MINORITY VIEWS
H.R. 2776, "WORKFORCE DEMOCRACY AND FAIRNESS ACT"
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The deceptively-named "Workforce Democracy and Fairness Act" is designed to deny private-sector workers a right to a fair union representation election by mandating unnecessary pre-election delays, encouraging additional delays through wasteful and frivolous litigation, and empowering employers to gerrymander the bargaining unit selected by the workers in order to dilute the voting strength of workers who want to form a union.

A worker's right to join a union and collectively bargain is among the most effective means to grow the middle class and reduce income inequality.[1] The majority has advanced H.R. 2776 at a time of soaring income inequality, attributable, in part, to the decline of private-sector union membership. This bill specifically targets the right to join a union by undermining the union representation election process. Instead of raising wages and empowering employees, H.R. 2776 tilts the playing field against workers who want to organize a union.

The bill was approved with 22 Republicans to 16 Democrats, with all Democrats present opposing the bill on a roll call vote.

H.R. 2776 Overturns Key Parts of the NLRB's 2015 Election Rule by Mandating Delays

The National Labor Relations Board's (NLRB) 2015 election rule updated union election procedures to increase transparency and reduce wasteful litigation that stalls the election process. Unnecessary procedural delays enable employers to have more time to campaign against the union, and research shows that employers often use that time to engage in coercive tactics against workers seeking to unionize.[2] By streamlining the union election process, the 2015 election rule best effectuates the stated purpose of the National Labor Relations Act (NLRA): to "encourag[e] the practice and procedure of collective bargaining" and "protect[] the exercise by workers of full freedom of association."[3]

Under the 2015 election rule, when a union files a petition for a union election, the regional office must schedule a pre-election hearing eight days from the date of the petition.[4] This rule harmonizes the practices of various regional offices; prior to 2015, the regions scheduled hearings using various timelines. The 2015 election rule also narrowed the scope of permissible issues that could be litigated in a pre-election hearing to reduce pre-election delays and avoid wasteful litigation.[5] Before 2015, the employer could insist on litigating any issue of voter eligibility. The pre-election hearing now focuses on issues that are necessary to determine

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[1] Ross Eisenbrey and Colin Gordon, *As Unions Decline, Inequality Rises*, Economic Policy Institute, June 6, 2012 http://www.epi.org/news/union-membership-declines-inequality-rises/.
[2] *NO HOLDS BARRED: The Intensification of Employer Opposition to Organizing*, Kate Bronfenbrenner, Director, Labor Education and Research, Cornell School of Industrial and Labor Relations, May 20, 2009 http://www.epi.org/files/page/-/pdf/bp235.pdf.
[3] 29 U.S.C. § 151.
[4] 29 C.F.R. § 102.63(a)(1).
[5] 29 C.F.R. § 102.64(a).

whether it is appropriate to conduct the election at all. This way, litigation regarding individual voters' eligibility is postponed to after the election, when many disputes can be mooted if their outcome is not enough to change the results of the election. Once the pre-election disputes are resolved, the NLRB's 2015 rule requires the election to be held as soon as practicable, in order for the elections to be conducted efficiently.[6]

The NLRB's election procedures are now settled law: every court where the 2015 election rule has been challenged has upheld the rule.[7] For example, as the Fifth Circuit Court of Appeals held with regards to the suit filed by the Associated Builders and Contractors (ABC) of Texas:

> [The Board] conducted an exhaustive and lengthy review of the issues, evidence, and testimony, responded to contrary arguments, and offered factual and legal support for its final conclusions. Because the Board acted rationally and in furtherance of its congressional mandate in adopting the rule, the ABC entities' challenge to the rule as a whole fails.[8]

Similarly, the U.S. District Court for the District of Columbia held:

> Congress authorized the Board "to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of the NLRA." Plaintiffs complain that "the hundreds of pages in the Board's Final Rule contain remarkably little logic or sound explanation for the sweeping changes made by the Final Rule," but in reality, the Board engaged in a comprehensive analysis of a multitude of issues relating to the need for and the propriety of the Final Rule, and it directly addressed the commenters' many concerns, including a number of the arguments plaintiffs raised here.[9]

The failure of these court challenges to the rule has prompted this legislation to overturn the 2015 NLRB election rule.

