. On March 20, 2017, the Regional Director halted the election based on blocking charges alleging the petition was collected during work time and under employer supervision. The employees who collected the petition filed a Request for Review and submitted affidavits demonstrating they had collected the signatures during non-work time and at non-work locations, away from management personnel. The union eventually withdrew its blocking charges, presumably to avoid their dismissal. The Region finally held an election, and the union lost. Yet aided by its spurious blocking charges, the unpopular incumbent union was able to delay its ouster for nearly three months.

In *Apple Bus Co.*,[31] Elizabeth Chase filed her first decertification petition on July 31, 2017. The petition was dismissed due to the Board's "successor bar" doctrine. After the successor bar expired, on March 15, 2018, Chase filed a second decertification petition. Between the filing of the petition on March 15, 2018, and March 28, 2019, Teamsters Local 959 filed nine different blocking charges alleging unlawful employer misconduct. The Region continuously blocked the election despite Chase filing three Requests for Review. Local 959 ultimately withdrew seven of its meritless charges. Among the charges withdrawn were baseless allegations that Apple Bus aided Chase in the collection of her petition. The remaining minor allegations were settled with a non-admissions clause, which allowed an election to be scheduled after the notice-posting period. Before an election could take place after settlement, on March 28, 2019, Local 959 filed a new unfair labor practice charge, which was resolved on May 14, 2019, by another settlement with non-admissions clause. But before an election could be conducted, between July and August, Local 959 filed an additional five blocking charges. In total, the union filed 15 charges against Apple Bus and withdrew over half of them because of their lack of merit. Chase made five attempts to appeal requesting the Board to modify its blocking charge policy and to grant the employees an election. Despite majority support for the decertification petition since March 2018, the Region continued to postpone the decertification election based on the notion that some connection might exist between the petition and allegedly unlawful employer

[29] ADT eventually withdrew recognition from the IBEW because Oelrich petition was supported by the majority of employees.
[30] Case No. 28-RD-194724 (June 27, 2017) (order denying review).
[31] Case Nos. 19-RD-203378 and 19-RD-2166369.

conduct. In November 2019, over two years from the filing of Chase's first petition, the union disclaimed interest in representation and walked away rather than face the voters it claimed to represent.

As these examples illustrate, the blocking charge policy leads to frivolous charges, delayed votes, and the virtual destruction of employees' Sections 7 and 9 rights.

D. The Board ignored data showing the blocking charge policy caused widespread delays, while elections rarely had to be rerun under the Election Protection Rule.

When promulgating a rule, an agency must "examine the relevant data and articulate a satisfactory explanation for its action."[32] It may not rely "on one unsubstantiated conclusion heaped on top of another."[33] A rule cannot be "intended to defeat a bogeyman whose existence was never verified."[34] The blocking charge policy fails this standard. It fights a bogeyman that doesn't exist: the Board's own data shows very few elections were overturned under the Election Protection Rule while many more elections were unjustly stopped by the blocking charge policy.

The Biden Board reinstated the blocking charge policy because it believed too many employees voted in a "coercive atmosphere that interferes with employee free choice."[35] But the Board failed to grapple with the actual data. In writing its comments to the Biden Board, the National Right to Work Foundation could only find three overturned elections under the Election Protection Rule.[36] The Board itself could only cite five additional cases—all of which concerned union certification elections cases where the General Counsel sought bargaining orders—and *one* additional union certification case where the parties agreed to a rerun election.[37]

At most, the Board identified nine rerun elections over four years. Compare this to the data presented by then-Member McFerran in her April 2020 dissent to the Trump I Election Protection Rule. That data showed in fiscal years 2016 and 2017

---

[32] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).
[33] *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014).
[34] *Id.* at 710.
[35] 89 Fed. Reg. at 62967.
[36] *Id.* at 62979.
[37] *Id.* at 62980 n.142.

Regions blocked forty-five petitions due to non-meritorious charges. That's an average of 22.5 unjustified investigations per year—or nearly two per month—imposing significant costs on the parties and the Board without any legitimate basis.

