STATEMENT OF GLENN M. TAUBMAN
TO THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS
HEARING: March 4, 2015

Chairman Roe and Distinguished Committee Members:

Thank you for the opportunity to appear today. I have been practicing labor and constitutional law for 32 years, on behalf of individual employees only, at the National Right to Work Legal Defense Foundation. (My vitae is attached as Exhibit 1). I have a unique perspective on the NLRB's "ambush" election rules, which comes from three decades of representing thousands of employees who are subject to the National Labor Relations Act. I have represented employees in countless elections arising under the NLRA, including certification elections, decertification elections and deauthorization elections.

I start today with the premise that *only* employees have rights under the National Labor Relations Act.[1] The NLRA is not about unions or employers: it is about whether the employee has information from both sides to make a free and informed choice. And the key issue under the NLRA is employee free choice.

Given the centrality of employee free choice under the NLRA, I would like to address two major issues. The first is the way the NLRB's new

[1] *Lechmere Inc. v. NLRB*, 502 U.S. 527, 532 (1992).

"ambush" election rules skew the process to wholly favor unionization, while invading employees' privacy and depriving them of their Section 7 right to choose or reject unionization in an informed and thoughtful manner. The second issue concerns the way in which the ambush election rules continue the odious practice of blocking decertification elections to entrench incumbent unions, via "blocking charges" and arbitrary "election bars," while simultaneously speeding certification elections. The NLRB's new ambush election rules contain aggressive procedures to help unions win elections and get into power, while hypocritically retaining "blocking charges" and "election bars" that make it almost impossible for employees to exercise their rights to rid their workplace of an unwanted union.

I. THE AMBUSH ELECTION RULES PREVENT EMPLOYEES FROM EXERCISING THEIR SECTION 7 RIGHTS

There is much to criticize in the NLRB's new rules. As an employee representative, I will highlight just a few:

First, the ambush election rules mandate a serious invasion of employees' privacy. The rules force employers to disclose to unions their employees' names, *personal* private home or cell phone numbers, *personal* email addresses, and work schedules, including employees who may be supervisors or whose status in or out of the bargaining unit has not been

determined. Despite employees' pleas,[2] the Board has cavalierly brushed aside all privacy concerns, creating illusory or toothless "remedies" for union misuse of employees' personal information. While Congress has mandated "Do Not Call" lists and other consumer protections against SPAM and internet abuse, the Board has refused to apply those principles here, and refuses to allow employees to opt out of the forced disclosure of their personal information. And, once employees' information is handed over, unions can spread this personal information to union officers, organizers, supporters inside the shop and out, and to the entire internet, if they choose.

The Board places no real restrictions or safeguards on how unions use or disseminate this sensitive personal information. The NLRB can neither take back the information once it is conveyed, nor effectively police how unions use or share this information. The only way to protect employee privacy is for the NLRB not to compel the disclosure of employees' private information to union officials in the first place. Indeed, the American public would be appalled if the U.S. Government forced disclosure of citizens' personal contact information to politically active groups like the NRA,

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[2] The National Right to Work Legal Defense Foundation's Comments and Supplemental Comments to the NLRB in opposition to the election rules, dated August 18, 2011 and April 7, 2014, respectively, are attached as Exhibit 2. Additionally, the National Right to Work Legal Defense Foundation's amicus brief in one of the federal cases challenging the rule, *Chamber of Commerce v. NLRB*, No. 1:15-cv-09-ABJ (D.D.C. Jan. 5, 2015), is attached as Exhibit 3.

ACORN or the Sierra Club, but the NLRB has issued an edict doing just that for the benefit of a few politically active and sometimes violent special interest groups called labor unions.

Second, despite unions' high win rate in elections held under the current rules – over 60% – the new ambush rules create an aggressive regulatory regime with one goal: to get even more unions in power, even faster. Perhaps worst of all, the rules completely exclude employees' views and participation in the process. Employees have no right to intervene in any election that is called; no input into the scheduling of the election; no input into the conduct of the election; no input into the scope of the bargaining unit or their own inclusion or exclusion from the unit; and no ability to file objections or challenges to a tainted election. Their voices are silenced.

For example, many employees may be unaware that a union organizing campaign is underway in their shop until they are notified of an impending election just days away. But if these employees – even a majority – seek a delay in the election so they can learn more about both sides and the effects of unionization, the NLRB will deny their request. If they ask for clarity as to who will be included in their unit and who will be excluded, their request will be denied. If they want time to research the union that has targeted them, their request will be denied. All of these flaws were pointed out to the NLRB in comments, yet the concerns were ignored or brushed aside.

Under new NLRB Rule 102.64, the Board will not determine before the election whether specific job positions will be included in a proposed bargaining unit. Employees whose status is uncertain, and their co-workers, will proceed through the election process without knowing whether they are in the unit, or even if some of them are statutory supervisors whose activities could taint the election. Those employees will not know whether to participate in any election campaign, as they can only vote "under challenge." Other employees, who might not want to be in a unit with certain classifications of other employees, will be voting in the dark about the scope of the unit.

This is no way to run a democracy. It is akin to a mayoral election in which it is unknown, either before or after the election, whether up to 20% of the potential voters are inside or outside the city limits. Coupled with the Board's *Speciality Healthcare*[3] decision allowing gerrymandered "micro-units," the ambush election rules provide employees with no input into the timing or occurrence of the election, the scope of who is included or excluded, and the ultimate bargaining unit that will result.

The bottom line is clear: the ambush election rules undermine employees' ability to make informed and thoughtful decisions about

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[3] *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011).

unionization, and violate their right to personal privacy with no right to opt out.

II. REFORM OF THE NLRB'S "BLOCKING CHARGE" RULES

The second issue I want to highlight concerns the Board-created "blocking charge" and "election bar" rules, which make decertification elections almost impossible to obtain. In testimony I gave to this Committee on June 26, 2013, I highlighted several specific cases in which the NLRB allowed unions to game the system and delay decertifications for years, but when those decertification elections were finally held the unions lost overwhelmingly. (A copy of that testimony is attached as Exhibit 4, *see* pages 10-14).

In the Foundation's comments to the Board, we highlighted the unfairness of the "blocking charge" and "election bar" rules, which prevent and delay employees' decertification elections for months or years. We noted that the blocking charge rules do not apply in certification elections, and we asked the Board to act in an evenhanded manner and allow decertifications to proceed under the same basis as certification elections, no matter what elections rules were ultimately adopted. The Board refused, and brushed aside our comments. The ambush election rules keep the blocking charge policies in place, allowing unions to delay indefinitely almost every

decertification in America.

In short, the Board has created aggressive procedures to speed up certification elections and help unions get into power, but ignores blocking charges and election bars that hinder or completely deny employees' ability to decertify the union.

Exhibit 1

GLENN M. TAUBMAN

Education: State University of New York at Stony Brook (B.A., Political Science, 1977); Emory University School of Law (J.D. with Distinction, Order of the Coif, 1980); Georgetown University Law Center, Washington, D.C. (LL.M, Labor Law, 1985).

Employment History: 1980-81: Staff Attorney to the Judges of the United States District Court for the Middle District of Florida; 1981-82: Law clerk to the Hon. Warren L. Jones, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, in Jacksonville, Florida; 1982-Present: Staff attorney with the National Right to Work Legal Defense Foundation, Springfield, VA.

Relevant Practice Experience: Trial and appellate litigation on behalf of individual employees only, exclusively in the areas of labor and constitutional law.

Representative cases: Tierney v. City of Toledo, 824 F. 2d 1497 (6th Cir. 1987), further proceedings, 917 F.2d 927 (1990); NLRB v. OPEIU Local 2, 292 NLRB 117 (1988), enforced, 902 F.2d 1164 (4th Cir. 1990); California Saw & Knife Works, 320 NLRB 224 (1995), petitions for review denied in part, IAM v. NLRB, 133 F.3d 1012 (7th Cir. 1998), cert denied, Strang v. NLRB, 525 U.S. 813 (1998); Penrod v. NLRB, 203 F.3d 41 (D.C. Cir 2000); Albertson's/Max Food Warehouse, 329 NLRB 410 (1999); UFCW Local 951 (Meijer, Inc.), 329 NLRB 730 (1999), review granted, UFCW Local 1036 v. NLRB, 249 F.3d 1115 (9th Cir. 2001), rehearing en banc granted, 265 F.3d 1079 (2001), opinion after rehearing, 307 F.3d 760 (2002), cert. den., Mulder v. NLRB, 537 U.S. 1024 (2002); Lamons Gasket Co., 357 NLRB No. 72 (Aug. 26, 2011); Dana Corp., 351 NLRB

434 (2007); L-3 Communications, Inc., 355 NLRB No. 174 (Aug. 27, 2010).

Bar Admissions: Georgia; New York; District of Columbia; United States Supreme Court and numerous federal courts.

Publications: Union Discipline and Employee Rights, Labor Law Journal, (Dec. 1998); Neutrality Agreements and the Destruction of Employees' Section 7 Rights, ENGAGE, May 2005, at 101.

Exhibit 2

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August 18, 2011 *Via Electronic Filing*

Mr. Lester Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Re: Comments of the National Right to Work Legal Defense Foundation Regarding Proposed Amendments to the Board's Rules Governing Representation Case Procedures (76 Fed. Reg. 36,812; RIN 3142-AA08)

Dear Mr. Heltzer:

Please accept the following comments of the National Right to Work Legal Defense Foundation regarding the National Labor Relations Board's proposed amendments to its rules governing representation case procedures, 76 Fed. Reg. 36,812 (June 22, 2011) (RIN 3142-AA08).

The Foundation is a nonprofit, charitable organization providing free legal aid to employees whose human or civil rights have been violated by abuses of compulsory unionism. Foundation attorneys represent individual employees in cases involving both representation and decertification elections, as well as in cases involving employees' right to hold a deauthorization election to rescind the compulsory unionism clauses governing their employment. Cases in which Foundation attorneys are or have been involved include *Rite Aid/Lamons Gasket*, 355 N.L.R.B. No. 157 (Aug. 27, 2010); *Saint-Gobain Abrasives*, 342 N.L.R.B. 434 (2004); *Covenant Aviation Security*, 349 N.L.R.B. 699 (2007); *Albertson's/Max Food Warehouse,* 329 N.L.R.B. 410 (1999). Among many other important cases litigated before this Board, Foundation attorneys secured employees' right to demand a secret-ballot election as a means of challenging suspect card-check recognitions in *Dana Corp*., 351 N.L.R.B. 534 (2007).

The Foundation strongly opposes the proposed rules because:

(1) the shortened time-frame for representation elections will adversely affect the ability of individual employees to fully educate themselves about the pros and cons of monopoly union representation, and hampers the ability of employees opposed to union representation to organize themselves in opposition to unions;

(2) the providing of employees' personal contact information—to include their phone numbers, email addresses, and work times—to a union, and thus potentially to their co-workers and other individuals with whom the union shares its information, invades employees' right to privacy and places them in danger of harassment or worse; and

(3) the Board not determining the proper scope and composition of a bargaining unit if less than 20% of the unit sought by a union is disputed conflicts with § 9 of the Act.

The Foundation further proposes two amendments to the Board's representation procedures, which should be adopted as common sense reforms even if the proposed rules are not adopted:

(1) the Board's so-called "blocking charge" policy should be repealed so that any allegations of unfair labor practices are resolved post-election, to end the routine union tactic of using frivolous unfair labor practice charges to delay employee votes when the union fears that it may lose the vote; and

(2) the Board should eliminate the ability of petitioners to withdraw election petitions after they are filed. The Board should always conduct an election after a proper election petition is filed, to end the routine union tactic of calling off or delaying secret-ballot elections when a union fears that it may lose the election that it requested.

I. Although Section 7 Equally Protects Employees' Right to Join or Oppose a Union, the Proposed Rule Unduly Restricts the Ability of Employees to Learn About the Union and Oppose Unionization If They So Choose.

The proposed rules' chief purpose is to shorten the time frame from the filing of a petition to the date on which an election is conducted. Under the proposed rules, elections will be conducted in approximately 10-21 days, as compared to the recent median time frame of 38 days from the filing of the petition. 76 Fed. Reg. at 36,831 (Hayes, dissenting). This shortened time-frame will adversely affect the right of employees to educate themselves about the merits or demerits of monopoly union representation and, if they choose, to organize themselves in opposition to the union.

The Supreme Court recently recognized that the NLRA grants employees an implicit "right to receive information opposing unionization." *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008). Indeed, in enacting Sections 7 and 8(c) of the NLRA, Congress intended to foster "'uninhibited, robust, and wide-open debate'" regarding unionization. *Id.* (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974)). In other words:

> 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.

Southwire Co. v. NLRB, 383 F.2d 235, 241 (5th Cir. 1967); *see NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir. 1986); *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971).