H.R. 2776 targets the 2015 election rule by replacing the 8-day deadline for pre-election hearings with a 14-day delay before the hearing. It would also prohibit the NLRB from holding any union election sooner than 35 days after the filing of a petition for an election, even if there are no pre-election matters in dispute. This undermines the parties' free choice: in over 90 percent of union elections, the parties themselves agreed to when the election would occur and who is eligible to vote.[10] During the hearing, the Majority did not articulate any reason to interfere in these agreements by forcing unnecessary delay.

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[6] 29 C.F.R. § 102.67(b).

[7] *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *affirming* 1-15-CV-026, U.S. Dist. LEXIS 78890 (W.D. Tex. June 1, 2015); *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015).

[8] *Associated Builders & Contractors of Texas, Inc.*, 826 F.3d at 229 (5th Cir. 2016).

[9] *Chamber of Commerce*, 118 F. Supp. 3d at 220 (quoting 29 U.S.C. § 156 and plaintiff's motion for summary judgment, respectively).

[10] Percentage of Elections Conducted Pursuant to Election Agreements in FY16, NLRB https://www nlrb.gov/news-outreach/graphs-data/petitions-and-elections/percentage-elections-conducted-pursuant-election (last accessed Jul. 7, 2017).

Committee Republicans at the June 29, 2017 markup echoed anti-union business groups in describing the NLRB's 2015 election rule as an "ambush election rule . . . designed to rush employees into union elections."[11] Indeed, when the D.C. District Court considered the Chamber of Commerce's challenge to the rule, it noted that the Chamber "rel[ied] heavily on the repetition of disparaging labels, referring to the Final rule as the 'ambush' or 'quickie' election rule."[12] The court found that "[t]his tendency to speak in broad terms" ignored how, "when one descends to the level of the particular, the provisions at issue are not quite as described. On its face, the Final Rule does not necessarily lead to the outcomes to which plaintiffs object . . . ."[13] By replacing the NLRB's common sense 2015 election rule with mandatory delays, H.R. 2776 serves no useful purpose other than to buy employers more time to chill employee support for a union.

H.R. 2776 Overturns Parts of the NLRB Election Rule That Streamlines the Hearing Process and Creates Opportunities for Wasteful Litigation and Ambush Hearings

H.R. 2776 expands the issues that parties can litigate prior to the election. Where the 2015 election rule reduced wasteful litigation by delaying issues that could be mooted by the election's outcome, H.R. 2776 now allows parties to raise any pre-election issue that "may reasonably be expected to impact the outcome of the election." This provision allows employers to raise issues that have no bearing on whether there is an appropriate bargaining unit. Thus, it grants employers the ability to extend hearings for weeks on end to buy time to chill the workers' organizing drive or pressure them from organizing. This is not a one-sided concern: unions facing decertification campaigns could use the same delaying tactics. Any issues even remotely work-related, from unfair treatment by supervisors to the accuracy of campaign flyers, can be considered "reasonably expected to impact the election's outcome" and therefore be raised during a hearing. It is foreseeable that the NLRB will be burdened with a docket clogged with cases containing irrelevant issues having nothing to do with whether to conduct an election, or how to define an appropriate bargaining unit. This will further stall review efforts, which in turn will prevent elections from being held.

H.R. 2776 also allows ambush hearings by allowing parties "to raise any issue or assert any position at any time prior to the close of the hearing." The NLRB's 2015 election rules require parties to declare all of the issues to be litigated at the outset of a hearing, as is commonly done in civil litigation, to assure orderly proceedings.[14] H.R. 2776 overturns that rule.

H.R. 2776 Undermines Employees' Right to Full Freedom of Association by Empowering Employers to Gerrymander the Composition of the Bargaining Unit

H.R. 2776 establishes an entirely new regime that would give employers, instead of employees, the dominant voice in determining who should be included and who should be excluded in a bargaining unit. The bill allows employers to dilute the percentage of employees interested in forming a union by expanding the pool of eligible voters with employees who have expressed no interest in joining a union. Employer gerrymandering rigs the NLRB's election process and

[11] Address of Chairwoman Virginia Foxx at U.S. House of Representatives Committee on Education and the Workforce Markup (June 29, 2017) https://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=401796.
[12] *Chamber of Commerce*, 118 F. Supp. 3d at 189.
[13] *Chamber of Commerce*, 118 F. Supp. 3d at 189.
[14] 29 C.F.R. § 102.63(b).

makes it much harder for employees to win a union.