The data demonstrates the true problem is delayed elections—not overturned and re-run elections. Yet the Biden Board never considered so few elections were overturned because the blocking charge policy was unnecessary.[38]

The bottom line is blocking charges protect unpopular union incumbents. Employees deserve better. If an employee has the courage to publicly voice his opposition to his exclusive representative to his coworkers and collect a valid petition, the Board should timely process it and hold an election.

E. The Board should overturn *Rieth-Riley* and allow elections to proceed.

In overturning the blocking charge policy the Board should not just readopt the Trump I rule because that rule itself suffered from a defect. The Biden Board interpreted the rule to still allow Regional Directors to dismiss a decertification petition based solely on the General Counsel's issuance of a complaint in an unfair labor practice case.[39] This was despite the fact that the Election Protection Rule stated "the final-rule amendment provides that a blocking-charge request will no longer delay the conduct of an election in *any case*."[40] Any new rule passed by the Trump II Board should not allow a preliminary finding of merit by the General Counsel to derail an election. Instead, the Board should make clear that an allegation is not meritorious unless admitted or there has been a final determination by *the Board* after litigation.

II. The Board should reform or eliminate non-statutory election bars.

The Board can return balance and fairness to the Act by jettisoning all of its non-statutory election bars. When Congress enacted the NLRA, it created only one

---

[38] *State Farm*, 463 U.S. at 43 (agency action is arbitrary and capricious if the agency "offered an explanation for its decision that runs counter to the evidence before the agency."); *Envir. Def. Fund v. EPA*, 922 F.3d 446, 454 (D.C. Cir. 2019) ("An agency acts arbitrarily and capriciously when it offers inaccurate or unreasoned justifications for a decision.").

[39] *Rieth-Riley Construction Co*., 371 NLRB No. 109 (June 15, 2022).

[40] 85 Fed. Reg. at 18375 (emphasis added).

bar to elections—the "election bar," which prohibits elections for one year after a valid election has been conducted.[41]

When unrepresented employees want an election to certify a union, the statute enacted by Congress says they only have to contend with the election bar. Yet the Board over the decades has forced decertification petitioners to overcome several NLRB-created bars that severely limit when they can exercise their equal right to refrain from unionization. The purpose of these bars is to frustrate employee free choice and entrench unwanted unions.[42] These bars have no basis in the Act's text and should be reexamined and jettisoned.

A. The Board should jettison the recognition and successor bars.

Two of the most pernicious bars are the "recognition bar" and the "successor bar." The voluntary recognition bar prohibits petitions for a secret ballot election for at least six months and possibly up to one year from the first date of bargaining session after an employer recognizes a union based on a card check or other non-electoral evidence.[43] Similarly, the successor bar prohibits an election for a similar timeframe after a change in ownership.[44] Under both bars, between six months and

[41] *See* 29 U.S.C. §§ 159(c)(3) & 159(e)(2).

[42] *UGL-UNICCO Serv. Co.*, 357 NLRB 801, 810 (2011) (Member Hayes, dissenting) (an election bar does not aid employee free choice, but serves only "the ideological goal of insulating union representation from challenge whenever possible"); *Americold Logistics LLC*, 362 NLRB 493, 503 (2015) (Member Miscimarra, dissenting) (an election bars' main purpose is to "protect [incumbent] unions from decertification or displacement by a rival union.").

[43] The prior Board, under Chairman Ring, modified the voluntary recognition bar by requiring unions and employers who seek to utilize the "voluntary recognition bar" to notify employees and give them a forty-five day window period to seek a secret ballot election should they wish to challenge the union's allegation of majority support. 29 C.F.R. § 103.21. Showing no concern for employee free choice, the Biden-appointed majority repealed those reforms through rulemaking and reimposed the voluntary recognition bar as it existed in *Lamons Gasket*, 357 NLRB 739 (2011).

[44] *UGL-UNICCO Service Co*., 357 NLRB 801 (2011).

one year, any decertification petitions are subject to a complex five factor test seeking to determine whether a union has been given a reasonable time to bargain.[45]

These multifactor tests create confusion for employees and other participants and extra work for the Board. An employee faced with an unpredictable five-part test has little choice but to successively file multiple election petitions, one after another, in the hope that eventually one might be processed by the NLRB. For example, in *Student Transp. of Am., Inc.*,[46] the petitioner, my former client Bob Williams, filed four successive decertification petitions over a year-long period until the NLRB Region finally granted an election—which the union lost by an overwhelming vote of 88-13.

