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WHAT SHOULD WORKERS AND EMPLOYERS EXPECT NEXT FROM THE NATIONAL LABOR RELATIONS BOARD?

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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WHAT SHOULD WORKERS AND EMPLOYERS EXPECT NEXT FROM THE NATIONAL LABOR RELATIONS BOARD?

Tuesday, June 24, 2014
House of Representatives,
Subcommittee on Health, Employment, Labor, & Pensions, Committee on Education and the Workforce,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:07 a.m., in Room 2175, Rayburn House Office Building, Hon. Phil Roe [chairman of the subcommittee] presiding.

Present: Representatives Roe, Wilson, Guthrie, Bucshon, Kelly, Brooks, Messer, Byrne, Tierney, Holt, Pocan, Scott, Courtney, and Bonamici.

Also present: Chairman Kline.

Staff present: Janelle Belland, Coalitions and Members Services Coordinator; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Senior Legislative Assistant; Marvin Kaplan, Workforce Policy Counsel; Nancy Locke, Chief Clerk; James Martin, Professional Staff Member; Zachary McHenry, Senior Staff Assistant; Daniel Murner, Press Assistant; Brian Newell, Communications Director; Krisann Pearce, General Counsel; Alissa Strawcutter, Deputy Clerk; Juliane Sullivan, Staff Director; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Melissa Greenberg, Minority Labor Policy Associate; Eunice Ikene, Minority Labor Policy Associate; Brian Kennedy, Minority General Counsel; Julia Krahe, Minority Communications Director; Leticia Mederos, Minority Director of Labor Policy; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority Staff Director; Amy Peake, Minority Labor Policy Advisor; Michael Zola, Minority Deputy Staff Director; and Mark Zuckerman, Minority Senior Economic Advisor.

Chairman ROE. A quorum being present, the Subcommittee on Health, Employment, Labor, and Pensions will come to order.

Good morning. I would like to welcome our guests and thank our witnesses for joining us. We appreciate the time you have taken out of your busy schedules to participate in today's hearing.

Four years ago, the Obama Administration promised the start of a "recovery summer." The American people were told at the time the nation was about to enter a period of strong growth and job

creation. We know four years later that simply wasn't the case. Instead of a robust recovery, the nation continued to struggle with a jobs crisis that is hurting working families to this day.

It has taken five years to simply regain the jobs lost as a result of the recent recession, making it the slowest recovery in our nation's history. On our current path, it will take four more years before we close what is known as the jobs gap, the number of jobs destroyed by the recession plus the number of jobs that we simply need to keep pace with population growth. Four years after the so-called "recovery summer," roughly 10 million Americans are still searching for work, including more than three million Americans who have been out of a job six months or longer.

When the focus should be on developing bipartisan solutions that will help put people back to work, the Obama Administration has spent most of its time promoting a partisan agenda at the behest of powerful special interests. That has certainly been the case with the National Labor Relations Board.

In response to a steady decline in its membership, unions have increasingly relied on federal agencies to tilt the balance of power in their favor. The NLRB is at the center of this effort, promoting a culture of union favoritism that makes it virtually impossible for employers and workers to resist union pressure.

Under President Obama's watch, the board has restricted access to the secret ballot, advanced an ambush election rule that will stifle employer free speech and cripple worker free choice, and begun to bless micro-unions that will tie employers up in union red tape while undermining employee freedom in the workplace. The NLRB even went so far as to try and dictate where a private employer could and could not create jobs. And I could go on and on.

Additionally, there are cases before the board right now that threaten to further stack the deck in favor of the administration's union allies. For example, the board has requested feedback on how to determine joint-employer status under the *National Labor Relations Act,* a standard that has been in place for 30 years to determine when two employers share immediate and direct control over essential terms and conditions of employment, such as hiring, firing, discipline, and supervision. This isn't a new concept, so the board's recent solicitation is highly suspect and strongly suggests it is eager to abandon existing policies in favor of a new standard more favorable to union interests.

The board may also be looking for ways to give union organizers greater access to employer property, most notably employers' e-mail systems. The board has always instructed employers that any policy limiting the use of work e-mail must be enforced in a non-discriminatory way, which means employers cannot treat unions any differently than any other non-charitable organizations. This provides employers a clear standard to follow and union organizers a level playing field to work on. It is likely the current board majority will seek to impose a fundamentally different approach, one that would give union organizers practically unfettered access to the employers' e-mail systems.

On their own, these may seem like relatively minor issues. However, they are part of a larger pattern that is generating a lot of uncertainty, confusion, and anxiety in workplaces across this coun-

try. Every member of this committee supports the right of workers to freely choose whether or not to join a union. It is ultimately a decision that rests with each and every individual worker. Federal policymakers don't have the authority to make that choice for them.

Today's hearing is a part of the committee's continued oversight of the NLRB, but more importantly, a part of our commitment to defend the rights of workers and employers.

I look forward to learning more from our witnesses in our discussion later this morning. Before I conclude, I would like to take a moment to recognize the new senior Democratic member of the subcommittee, Representative John Tierney. I know he is passionate and a tireless advocate for working families.

And John and I have taken the time to get to know each other. I know that a lot of times you don't see this, but we have taken the opportunity to get to know each other. I have been in his office on an informal basis recently. He was very gracious. And even though we may not see eye-to-eye on a number of issues, I am confident we will find ways to disagree without being disagreeable.

And congratulations on your appointment, Congressman Tierney. And with that, I recognize you for your opening statement.