After a union files its petition for an election, including signatures demonstrating a showing of interest of at least 30 percent of the employees, the NLRB applies its traditional two-step process to resolve disputes regarding whether the bargaining unit that the union petitioned for is appropriate.[15]

- First, the NLRB determines whether the unit is a readily identifiable group sharing a "community of interest" using factors such as similarity of wages, hours, terms and conditions of employment, and supervision.[16]
- Second, assuming the unit shares a "community of interest," if the employer contends additional employees should be added to the unit, then the NLRB looks at whether the employees in the unit share an "overwhelming community of interest" such that there "is no legitimate basis upon which to exclude certain employees from it."[17]

Various units are potentially appropriate for collective bargaining. The union need only petition for *an* appropriate unit, not the single *most* appropriate unit, or even the largest one.[18]

The bill undermines this traditional analysis by lowering the standard the employer needs to meet in order for employees to be added to the unit. H.R. 2776 allows an employer to override the union's petitioned-for unit and require that employees be added if they can be shown to also share a community of interest, but without regard to whether this is how the workers chose to freely associate. This change could head off an election by diluting the percentage of employees interested in forming a union to below the 30 percent threshold required for a showing of interest. Even if an election occurs, the ballot box will be stuffed with votes from workers who had no interest in forming a union at the outset, but were added to the voter pool to advance the employer's efforts to defeat the union. This bill shifts the burden of proof on employees to justify why the employer cannot simply dilute a proposed bargaining unit with workers who had no interest in organizing.

The practical impact of this bill is that employers will find it much easier to gerrymander bargaining units to determine who can vote in a union election—presumably to either prevent an election or reduce the union's chances of victory.

This provision has been advanced by employer interests under the guise of overturning the NLRB's 2011 *Specialty Healthcare* decision, which clarified the NLRB's traditional two-step analysis. Committee Republicans inaccurately contend that this decision created a new standard for determining an appropriate bargaining unit that creates "micro-units" and allows unions to

[15] *Specialty Healthcare*, 357 NLRB 934 (2011), *enforced sub nom Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).
[16] Other factors can include "whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; [and] interchange with other employees." *Specialty Healthcare*, 357 NLRB at 942 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)).
[17] *Specialty Healthcare*, 357 NLRB at 944.
[18] *Id.* at 940.

gerrymander bargaining units. Alarmist warnings of a proliferation of "micro-units" have not materialized, as the median bargaining unit size approved by the NLRB has remained unchanged since the 2011 decision.

Fiscal Year	Median Bargaining Unit Size Approved by NLRB (Source: NLRB)
FY 2007	24
FY 2008	26
FY 2009	24
FY 2010	27
FY 2011	26
FY 2012	28
FY 2013	24
FY 2014	26
FY 2015	25
FY 2016	26

As the chart illustrates, the median bargaining unit size was 26 three years before the *Specialty Healthcare* was decided, it was 26 when the decision was issued in 2011, and it was unchanged at 26 in 2016, five years later.[19]

The NLRB's traditional two-step analysis is not new: *Specialty Healthcare*, which was affirmed by the Sixth Circuit Court of Appeals, only clarified the NLRB's existing standard. The D.C. Circuit previously articulated the same test and noted the Board's decades-long precedent using that test.[20] Eight separate Courts of Appeals have subsequently considered *Specialty Healthcare* and held that the NLRB merely "laid out the traditional standard,"[21] and, on June 19, 2017, the U.S. Supreme Court declined to hear a case challenging the two-prong test outlined above involving a Macy's department store.[22]

The Majority's allegations that the *Specialty Healthcare* decision enables "union gerrymandering" of a bargaining unit are also unfounded. Section 9(c)(5) of the NLRA specifically states that "the extent to which the employees have organized shall not be controlling" when determining "whether a unit is appropriate." Union gerrymandering is therefore prohibited, and *Specialty Healthcare* complements Section 9(c)(5) by precluding