The proposed rules are deliberately calculated to minimize the time that employees have to receive information from their employer and elsewhere about the potential drawbacks of monopoly union representation, and thus make an informed choice to accept or reject unionization. Because the union initiates an organizing campaign and controls the timing of the filing of the election petition, employees will doubtlessly be fully exposed to union blandishments and propaganda. Unions will have their literature and talking points prepared and disseminated in advance of requesting any election. But employees will have little opportunity to hear opposing viewpoints.

The result is a less-informed electorate, as employees will be unable to fully educate themselves about unionization before being forced to vote on the issue. *See*, *e.g.*, *Healthcare Ass'n v. Pataki*, 388 F. Supp. 2d 6, 23 (N.D.N.Y. 2005), *rev'd on other grounds*, 471 F.3d 87 (2d Cir. 2006) ("It is difficult, if not impossible to see, however, how an employee could intelligently exercise such [§ 7] rights, especially the right to decline union representation, if the employee only hears one side of the story–the union's. Plainly[,] hindering an employer's ability to disseminate information opposing unionization 'interferes directly' with the union organizing process which the NLRA recognizes.").

Moreover, those who oppose unionization will have insufficient time to organize themselves in opposition to the union and share their beliefs with their co-workers. This grossly tilts the playing field in the union's favor in representation elections, as a union requesting a certification election will certainly prepare and organize itself well in advance of the time that it files an election petition with the Board. The short time frame under the proposed rules will make it extremely difficult, if not impossible, for individual employees opposed to unionization to organize against a union's well-funded and professionally orchestrated campaign to win the monopoly bargaining privilege.

In short, the Board majority threatens to turn the Act's policies on their head by devising rules that place union officials' self-interests above employees' statutory right to make a fully informed choice regarding unionization. "By its plain terms . . . the NLRA confers rights only on *employees,* not on unions or their nonemployee organizers." *Lechmere v. NLRB*, 502 U.S. 527, 532 (1992) (emphasis in original). "[W]hat the statute was enacted to accomplish was to protect not the rights of unions to obtain representation contracts but the rights of employees to be represented by a

bargaining agent of their own choosing." *NLRB v. Red Arrow Freight Lines*, 193 F.2d 979, 981 (5th Cir. 1952). The proposed rules fly in the face of these principles, and thus must be withdrawn.

II. Providing Employees' Personal Information to Unions and, Thus, Their Supporters Invades Employees' Privacy and Places Them in Danger.

The proposed rules require employers to give a petitioning union, within two-days after an election is directed, an electronic list of all employees' telephone numbers, email addresses, work shifts, classifications, and locations. This will be a gross invasion of employees' privacy that subjects employees to the danger of harassment or worse from union agents or supporters.

A. *The Contemplated Disclosure of Employees' Personal Information to Unions Violates Employees' Right to Personal Privacy*

1. Most employees would be appalled to learn that a government agency is contemplating compulsory disclosure of their personal information to a private special interest group *for the purpose* of making it easier for that group to cajole, induce or harass them to support its agenda. Over 93% of private sector employees have chosen not to associate themselves with unions.[1] Only a minority of Americans have favorable views of unions.[2] Many, if not most, Americans do not support the far left-wing agenda that union officials aggressively advance.[3] For this agency of the Obama Administration to compel disclosure of individuals' personal information to these unpopular and politicized special interest groups is indefensible, and functionally no different than the Administration requiring disclosure of citizens' information to ACORN or Greenpeace so as to facilitate their abilities to advance their narrow agendas.

Indeed, the contemplated disclosures run contrary to federal efforts to protect the privacy of citizens' personal phone numbers and email addresses. In 2003, Congress enacted the Do-Not-Call Implementation Act, Public Law No. 108-10, 15 U.S.C. § 6101 *et. seq*., pursuant to which the

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[1] *See* Dept. of Labor, Bureau of Labor Statistics Economic News Release, *Union Member Summary*, USDL-11-0063 (Jan. 21, 2011) (6.9% of private sector employees were union members in 2010) (available at http://www.bls.gov/news.release/union2.nr0.htm).

[2] *See* Pew Research Poll (Feb. 17, 2011) (unions viewed favorably by 47% of public, unfavorably by 39%) (http://people-press.org/2011/03/03/section-4-opinions-of-labor-unions/).

[3] *See, e.g*., http://www.teachersunionexposed.com/dues.cfm ("When teachers were given the chance to opt out of paying for the political causes of education unions, the number of teachers participating in Utah dropped from 68 percent to 6.8 percent, and the number of represented teachers contributing in Washington dropped from 82 percent to 6 percent.").

Federal Trade Commission and Federal Communication Commissions' created a national "Do Not Call" registry to allow citizens to opt out of unwanted telemarketing solicitations.[4] In the same year, Congress also enacted the CAN-SPAM Act, Public Law No. 108-187, 15 U.S.C. § 7701 *et seq*., to protect individuals from receiving unsolicited email communications.

Notably, the disclosure of employees' personal information will occur absent any stated intent or desire whatsoever by these employees to make their home phone numbers, email addresses, and work times available to a union. Indeed, the compelled disclosure will occur even if the employees strongly object to the disclosure, because there is no opt-out mechanism in the proposed rules. Nor could there realistically be such an opt-out considering the extremely short time frame in which the employer must give up the employees' information. Thus, employees who might have qualms about a union obtaining their phone numbers and personal email addresses, and learning where and when they work—and this would include most sensible employees given some unions' long association with violence and intimidation—would have no way to protect their privacy.

2. The proposed rules purport to limit the contemplated invasion of employees' privacy by requiring that unions can only use employees' personal information for "purposes related to the representation proceeding and related Board proceedings." 76 Fed. Reg. at 36,838. This ostensible restriction is both meaningless and unenforceable.

First and foremost, the restriction does nothing to stop the intended invasion of employees' privacy—*i.e.*, union operatives and supporters calling and emailing employees, tracking their movements to and from work, and visiting their homes to cajole or coerce them to support the union in an election (or to secure enough authorization cards to allow a "card check" and thereby avoid an election). Employees who take measures to protect their personal privacy—such as by not listing their telephone numbers or limiting with whom they share their email addresses—will find their attempts at privacy upended by the compulsory disclosure of detailed personal information to an outside third-party—one that the employees may vehemently oppose.

Second, the phrase "related to the representation proceeding and related Board proceedings" is as vague as it is broad. It could be interpreted to include *any* union use of information that regards concerted activity under the Act, as *all* such activities could potentially result in a "Board proceeding." This includes using the information to drum up unfair labor practice charges against the employer, which is a common tactic in union corporate campaigns.[5] The information could also be used by a union to obtain voluntary recognition from the employer, which could result in unfair

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[4] *See, e.g.*, http://www.ftc.gov/bcp/edu/microsites/donotcall/index.html *and* https://www.donotcall.gov.

[5] *See*, *e.g.*, *Pichler v. UNITE*, 542 F.3d 380, 383-84, 395-86 (3d Cir. 2008).

labor practice proceedings or a *Dana* election proceeding (unless the current Board majority overrules that decision).

Third, the proposed restriction is unenforceable as a practical matter. How will the Board or anyone else be able to determine exactly how a union uses employees' personal information? How would the Board enforce this restriction? Through a feckless unfair labor practice prosecution? And what sanctions could it realistically levy for misuse of the information? Absent the unusual circumstance of an internal union whistle blower or an odd happenstance, it will be impossible to determine how the union used the information and with whom it shared that information. Thus, it will be impossible to effectively sanction such a miscreant union or one of its rogue supporters.

One need not look far to see that union officials are predisposed to ignore any restriction placed on their use of employees' personal information. Union indifference to employees' privacy rights is exemplified by the recent conduct of UNITE officials. The Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721 *et seq*., makes it a federal crime for any person knowingly to obtain or disclose personal information from a motor vehicle record, subject to certain limited exemptions. Yet, even this prohibition did not deter UNITE from not once, *but twice*, engaging in systematic and widespread efforts to obtain employees' personal information by covertly copying their license plate numbers and illicitly accessing their motor vehicle records. *See Pichler v. UNITE*, 446 F. Supp. 2d 353, *judgment modified*, 457 F. Supp. 2d 524 (E.D. Pa. 2006), *aff'd*, 542 F.3d 380 (3d Cir. 2008); *Tarkington v. Hanson & UNITE*, Docket No. 4-00-CV-00525 (E.D. Ark. 2000). Considering that unions such as UNITE are willing to blatantly disregard federal statutes that prescribe criminal penalties and significant liquidated damages in order to obtain and use personal information about employees, the notion that unions will refrain from misusing employees personal information based on whatever paltry sanctions the Board majority postulates borders on the laughable.

B. *The Contemplated Disclosures Will Place Employees in Personal Danger from Individuals with Whom a Union Shares Their Personal Information*

1. Even worse than the danger that arises from union use of employees' personal information is the danger posed to employees by misuse of the information by individuals with whom the union shares their information. In election campaigns, unions operate through their agents and supporters. This often includes individuals who are employed at the workplace targeted for unionization. Given that the Board majority's purpose for forcing employers to provide unions with employees' personal information is to facilitate union contact with employees, *see* 76 Fed. Reg. at 36,820, it is both intended and foreseeable that unions will share employees' personal information with their agents and supporters, including the employees' co-workers who support unionization.

Once a union shares employees' personal information with its supporters, those individuals can and likely will misuse this information to the detriment of the employees. The potential for harassment, unwanted sexual advances, identity theft, and property crime are readily apparent.

Harassment. Militant union supporters could easily use personal information to retaliate against individuals who dare oppose the union that they support— incessant and late night phone calls, threatening emails, using the email addresses to sign employees up for spam or malware, and the theft or destruction of their property when they are not at home. For example, UPS employee Rod Carter began to receive threatening late night phone calls following his opposition to a strike by the Teamsters, and was ultimately stabbed with an ice pick by Teamsters militants who tracked his driving route.[6] Of course, union supporters can also use employees' personal information to harass those against whom they have a personal grudge.

Such harassment can occur both with and without the union's knowledge. It can also continue long after the election proceeding ends, for a union has no way to fully retrieve the information that it shares with its supporters (who can simply copy it).

Sexual Harassment. It is unlikely that women in many workplaces will feel comfortable knowing that their personal email addresses, telephone numbers, and when they get off work will be made known to any co-worker or stranger who supports the union's campaign. These individuals can plainly misuse that information to make unwanted sexual advances, and to stalk those who refuse their advances. Indeed, with current technology, an individual's physical movements can even be tracked via their cell phone if their cell number is known.[7]

Sexual harassment is already a well-recognized problem within the workplace. Facilitating the spread of employees' personal information amongst the workforce, as the Board's proposed rule will, can only serve to exacerbate the problem.

Identity theft. A certain result of the Board compelling the disclosure of electronic lists of employees' personal information is identity theft. This is the fastest growing white collar crime in

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[6] *See* http://articles.latimes.com/2001/apr/13/business/fi-50418, last accessed July 14, 2011.

[7] *See* Justin Scheck, *Stalkers Exploit Cell Phone GPS*, WALL STREET JOURNAL (Aug. 3, 2010) ("researchers with iSec Partners, a cyber-security firm, described in a report how anyone could track a phone within a tight radius. All that is required is the target person's cellphone number, a computer and some knowledge of how cellular networks work . . . .") (available at http://online.wsj.com/article/SB10001424052748703467304575383522318244234.html).

the country, and can exact devastating harms on its victims.[8] An electronic list that contain dozens or hundreds of employees' names, addresses, phone numbers, email accounts, employers, and job descriptions is tailor-made for identity theft.

For example, agents of Communication Workers of America Local 1103 in Connecticut recently used personal information that they attained about Patricia Pelletier to sign her up for hundreds of unsolicited and unwanted magazines and consumer products in retaliation for her petitioning for a decertification election.[9] Not only was Pelletier forced to spend several hours each day canceling individual subscriptions and products, but she was billed for thousands of dollars by unwitting marketers and publishing companies, jeopardizing her credit rating and causing her severe emotional distress. With access to employees' detailed personal information, union militants can easily subject other employees to the same or similar types of retaliatory harassment.

Equally dangerous is the identity theft that will occur without the union's knowledge. Because unions cannot control how their agents and supporters will use the personal information provided to them, they cannot prevent their supporters from innocently or inadvertently sharing the information with others who may have wrongful inclinations.

Property Crime. Providing information regarding employees' work schedules and shifts also will facilitate the theft of employees' property and the burglary of their homes. To know when someone is at work is to know when they are not at home, and thus leaves them susceptible to home invasion. If the proposed rule goes into effect, any union agent or supporter—or anyone with whom the agent or supporter shares the information—will gain knowledge of employees' home addresses and times when they are not at home.