[The statement of Chairman Roe follows:]

Prepared Statement of Hon. Phil Roe, Chairman, Subcommittee on Health, Employment, Labor, and Pensions

Good morning. I'd like to welcome our guests and thank our witnesses for joining us. We appreciate the time you've taken out of your busy schedules to participate in today's hearing.

Four years ago, the Obama administration promised the start of "recovery summer." The American people were told at the time the nation was about to enter a period of strong growth and job creation. We know four years later that simply wasn't the case. Instead of a robust recovery, the nation continued to struggle with a jobs crisis that is hurting working families to this day.

It has taken five years to simply regain the jobs lost as a result of the recent recession – making this the slowest recovery in our nation's history. On the current path, it will take four more years before we close what's known as the jobs gap, the number of jobs destroyed by the recession plus the number of jobs we need to simply keep pace with population growth. Four years after the so-called "recovery summer" and roughly 10 million Americans are still searching for work, including more than 3 million Americans who have been out of a job for six months or longer.

When the focus should be on developing bipartisan solutions that will help put people back to work, the Obama administration has spent most of its time promoting a partisan agenda at the behest of powerful special interests. That has certainly been the case with the National Labor Relations Board.

In response to a steady decline in its membership, union bosses have increasingly relied on federal agencies to tilt the balance of power in their favor. The NLRB is at the center of this effort, promoting a culture of union favoritism that makes it virtually impossible for employers and workers to resist union pressure.

Under President Obama's watch, the board has restricted access to the secret ballot, advanced an ambush election rule that will stifle employer free speech and cripple worker free choice, and begun to bless micro unions that will tie employers up in union red tape while undermining employee freedom in the workplace. The NLRB even went so far as to try and dictate where a private employer could and could not create jobs. I could go on and on.

Additionally, there are cases before the board right now that threaten to further stack the deck in favor of the administration's union allies. For example, the board has requested feedback on how to determine joint-employer status under the National Labor Relations Act. A standard has been in place for 30 years to determine when two employers share immediate and direct control over essential terms and conditions of employment, such as hiring, firing, discipline, and supervision. This isn't a new concept, so the board's recent solicitation is highly suspect and strongly

suggests it's eager to abandon existing policies in favor of a new standard more favorable to union interests.

The board may also be looking for ways to give union organizers greater access to employer property, most notably employers' email systems. The board has always instructed employers that any policy limiting the use of work email must be enforced in a non-discriminatory way, which means employers cannot treat unions any differently than other non-charitable organizations. This provides employers a clear standard to follow and union organizers a level playing field to work on. It's likely the current board majority will seek to impose a fundamentally different approach, one that would give union organizers practically unfettered access to employers' email systems.

On their own these may seem like relatively minor issues. However, they are part of a larger pattern that is generating a lot of uncertainty, confusion, and anxiety in workplaces across the country. Every member of this committee supports the right of workers to freely choose whether or not to join a union. It is ultimately a decision that rests with each and every individual worker; federal policymakers don't have the authority to make that choice for them. Today's hearing is part of the committee's continued oversight of the NLRB, but more importantly, part of our commitment to defending the rights of workers and employers.

I look forward to learning more from our witnesses and our discussion later this morning. Before I conclude, I'd like to take a moment to recognize the new senior Democrat member of the subcommittee, Representative John Tierney. I know he is passionate and tireless advocate for working families. Even though we may not see eye to eye on a number of issues, I am confident we will find ways to disagree without being disagreeable. Congratulations on your appointment, Congressman Tierney. With that, I will now recognize Mr. Tierney for his opening remarks.

Mr. TIERNEY. Thank you, Chairman Roe. And, yes, this I think will be a good exercise in comity as we try to work through these problems in a way that reflects civility and deals with the issues themselves.

This is the first hearing that has occurred since I was elected to serve as ranking member. And so I want to begin my official statement by thanking Ranking Member Miller, the full committee, and my Democratic colleagues for entrusting me with this capacity to serve.

You know, I have had the privilege of being on this subcommittee for a number of years, and I do it because the jurisdiction is so important, I think, to the issues that really impact the lives of workers, employers, retirees, middle-class families everywhere, and the things that really matter, the things they talk about around the kitchen table, ensuring that all Americans get a decent job that pays a fair wage, access to affordable, quality health care, retire with dignity, and perhaps a little change in their pocket. They are squarely in the subcommittee's jurisdiction, and that is what makes it so interesting and worth serving on.

They are also priorities which I have fought for my career in Congress, and so I am honored to serve as ranking member and ready to take up the challenge. And I do want to thank you, Chairman Roe, for the courtesies that you and your staff have extended to my staff and to me. To date, we have been dealing a lot with the multi-employer pension crisis. I look forward to working on that rather complex issue as we go forward.

Now, with respect to today's hearing, in the past 3–1/2 years, the committee has held at least 16 hearings or markups on the National Labor Relations Board, and today we are doing it again.

Now, it is my understanding that witnesses will discuss two cases. One is the Browning-Ferris case, where the board has asked for input on whether to update and modernize the joint employer

standard. It is believed that the current standard may not reflect the reality of today's workplaces, so the board apparently has asked for the opinion of others so that they can consider that and determine whether or not it needs to be updated and modernized.

The second case, Purple Communications, deals with the right of employees to use e-mail to communicate regarding organizing, bargaining, or forming a union.