And Mr. Williams was one of the lucky ones—employees opposing a card check may never receive an election. In *Americold Logistics, LLC*,[47] my former client Karen Cox was subject to a card check campaign at her workplace. After the union was voluntarily recognized by the employer, she collected a decertification petition and filed three successive requests for a secret ballot election. After her third election petition, the NLRB Region held a secret ballot election. Because the Union appealed the Region's decision, the Region impounded the ballots pending appeal. On appeal, the Obama NLRB majority overturned the election, finding the union was not granted sufficient time to bargain, despite the fact the union had been recognized for more than one year.[48] The impounded ballots were subsequently destroyed. Because the employer and union had entered into a collective bargaining agreement after the final petition was filed, the employees could not seek another election until the end of the Board's contract bar period.[49]

---

[45] *Lamons Gasket*, 357 NLRB at 748 (establishing five factor test); *MGM Grand Hotel, Inc.*, 329 NLRB 464 (1999) (voluntary recognition bar can last for over eleven months).

[46] Case No. 06-RD-127208.

[47] 362 NLRB 493 (2015).

[48] *Id.*

[49] *General Cable Corp*., 139 NLRB 1123 (1962) (contract bar prohibits employees from filing a decertification petition for the term of a CBA, or for three years, whichever is shorter).

B. The voluntary recognition bar elevates unreliable card checks over elections.

Recognizing these problems with the recognition bar, the Trump I Board's Election Protection Rule reestablished a modified recognition bar. Under the Board's rule, a recognition bar continued for a reasonable period only if: (1) the employer and union notified the Regional office that recognition had been granted; (2) the employer posted a notice of recognition (provided by the Regional office) informing employees that recognition has been granted and they had a right, during a 45-day "window period," to file a decertification or rival-union petition; and, (3) 45 days passed without a properly supported decertification petition being filed. If a petition was filed during the 45-day window period, the Board would process it and hold a secret ballot election.[50]

These procedures were a positive step because card checks are not reliable indicators of employee support. Consider my former client Tami Kecherson, who was the petitioner in *Baseball Club of Seattle, LLLP d/b/a Seattle Mariners*.[51] Ms. Ketcherson was a retail employee of the Seattle Mariners. In 2023, based on an ostensible majority of employees signing union authorization cards, the Mariners voluntarily recognized UFCW Local 3000. A number of the employees questioned the accuracy of the card check recognition and filed for a secret ballot election to determine whether the union really did represent a majority of employees.

The union lost the NLRB secret ballot election by a margin of 50-9. Before the NLRB Regional Director could issue a final certification of the 50-9 election, Local 3000 issued a "disclaimer of interest" and walked away from any authority to represent Ms. Kecherson and her co-workers. In short, the authorization cards were an inaccurate indicator of employee support as the union garnered only 15% of the votes in the secret ballot election.

But it shouldn't surprise anyone that a card check was unreliable. Union-collected authorization cards are inherently unreliable gauges of employee free choice because they are conducted without Board oversight or safeguards to prevent union misrepresentations or coercion of card signers. Unions can and often do engage in coercive conduct and misrepresentations during card check campaigns that would not be tolerated in Board-conducted elections. For example, the following activity has been held to contaminate the "laboratory conditions" necessary to

[50] *See also Dana Corp.*, 351 NLRB 434 (2007).
[51] NLRB Case No. 19-RD-316179.

employee free choice in Board conducted elections: electioneering at the polling place;[52] prolonged conversations with prospective voters in the polling area by union or employer representatives;[53] electioneering among employees waiting in line to vote;[54] speechmaking by a union or employer to massed groups or captive audiences within twenty-four hours of the election;[55] a union or employer keeping a list of employees who have voted as they entered the polling place (other than the official eligibility list);[56] and a union or employer handling ballots.[57]

But similar or identical conduct occurs by union organizers in almost every card check campaign. The place where the union confronts an employee with an authorization card is the functional equivalent to an election polling place because it is where the employee makes his or her definitive choice regarding union representation. When an employee signs—or refuses to sign—a union authorization card, he or she is not likely to be alone. Rather, this decision is likely made in the presence of one or more union organizers soliciting—or, worse, pressuring the employee to sign. Many employees are coerced, harassed, or wrongfully induced to sign union authorization cards. The employee's decision to sign or not sign the card is not secret, as in a Board-conducted election, because the union knows who signed a card and who did not.