2. There is no rule or restriction that the Board can impose on unions to eliminate these dangers to employees' well-being, because they can and will occur without the union's intent or knowledge. The dangers are inherent in the union sharing employees' personal information with its agents, supporters and employees' co-workers—which is the inevitable and intended result of the disclosures. Once a union shares employees' personal information with its supporters, the union: (1) cannot control how these individuals will use the information; (2) cannot control with whom they

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[8] *See*, *e.g.*, Nick K. Elgie, *The Identity Theft Cat-and-mouse Game: an Examination of the State and Federal Governments' Latest Maneuvers,* 4 I/S: J. L. & Pol'y for Info. Soc'y 621, 622-23 (2008).

[9] *See Patricia Pelletier v. CWA, Local 1103*, Case No. Cv-08-5021589-S (Conn. Sup. Ct. 2010); *CWA Communications Workers of America & Its Local 1103 (Connecticut Student Loan Foundation)*, N.L.R.B. Case No. 34-CB-3017.

will share the information; and (3) cannot take the information back if it is misused or after the organizing campaign ends. The "cat" is forever out of the proverbial "bag."

For example, assume that a union shares employees' addresses, phone numbers, email addresses, and work times with several of its supporters. Even if the union shared the information solely to facilitate its organizing campaign, the end result is the same—employees' personal information is now in the hands of individuals who may have their own agendas. These individuals can use this information to stalk a co-worker or engage in identity theft. Even if the union supporters are not themselves miscreants—their associates or teenage child who likes to hack computers may be a different story.

In sum, the only way to protect employees' privacy and safety in the first place is not to compel disclosure of their personal information to unions. Employees' privacy and safety must come before union self-interests in acquiring more dues-paying members.

III. Not Determining the Proper Scope of a Bargaining Unit If Less Than 20% of the Unit Sought by a Union Is Disputed Conflicts with § 9 of the Act.

The proposed rules require that the proper scope of a bargaining unit not be determined before an election if less than 20% of the proposed unit is in dispute. 76 Fed. Reg. at 36,823-36,824. Instead, an election is to be conducted with the disputed employees voting subject to challenge. *Id*. The dispute regarding the proper scope of the unit is to resolved only if the challenged votes affect the election's outcome. *Id*. If the union wins the election irrespective of the challenged votes, the Board will certify the union as the representative of a bargaining unit that includes the disputed employee classifications without determining whether that unit is appropriate. *Id*. at 36,824. This proposal violates the statutory requirements of § 9 of the Act in at least two respects.

First, the Board cannot determine whether there is a question concerning representation under § 9(c)(1) without knowing the size and composition of the bargaining unit. Section 9(c)(1) requires that, after a petition is filed

> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(1). The Board has long required a showing of interest signed by at least 30% of the employees in a bargaining unit to support an election petition. *See* Casehandling Manual (Representation), Sections 11020-11042.

Obviously, the Board cannot determine if 30% of a bargaining unit desires an election if it does not first determine how many employees are in the unit. For example, assume that a union petitions for an election in a unit that it alleges contains 100 employees based on showing of interest signed by 31 employees. The employer contends that a proper unit contains 118 employees. If the employer is correct, the union lacks the 30% showing necessary to establish a question concerning representation. Nevertheless, under the proposed rules, the Region will not resolve the dispute because the 18 disputed employees are less than 20% of the unit. Rather, it will direct an election without first determining if a question concerning representation exists, as § 9(c)(1) requires, and the faulty showing of interest will never be rectified. In effect, the Board now proposes to lower the threshold for a showing of interest for certification elections to less than the traditional 30%.

Indeed, if these proposed rules come into effect, unions will deliberately seek to exploit them in the manner described above. If a union lacks the necessary 30% showing of interest to properly obtain an election, it can simply file a petition for a unit that is 20% smaller, no matter how glaringly inappropriate the proposed unit. When the employer asserts that the unit is inappropriate and under-inclusive, the Region will never bother to determine if there exists an adequate 30% showing of interest or a true question concerning representation. Instead, it will mindlessly direct an election in the ersatz unit.

Second, § 9(b) of the Act requires that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). But under the proposed rules, if less than 20% of the bargaining is in dispute, the Board will *not* determine the unit appropriate for collective bargaining if the union wins an election by a margin that makes the votes of employees in the disputed portions of the unit irrelevant to the electoral outcome. Instead, the Board will blindly certify the union as the representative of a unit that includes the disputed employee classifications, without ever determining if those classifications are properly part of the unit. The Board majority's comments to the proposed rules expressly contemplate this result:

> If, on the other hand, a majority of employees choose to be represented, even assuming all the disputed votes were cast against representation, the Board's experience suggests that the parties are often able to resolve the resulting unit placement questions in the course of bargaining and, if they cannot do so, either party may file a unit clarification petition to bring the issue back before the Board.

76 Fed. Reg. at 36,824.

For example, assume that a union petitions for an election in an asserted unit with three job classifications and 118 employees. The employer contends that the unit is improper because one job classification that contains 18 individuals consists of supervisors. Under the proposed rule, the Board will conduct the election without resolving the "scope of the unit" issue because it concerns less than 20% of the unit. If the union wins the election by a margin that renders the votes of the 18 disputed-individuals irrelevant to the electoral outcome, the Board will blindly certify the union as the exclusive representative of all three job classifications—to include the 18 individuals who might be supervisors —without ever resolving if that unit is proper.

The Board majority's deliberate refusal to determine the proper scope of the unit in this circumstance is plainly inconsistent with not only § 9(b), but also § 9(a).[10] Indeed, both Supreme Court[11] and Board[12] precedent are clear that a precisely defined "bargaining unit" is at the heart of the Act's structure. Nowhere in the NLRA's text or history is there any evidence that Congress wished to permit an erroneous class of workers (equaling up to 20%) to be included in a bargaining unit even if those workers have no real connection to the unit. "[T]he Board's powers in respect of unit determinations are not without limits, and if its decision 'oversteps the law' it must be reversed." *Chemical Workers Local 1 v. Pittsburgh Plate Glass*, 404 U.S. 157, 171-2 (1971) (citations omitted).

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[10] Section 9(a) provides that only "representatives 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* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." 29 U.S.C. § 159(a) (emphasis added).

[11] *See*, *e.g.*, *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985) ("Section 9(b) of the Act vests in the Board authority to determine 'the unit appropriate for the purposes of collective bargaining.' . . . . The Board does not exercise this authority aimlessly; in defining bargaining units, its focus is on whether the employees share a 'community of interest.' A cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining, and prevents a minority interest group from being submerged in an overly large unit." (citations omitted)).

[12] *See*, *e.g.*, *Chester Valley, Inc.*, 251 N.L.R.B. 1435, 1450 (1980) ("Because of this substantial deviation between the appropriate unit and the unit specified in the . . . bargaining demand, that demand was not a proper request to bargain."); *Motown Record Corp.*, 197 N.L.R.B. 1255, 1261 (1972) ("In order to impose a bargaining duty upon an employer, the union's demand should clearly define the unit for which recognition is sought.").

The Board's proposed "20%-is-close-enough" rule also demonstrates a callous disregard for the rights of the individuals within the disputed portions of the unit. The Board majority will subject these persons to monopoly union representation (and, likely, forced union dues obligations), without bothering to determine if they share a community of interest with the rest of the unit, or even if they are statutory employees.

The Board's intended refusal to determine a proper bargaining unit when the votes of the disputed portions do not affect an election will provide unions with a strong incentive to file petitions that encompass supervisors and/or inappropriate job classifications because it presents them with a "no lose" situation. Consider the three possible outcomes of this gambit under the proposed rules:

(1) If the union wins the election irrespective of the challenged votes, it benefits because it will become the exclusive representative of supervisors and/or inappropriate job classifications, as the Board will never determine the proper scope of the unit.

(2) If the union loses the election irrespective of the challenged votes, then the union is no worse off, as it would have lost the election amongst a proper unit anyway.

(3) If the union will win the election if some or all challenged votes are not counted, then the union can simply change its position and concede that those supervisors or inappropriately classified workers whose votes stand in the way of its certification are not part of the unit.

As is readily apparent, the proposed rules give unions every incentive to abuse the representation process, game the system, and make repeated attempts at becoming the exclusive representative of individuals who would not be considered part of a proper bargaining unit if the Board actually adjudicated the issue.

Overall, the Board majority seeks to enshrine in its rules the principle that being up to 20% wrong is "close enough for government work" when determining whether there is a question concerning representation and whether a bargaining unit is appropriate under the Act. But this huge margin of error is not "close enough" under NLRA § 9. Indeed, the courts have consistently refused to enforce Board orders when there is an appreciable difference between the scope of the unit during the election and that ultimately certified. *See*, *e.g.*, *NLRB v. Beverly Health & Rehab. Servs*., 120 F.3d 262 (4th Cir. 1997) (unpublished) (unit differed by 20%); *Nightingale Oil Co. v. NLRB*, 905 F.2d 528, 531 (1st Cir.1990) (units differed by 10%); *NLRB v. Parsons Sch. of Design*, 793 F.2d 503, 506-08 (2d Cir.1986) (units differed by 10%); *cf. NLRB v. Lorimar Prods*., 771 F.2d 1294 (9th

Cir.1985) (units differed by a third); *Hamilton Test Sys. v. NLRB*, 743 F.2d 136 (2d Cir.1984) (units differed by more than half).[13]

In sum, Congress enacted § 9 of the Act to give the Board a clear duty to determine whether a question concerning representation exists, as well as a clear duty to determine with precision the size and composition of a proper bargaining unit. The Board cannot neglect its duties and declare that anything within a 20% margin of error is "close enough for government work," thereby rushing elections for the sole benefit of union officials seeking more compelled dues payors.

IV. The Board's "Blocking Charge" Policy, Which Allows Unions to "Game The System" in Decertification Cases, Must be Eliminated.

The Board majority claims the proposed rules are justified because of the need to "eliminate unnecessary litigation concerning issues that may be, and often are, rendered moot by election results." 76 Fed. Reg. at 36,817. The Board also justifies pushing many current pre-election issues to post-election hearings because "Congress did not intend the hearing to be used by any party to delay the conduct of the election." *Id*. at 36,822. To the extent that these rationales have any validity, then the Board's blocking charge policy must also be eliminated, because it provides unions with an unfettered license to "game the system" and interminably block and delay decertification elections by raising issues that are better left to post-election challenges. Congress clearly did not intend for this result, since it did not legislate "blocks" to elections. Rather, the Board has created such "blocks" in its own discretion.

The Foundation, therefore, proposes that the Board's blocking charge policy be eliminated, and that all decertification elections should go forward and the ballots be counted notwithstanding any previous or contemporaneous unfair labor practice charges. Any allegations in such charges can and should be litigated as post-election challenges/objections. In no case should unfair labor practice charges be allowed to block or delay a decertification election sought by employees. Moreover, ballots should not be impounded because of such charges.

The Foundation's staff attorneys know from decades of personal experience that the first reaction of almost every union facing a decertification petition is to spend .44 cents and mail to the Regional office a "blocking charge," no matter how frivolous. How could it be any other way, because every

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[13] These cases are not distinguished by the Board majority's assertion that, under the proposed rules, employees would not be misled as to the proper scope of the unit because the disputed employee classifications would be voting subject to challenge, 76 Fed. Reg. at 36,824. This does not change the fact that the Board will not actually determine whether the disputed employee classifications are properly within the bargaining unit unless those votes are actually challenged as affecting the electoral outcome.

incumbent (whether a union or politician) wants to remain in power and will do whatever is necessary to block or delay the day of electoral reckoning. We ask the Board to review its own statistics and determine the percentage of decertification elections that are subject to a blocking charge or similar delay. We expect the number to be astronomically high given our experience with unions routinely "gaming the system" to block and delay such elections.

The Board's Casehandling Manual Section 11730 states laudably that "it should be recognized that the [blocking charge] policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition." However, the blocking charge policy is consistently misused by unions for just this purpose. This abuse of the process occurs regularly and has been going on for decades. We ask the Board to take administrative notice of the record in just a few recent or currently pending cases, which are examples of the misuse:

(1) *Metal Technologies, Inc., United Steelworkers Local 2-232, and Pamela J. Wichman (Employee)*, Case No. 30-RD-1526: The decertification petition was filed on November 17, 2010, but blocked until June 2011 by unfair labor practice case 30-CA-18806 (filed by the union on November 23, 2010, just 6 days after the petition). The election *may* occur in August 2011, if no more blocking charges are filed.

(2) *Scott Brothers Dairy/Chino Valley Dairy Products, Teamsters Local 63, and Chris Hastings (Petitioner)*, Case No. 31-RD-1611: The union has filed a long series of unsuccessful unfair labor practice charges, including 31-CA-29944, in an effort to stall the election. The election was held in May 2011, but the ballots remain impounded by additional charges. The union consequently remains as bargaining agent despite grave doubts as to its majority status.