In neither of these cases did the board yet come to a decision on whether or not to change the standards as they are currently interpreted. In fact, in one of the witnesses' testimony, today it says, "all indications are that workers and employees should expect that—is that the NLRB will decide these cases by carefully, applying established legal principles to the particular facts of each case, and that in so doing the board will attempt to provide legal guidance to workers and employers who encounter similar situations in the future."

Now, that is exactly what the board is charged with doing. The statute sets it up that way. So assuming that no one associated with this hearing would want to be perceived as attempting to chill the board members from actually doing their job or attempt to influence a decision that is under consideration, one has to wonder why we are having this hearing at all. It is a bit premature and, certainly, I think sort of tries to jump the gun in terms of what the NLRB itself may do in terms of coming to a decision on those issues.

I look forward to the testimony. I trust we are going to be informed and led by the facts and not spend time undermining the efforts or the integrity of the board or mischaracterizing its decisions or maligning board members. That wouldn't be fair, nor would it be productive.

I want to quote the witness again who says, "There is no reason to think whatsoever that workers and employers would expect anything from the NLRB in deciding these cases other than a thoughtful, considered application of established principles to the particular facts of the case."

At the 16 hearings and markups, the subject of the NLRB has been covered pretty extensively, and I think that we ought perhaps wait until the board takes its action, gets all of the input that it wants, and with due deliberation decides.

You know, there have been 9.4 million private-sector jobs that have been created since the recession, when we were losing 800,000 jobs a month. Yet we don't continue to create as much jobs—or as many jobs as we should because we failed to pass a robust transportation bill, which would create hundreds of thousands of jobs. We failed to deal with an anemic research-and-development aspect, which would create jobs. We are missing the opportunity to pass an energy policy that would expedite not only the creation of more jobs, but a policy that would move us away from the reliance on fossil fuels and some dangerous positions in the world.

So I would think that any decision clarifying the law on what is being done in the labor relations field would be best left to the board that is charged with that. In the meantime, we have got a number of things that we could be doing. You know, we certainly have plenty of work to be done on modernizing all of these issues,

and I would ask that we go through this hearing, we, say, keep it away, and let the board encourage the practice and procedure of collective bargaining and protect the exercise of workers of the full freedom of their association in the way the statute requires.

Thank you, Mr. Chairman.

[The statement of Mr. Tierney follows:]

Prepared Statement of Hon. John F. Tierney, a Representative in Congress from the State of Massachusetts

Thank you, Chairman Roe.

This is the first hearing that's occurred since I was elected to serve as Ranking Member of this Subcommittee – so, before beginning my official statement, I want to first thank Ranking Member Miller and my Democratic Committee colleagues for the support and confidence they've placed in me to serve in this capacity.

I have had the privilege of serving on this Subcommittee for many years, and I do so because its jurisdiction is so important and impacts the lives of so many workers, employers, retirees, and middle-class families.

I believe the things that really matter – ensuring all Americans can get a decent job that pays a fair wage, access affordable, quality healthcare, and retire with dignity and a little change in their pocket – are squarely in this Subcommittee's jurisdiction.

They're also priorities which I've fought for my entire career in Congress, so I'm honored to now serve as Ranking Member of this Subcommittee and ready to take up this new challenge.

Finally, I also want to thank Chairman Roe for the courtesy that he and his staff have extended me and mine to date – particularly on the multi-employer pensions crisis. I look forward to working with him on that complex issue and others in the weeks and months ahead. Thank you, Dr. Roe.

Now with respect to today's hearing, in the past three and a half years, the Committee has held at least 16 hearings or mark-ups on the National Labor Relations Board, and today, we unfortunately are at it again.

It's my understanding that witnesses will discuss two cases:

In the Browning-Ferris case, the Board has asked for input on whether to update and modernize the "joint-employer standard." It is believed that the current standard does not reflect the reality of today's workplaces. The second case, Purple Communications deals with the right of employees to use email to communicate regarding organizing, bargaining, or forming a union.

The Board has not come yet to a decision to change either of these standards. It is simply asking for comments.

In fact, according to one of the witness's testimony – and I am quoting here – "All indications are that what workers and employers should expect is that NLRB will decide these cases by carefully applying established legal principles to the particular facts of each case and that, in so doing, the Board will attempt to provide legal guidance to workers and employers who encounter similar situations in the future."

Assuming that no one associated with the hearing would want to be perceived as attempting to "chill" NLRB Members from engaging in their job or attempt to influence a decision under consideration, one must wonder about the timing of this hearing and question its purpose.

I look forward to hearing the testimony and trust we will be informed and led by the facts and not spend time undermining the efforts or integrity of the Board, mischaracterizing its decisions, or maligning Board Members. That's not fair or productive.

Again, to quote one of the witness's testimony, "there is no reason to think whatsoever that workers and employers should expect anything from the NLRB in deciding these cases other than a thoughtful, considered application of established principles to the particular facts of each case."

Mr. Chairman, after 16+ hearings and mark-ups, I think the subject of the NLRB has been covered.

In the few months we have remaining this session, I hope this Subcommittee, the full Committee, and this Congress will turn its attention to what many of us would consider incredibly urgent priorities of the American people – raising the minimum wage, extending unemployment insurance for the millions who need it, stopping employment discrimination based on sexual discrimination, ensuring pay fairness for women, and providing relief for the tens of millions of students and parents with student loan debt.

Again, I thank the Chair and yield back my time.

Chairman ROE. I thank the gentleman for yielding.

Pursuant to committee rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record. Without objection, the hearing record will remain open for 14 days to allow such statements and other extraneous material referenced during the hearing to be submitted for the official hearing record.