In contrast, each employee participating in a NLRB-conducted election makes his or her choice in private—secret from both the union and the employer. Once the employee has made the decision by casting a ballot, the process is at an end. This is not true for an employee caught in the maw of a year-long card check campaign, who may be solicited repeatedly and, perhaps coercively, month after month until he or she signs.

---

[52] *Alliance Ware, Inc.*, 92 NLRB 55 (1950); *Claussen Baking Co.*, 134 NLRB 111 (1961).
[53] *Milchem, Inc.*, 170 NLRB 362 (1968).
[54] *Bio-Medical Applications*, 269 NLRB 827 (1984); *Pepsi-Cola Bottling Co.*, 291 NLRB 578 (1988).
[55] *Peerless Plywood Co.*, 107 NLRB 427 (1953).
[56] *Piggly-Wiggly*, 168 NLRB 792 (1967).
[57] *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004); *Professional Transportation, Inc.*, 370 NLRB No. 132 (June 9, 2021) ("[W]e hold that a party's solicitation of one or more mail ballots constitutes objectionable conduct that may warrant setting aside an election.").

These issues are why the Supreme Court[58] and nearly every circuit court has made the common-sense observation that card check campaigns are inferior to secret ballot elections.[59] The Fourth Circuit perhaps put it best: "[i]t would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands. The one is no more reliable than the other."[60]

The Trump II Board should work to safeguard and conduct more elections and end the voluntary recognition bar.

III. The Board should follow Supreme Court precedent and require non-member employees to opt-in to paying for union political expenditures.

Finally, the Board can strengthen *Beck* rights and protect employee free choice by adopting an "opt-in" regime for non-members required to pay union dues. This would require employees to affirmatively consent to pay for union political and ideological expenditures. In non-Right to Work states, non-members subject to a forced fee agreement are assumed to want to pay full union dues. Full dues include political and ideological costs. Employees who want to pay a reduced fee are often forced to jump through several procedural hoops to pay the reduced fee. A system where non-members must opt-in to paying full dues would better ensure that non-

---

[58] *NLRB v. Gissel*, 395 U.S. 575, 602 (1969) ("secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support").

[59] *NLRB v. Hannaford Bros. Co.*, 261 F.2d 638, 640-41 (1st Cir. 1958) (noting the "vast difference" between secret ballots and card checks); *NLRB v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965) ("it is beyond dispute that secret election is a more accurate reflection of the employees' true desires than a check of authorization cards"); *NLRB v. Southland Paint Co.*, 394 F.2d 717, 729 (5th Cir. 1968) (calling arguments against card check "persuasive"); *NLRB v. Ben Duthler, Inc.*, 395 F.2d 28, 33 (6th Cir. 1968) (citation omitted) (calling cards "notoriously unreliable"); *NLRB v. Gruber's Super Market, Inc.*, 501 F.2d 697, 705 (7th Cir. 1974) (noting "pressures to sign authorization cards are not unknown, and, because of personal factors arising out of the daily working relationship among fellow employees, are not always easily resisted.") (citation omitted); *NLRB v. Arkansas Grain Corp.*, 390 F.2d 824, 828 n. 4 (8th Cir. 1968) ("authorization cards may be a totally unreliable indication of majority status"). *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460, 469 n.4 (3d Cir. 1981).

[60] *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 565 (4th Cir. 1967).

members cannot be required to fund political and ideological speech with which they disagree.

In *Communication Workers of America v. Beck*,[61] the Supreme Court held that NLRA Section 8(a)(3)[62] allows nonmembers to refrain from paying any portion of a union's dues that are spent on political and ideological activities unrelated to collective bargaining, contract administration, or grievance adjustment. In other words, an employee who is not in a Right to Work state cannot be fired for refusing to pay for a union's political and ideological activities.