(3) *Cortina's Painting, International Union of Painters & Allied Trades District Council 5 ("IUPAT"), and Sergio Martinez Santos (Petitioner)*, Case No. 19-RD-3890: This decertification petition was filed on March 2, 2011. IUPAT has blocked two previously scheduled elections by filing a series of unfair labor practice charges against Cortina's Painting, the latest in June. An election has again been scheduled for August 19. In all, union blocking charges have delayed an election for almost six months despite clear evidence that a majority of the employees no longer support the union.

(4) *SEIU District 1199, Community Support Services, and Susan Ritz (Petitioner)*, Case No. 8-RD-02179. This decertification petition was filed in February 2010 (after a prior one in 2008 was blocked), but no election was held until February 2011 due to additional blocking charges.

These are just a few examples of unions' misuse and abuse of the blocking charge policy. The Board has recognized that such "blocking charges" serve to deny employees their fundamental § 7 rights. *See Saint-Gobain Abrasives*, 342 N.L.R.B. 434 (2004). Nonetheless, in practice the Board

routinely imposes such "blocks," forgetting that the Act's fundamental and overriding principle is employee free-choice and "voluntary unionism," not the entrenchment of incumbent union officials. Because any "bar" to a decertification election deprives employees of rights expressly granted to them under the Act, *see* §§ 7 and 9(c)(1)(A)(ii), all such "bars" should be strictly and narrowly construed. *See Saint-Gobain Abrasives*; *Waste Management of Maryland*, 338 N.L.R.B. 1002 (2003) ("a finding of contract bar necessarily results in the restriction of the employees' right to freely choose a bargaining representative").

Employees enjoy a statutory right to petition for a decertification election under§ 9(c)(1)(A)(ii) of the NLRA. But that right is trampled by arbitrary "bars" or "blocking charges" which prevent the expression of true employee free choice. Indeed, most of the Board's "bars" and "blocking charge" rules stem from discretionary Board policies, which should be reevaluated when industrial conditions warrant. *See Dana Corp.*, 351 N.L.R.B. 434 (2007); *IBM Corp.*, 341 N.L.R.B. 1288 (2004). It is long past time for the Board to drastically alter, if not end, its "blocking charge" rules.

Employee free choice under § 7 is the paramount interest the NLRA is intended to advance. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *Pattern Makers v. NLRB*, 473 U.S. 95 (1985); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1463 (D.C. Cir. 1997) (Sentelle, J., concurring) (employee free choice is the "core principle of the Act"). An NLRB conducted secret-ballot election is the preferred forum for employees to exercise their right of free choice. *Levitz Furniture Co.*, 333 N.L.R.B. 717, 725 (2001) ("Board elections are the preferred means of testing employees' support"). This right of *employee* free choice should not be sacrificed by allowing unions to "game the system" by blocking elections with unsupported allegations that an employer committed an infraction of the law.

For this reason, the Board's "blocking charge" practice has faced severe judicial criticism. *See*, *e.g.*, *NLRB v. Gebhard-Vogel Tanning Co.*, 389 F.2d 71 (7th Cir. 1968); *NLRB v. Minute Maid Corp.*, 283 F.2d 705 (5th Cir. 1960). Judge Sentelle's concurring opinion in *Lee Lumber*, 117 F.3d at 1463-64, highlights the unfairness of the Board's policy:

> As the court today notes in discussing the imposition of the bargaining order, "employee 'free choice' ... is a core principle of the [National Labor Relations] Act." (citing *Skyline Distribs. v. NLRB*, 99 F.3d 403, 411 (D.C. Cir.1996)). However, in cases like the present one, the Board, in the face of that core principle, presumes that the employees are incapable of exercising their core right because they might have been deceived as to the union's strength by the employers' apparent willingness to challenge the union. If that is the case, and a union is worth having, then why couldn't the unions so inform the employees out of it? To presume that employees are such fools and sheep that they have lost all power of free choice based on the acts of their employer, bespeaks the same sort of elitist Big Brotherism that underlies the imposition of the invalid bargaining order in this case. Consider anew the facts before us. In 1990, 85.7 percent of the

employees of the bargaining unit signed a petition asking for a chance to exercise their free choice. Seven years later, those employees still have not had the election they sought because the Board presumes that the employers' refusal for a few days to bargain with the Union thoroughly fooled those poor deluded employees to such a point that neither the Union nor anyone else could possibly educate them of the truth known only to their Big Brother, the Labor Board.

Instead of arbitrarily blocking elections and treating employees like children, the Board should conduct elections in all decertification cases without delay. Employees are not sheep, but responsible, free-thinking individuals who should be able to make their own choice about unionization. *Id*. Even in where employers commit an unfair labor practice, the Board's "blocking charge" rules are arbitrary and anti-democratic because they halt decertification elections without regard to the desires of the employees, based upon "the sins" of the employer. *Overnite Transp. Co.*, 333 N.L.R.B. 1392, 1398 (2001) (Member Hurtgen dissenting). This does nothing but unfairly entrench incumbent unions.

In sum, the Board must end the misuse and abuse of blocking charges by NLRB Regional Offices and incumbent unions bent on clinging to power. The Board's rule should be amended to provide that unfair labor practice charges will not block an election, but instead will be considered (if deemed sufficiently meritorious by the General Counsel) in conjunction with any objections to the outcome of the election.[14]

V. The Board Should Amend Its Rules So That Petitioners Cannot Prevent the Board from Conducting Otherwise Valid Elections by Withdrawing Petitions.

When unions believe that employees will vote against them in the voting booth, they resort to a common and unsavory tactic: simply cancelling the election by withdrawing their election petitions. Roughly *one-third* of all union representation petitions are withdrawn by the union before

[14] The Board posited nine different options concerning the current blocking charge policy. 76 Fed. Reg. at 36,827-36,828. Option Number 8, to ban blocking charges, is the best course. However, if the Board does not scrap entirely the current policy, it should at least require unions filing unfair labor practice charges in the face of an election petition to simultaneously offer proof and provide immediate access to its witnesses so the Region can expeditiously investigate the charges. In no event should the election be delayed or cancelled, or the ballots impounded, while this investigation occurs.

an election occurs.[15] This union practice of effectively "taking their ball and going home" whenever defeat is likely must be halted.

First and foremost, unions already enjoy a great electoral advantage by being able to control if and when they petition for an election. This enables unions to time the election for when they believe their support will be at its peak. It also enables unions to effectively marshal their resources and organize their campaigns. By contrast, employees and employers are in the dark about exactly when the union blow will fall upon them.

To compound this electoral advantage with the ability to unilaterally withdraw an otherwise valid election petition if the union fears defeat, and potentially re-file the petition later when conditions improve, is grossly unfair. It is akin to giving an incumbent President the ability to control not only the date of the next presidential election—which he would of course time to coincide with a favorable political environment—but also to cancel the election if the political winds unexpectedly shift against him, and then reschedule at a different more advantageous time.

Second, union withdrawal of election petitions advances neither the NLRA's core policy of effectuating employee freedom of choice, nor its subsidiary policy of improving "industrial stability." If there is a question concerning representation amongst employees under § 9 of the Act, resolving that question with an election—one way or the other—clearly advances both policies. Indeed, this is very reason for the existence of election procedures under § 9 of the Act. In contrast, not resolving a legitimate question concerning representation merely because a union fears that employees may exercise their § 7 rights to refrain from representation impairs both employee freedom of choice and industrial stability.

Finally, the Board majority should limit the ability of unions and other petitioners to withdraw valid election petitions because of the impact of some of the other proposed rules. For example, the mandatory disclosure of limited information about employees *before* an election hearing, and the mandatory disclosure of their detailed personal information two-days *after* an election hearing, dictates that unions *not* be permitted to unilaterally cancel the election after receiving this personal information. Otherwise, unions will surely engage in the loathsome tactic of petitioning for an election just to obtain private information about employees, but then withdraw the petition and use that private information to facilitate a corporate campaign against the employer or for other nefarious purposes. If unions are given automatic access to detailed personal information about employees within nine days after filing a petition—which is what the rules contemplate—it is imperative to prevent them from using that private information for purposes other than the election itself.

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[15] According to the Board's statistics, the following percentage of RC petitions were withdrawn over the past five years: 30% in 2010; 31% in 2009; 32% in 2008; 43% in 2007; 36% in 2006; and 40% in 2005. *See* http://www.N.L.R.B..gov/rc-elections-bar-chart#chart1bar.

For these reasons, the Board's regulations should be modified to effectively prohibit unions and other petitioners from withdrawing otherwise valid election petitions. The rules should provide that, when an election petition is filed, the Region *shall* determine whether a question concerning representation exists, conduct an election if such a question exists, and certify the results thereof *irrespective* of the petitioner's further participation in the process.

CONCLUSION

Under the Act, "[u]nions represent employees; employees do not exist to ensure the survival or success of unions." *MGM Grand Hotel*, 329 N.L.R.B. 464, 475 (1999) (Member Brame, dissenting). In proposing these changes to its electoral policies, the Board majority seeks to stand this principle on its head by disadvantaging employees to satiate union self-interests. The proposed amendments to the NLRB's election rules must be rejected and the Board's blocking charge and withdrawal policies amended as described above.

Respectfully submitted,

Raymond J. LaJeunesse, Jr.

RJL/wlm

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April 7, 2014 *Via Electronic Filing*

Gary Shinners, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Re: Supplemental Comments of the National Right to Work Legal Defense Foundation, Inc., Regarding Proposed Amendments to the Board's Rules Governing Representation Case Procedures (Docket No. NLRB-2011-0002, 79 FR 7318)

Dear Mr. Shinners:

Please accept the following supplemental comments of the National Right to Work Legal Defense Foundation regarding the National Labor Relations Board's proposed amendments to its rules governing representation case procedures (Docket No. NLRB-2011-0002, 79 FR 7318). The Foundation reiterates the detailed comments that it submitted on August 18, 2011, in opposition to the Board's first proposed-rulemaking on this subject—i.e., 76 FR 36812, RIN 3142-AA08—which are applicable to the Board's latest proposed rule. *See* 79 FR 7319. The Foundation also reiterates its proposals set forth in those comments that the Board eliminate its "blocking charge" policy and prohibit unions and other petitioners from withdrawing valid election petitions after they are filed.

In addition, the Foundation submits that the Board should require that a *minimum* amount of time must pass before any election is conducted under the Act in order to ensure that employees have a sufficient amount of time to make an informed decision regarding unionization before voting on the subject. The Board should require that no election can be held less than thirty-five (35) days from the date an election petition is filed.

This rule change is necessary to preclude the collusive ambush elections that unions and employers are increasingly springing on employees on short notice using the Board's consent election procedures. For example, in the high profile election recently conducted at a Volkswagen plant in Chattanooga, Tennessee, the company and UAW jointly sprang a consent election on employees with only nine (9) days' notice. *See Volkswagen Group of America Inc. (UAW)*, Case No. 10-RM-121704 (election began nine days after filing of petition). Similarly, pursuant to a pre-negotiated organizing agreement, the National Nurses Organizing Committee and a hospital chain sprang elections on nurses at several hospitals with as little as nine days' notice to those nurses. *See*

DHSC, d/b/a Affinity Medical Center (NNOC), 08-RC-087639 (election conducted nine days after filing of petition); *Greenbrier VMC, d/b/a Greenbrier Valley Medical Center (NNOC)*, 10-RC-087613 (election conducted ten days after filing of petition); *Bluefield Hosp. Co., LLC d/b/a Bluefield Reg. Med. Center (NNOC)*, 10-RC-087616 (same).

Nine days is obviously far too short a time period for employees to educate themselves on the pros and cons of unionization and to make an informed decision on this important matter. So too is the ten to twenty-one day time period that will result from the Board's proposed rule. At a bare minimum, employees should have at least a month to listen to both sides of the debate about unionization, to inform their co-workers of their views on the subject, and contemplate their options before having to cast a vote that could seriously impact their livelihoods for years to come. Given the delay between the filing of an election petition and the posting of a notice informing employees about the election, particularly when a petition is filed on a Friday, the Foundation proposes that the Board amend its rules to mandate that no election be conducted sooner than thirty-five (35) days after the filing of an election petition.

Respectfully submitted,

Raymond J. LaJeunesse, Jr.

RJL/wlm

Exhibit 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, et al.	)	
Plaintiffs,	)	
v.	)	Case No. 1:15-cv-09-ABJ
	)	Judge Amy Berman Jackson
NATIONAL LABOR RELATIONS BOARD, et al.,	)	
Defendants.	)	

AMICUS BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE & EDUCATION FOUNDATION, INC., IN SUPPORT OF PLAINTIFFS

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I. Introduction

The National Labor Relations Board ("NLRB" or "Board") has adopted new rules for speeding up the conduct of union certification elections ("Election Rule," 79 Fed. Reg. 74,308 (Dec. 15, 2014)). The Election Rule acknowledges that "the regional director must always decide on the appropriateness of the unit before directing or conducting an election." 79 Fed. Reg. at 74,392. This is because § 9(b) of the National Labor Relations Act ("NLRA" or "Act") requires that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b).