Now it is my pleasure to introduce our distinguished panel of witnesses. First, Mr. Andrew Puzder is the chief executive officer for CKE Restaurant Holdings in California. Welcome.

Mr. Seth Borden is a partner of McKenna Long and Aldridge in New York, and Mr. Borden has represented management and labor in employment matters since 1998. Welcome, Mr. Borden.

Mr. James Coppess is the associate general counsel for the AFL–CIO in Washington, D.C., and welcome, Mr. Coppess.

And Mr. Roger King is counsel at the Jones Day law firm in Columbus, Ohio, and he represents management in matters arising under the *National Labor Relations Act.* And welcome again, Mr. King, to our committee.

Before I recognize you to provide your testimony, let me briefly explain our lighting system. You have got five minutes to present your testimony. When you began, the light in front of you will turn green. When one minute is left, the light will turn yellow. And when your time is expired, the light will turn red. At that point, I will ask you to wrap up your remarks as best as you are able to, and after everyone has testified, each member will have five minutes to ask questions. And I will probably be a little more diligent with the members.

And now I would like to now begin the testimony. Mr. Puzder, if you would open.

STATEMENT OF MR. ANDREW F. PUZDER, CEO, CKE RESTAURANTS, CARPINTERIA, CALIFORNIA

Mr. PUZDER. Chairman Roe, Ranking Member Tierney, and members of the subcommittee, thank you for inviting me to testify on an issue of importance not only to our company, but to our nation's entire franchise community: the NLRB potentially adopting a new joint employer standard that would consider franchisors employers of their franchisee's employees. Such a standard would threaten the very successful franchisor-franchisee relationship that has been generating jobs and economic growth for decades.

I can't see the logic of the labor laws requiring or even permitting this. As I will explain, franchisors and their franchisees simply are not joint employers.

My name is Andrew F. Puzder. I am CEO of CKE Restaurant Holdings, Inc., and it is an honor to be here. CKE owns and franchises nearly 3,500 restaurants in 42 states and 31 foreign countries under the Carl's Jr. and Hardee's brands. We employ over 22,000 Americans, and our 226 franchisees additionally employ about 50,000 Americans.

We and our franchisees also spend hundreds of millions of dollars on capital projects, services, and supplies that create thousands of additional jobs and generate broader economic growth. And franchising's overall economic impact is greater still. As I cited

in my written testimony, as of 2012, there were nearly 750,000 franchise establishments in the United States, employing about 8.1 million people with economic output of $769 billion, or roughly 3.4 percent of our nation's gross domestic product.

And that is not all. One report estimated that in 2005, franchising's economic impact was to add 21 million jobs and $660.9 billion in payroll. That is 15.3 percent of all private-sector jobs and 12.5 percent of all private-sector payrolls. And franchising's impact has only grown in the nine years since that report.

The franchisor-franchisee relationship is built on a division of roles and responsibilities. The franchisor owns and licenses the brand, and the franchisee owns and operates one or more locations as a licensee. Businessmen and women from diverse financial and cultural backgrounds invest their time and money in franchisee businesses because the model works. Franchisors are contractually empowered to protect their brands, but those contractual provisions are limited.

At CKE, we set standards that our franchisees need to meet to protect the integrity of our brands and ensure consistency throughout our system, but our franchisees run their businesses. With respect to employees, the franchisee independently choose the people they hire, the wages and benefits they pay, the training such employees undergo, the specific labor practices they utilize, the method by which those employees are monitored and evaluated, and the circumstances under which they are promoted, disciplined, or fired. As franchisors, we're not involved in those decisions.

As with most franchisors, CKE receives a one-time-per-restaurant fee, generally about 25,000, and a royalty, generally 4 percent of sales, to compensate us for the services we provide, for the use of our trademarks, and for protecting the value of those trademarks. CKE does not receive a share of the franchisee's profits.

Franchisors such as CKE benefit from a percentage of each restaurant's top-line sales. Franchisees, on the other hand, benefit from their restaurant's bottom-line profits. Because they directly benefit from an efficient and well-managed staff, the franchisees assume the risks associated with having and managing employees.

Making franchisors liable for their franchisees' employment decisions would force franchisors to exert control over such employment decisions. For example, franchisors would need to review hiring and compensation decisions. Franchisors would need to be present in the franchised restaurants more frequently to monitor the workplace, to dictate or even administer employee training, and to increase restaurant staffing, as the franchisor deemed necessary.

Suddenly, franchisees would find themselves unable to independently run their businesses or to control their labor costs, a key controllable expense. The franchisors' royalties are contractual as part of a franchise agreement that generally has a 20-year term and was never intended to compensate for the cost of managing a franchisee's employees. To impose such risks and the associated costs on franchisors beyond their contractual obligations while depriving franchisees of the ability to control their labor costs would seriously threaten the viability of this very successful franchise business model.

In closing, extending the joint employer standard to franchising would not further any purpose of the labor laws. Rather, it would unnecessarily require systemic changes in the franchisor-franchisee relationship, impairing the viability of this very successful business model that has created so many jobs and so much economic growth. Thank you.

And I am happy to take questions.