In *California Saw & Knife Works*,[63] the Board created a set of procedures purportedly meant to implement *Beck*. The Board outlined a three-stage process: (1) the initial notice stage, requiring a notice to potential objectors to inform them of their rights to be nonmembers and objectors; (2) the objection stage, at which an employee who made an objection to paying full dues receives more detailed financial information from the union explaining how it arrived at its chargeable amount; and (3) the challenge stage, allowing employees to dispute the union's calculation of its chargeable expenses.

The Board adopted an opt-out regime because the Supreme Court long ago made an offhand comment, in *Machinists v. Street*, that an employee's "dissent is not to be presumed[,] it must affirmatively be made known to the union by the dissenting employee."[64]

But the Supreme Court effectively outlawed public sector opt-out schemes in *Knox v. SEIU, Local 1000*[65] and *Janus v. AFSCME*.[66] And in doing so, the Court cast serious doubt on the continuing validity of opt-out schemes in the private sector.

In *Knox*, the Court noted an opt-out system represented "a remarkable boon for unions" because nonmembers would normally "prefer not to pay the full amount

[61] 487 U.S. 735 (1988).
[62] 29 U.S.C. § 158 (a)(3).
[63] 320 NLRB 224, 332-33 (1995).
[64] 367 U.S. 740, 744 (1961).
[65] 567 U.S. 298 (2012).
[66] 585 U.S. 878 (2018).

of union dues." The Court asked "[s]houldn't the default rule comport with the probable preference of most non-members?"[67]

The *Knox* Court found an opt-out system inadequate because it "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree."[68] Justice Alito concluded that *Street* and other cases gave "surprisingly little attention" to these issues and that the opt-out approach had "come about more as a historical accident.[69]" The Court concluded *Street*'s 'dissent is not to be presumed' language was mere "dicta," "stated in passing" and an "offhand remark."[70]

If there were any more questions, the Court conclusively closed the door on opt-out schemes in *Janus*. There, the Court ruled that employees could not be required to pay an agency fee unless the employee "affirmatively consents to pay."[71] This is because by agreeing to pay money to a union nonmembers are waiving their rights and "such a waiver cannot be presumed."[72] Thus, employees must clearly and affirmatively consent before any money is taken from them.

In sum, the Board should replace its outdated opt-out framework with an opt-in regime that respects employees' statutory rights and aligns with modern Supreme Court precedent. The original justification for the opt-out system, that dissent must be affirmatively expressed, has been thoroughly abrogated by the Supreme Court. This language was given little analytical thought and cannot support a system that presumes consent to waive an employee's right to refuse to subsidize political and ideological speech. This reform would not hinder unions from collecting voluntary contributions but would simply require them to secure an employee's affirmative consent to pay for ideological and political speech. Adopting an opt-in regime would ensure that the Board's procedures provide meaningful protection for employee free choice.

---

[67] 567 U.S. at 312.
[68] *Id.*
[69] *Id.*
[70] *Id.* at 313.
[71] 585 U.S. at 930.
[72] *Id.*

Steps Congress should take to support returning balance and fairness to the Board.

While the Board can accomplish much of what I recommend today, Congress can promote employee free choice through the following steps:

(1) Congress should pass the National Right to Work Act (H.R. 1232), which would eliminate the need to depend on the NLRB to enforce workers' right not to subsidize union political and other non-bargaining activities;

(2) Amend NLRA Section 9 to provide that unions may become exclusive bargaining representatives only through Board-conducted secret ballot elections;

(3) Amend NLRA Section 9(c)(3) to specify that decertification petitions are barred only within one year of a Board-conducted election and not for any other reason;

(4) Amend the NLRA to provide that unproven unfair labor practice charges will not block decertification elections, but will be considered (if deemed sufficiently meritorious by the NLRB General Counsel) in conjunction with any objections to an election after the ballots have been cast and counted.

The NLRA needs substantial reform, which should be geared to protecting employee free choice and the democratic process. Union officials should not be empowered by federal law to gain representational rights without a secret ballot election or force employees to pay compulsory union dues and for political expenditures under threat of discharge. Thank you for your attention, and I look forward to answering any questions the Subcommittee Members may have.