Nevertheless, directly contravening § 9(b)'s mandate, the Election Rule provides that the Board need *not* determine the composition of roughly one-fifth of a proposed bargaining unit in election proceedings. New NLRB Rule 102.64(a) provides that "[d]isputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted," 79 Fed. Reg. at 74,482. Moreover, the Board "strongly believe[s]" that under the new rule regional directors should typically not resolve "pre-election eligibility and inclusion issues amounting to less than 20 percent of the proposed unit." *Id*. at 74,388 n.373. Perhaps even more egregious, if the votes of individuals

in disputed job classifications will not change the election's outcome, the Board will never decide, even after the election, whether the disputed classifications are properly part of a bargaining unit under new NLRB Rule 102.69(b). 79 Fed. Reg. at 74,487. The Board will instead leave unresolved the parameters of up to 20% of the unit. *Id*.

Consequently, if there is any dispute as to whether individual employees or particular classifications are in the bargaining unit, employees will be left in the dark as to exactly who is in the unit about which they must vote. Under those circumstances, employees may not be able to intelligently decide how to vote.

It would be absurd for a redistricting commission to assert that it properly defined a congressional district while leaving unresolved whether one-fifth of adjacent counties are in or out of the district. So too is it absurd for the Board to claim it is defining an appropriate bargaining unit while leaving unresolved whether one-fifth of job positions are in that unit. Being up to 20% wrong about the proper scope of a unit is simply not "close enough for government work." Under NLRA § 9(b), the Board must define the scope of the bargaining unit in each case. The Board's willful abdication of that statutory responsibility in the Election Rule renders the rule invalid.[1]

[1] The Election Rule is fundamentally flawed for a number of other reasons, such as those set forth in amicus Foundation's comments submitted to the Board and those stated by the two dissenting Board Members. However, this brief only focuses on this flaw and the invasion of employee privacy it facilitates, discussed below, because these are the most glaring deficiencies and do the greatest harm to employee rights to choose or reject unionization.

II. The Board Has a Statutory Duty in Election Proceedings to Determine the Scope of the Bargaining Unit.

"In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 NLRB 124, 127 (1948). This includes a statutory duty under NLRA § 9(b) to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. § 159(b). Two aspects of § 9(b) are noteworthy.

First, the Board's duty to establish an appropriate bargaining unit is mandatory in every election, as § 9(b) requires that "[t]he Board *shall decide* in *each case* whether . . ." *Id.* (emphasis added). The Board has no leeway to shirk this duty in order to haphazardly facilitate its pursuit of another goal: certifying union representatives as fast as possible without regard to the consequences for up to 20% of the employees who may wrongfully be forced into a union and lose their right to bargain for themselves.

Second, the Board must decide who is in a bargaining unit "in order to assure *to employees* the *fullest freedom* in exercising the rights guaranteed by this subchapter." *Id.* (emphasis added). This means the rights guaranteed employees by § 7 of the NLRA "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing," and "the right to refrain from any or

all of such activities." 29 U.S.C. § 157. These rights are "inviolate," as "[o]ne of the principal protections of the NLRA is the right of employees to bargain collectively through representatives of their own choosing *or* to refrain from such activity." *Skyline Distribs. v. NLRB*, 99 F.3d 403, 411 (D.C. Cir. 1996).

If the Board fails or refuses to perform its duty under NLRA § 9(b), employees will be voting whether or not to be represented by a union without knowing exactly who will be in the collective over which the union will have monopoly bargaining power.

Moreover, unsuspecting employees may get wrongfully lumped into a unionized bargaining unit after the fact, thereby severely and negatively impacting their right to refrain from unionization. *See Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1286-88 (11th Cir. 2010) (employee suffers cognizable injury if he is "thrust unwillingly into an agency relationship, where the union is his 'exclusive representative[ ] . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment' under § 9(a)"); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("the congressional grant of power to a union to act as exclusive collective bargaining representative" necessarily results in a "corresponding reduction in the individual rights of the employees so represented"). Employees should not have their individual rights "reduced" simply because the Board refuses to perform its vital role of determining with specificity the individuals and job classifications to be included in or excluded from a bargaining unit.

III. Under the Election Rule, the Board Empowers Itself to *Not* Determine Whether Classifications of Employees Are in a Bargaining Unit.

A. The Election Rule allows the Board to shirk its duty to establish the scope of a bargaining unit, for the sole purpose of giving unions lightning fast electoral victories before employers and employees opposed to unionization know what hit them. As the dissenting Board members aptly stated, "the Final Rule manifest[s] a relentless zeal for slashing time from every stage of the current pre-election procedure," and "the Final Rule's keystone device to achieve this objective is to have elections occur *before* addressing important election-related issues." 79 Fed. Reg. at 74,432 (emphasis added). The "device[s]" for rushing union certification elections are two provisions of the Election Rule that require NLRB regional directors *not* to determine whether disputed classifications of workers are in a bargaining unit, either before or after an election.

The new rule against determining the exact composition of a bargaining unit prior to an election is NLRB Rule 102.64(a), which states that "[d]isputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted." 79 Fed. Reg. at 74,482.[2]

[2] Perversely, the Election Rule also provides that, if a party does not attempt to litigate inclusion issues at the pre-election hearing, then the party is precluded from *ever* disputing the appropriateness of the bargaining unit. *See* NLRB Rule 102.66(d); 79 Fed. Reg. at 74,484. Thus, the Election Rule simultaneously provides that the composition of the unit is not a litigable issue before the election, but parties will be punished with a draconian "waiver" if they don't try to litigate that issue anyway.

That includes disputes concerning whether entire classifications of workers are part of a petitioned-for bargaining unit. *See id.* at 74,384.[3] The Board advises that regional directors *not* resolve who is in a proposed bargaining unit if less than 20% of the proposed unit is in dispute. *Id.* at 74,388 n.373. The status of disputed individuals is to remain unresolved during the election, and the disputed individuals may be allowed to vote subject to challenge.

> If the direction of election provides for individuals to vote subject to challenge because their eligibility has not been determined, the Notice of Election shall so state, and shall advise employees that the individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge. The election notice shall further advise employees that the eligibility or inclusion of the individuals will be resolved, if necessary, following the election.

NLRB Rule 102.67(b); 79 Fed. Reg. at 74,485.

The Board's new rule against determining whether disputed individuals or work groups are properly part of a bargaining unit, if their votes do not affect the election's outcome, is expressed at NLRB Rules 102.69(b), which states:

> *Certification in the absence of objections, determinative challenges and runoff elections.* If no objections are filed within the time set forth in paragraph (a) of this section, <u>if the challenged ballots are insufficient in number to affect the results of the election</u>, and if no runoff election is to be held pursuant to § 102.70, the regional director shall forthwith issue to the parties a certifica-

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[3] As an example, the Board majority stated that, in a proposed unit of "production employees," a regional director will not decide "[w]hether production foremen are supervisors," or "whether workers who perform quality control functions are production employees." 79 Fed. Reg. at 74,384. Those employees are cast into the abyss throughout the entire election process, not knowing whether to vote or whether their ballot, if cast, will ever be counted. And, all employees who do vote will not know exactly who will be in the unit if the union wins the election.

> tion of the results of the election, including certification of representative where appropriate with the same force and effect as if issued by the Board.

Id. (italics in original, underlining added); 79 Fed. Reg. at 74,487. In other words, if a union wins an election by a margin greater than the number of disputed individuals, the Board will certify the union as exclusive representative of a so-called "unit" of employees, but it will not resolve the status of disputed classifications of employees. The certification order will include a gratuitous "footnote to the effect that they are neither included nor excluded" in the bargaining unit. 79 Fed. Reg. at 74,413. The Board intends to allow the employer and union to decide for themselves, *after* the election, whether those individuals are part of the unionized unit. *Id.*

Taken together, new NLRB Rules 102.64 and 102.69(b) announce a policy under which the Board may never determine whether as many as 20% of workers are (or are not) part of a unionized bargaining unit. According to the Board majority, "deferral of up to 20% of eligible voters would have left the challenged ballots non-determinative in more than 70% of all representation elections conducted in FY 2013." 79 Fed. Reg. at 74,390 n. 388. The Board has thus embraced the proposition that it will not decide the composition of a bargaining unit in about 70% of contested representation elections. That is a dereliction of the Board's duty under NLRA § 9, with broad and deleterious ramifications for employees' right to free choice.

B. To illustrate how these rules would work in practice, consider a simple example. A union petitions for an election in a bargaining unit of "production employees" that it claims has 100 job positions. The employer asserts that 15 of

those job positions are not part of the unit because 10 "system analyst" positions are technical in nature and 5 "foremen" positions are supervisors (under NLRA § 2(11), 29 U.S.C. § 152(11), "supervisors" are not "employees," but agents of the employer).

Under new NLRB Rule 102.64, the Board will not determine before the election whether these fifteen job positions are part of the proposed unit. Those individuals, their co-workers, and the employer will proceed through the election without knowing whether they are in the unit, or even if some of them are statutory supervisors. Those individuals will not know whether to participate in the election campaign. If the foremen turn out to be supervisors, their participation in the campaign will likely be illegal and taint the entire election process. *See, e.g.*, *Dejana Indus., Inc.*, 336 NLRB 1202 (2001) ("if a supervisor directly solicits authorization cards, those cards are tainted"); *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004) (actions of pro-union supervisors taint the election process). Moreover, other employees who might not want to be in a unit with system analysts or foremen will be voting in the dark.

And, if the union wins the election by more than fifteen votes, the Board will certify it as the representative of a bargaining unit of "production employees" pursuant to NLRB Rule 102.69(b) without ever determining whether that unit includes those fifteen system analysts and foremen. Their status, and thus the scope of the unit, will simply be left unresolved. It is akin to a mayoral election in

which it is unknown, either before or after the election, whether 15% of the potential voters are inside city limits.

IV. The Election Rule Is Invalid Because the Board Will Not Establish an Appropriate Unit Either Before or After an Election.

A. The Board concedes that "the regional director must always decide on the appropriateness of the unit before directing or conducting an election." 79 Fed. Reg. at 74,392. This result is required not only by NLRA § 9(b), but also by NLRA § 9(c)(1), which mandates that the Board "provide for an appropriate hearing," and "find[ ] upon the record of such hearing that such a question of representation exists," before it "direct[s] an election by secret ballot and . . . certif[ies] the results thereof." 29 U.S.C. § 159(c)(1).

Nonetheless, as discussed above, the Election Rule allows the Board *not* to establish the scope of up to 20% of a bargaining unit either before an election or after, as long as resolution of the dispute will not change the election's outcome. That is incompatible with NLRA §§ 9(b) and 9(c)(1). As the Board stated when it proposed the Election Rule, "[t]he unit's scope *must always* be established and found to be appropriate prior to the election." 79 Fed. Reg. 7318, 7331 (Feb. 6, 2014) (emphasis added).

The Board attempts to reconcile the irreconcilable by claiming that establishing an "appropriate unit" does not necessitate resolving "inclusion issues," *i.e.*, deciding which employees are in a bargaining unit. *See id.* at 7330-31; 79 Fed. Reg. at 74,384. According to the Board, "[g]enerally, individual eligibility and inclusion

issues concern either (1) whether an individual or group is covered by the terms used to describe the unit, or (2) whether an individual or group is within a particular statutory exclusion and cannot be in the unit." *Id.* at 74,384.

> For example, if the petition calls for a unit including "production employees" and excluding the typical "professional employees, guards and supervisors as defined in the Act," then the following would all be eligibility or inclusion questions: (1) whether production foremen are supervisors, *see, e.g., United States Gypsum Co.*, 111 NLRB 551, 552 (1955); (2) whether production employee Jane Doe is a supervisor, *see, e.g., PECO Energy Co.*,322 NLRB 1074, 1083 (1997); (3) whether workers who perform quality control functions are production employees, *see, e.g., Lundy Packing Co.*, 314 NLRB 1042 (1994); and (4) whether Joe Smith is a production employee, *see, e.g., Allegany Aggregates, Inc.*, 327 NLRB 658 (1999).

Id.

The distinction between "unit determinations" and "inclusion determinations" the Board posits does not exist with respect to whether job classifications are part of a unit.[4] Bargaining units *are composed* of job classifications. If the Board does not decide what job classifications are included in a unit, then the Board has not decided the composition of the bargaining unit as NLRA § 9(b) requires.

The NLRB's function of making unit determinations is analogous to the function of redistricting commissions many states use to draw congressional and

[4] A dispute concerning whether a particular individual is employed in a job classification – unit placement – is a different matter, as that dispute does not affect the parameters of the unit. For example, if an employer and union dispute whether "press operator" positions are part of a unit, that dispute affects the scope of the unit. But, if the parties agree that press operator positions are in a bargaining unit, but dispute whether laid-off employee John Smith is still employed as a press operator, that eligibility question does not affect the unit's scope.

legislative districts.[5] No one would say that a redistricting commission fulfills its function of defining a congressional district if it does not determine whether particular counties or towns are in that district. The reason, of course, is that a congressional district is the sum of its geographic parts. Similarly here, a bargaining unit is the sum of its job classifications. The Board cannot fulfill its statutory function of establishing the scope of a bargaining unit if it does not resolve whether the unit includes or excludes particular job classifications.