[The statement of Mr. Puzder follows:]

Written Testimony of Andrew F. Puzder,
CEO of CKE Restaurants Holdings, Inc.
On Why the NLRB Adopting a New Joint Employer Standard Would Be Bad for Workers, Employers, Franchising and the Economy
Before the House Education and the Workforce Committee's Subcommittee on Health, Employment, Labor, and Pensions

I. Introduction

I want to thank Chairman Roe and the members of the Health, Employment, Labor and Pensions Subcommittee for giving me the opportunity discuss what workers and employers should expect from the National Labor Relations Board ("NLRB"). The NLRB's recent invitation for parties and amici to brief the issue of whether it should adhere to its existing joint employer standard or adopt a new standard is of particular concern to this nation's franchise community, including our company, CKR Restaurant Holdings, Inc. ("CKR"), which franchises the Carl's Jr. and Hardee's quick service restaurant brands.

Our concern is that the NLRB will adopt a standard that views franchisees' employees as employees of the franchisor. Such a standard could completely disrupt the franchisor/franchisee relationship if it were to make franchisors liable for their franchisees' employment practices despite the fact that franchisors have no control over such practices.

The NLRB's current standard has been in place for over 30 years. During that time the franchise business model has proven enormously successful at enabling individuals to own and operate their own businesses, creating substantial economic growth and jobs. The franchise model has also provided countless entrepreneurial opportunities for women, minorities, and veterans. If the NLRB were to change that standard so as to hold franchisors responsible as joint employers with their franchisees, it would significantly and negatively impact both the franchise business model and the small businessmen and businesswomen who have invested their time, energy and money in the hopes of becoming successful franchisees, including those who have done so as part of CKE's restaurant franchise system.

As CEO of CKE, I'm hopeful my testimony will help open a dialogue between legislators, regulators and the business community on this issue because it is absolutely critical for everyone in this room to understand the potential adverse effects such a changed standard would have. As such, I would like to start with a general comment about the value of franchising and how it works.

The franchisor/franchisee relationship is built on a division of roles and responsibilities. The franchisor owns, represents and licenses the brand, and the franchisee owns and operates one or more locations as a licensee. Businessmen and businesswomen from diverse financial and cultural backgrounds invest money in America's franchised businesses, including CKE's, because they believe they can succeed using their individual business acumen and capital combined with our brand, even in competition with large national chains. Franchisees are the quintessential independent entrepreneurs. They create direct and indirect jobs while generating tax revenues and improving both our nation's economy and their local communities.

While as a franchisor CKE is contractually empowered to protect its brands and to do so on behalf of all of its franchisees, those contractual provisions are limited and do not extend to every phase of the business. We set standards our franchisees need to meet in order to protect the integrity of our brands and ensure consistency throughout our system, but our franchisees run their businesses. Among other things, our franchisees choose their restaurant's location, determine how much they will pay for the location, invest their own capital in facilities and equipment, choose the prices they charge for products and manage every aspect of their restaurants day to day operations.

With respect to employees, the franchisees independently choose the people they hire, the wages and benefits they pay, the training such employees undergo, the specific labor practices they utilize, the method by which those employees are monitored and evaluated and the circumstances under which they are promoted, disciplined or fired.

As with most franchisors, CKE receives a onetime fee per restaurant (generally $25,000) and a royalty (generally 4% of sales) to compensate it for the services it provides, for the use of its trademarks and for protecting the value of

those trademarks. CKE does not receive a share of its franchisees' profits. As such, franchisors benefit from a percentage of each franchised restaurant's top line sales. The franchisees, on the other hand, benefit from their restaurants' bottom line profits. Franchisees are responsible for their employees as they are the ones who directly benefit from an efficient and well managed staff. As they are the ones who benefit, the franchisees are also the ones who assume the risks associated with having and managing employees. It simply would be untenable for a franchisor to be deemed a joint employer.

Each of the 42 states in which our franchisees operate has its own particular labor laws with which such franchisees must comply. The franchisor's royalties are contractual as part of a franchise agreement that generally has a 20 year term. Neither the initial franchise fee nor the franchisor's royalty were intended to cover nor do they cover the costs of managing employee related risks. To impose such risk on franchisors would materially alter the existing franchisor/franchisee relationship to the detriment of both parties and materially damage the current very successful franchise business model.

Franchisees run their own businesses and each franchisee is in charge of the profitability of his or her restaurant, *not the franchisor*. The value of the franchise model is that it allows individual entrepreneurs to use their business judgment to run small businesses that utilize national or regional brands. A joint employee liability standard could destroy that model.

Let me describe our business and the importance of the franchise system to that business.

II. Company Description and Job Creation Impact

CKE Restaurants Holdings, Inc. is a quick service restaurant company that, through its subsidiaries, owns or franchises nearly 3,500 restaurants in 42 states and 31 foreign countries and territories. We are headquartered in Carpinteria, California with regional headquarters in Anaheim California, and St. Louis, Missouri. Carl N. Karcher, an Ohio native with an 8th grade education, and his

wife Margaret, a California native, started our Company in 1941 with a hot dog cart in South Central Los Angeles.

We now employ over 22,270 people in the United States. Our domestic franchisees employ approximately an additional 50,000 people. As such, we account for over 70,000 jobs in the United States.

Our Company owns and operates 883 of our 3,487 restaurants. Our franchisees own and operate the remaining 2,604 restaurants of which 2,008 are in the United States. Our Company-owned restaurants average over $1.3 million in sales per year. Each restaurant employs about 25 people and has one General Manager.

We provide significant employment opportunities for minorities. Today, 62% of our Company employees are minorities. We also provide significant employment opportunities for women. Currently, 62% of our employees are women. We're proud of the Company's diversity.