[19] Median Size of Bargaining Units in Elections, NLRB https://nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-size-bargaining-units-elections (last accessed Jul. 8, 2017).
[20] *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008).
[21] *Macy's, Inc. v. NLRB*, 824 F.3d 557, 567 (5th Cir. 2016) (internal citation omitted); *see also Rhino Northwest, LLC v. NLRB*, Case Nos. 16-1089, 16-1115, 2017 U.S. App. LEXIS 14884 (D.C. Cir. Aug. 11, 2017) ("Throughout, the Board's approach has remained fundamentally the same . . . We thus join seven of our sister circuits in concluding that *Specialty Healthcare* worked no departure from prior Board decisions.") (internal citations omitted); *Constellation Brands, Inc. v. NLRB*, 842 F.3d 784, 792 (2d Cir. 2016) (the standard is "consistent with earlier Board precedents"); *FedEx Freight, Inc. v. NLRB*, 839 F.3 636, 639 (7th Cir. 2016) (the standard is "not the invention of the *Specialty Healthcare* case"); *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 442 (3d Cir. 2016) ("The Board's citation to and approval of the D.C. Circuit's understanding of Board precedent was not the adoption of new law…"); *Nestle Dreyer's Ice Cream Co. v. NLRB*, 821 F.3d 489, 500 (4th Cir. 2016) ("[T]he Board clarified—rather than overhauled—its unit-determination analysis."); *FedEx Freight, Inc. v. NLRB*, 816 F.3d 515, 523 (8th Cir. 2016) ("The precedents relied on by the Board in *Specialty Healthcare* make clear that the Board does not look at the proposed unit in isolation."), *reh'g and reh'g en banc denied* (May 26, 2016); *Kindred Nursing Centers East, LLC*, 727 F.3d 552, 561 (6th Cir. 2013) ("The Board has used the overwhelming-community-of-interest standard before, so its adoption in *Specialty Healthcare* is not new.").
[22] *See Macy's Inc. v. NLRB*, No. 16-1016, U.S. Sup (June 19, 2017).

employer gerrymandering. H.R. 2776 disrupts settled law by allowing employers to rig union elections in their own favor.

H.R. 2776 thus undermines the very right to organize a union by replacing the "overwhelming community of interest" standard and requiring that any additional employees with a mere community of interest be added to the voting pool upon the request of the employer. By attacking the NLRB's traditional standard and creating a controversy where none exists, Committee Republicans hope to use this as an opening to rewrite the National Labor Relations Act to de-unionize the economy.

COMMITTEE DEMOCRATS OFFER AMENDMENTS TO H.R. 2776

Democrats offered the following amendments to H.R. 2776 at the June 29, 2017 markup:

Amendment 1 – To eliminate the 35-day waiting period for an election

In order to prevent needless delays in conducting elections, Representative Frederica S. Wilson proposed an amendment to strike the text that requires an election to be delayed for at least 35 days from the date the petition was filed when a party contests a pre-election issue. This amendment would restore the current NLRB election rule so an election would be conducted as soon as practicable following the pre-election hearing (consistent with the requirement that a notice of election is posted for three days prior to the election). While H.R. 2776 prescribes minimum delays, there is no provision in the bill to limit the time that an election can be delayed.

This amendment was rejected 16-22.

Amendment 2 – To replace the 14-day waiting period for a pre-election hearing with an 8-day deadline

In order to prevent needless delays in conducting elections, Representative Adriano Espaillat proposed an amendment to require a pre-election hearing to be held 8 days after the date the petition was filed, replacing text requiring that a pre-election hearing be delayed for at least 14 days from the date of the petition. This amendment would codify the current NLRB election rule that went into effect in April 2015. H.R. 2776 allows open-ended delays in holding pre-election hearings, while also prescribing a longer minimum time period before pre-election hearings can be held.

This amendment was rejected 16-22.

Amendment 3 – To prevent employers from withdrawing recognition of a union without an election

In order to promote workforce democracy and fairness, as the bill purports, Representative Joe Courtney proposed an amendment to prohibit employers from withdrawing recognition of the union that was originally certified through an election without first conducting a decertification election. Under current law, if an employer can present objective evidence that a union has lost majority support during a period when the union's decertification is not barred, then the employer can unilaterally withdraw recognition of the union without an election. However, if a

union campaigning for representation presents objective evidence that it has majority support, the employer can require an election before being required to recognize the union. This amendment rectifies that double-standard, by requiring an election before an employer can unilaterally withdraw recognition.