B. In addition to making logical sense, the text of NLRA § 9(b) makes clear that unit determinations require resolving so-called "inclusion" issues. Section 9(b) states that "[t]he Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or *subdivision thereof*." 29 U.S.C. § 159(b) (emphasis added). The term "subdivision thereof" indicates Congress' intent that the Board decide, as part of its unit determination, which subdivisions of employees – *i.e.*, which job classifications – are included in the unit.

NLRA § 9(b) also requires that the Board decide an appropriate bargaining unit "in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the NLRA]." 29 U.S.C. § 159(b) (emphasis added). All employees who vote in a representation election when the Board refuses to resolve whether a

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[5] *See* National Conference of State Legislatures, *Redistricting Commissions: Redistricting Plans*, available at http://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx (last visited Jan. 29, 2015).

disputed job classification is in the unit are not exercising their section 7 right to choose whether to be represented with the full information necessary to a free and intelligent decision, because how they vote may be affected by what classifications are in the unit.

Moreover, the Board particularly fails to protect, much less effectuate, the rights of employees in disputed job classifications if it refuses to resolve whether they are properly part of a bargaining unit. To begin with, they do not know whether they should vote or not, because they do not know whether their vote will be counted and whether they will be in the unit if the union wins the election.

Then, when a union is certified as the result of an election, the problem is compounded. If unresolved job classifications rightfully should be part of the unionized unit, the Board has failed to effectuate the § 7 rights of employees in the disputed classifications who support the union if the employer and union agree after the election to exclude them. Conversely, and more likely, if unresolved job classifications are not properly part of the unionized unit, but the employer and union agree after the election to include them, the Board has failed to protect the § 7 rights of such employees who oppose the union not to be subjected to forced unionization. Either way, the Board is not assuring to employees in disputed job classifications "the fullest freedom in exercising the rights guaranteed by [the NLRA]." 29 U.S.C. § 159(b).

NLRA § 9(b)'s exceptions for "professionals" and "guards" further prove Congress' intention that defining an appropriate unit includes deciding which job

classifications are in that unit. Sections 9(b)(1) and (3) state in relevant part that, when making unit determinations:

> [T]he Board shall not:
>
> (1) decide that any unit is appropriate for such purposes *if such unit includes both professional employees* and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or
> . . .
> (3) decide that any unit is appropriate for such purposes *if it includes, together with other employees, any individual employed* as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises . . .

29 U.S.C. §§159(b)(1),(3) (emphasis added); *see Leedom v. Kyne*, 358 U.S. 184 (1958) (Board improperly included both professional and nonprofessional employees in a bargaining unit it found appropriate, despite § 9(b)(1)'s commands). These sections demonstrate that there is no principled distinction between deciding an appropriate unit and deciding which employees are included in that unit. Congress envisioned that the former includes the latter.

Nevertheless, the Election Rule provides that, unless a union actually lists professionals as being part of a unit in its election petition, the new standard rules will apply, and the regional director need not decide whether a unit includes professionals or guards. 79 Fed. Reg. 74,384-85 n.357. However, to find a unit appropriate if it mixes professional and guard employees with other employees is incompatible with the Board's statutory duty under § 9(b) of the Act.

C. The Board's position that it need not determine *who* is included in order to define an appropriate unit also is inconsistent with NLRA § 9(a), which defines exclusive representation as follows:

> Representatives 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* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

29 U.S.C. § 159(a) (emphasis added). The reference to "all the employees in such unit" indicates that Congress envisioned that, when determining an appropriate unit, the Board would decide the identity of "all the employees in such unit."

The Election Rule is inconsistent not only with NLRA § 9(a)'s text, but also with its purpose, which is to define the parameters of collective bargaining. Under § 9(a), an employer's obligation to bargain with a union "extends only to the 'terms and conditions of employment' of the employer's 'employees' in the 'unit appropriate for such purposes' that the union represents." *Allied Chemical Workers, Local 1 vs. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971) (quoting 29 U.S.C. § 159(a)); *see also Pall Corp. v. NLRB*, 275 F.3d 116 (D.C. Cir. 2002) (terms for recognizing a union as the representative of employees in a different bargaining unit is not a mandatory subject of bargaining). In other words, the scope of the unit controls the scope of bargaining. The Board's decision *not* to resolve whether a union represents individuals in certain job classifications undermines the bargaining process, as the Board itself has acknowledged:

> Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.

Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962).

The Board's refusal to determine exactly whom a union represents is particularly problematic given that unions owe a duty of fair representation to all employees they exclusively represent under NLRA § 9(a). *E.g., Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). A union's "duty of fair representation is . . . akin to the duty owed by other fiduciaries to their beneficiaries," such as the "duty a trustee owes to trust beneficiaries," or the relationship "between attorney and client." *ALPA v. O'Neill,* 499 U.S. 65, 74 (1991). The Election Rule threatens to leave a union uncertain as to whom it owes a fiduciary duty, and employees uncertain as to whether any duty is owed to them. It is akin to an attorney not knowing whether he represents a defendant in a court proceeding, and the client not knowing if the attorney actually represents him.

D. The Board's artificial distinction between unit determinations and inclusion determinations finds no basis in its case law, which employs the same basic legal standard for making both determinations. "[I]n defining bargaining units, [the Board's] focus is on whether the employees share a 'community of interest.'" *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985); *see Blue Man*

Vegas, LLC v. NLRB, 529 F.3d 417, 421-22 (D.C. Cir. 2008). The Board uses a similar community of interest standard when deciding if a petitioned-for unit is appropriate prior to an election,[6] as it does in deciding whether challenged classifications are in the unit after an election.[7] The Board's new notion that these are different inquiries makes little sense given that they pose the same basic legal question, and have an equal effect on employees' rights.

Indeed, prior to the Election Rule the Board actively policed and decided both unit scope and inclusion issues. In *Boeing Co.*, 337 NLRB 152, 153 (2001), the Board described its policy with respect to determining appropriate units in this way:

> The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. If the petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the par-

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[6] *See, e.g.*, *Blue Man Vegas,* 529 F.3d at 420-22 (community of interest standard used to resolve appropriateness of larger unit of stagehands that excluded musical instrument technicians); *Macy's, Inc.*, 361 NLRB No. 4, at * 7-8 (2014) (modified community of interest standard used to resolve whether unit composed of only Macy's cosmetic department employees, and no others, is an appropriate unit); *Specialty Healthcare & Rehab. Ctr.*, 357 NLRB No. 83, at * 14-16 (2011) (modified community of interest standard used to resolve whether unit composed only of certified nursing assistants, and not hospital's other employees, is an appropriate unit); *United Operations, Inc.*, 338 NLRB 123, 125 (2002) (community of interest standard used to resolve whether unit composed of only HVAC employees, but not an employer's other employees, is an appropriate unit); *Omni-Dunfey Hotels, Inc.*, 283 NLRB 475, 476 (1987) (community of interest standard used to resolve whether unit composed of only engineering department employees, and not a hotel's other employees, is appropriate).

[7] *See, e.g.*, *Speedrack Products Grp., Ltd. v. NLRB*, 114 F.3d 1276, 1278-79 (D.C. Cir. 1997) (community of interest standard used to resolve challenge to inclusion of work-release employees in a bargaining unit); *Lundy Packing Co., Inc.*, 314 NLRB at 1043-44 (community of interest standard used to resolve challenge to inclusion of quality control job positions in a production employees' unit).

> ties, but it also has the discretion to select an appropriate unit that is different from the alternative proposals of the parties. *See, e.g., Overnite Transportation Co.*, 331 NLRB 662, 663 (2000); *NLRB v. Lake County Assn. for the Retarded*, 128 F.3d 1181, 1185 fn. 2 (7th Cir. 1997).

The Election Rule disregards much of this precedent and past practice, as shown by the Board majority's overruling of the decision in *Barre National, Inc.*, 316 NLRB 877 (1995). *See* 79 Fed. Reg. at 74,386. In *Barre National*, the Board held that § 9(c)(1) *requires* that pre-election hearings provide the opportunity to present evidence regarding who is eligible to vote and to raise questions regarding supervisory status, among other things. There, a hearing officer refused to permit evidence regarding an employee's supervisory status. The Board found the refusal "did not meet the requirements of the Act," even though the hearing officer—like the Election Rule—would have permitted the individual to vote under challenge, subject to post-election proceedings to determine supervisory status. 316 NLRB at 878-89; *see North Manchester Foundry, Inc.,* 328 NLRB 372 (1999) (recognizing that § 9(c)(1) of the Act requires an appropriate pre-election hearing on eligibility issues). Rejecting this settled practice that found its roots in the Act itself, the current Board majority overrules *Barre National* and disregards its own prior interpretations of what Section 9(c)(1) "requires."

Similarly, in overseeing the Board's power to certify unions as representatives of clearly defined units, federal courts have refused to enforce Board orders when there is an appreciable difference between the scope of the unit during the election and that ultimately certified. *See NLRB v. Parsons Sch. of Design*, 793 F.2d

503, 506-08 (2d Cir. 1986) (units differed by 10%); *NLRB v. Beverly Health & Rehab. Servs, Inc.*, 120 F.3d 262 (4th Cir. 1997) (unpublished) (unit differed by 20%); *NLRB v. Lorimar Prods, Inc.*, 771 F.2d 1294 (9th Cir. 1985) (units differed by one-third); *Hamilton Test Systems v. NLRB*, 743 F.2d 136 (2d Cir.1984) (units differed by more than one-half).

The Board possesses no power to deviate from these principles.[8]

E. Finally, the Board majority's position that the status of *20 percent* of a bargaining unit can be a so-called inclusion issue, as opposed to a unit determination issue, *see* 79 Fed. Reg. at 74,388 n. 373, is simply unreasonable as a quantitative matter. Congress mandated in NLRA § 9(b) that the "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining . . . ." It is inconceivable that Congress envisioned that this duty would be fulfilled if the Board left unresolved whether one-in-five employees is properly part of a certified unit. In short, the Election Rule undermines Congress' explicit statutory commands to the Board and, therefore, cannot stand.

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[8] *NLRB v. A.J. Tower Co.*, 329 U.S. 324 (1946), does not save the Election Rule, as the Board erroneously claims, *see, e.g.,* 79 Fed Reg. at 74,425. *A.J. Tower* upheld a Board rule that barred employers from challenging a ballot post-election if they had not made a pre-election ballot challenge. 329 U.S. at 325-26. That is not the situation here. The Election Rule *precludes* regional directors from determining whether individuals are properly part of a bargaining unit even if their inclusion or exclusion is disputed pre-election. *See* NLRB Rule 102.69(b).

V. The Board Cannot Leave It to Employers and Unions to Decide the Representational Preferences of Employees.

The Board justifies its refusal to decide the exact scope of a bargaining unit, when its decision purportedly would not change an election's outcome, by claiming that the employer and union can work it out between themselves, either through bargaining or through filing a petition for unit clarification. 79 Fed. Reg. at 74,393, 74,413. This excuse is untenable given NLRA § 9(b)'s requirement that "[t]he Board shall decide *in each case* . . . the unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b) (emphasis added). The Board cannot shirk its duty on the grounds that it may decide the inclusion issues in a later-filed unit clarification case if the employer and union cannot do so themselves. The Board itself has a statutory obligation to determine who is in (or out) of a unionized bargaining unit in *each* representation case.

Moreover, letting self-interested employers and unions decide whether individuals or groups of employees are properly part of a union-represented bargaining unit is inconsistent with the Board's responsibility to make unit determinations "in order to assure *to employees* the fullest freedom in exercising the rights guaranteed by [the NLRA]." *Id*. (emphasis added). That would turn the Act's primary purpose – protecting employee rights *from* employers and unions – on its head. *See* NLRA §§ 8(a) & (b), 29 U.S.C. §§158(a) & (b) (delineating employer and union unfair labor practices).

Employers and unions, if allowed to themselves decide whether employees are part of a bargaining unit, will necessarily make those decisions based on their own self-interests, and not on the actual merits of the employees' status or desires. Employees will become little more than bargaining chips in negotiations between the employer and union.