Of CKE's over 22,270 employees, 2,936, or 13%, earn the federal minimum wage. Of these 2,936 minimum wage employees, 1,851, or 63%, are between the ages of 18 and 21 (basically high school or college age). As such, 5% of our total employee base is over 21 years of age and earning the federal minimum wage. The average hourly rate for all restaurant level employees is $8.96. Last year, CKE spent $329 million on restaurant level labor or about 28% of total company owned restaurant sales.

Our General Managers are 62% minorities and 66% women. They are 41 years old on average. However, their ages range from 19 to 64. Several of our Executive Vice Presidents and Senior Vice Presidents started as restaurant employees and learned the business as restaurant General Managers.

Our franchisees, who are generally small business owners and entrepreneurs themselves, often started out as General Managers in our restaurants or our competitors' restaurants. Many run family businesses that have passed from one

generation to the next. We have 226 franchisees nationwide. A few of our franchisees own a hundred or more restaurants, but most of our franchisees own 20 or less. These franchisees exemplify the American entrepreneurial spirit on which we built our Company and they instill that spirit in their 50,000 employees and managers.

While we and our franchisees directly account for over 70,000 jobs in the United States, our Company's impact on the Nation's employment rate goes well beyond the number of people we directly employ. The hundreds of millions of dollars we and our franchisees spend on capital projects, services and supplies throughout the United States create thousands of additional jobs and generate broader economic growth. This is the power of a franchising model that has existed for years under the NLRB's current standard.

III. The Franchise Relationship

At its simplest, franchising is a mechanism through which the franchisor licenses the use of its trademarks, goods and services to other individuals and businesses (the franchisee) to enable the franchisee to independently own and operate its own business. In the context of restaurant franchising, the franchisor in effect provides a business format for the development, establishment and operation of restaurants, using uniform and unique building designs, restaurant layouts, trade dress (including specially designed décor and furnishings), recipes and menu items, cooking techniques, training systems, regional or national advertising and the like. This business format, which is unique to each franchisor, is sometimes referred to as that franchisor's "System."

CKE, like other franchisors, has expended significant time, expertise and money over the years to develop a distinctive System, and continues to invest its resources to keep the System relevant in today's market. It would be extremely difficult for an individual or group of individuals to develop and maintain their own restaurant System, placing their dream of owning their own business out of reach. Moreover, developing a new System in the competitive restaurant industry is highly risky. The ability to franchise enables entrepreneurs who want to own

their own business to enter this highly competitive market backed by the strength of an established and proven restaurant System, thus significantly reducing both the cost and risk of being an entrepreneur. As consideration for providing would-be entrepreneurs with a System, the franchisor receives a royalty. In our industry, the royalty rate usually ranges from 4% to 5% of sales. We do not receive a share of the franchisees' profits.

We believe the desire to be an entrepreneur and the minimization of risk franchising makes possible are the primary reasons business format franchising has experienced such explosive growth in the last couple of decades. As of 2012, there were nearly 750,000 franchise establishments in the United States. IHS Global Insight, *Franchise Business Economic Outlook for 2013*, at 1, 7 (December 2012). These establishments employ about 8.1 million people and have an economic output of $769 billion. *Id.* Franchise establishments account for roughly 3.4% of the country's gross domestic product. *Id.* at 2.

However, the economic impact of franchised businesses goes beyond the establishments themselves. After accounting for factors such as products and services purchased by franchised outlets and the personal purchases of franchise owners and employees, PriceWaterhouseCoopers estimated that, in 2005, the total impact of franchising, including its spillover effects, was to add 21 million jobs (or 15.3% of all private-sector jobs) and $660.9 billion of payroll (12.5% of all private-sector payroll) to the American economy. PriceWaterhouseCoopers, *The Economic Impact of Franchised Businesses Vol. II: Results for 2005*, at 7.

In CKE's System, we further encourage the entrepreneurial spirit that made this country strong by respecting the business experience of our franchisees and working with them to build a stronger System. While at the end of the day, as Franchisor we have to set the standards and make the rules that will define our brands, we practice an independent exchange of ideas and open discussion with our franchisees on every topic of importance to them, ranging from products to marketing to IT issues. Indeed, some of our popular and successful products were introduced to us by our franchisees. Our franchisees are not a division, subsidiary or alter ego of CKE, but are truly independent small businessmen and businesswomen who know how to drive their own business and do not hesitate to

speak their minds. We believe that the open exchange of ideas fostered by the franchise model is healthy for us and our franchisees.

As I mentioned, franchising benefits the economy as a whole. Franchising multiplies the resources that would be available to us alone, thus resulting in faster growth. This means more construction, more demand for the supplies and services used in our business, more opportunities for the lending community, more demand for real estate, resulting in more job creation and more local, state and federal tax revenue. Successful franchising is good for small businesses and good for our economy.

The key to operating a successful franchise System is to maintain standards and maintain brand uniformity throughout the System, while ensuring that the franchisee can still run his or her business. In order to maintain brand uniformity and to protect the value of its trademarks by which that System is known, the franchisor of a business format or System must control certain aspects of that System. For example, the franchisor must be able to control what products franchisees offer under its trademark, the quality of those products and how those products are prepared and presented.

The franchisor must be able to set standards dictating the appearance of the restaurants, including remodel requirements, and the format of guest service. The franchisor may approve suppliers and other vendors. In most Systems, including ours, the franchisor controls or approves advertising (although the franchisee generally controls local marketing), and will have the right to approve or disapprove the closure of a restaurant before expiration of the franchise term, or the transfer of the franchise rights to another individual or business entity.