This amendment was ruled non-germane. The appeal of the ruling was tabled on a vote of 22-16.

Amendment 4 – To strike language allowing open-ended litigation in pre-election hearings

In order to ensure that pre-election hearings are focused on resolving genuine disputes, Ranking Member Bobby Scott proposed an amendment striking the text that authorizes parties to raise "any other issue which … may reasonably be expected to impact the outcome of the election." Pre-election hearings are for setting election ground rules such as defining the appropriate bargaining unit, or resolving issues that eliminate the need for an election. They are not for concocting litigation over "any other issue" that could impact the election's outcome, which could range from disputes over the accuracy of campaign literature to alleged unfair labor practices by either party.

The amendment was rejected 16-22.

Amendment 5 – To sanction frivolous and vexatious filings

In order to deter frivolous filings, Representative Suzanne Bonamici proposed an amendment to provide the NLRB with the authority to impose sanctions on any party for presenting a frivolous or vexatious filing during any stage of a representation proceeding. Potential sanctions included reimbursement of the opposing party's attorney fees and costs, using criteria in Rule 11 of Federal Rules of Civil Procedure. In addition, if the Board determines that a party presented a frivolous filing for purposes of delaying an election, the Board shall direct an election in not less than 7 days after such determination. The NLRB has no sanction procedures with regards to representation proceedings.

The amendment was rejected 16-22.

Amendment 6 – To prevent employers from gerrymandering the bargaining unit

Representative Mark DeSaulnier proposed an amendment to strike text that would allow employers to gerrymander bargaining units as a way to impact the outcome of union elections. The amendment reinstated the traditional requirement that an employer can only succeed in adding employees to the proposed bargaining unit if the additional employees shared an "overwhelming community of interest" with the other employees. This bill hinders employees' right to join a union by empowering employers to cram the pool of eligible voters with employees who have expressed no interest in joining a union. In addressing this problem, the amendment restores the current law as expressed in the NLRB's *Specialty Healthcare* decision.

This amendment was rejected 16-22.

Amendment 7 – To prohibit captive audience meetings after an election is ordered

To prevent coercion and intimidation by employers during the election process, Representatives Donald Norcross and Jared Polis proposed an amendment to prohibit captive audience meetings between the date an election is ordered and the time of election. Should an employer violate this provision, the election can be invalidated and a new election ordered upon the filing of valid objections. The amendment provided an exception where there is an explicit written agreement between the employer and a union.

Captive audience meetings are compulsory listening sessions that are conducted by employers on an employee's paid time and are used to propagandize against the union seeking recognition. Current law only prohibits captive audience meetings in the 24 hours prior to an election. Under current law, employees who refuse to participate or object to any portion of the presentation can be legally fired by their employer. Unions are not provided equal time at these meetings, nor do they have any right to enter the employer's worksite to provide information. This amendment helps to level the playing field, and it will help ensure that employees can exercise their choice untainted by attendance at forced meetings. The amendment does not restrict the employer's ability to hold voluntary and unpaid meetings with employees, which are the same terms on which unions campaign.

This amendment was rejected 16-22.

Amendment 8 – To substitute the text of the bill with the Raise the Wage Act

Representative Mark Takano offered an amendment to replace the bill with the Raise the Wage Act (H.R. 15). This amendment raises the federal minimum wage to $15 an hour by 2024. H.R. 2776 does nothing to grow the economy or expand the middle class. By impeding the ability of workers to organize, it depresses wages and creates a more insecure labor market. During this time of skyrocketing inequality, this Committee should be focused on empowering workers and raising wages.

The amendment was ruled non-germane, and the appeal of the ruling was tabled.

ROBERT C. "BOBBY" SCOTT
Ranking Member

SUSAN A. DAVIS

RAÚL M. GRIJALVA

JOE COURTNEY

MARCIA L. FUDGE

JARED POLIS

GREGORIO KILILI CAMACHO SABLAN

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