It is largely for this reason that the Supreme Court warned decades ago against deferring to even ostensibly "good faith" employer and union beliefs about employee preferences, because it "would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act – that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives." *International Ladies' Garment Workers Union v. NLRB*, 366 U.S. 731, 738-39 (1961); *see Auciello Iron Works Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (finding "nothing unreasonable in giving a *short leash* to the employer as vindicator of its employees' organizational freedom") (emphasis added); *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003) (overruling Board decision to defer to agreement between an employer and union regarding whether employees wanted union representation because, "[b]y focusing exclusively on employer and union intent, the Board has neglected its fundamental obligation to protect employee Section 7 rights. . . .").[9] *Id.* at 532. The Board simply

[9] The concern that self-interested unions and employers will gerrymander units or grant recognition within inappropriate units regardless of employees' representational preferences is not speculative or theoretical. In *Service Employees Int'l Union UHW-West & Local 121-RN and Los Robles Hospital & Medical Center*, Cases 31-

cannot delegate to self-interested employers and unions its statutory duty to decide which employees are in a proper bargaining unit.

VI. The Election Rule Severely Undermines Employees' Privacy Rights.

A. The Election Rule contains a new "voter information" requirement, by which employers must quickly turn over to petitioning unions employees' personal e-mail addresses, personal cell phone numbers and other private information, without the individual employees' knowledge or consent. *See* 79 Fed. Reg. at 74,301.[10] In issuing that requirement, the Board cavalierly brushed aside all concerns for employee privacy and personal security, refusing to permit employees to opt out or put themselves on a "do not call" list, 79 Fed. Reg. at 74,341-52, despite the well-known abuse every citizen faces from identity theft and solicitors' misuse of personal information. *See* FTC Do-Not-Call Rule, 16 CFR part 310; CAN-SPAM Act, 15 U.S.C. § 7701 *et seq*. (protecting individuals from receiving unsolicited e-mail communications).

CB-105004 *et alia* and 31-CA-105045 *et alia*, two unions and a hospital forced unionization onto two newly acquired units of nurses and service employees without their knowledge or consent. After unfair labor practice charges were filed in 2013, the unions and hospital settled by withdrawing the unlawful recognition.

[10] 79 Fed. Reg. at 74,301 states:

> Within 2 business days of the direction of election, employers must electronically transmit to the other parties and the regional director a list of employees with contact information, including more modern forms of contact information such as personal email addresses and phone numbers if the employer has such contact information in its possession. The list should also include shifts, job classifications, and work locations.

The Board's only response to these legitimate privacy concerns is a weak warning to unions not to use the information "for purposes other than the representation proceeding, Board proceedings arising from it, and related matters." 79 Fed. Reg. at 74,336. However, the Board does not define "related matters," leaving a gaping hole regarding the use of employees' personal data. More importantly, the Board specifies no sanctions for misuse of employees' information, dangling only the vague notion that it will provide an "appropriate remedy" under the Act "if misconduct is proven and it is within the Board's statutory power to do so." 79 Fed Reg. at 74,360. This nebulous and toothless promise that the Board might sanction unions that misuse employees' personal information rings hollow.

In any event, the Board cannot prevent misuse of employees' personal information. Once a union shares employees' personal information with its officers, agents, organizers and supporters, it: (1) cannot control how these individuals will use the information; (2) cannot control with whom they will share the information; and (3) cannot take the information back if it is misused. Once information is disseminated, the Board cannot put the "cat" back in the proverbial "bag."

B. Worse, what about employees who are *not* properly part of a bargaining unit but whose status is not resolved prior to the election? Under the Election Rule, employers are obligated to provide these individuals' personal information to the union, even though they may be supervisors, or employed in jobs outside of the unit.

It is arbitrary and capricious for the Board to compel the disclosure of personal information about individuals the union has no right to represent.

For example, assume that an employer claims that 10 individuals in a petitioned for unit of 100 individuals are not "employees" under the NLRA, but are statutory supervisors the union has no legal right to represent. Assume further that the employer is correct. Nonetheless, under the Election Rule, the Board will not decide whether individuals are supervisors prior to the election, and will force the employer to disclose to the union the home addresses, personal e-mail addresses, and cell phone numbers of these supervisors. The Board has no legitimate reason for compelling the disclosure of that information. Thus, when taken together with the Board's rule against determining exactly who is in a bargaining unit, these disclosure requirements are arbitrary and capricious.

C. Finally, as a general matter, most employees would be appalled to learn that a government agency contemplates compulsory disclosure of their personal cell phone numbers and e-mails to a special interest group *for the purpose* of making it easier for that group to cajole, induce or harass them to support its agenda. Over 93% of private sector employees have chosen *not* to associate themselves with unions.[11] Many workers have unfavorable views of unions.[12] Many workers do not

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[11] *See* Dep't of Labor, Bureau of Labor Statistics Econ. News Release, *Union Member Summary*, USDL-15-0072 (Jan. 23, 2015) (6.9% of private sector employees were union member), available at http://www.bls.gov/news.release/union2.nr0.htm.

[12] *See* Pew Research Center Poll (Mar. 3, 2011) (unions viewed favorably by 47% of public, unfavorable by 39%), http://people-press.org/2011/03/03/section-4-opinions-of-labor-unions/.

support the political agenda that union officials aggressively advance.[13] For a federal agency to compel disclosure of individuals' personal information to these unpopular and politicized special interest groups is indefensible, and little different from the federal government requiring disclosure of citizens' information to ACORN, Greenpeace or the National Rifle Association to facilitate those organizations' abilities to advance their political agendas. This is especially true when the worker whose personal information is compulsorily disclosed may not even be in the bargaining unit under consideration.

CONCLUSION

"[T]he premise of the Act . . . [is] to assure freedom of choice and majority rule in employee selection of representatives." *International Ladies' Garment Workers*, 366 U.S. at 739. Congress, in enacting § 9 of the Act, gave the Board a statutory duty to determine with precision the size and composition of a proper bargaining unit. That determination helps ensure employee free choice. The Board cannot neglect its duties and declare that anything within a 20% margin of error is "close

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[13] *See, e.g.*, http://www.teachersunionexposed.com/dues.cfm.

enough for government work," thereby rushing elections for the sole benefit of union officials seeking more forced dues payors.

Respectfully submitted,

/s/ Glenn M. Taubman

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 6th day of February, 2015, a true and correct copy of the foregoing Brief Amicus Curiae on behalf of the National Right to Work Legal Defense & Education Foundation, Inc., was electronically filed with the Clerk of the Court using the CM/ECF system, and thereby a copy of said Brief Amicus Curiae was served on counsel for all parties, who are all on the ECF system.

/s/ Glenn M. Taubman

Exhibit 4

STATEMENT OF GLENN M. TAUBMAN
TO THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS
HEARING: June 26, 2013

Chairman Roe and Distinguished Committee Members:

Thank you for the opportunity to appear today. I have been practicing labor and constitutional law for 30 years, on behalf of individual employees only, at the National Right to Work Legal Defense Foundation. (My vitae is attached as Exhibit 1). I believe that I have a unique perspective that comes from three decades of representing thousands of employees who are subject to the National Labor Relations Act.

Marlene Felter is my client, and I am proud to have represented her in her on-going battle to rid her workplace of an unwanted union that used an underhanded and rigged card check process to try to gain representation rights and forced union dues from hundreds of workers. Sadly, Ms. Felter's story is far from unique. Employees trying to refrain from unionization, or decertify an unwanted union, face a daunting array of union and NLRB tactics to keep them unionized, or to thrust unionization on them against their will.

I would like to address two issues today: the first is the need for secret ballots in the union selection process, and the second is the need to reform the way in which the NLRB allows unions to "game the system" and cancel elections when employees want to decertify the union. The NLRB's current rules allow unpopular incumbent unions to remain in power for years after they have lost employees' support. These NLRB rules often prevent employees from ever having a decertification election. In the Tenneco case

highlighted later in my statement, 77% of the employees wanted the union out but the NLRB refused to conduct an election, leading to 7 years of litigation before the union was finally ousted. Far too often, the NLRB acts as an "incumbent protection squad," shielding unions from any challenge to their representational authority, thereby cramming unwanted representation onto unwilling employees.

I. SECRET BALLOTS ELECTIONS ARE NEEDED

a) Card check and neutrality agreements destroy employee rights.

Secret-ballot elections are desperately needed because of the rise of "neutrality and card check" agreements (often called euphemistically "voluntary recognition" or "labor peace" agreements) that abuse employees and destroy their right to free choice in unionization matters.

The basic theory of the NLRA is that union organizing is to occur "from the shop floor up." In other words, if employees want union representation, unions will secure authorization cards from consenting employees and either present those cards to the Board for a certification election or, if a showing of interest by a majority is achieved, present them to the employer with a *post-collection* request for voluntary recognition. The employer may refuse to recognize the union (as is its legal right under Linden Lumber Division, Summer & Co. v. NLRB, 419 U.S. 301 (1974)), and, in either case, the union's proper course is to submit to an NLRB supervised secret-ballot election held under "laboratory conditions." General Shoe Corp., 77 NLRB 124, 127 (1948).

Today, however, union officials subvert the system of organizing contemplated by

the NLRA. They use "neutrality and card check" agreements to organize from the "top down." Unions now organize *employers*, not employees, and they do so by coercing employers to agree in advance which particular union is to represent the employees, and to agree to waive secret-ballot elections. Companies, browbeaten by union "corporate campaigns," eventually agree to work with one specific union to unionize their employees. These neutrality and card check agreements are common in a host of industries, e.g., healthcare, lodging, textiles, automotive. http://www.nrtw.org/neutrality /info; Daniel Yager and Joseph LoBue, Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century, 24 Emp. Rel. L.J. 21 (Spring 1999); Symposium: Corporate Campaigns, 17 J. Lab. Res., No. 3 (Summer 1996). In effect, employers are coerced to create an exclusive organizing arrangement with a particular union even though not a single employee has weighed in on whether he or she desires that particular union as the representative, or desires any representation at all.

Once the neutrality and card check agreement is signed, the employer and the exclusively-favored union work together, irrespective of the employees' actual preferences. For example, employer signatories to a neutrality agreement provide the favored union with significant assistance and advantages – all *prior* to the union's solicitation of even a single authorization card. This assistance usually includes lists of employees' home addresses, phones numbers and other personal information; special access to the workplace for union organizers; and an agreement to recognize only that union. Employees are rarely, if ever, asked to consent to the release of their private

information to union officials, or are they shown the terms of the neutrality agreement. Indeed, the NLRB General Counsel has specifically held that employees have no right to see a copy of the agreement targeting them for unionization. Rescare, Inc. & SEIU Local Dist. 1199, Case Nos. 11-CA-21422 & 11-CB-3727 (Advice Memo. Nov. 30, 2007). (Copy attached as Exhibit 2).

Top-down organizing is repulsive to the central purposes of the NLRA. See Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 632 (1975) ("One of the major aims of the 1959 Act[1] was to limit 'top-down' organizing campaigns . . . "); Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 663 n.8 (1982) ("It is undoubtedly true that one of the central aims of the 1959 amendments to the Act was to restrict the ability of unions to engage in top-down organizing campaigns.") (citations omitted). Top-down organizing tactics, such as the pre-negotiation of neutrality and card check agreements, create the likelihood for severe abuse of employees' Section 7 rights to join or refrain from unionization. 29 U.S.C. § 157.

In fact, at least one United States Court of Appeals has recognized that neutrality agreements and the exchange of favors between an employer and a union can be an illegal "thing of value" under 29 U.S.C. § 302, the equivalent of a bribe that should be condemned. *Mulhall v. Unite Here Local 355*, 667 F.3d 1211 (11th Cir. 2012); *see also* Zev J. Eigen & David Sherwyn, A Moral/ Contractual Approach to Labor Law Reform,

[1] The "1959 Act" is the Labor Management Reporting and Disclosure Act of 1959.

63 Hastings L.J. 695, 725-31 (2012) ("We believe that card-check neutrality agreements violate Section 302 and the NLRA and therefore should not be enforced."). (Copy attached at Exhibit 3).