Control in these areas of brand protection, however, is limited and does not minimize the fact that the franchisee is very much the owner of its business, and controls the profitability of its restaurants. While the franchisee must meet System standards and pay a royalty and certain other fees to the franchisor, if the franchisee's business is successful, net profits from the business are his or hers to keep. On the other hand, the risk of financial loss from unsuccessful performance is also on the franchisee, just like any other small business.

When developing a new restaurant in the CKE System, the franchisee must obtain its own financing, select its own sites, acquire the property or enter into its own lease based on the terms they negotiate, and will enter into its own construction contracts. In our System, franchisees set the prices for the products they sell their customers, and choose their local store marketing. The franchisee is responsible for knowing local requirements for licensing, permits, fees, health department regulations, zoning and the like.

Similarly, while we have the right to approve suppliers and other vendors, our franchisees must enter into their own contracts with approved suppliers and vendors. Each franchisee's loan or payment terms are based on that franchisee's financial strength and credit, not the credit of CKE. In the event of a default under their loan or under any construction, supply or service contract, or a failure to meet local requirements, the franchisee alone is responsible, not CKE. CKE is not a party to those contracts, and the lenders, landlords, suppliers and vendors understand that the franchisee alone is the party they must look to in the event of a breach.

Similarly, the franchisee alone is responsible for who is hired in their restaurants, how they make their hiring decision, the number of employees, the wages they pay, the benefits they provide and whether an employee should be promoted, fired or suspended. While the Franchisee's Operating Principal (an equity owner responsible for operations) must be acceptable to us and meet our training qualifications, our Franchise Agreements specifically state:

> *Franchisee shall hire all employees of the Franchised Restaurant and be exclusively responsible for the terms of their employment and compensation, and for the proper training of such employees in the operation of the Franchised Restaurant, in human resources and customer relations. Franchisee shall establish at the Franchised Restaurant a training program for all employees that meets the standards prescribed by [Franchisor].*

Indeed, we see great variation among our franchisees in this area. As we do not set the requirements for or manage the number of employees a franchisee hires

or the percentage of sales they invest in labor, there is significant variability between franchisees based on their individual employment practices. Franchisees may hire as many as 60 employees per restaurant (particularly for openings), while others hire as few as 15. We believe the average is around 25. Spending on labor (as a percentage of sales), including managers, shift leaders, and hourly employees, could range from as low as 23% to as high as 34%. These are numbers that our franchisees manage.

As the franchisor, we set the performance standard in terms of product quality, appearance of the restaurant, and guest experience. However, it is up to the franchisee to hire, train and motivate their employees to meet those standards, and to discharge employees who fail to perform to the franchisee's expectations. If the franchisee is failing to meet standards, we will send the franchisee an assessment outlining the deficiencies or, if severe enough, issue an operational default notice. *But we will not dictate to the franchisee how to manage its employees to meet those standards.* As the owner of its business, that is the franchisee's exclusive domain because it is the franchisee that is a party to the employment relationship, not CKE.

Accordingly, the franchisee alone must be responsible if it violates any laws or regulations governing employment relationships, just as it alone is responsible if it were to default on its loans, leases or on its contracts for goods or services.

Through our franchise agreements, we have contractually agreed on the nature of our relationship with our franchisees:

> *No agency, employment, or partnership is created or implied by the terms of this Agreement, and Franchisee is not and shall not hold itself out as agent, legal representative, partner, subsidiary, joint venturer or employee of [Franchisor] or its affiliates. . . . . Franchisee is an independent contractor and is solely responsible for all aspects of the development and operation of the Franchised Restaurant . . . . Without limiting the generality of the foregoing, Franchisee acknowledges that [Franchisor] has no responsibility to ensure that the Franchised Restaurant is developed and operated in*

> *compliance with all applicable laws, ordinances and regulations and that [Franchisor] shall have no liability in the event the development or operation of the Franchised Restaurant violates any law, ordinance or regulation. . . . Franchisee shall post a sign in a conspicuous location in the Franchised Restaurant which will contain Franchisee's name and state that the Franchised Restaurant is independently owned and operated by Franchisee under a franchise agreement with [Franchisor].*

In short, franchisees are independent businesses in substance as well as in form. As mentioned earlier, however, because franchisees are licensed to operate as part of a larger System, franchising enables individual entrepreneurs to run small businesses that can compete with national chains. Any change to the NLRB's joint-employer standard that would result in making a franchisor a joint employer with their franchisees without the franchisor directly and immediately controlling the essential terms and conditions of employment, such as, hiring, firing, discipline, supervision and direction, is in direct conflict with the terms of most contractual agreements between a franchisor and its franchisees, and turns the concept of franchising on its head.

IV. Impact of The Joint Employer Standard On Franchising

If the NLRB were to issue a standard which considered franchisors joint employers with their franchisees and liable for the employment decisions of their franchisees, this would inevitably force franchisors to exert control over their franchisees employment decisions. Franchisors would need to review job applicants, review hiring decisions before offers were made, review compensation structure and bonus plans, and so forth.