Indeed, there exists a long history of cases in which employers and unions cut secret back-room deals over neutrality and card check and then pressured employees to "vote" for the favored union by signing authorization cards.[2] See, e.g., Duane Reade, Inc., 338 NLRB 943 (2003), enforced, No. 03-1156, 2004 WL 1238336 (D.C. Cir. 2004) (employer unlawfully assisted UNITE and unlawfully granted recognition based on coerced cards). A common thread running through the many "improper recognition" cases compiled in note 2, supra, is that the favored union did not first obtain an uncoerced

[2] Cases where an employer conspired with its favored union to secure "recognition" of that union are legion. See, e.g., Fountain View Care Center, 317 NLRB 1286 (1995), enforced, 88 F.3d 1278 (D.C. Cir. 1996) (supervisors and other agents of the employer actively encouraged employees to support the union); NLRB v. Windsor Castle Healthcare Facility, 13 F.3d 619 (2d Cir. 1994), enforcing 310 NLRB 579 (1993) (employer provided sham employment to union organizers and assisted their recruitment efforts); Kosher Plaza Super Market, 313 NLRB 74, 84 (1993); Brooklyn Hosp. Ctr., 309 NLRB 1163 (1992), aff'd sub nom. Hotel, Hosp., Nursing Home & Allied Servs., Local 144 v. NLRB, 9 F.3d 218 (2nd Cir. 1993) (employer permitted local union, which it had already recognized as an exclusive bargaining representative, to meet on its premises for the purpose of soliciting union membership); Famous Casting Corp., 301 NLRB 404, 407 (1991) (employer actions unlawfully supported union and coerced the employees into signing authorization cards); Systems Mgt., Inc., 292 NLRB 1075, 1097-98 (1989), remanded on other grounds, 901 F.2d 297 (3d Cir. 1990); Anaheim Town & Country Inn, 282 NLRB 224 (1986) (employer actively participated in the union organizational drive from start to finish); Meyer's Cafe & Konditorei, 282 NLRB 1 (1986) (employer invited union it favored to attend hiring meeting with employees); Denver Lamb Co., 269 NLRB 508 (1984); Banner Tire Co., 260 NLRB 682, 685 (1982); Price Crusher Food Warehouse, 249 NLRB 433, 438-49 (1980) (employer created conditions in which the employees were led to believe that management expected them to sign union cards); Vernitron Elec. Components, 221 NLRB 464 (1975), enforced, 548 F.2d 24 (1st Cir. 1977); Pittsburgh Metal Lithographing Co., 158 NLRB 1126 (1966).

showing of interest from employees and thereafter ask for "voluntary" recognition from the employer. Rather, the union and employer first made a secret neutrality agreement, and only then were the employees "asked" to sign cards for that anointed union.

Employers have a wide variety of self-interested business reasons to enter into neutrality agreements. This primarily includes avoiding the "stick" of union pressure tactics, and/or obtaining the "carrot" of favorable future collective bargaining agreements. Other reasons for which employers have assisted union organizing drives include: (1) the desire to cut off the organizing drive of a less favored union, see Price Crusher Food Warehouse, 249 NLRB 433 (1980); (2) the existence of a favorable bargaining relationship with the union at another facility, see Brooklyn Hospital Center, 309 NLRB 1163 (1992), aff'd sub nom. Hotel, Hospital, Nursing Home & Allied Services, Local 144 v. NLRB, 9 F.3d 218 (2d Cir. 1993); or (3) a bargaining chip during negotiations regarding other bargaining units, see Kroger Co., 219 NLRB 388 (1975).

As is self-evident, none of these union or employer motivations for entering into neutrality and card check agreements takes into account the employees' right to freely choose or reject unionization. Union officials and employers seek and enter into these agreements to satisfy their own self-interests, not to facilitate the free and unfettered exercise of employee free choice.

In short, secret-ballot elections are necessary in union certification campaigns to combat the abuses that flow from neutrality and card check agreements. Employees' rights to a secret-ballot election should not be a bargaining chip between power hungry

union officials and employers desperate to avoid a corporate campaign.

b) Conduct that would be considered objectionable and coercive in a secret-ballot election is inherent in every "card check" campaign.

When conducting secret-ballot elections, the NLRB is charged with providing a "laboratory" in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. See General Shoe Corp., 77 NLRB 124, 127 (1948); NLRB v. Gissel Packing Co., 395 U.S. 575, 601-02 (1969). In contrast, the fundamental purpose and effect of a "neutrality and card check agreement" is to *eliminate* Board-supervised "laboratory conditions" protecting employee free choice, and to substitute a system in which unions and employers have far greater leeway to pressure employees to accept union representation.

The contrast between the rules governing a Board-supervised, secret-ballot election and the "rule of the jungle" governing "card checks" could not be more stark. In an NLRB-supervised secret-ballot election, certain conduct has been found to violate employee free choice and warrant overturning an election, even if that conduct does not rise to the level of an unfair labor practice. General Shoe, 77 NLRB at 127. Yet, a union engaging in the identical conduct during a card check campaign can attain the status of exclusive bargaining representative under current NLRB rules. Worse still, some conduct that is objectionable in a secret-ballot election, and would cause the NLRB to set aside the election, is inherent in every card check campaign!

For example, in an NLRB-supervised, secret-ballot election, the following conduct

has been found to upset the laboratory conditions necessary to guarantee employee free choice, thus requiring the invalidation of the election: (a) electioneering activities, or even prolonged conversations with prospective voters at or near the polling place;[3] (b) speechmaking by a union or employer to massed groups or captive audiences within 24 hours of the election;[4] and (c) a union or employer keeping a list of employees who vote as they enter the polling place (other than the official eligibility list).[5]

Yet, this conduct occurs in *every* "card check campaign." When an employee signs (or refuses to sign) a union authorization card, he is likely not to be alone. To the contrary, it is likely that this decision is made in the presence of one or more union organizers soliciting the employee to sign a card, and thereby "vote" for the union.[6] This solicitation could occur during or immediately after a union mass meeting or a company-paid captive audience speech. In all cases, the employee's decision is not secret, as in an

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[3] See Alliance Ware, Inc., 92 NLRB 55 (1950) (electioneering activities at the polling place); Claussen Baking Co., 134 NLRB 111 (1961) (same); Bio-Med. Applications, 269 NLRB 827 (1984) (electioneering among the lines of employees waiting to vote); Pepsi Bottling Co., 291 NLRB 578 (1988) (same).

[4] Peerless Plywood Co., 107 NLRB 427 (1953).

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

[6] The NLRB's justification for prohibiting solicitation immediately prior to employee voting in a secret-ballot election is fully applicable to the situation of an employee making a determination as to union representation in a card check drive.

> The final minutes before an employee casts his vote should be his own, as free from interference as possible. Furthermore, the standard here applied insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter.

Milchem, Inc., 170 NLRB 362, 362 (1968). Union soliciting and cajoling of employees to sign authorization cards is incompatible with this rationale.

election, because the union clearly has a list of who has signed a card and who has not.

Indeed, once an employee has made the decision "yea or nay" by voting in a secret-ballot election, the process is at an end. By contrast, a choice against signing a union authorization card does not end the decision-making process for an employee in the maw of a "card check drive," but often represents only the beginning of harassment and intimidation for that employee. (One of my former clients, Clarice Atherholt, testified under oath in Dana Corp., 351 NLRB 434 (2007), that "many employees [in her shop] signed the cards just to get the UAW organizers off their back, not because they really wanted the UAW to represent them"). Like Marlene Felter, employees frequently report harassment and intimidation by union officials collecting signature cards. (Attached as Exhibit 5 are a small sample of written statements provided by Marlene Felter's co-workers at Chapman Medical Center who complained about SEIU's harassing and unwanted home visits, which they likened to being stalked. The witnesses' identities have been redacted to protect their privacy).[7]

If done during a secret-ballot election, conduct inherent in all card check campaigns would be objectionable and coercive and grounds for setting aside the

[7] Most card check campaigns are fraught with union coercion, intimidation and misrepresentations that do not necessarily amount to unfair labor practices. See HCF Inc., 321 NLRB 1320, 1320 (1996) (union held not responsible for threats to employee by authorization card solicitor that "the union would come and get her children and it would also slash her car tires"); Levi Strauss & Co., 172 NLRB 732, 733 (1968) (employer was ordered to recognize the union even though the Board had evidence of union misrepresentations to employees as to the purpose and effect of signing authorization cards). In Dana Corp., 351 NLRB 434 (2007), employees testified to relentless harassment by union officials intent on securing a card majority.

election. For example, in Fessler & Bowman, Inc., 341 NLRB 932 (2004), the Board announced a prophylactic rule that prohibits union officials from performing the ministerial task of handling a sealed secret ballot during a mail-in election – even absent a showing of tampering – because, where "ballots come into the possession of a party to the election, the secrecy of the ballot and the integrity of the election process are called into question." Id. at 933.

But in card check campaigns, the union officials do much more than merely handle a sealed, secret ballot as a matter of convenience for one or more of the employees. In these cases, union officials directly solicit the employees to sign an authorization card (and thereby cast their "vote"), stand over them as they "vote," know with certainty how each individual employee has "voted," and then physically collect, handle and tabulate these purported "votes." The coercion inherent in this conduct is infinitely more real than the theoretical taint found to exist in Fessler & Bowman.

Accordingly, even a card check drive devoid of conduct that may constitute an unfair labor practice does not approach the "laboratory conditions" guaranteed in a Board-conducted election. As every American instinctively knows, the superiority of Board-supervised, secret-ballot elections for protecting employee free choice is beyond dispute.

II. REFORM OF THE NLRB'S "BLOCKING CHARGE" RULES

I also want to highlight two recent decertification cases that I have been involved with, to demonstrate the unfairness of the NLRB's "blocking charge" rules. These rules

allow unions to delay or even cancel employees' efforts to hold secret-ballot decertification elections, yet no comparable procedures exist to halt or delay union certification elections. If Congress is going to mandate secret-ballot elections, it should also mandate that the NLRB actually hold those elections and not wrongly and arbitrarily delay or cancel them at the whim of union officials.

The first case involves Tenneco employees in Grass Lake, Michigan. The UAW had represented employees at this facility since 1945. But over time, more and more employees became disenchanted with the union's representation. The union lost touch with the employees and declared a disastrous strike in 2005. Many Tenneco employees resigned from the union and returned to work, and the strike was then marred by union harassment and picketing of nonstriking employees' homes.

One brave employee, my client Lonnie Tremain, attempted to exercise his rights under the NLRA by spearheading two employee-driven decertification campaigns. The first was filed with the NLRB on February 10, 2006, in Case No. 7-RD-3513. That decertification petition was supported by 63% of the bargaining unit employees, but the UAW managed to halt the election by filing unfair labor practice "blocking charges" against Tenneco, and the NLRB refused to conduct the election sought by 63% of the employees.

Ten months later, feeling ignored and disrespected by the NLRB, Mr. Tremain and his co-workers launched their second decertification effort. This time, 77% of the Tenneco employees signed the decertification petition. Because the NLRB steadfastly

refused to conduct a decertification election, Mr. Tremain and his fellow employees asked Tenneco to withdraw recognition of the unwanted union. Based on the overwhelming employee opposition to UAW representation and the passage of time between the two decertification petitions, Tenneco withdrew recognition of the union in December 2006.

Of course, the UAW filed new unfair labor practice charges, and the NLRB General Counsel issued a complaint claiming that Tenneco's unfair labor practice charges had tainted the employees' petition. On August 26, 2011, the NLRB issued a "bargaining order," mandating that Tenneco re-recognize the union and install it as the Tenneco employees' representative, despite the decertification petition signed by 77% of the employees. Tenneco, 357 NLRB No. 84 (2011).

Tenneco appealed to the U.S. Court of Appeals for the District of Columbia Circuit, and Mr. Tremain filed a brief in support. On May 28, 2013, the D.C. Circuit, in a unanimous opinion written by Judge Harry Edwards, ruled that Tenneco did nothing to taint the employees' decertification petition, and that the Board was wrong to issue a bargaining order to foist the union back onto the employees. (Copy attached as Exhibit 4).

In summary, it took Mr. Tremain more than seven (7) years of uncertainty, litigation and NLRB "bargaining orders" before he and his co-workers were finally rid of the UAW. The promise of a secret-ballot election under NLRA Section 9(a) was a cruel joke to Mr. Tremain and his co-workers, because the NLRB refused to hold any election based on union "blocking charges" that even Judge Edwards held were completely

unrelated to the employees' desire to decertify the union.

A similar story recently occurred in California. Chris Hastings is employed by Scott Brothers Dairy in Chino, California. On August 17, 2010, he filed for a decertification election with Region 31 of the NLRB, in Case No. 31-RD-1611. He was immediately met with a series of union "blocking charges" that the NLRB used to automatically delay his election, just as the union knew the Board would.

Officially, the NLRB's rules say this about the "blocking charge" policy (Casehandling Manual 11730):

> The . . . blocking charge policy . . . is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition. Rather, the blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process.

However, such blocking charges are regularly misused by union officials, who know that the NLRB will permit them to delay – or cancel – the decertification election. Using these tricks to "game the system," union officials can remain as the employees' exclusive bargaining representative even if the vast majority of employees want them out. Even worse, the NLRB recently ruled in WKYC-TV, 359 NLRB No. 30 (Dec. 12, 2012), that compulsory dues must continue to flow to the union even after the collective bargaining contract has expired, giving union officials even more incentive to "game the system" and block decertification elections. Indeed, union officials' desire to block decertification elections is predictable, as which incumbent would ever want to face the voters (and see his income cut off) if he didn't have to?

In Mr. Hastings' case, the Teamsters were able to "game the system" and delay the decertification election – with the NLRB's approval – for a full year. When the election was finally held after one year of delay, in August 2011, the union lost by a vote of 54-20. In effect, by filing "blocking charges," the Teamsters bought themselves an extra year of power and forced dues privileges with the connivance of the NLRB.

In conclusion, I urge you to protect the secret ballot, and to make sure that the NLRB is reformed so that the rules for secret-ballot elections apply fully and equally to decertification elections as well. Thank you for your attention.