Moreover, because the employees are integral to the daily operation of the restaurant, the oversight would not stop with hiring decisions and compensation. Franchisors would need to monitor the workplace, so a franchisor would need to be present in the franchised restaurants at a greatly increased frequency. Franchisors

would feel compelled to dictate or even administer employee training for its franchisees at all levels, and increase staffing as deemed necessary. Suddenly, the franchisee would find itself unable to control its labor costs, one of the key controllable expenses. And since the franchisor does not share in the restaurant's profitability, the franchisor may have a very different view of labor dollars that should be spent, taking away the franchisee's ability to control their profit. *Franchisees, if they chose to invest in or remain as a part of that structure, would find themselves functioning more as a wholly controlled division of the franchisor, rather than as independent owners and operators.*

Of course, all of this additional Franchisor oversight and liability comes with a price. The franchisor would need to add staff to oversee its franchisee's employment decisions and employee training in an effort to reduce the franchisor's exposure. But inevitably, despite increased oversight, at some point the franchisee and franchisor would find themselves defending a claim based on employment decisions made by the franchisee. The current structure of fees and royalties in hundreds of thousands of franchise agreements across this country do not contemplate franchisors assuming such responsibility or expense. Going forward, franchisors will want to be compensated for taking on this potential liability. We would consider a 4% or 5% royalty wholly insufficient for providing a System AND taking on the cost and liability of managing the approximately 50,000 workers our franchisees employ. We assume other franchisors will feel the same.

If franchisors are considered joint-employers with their franchisees, the cost of increased staff and increased risk will most likely translate into franchisors charging higher royalty rates and fees, perhaps significantly higher. Franchisor control over a franchisee's labor force, and the risk and higher royalty rates and fees associated with it, *have the potential to chill the desire of franchisors to franchise and of franchisees to acquire a franchise or to develop new units, at a time when the country desperately needs economic growth*.

Franchisors do not currently manage employee relations for their franchisees, who are independently owned and operated businesses, and there is no rationale and no public benefit to justify imposing legal responsibility on franchisors for the employment decisions of their franchisees. Indeed, it would be

as illogical as imposing legal liability on a franchisor if their franchisee failed to pay its rent or utilities bills. The risk, on the other hand, is great, in that the cost for entrepreneurs to franchise will increase, and the economic growth that flows from franchising could well be destroyed.

Conclusion

In conclusion, I want to thank you for the opportunity you've given me to talk about why the NLRB, in considering the joint-employer standard, should be careful not to tie franchisors to the decisions franchisees make when it comes to their employee workforce. As I shared with you, not only is this impractical and contrary to hundreds of thousands of existing contractual relationships, but it is also detrimental to the franchise model which gives franchisees the power to make decisions that they consider the most financially prudent. While we set standards that will protect our brands and ensure the quality of our products, we are simply not in the business of franchising to micromanage our franchisees and the way they run their business or manage their employees. Accordingly, we urge you to strongly consider the negative impacts of any NLRB change in the joint employer standard that would be applicable to the private and very successful franchisor/franchisee relationship.

Thank you.

Chairman ROE. Thank you.

Mr. Borden, you are recognized.

STATEMENT OF MR. SETH H. BORDEN, PARTNER, MCKENNA LONG & ALDRIDGE LLP, NEW YORK, NEW YORK

Mr. BORDEN. Thank you.

Good morning, Chairman Roe, Ranking Member Tierney—congratulations—and distinguished members of the subcommittee, it is a great honor and privilege to appear before this subcommittee as a witness. My name is Seth Borden, and I am a partner in the New York office of the law firm McKenna Long and Aldridge.

My testimony today should not be construed as legal advice as to any specific facts or circumstances. And I am not appearing today on behalf of any clients. My testimony is based on my own personal views and does not necessarily reflect those of McKenna Long or any of my individual colleagues there.

I have been practicing traditional labor and employment law for 16 years. During that time, I have represented employers of all types and sizes in a variety of industries throughout the United States and Puerto Rico before the National Labor Relations Board.

In 2010, I authored a chapter regarding new technologies and traditional labor law in the Thompson publication "Think Before You Click: Strategies for Managing Social Media in the Workplace," the first treatise of its kind. And since 2008, my team and I have maintained the Labor Relations Today blog, which I am proud to say has received numerous accolades and has been archived by the United States Library of Congress. A copy of my firm bio is provided with the written version of my testimony.

Mr. Chairman, I ask that the entirety of my written testimony, and the attachments thereto, be entered into the record of this hearing.

My testimony this morning is presented within the context of this subcommittee's examination of a number of pending National Labor Relations Board cases where the board appears poised to reverse longstanding precedents. Most specifically, my testimony focuses on the Purple Communications case now before the board.

The board has solicited amicus briefs in this case with an eye toward overruling longstanding board law and creating a new employee right to utilize employer equipment for union organizing and other Section 7 purposes. The board should decline to do so. There is simply no compelling reason for the board to depart from decades of precedent, most recently outlined in its 2007 Register Guard decision, which provides that absent evidence of discrimination, employees have no statutory right to use the employer's equipment for Section 7 activity.

First, this is an issue of employer property rights, not employee communication. Employers who invest their money in the purchase and maintenance of equipment and materials for the furtherance of their enterprise should be able to control the manner in which that equipment is used.

Other longstanding principles of labor law protect the employees' rights to engage in communication, solicitation, and distribution of literature in furtherance of union organizing and other Section 7 activity, so long as that activity does not interfere with operations

or other legitimate employer interests. The question in Purple is to what extent must an employer provide and pay for the means of employee communication and organizing.

Second, the general counsel's assertion that e-mail is the modern day virtual water cooler is entirely misplaced. Employer computer networks and e-mail are not the 21st century water cooler; they are the 21st century production floor. The board has long protected legitimate employer interests, most significantly the means of production, without which there would be no employees.

Insofar as employees have at their disposal a wide and growing range of alternative means of communication with each other, an employer should not be compelled to open its network to additional burdens on efficiency, external threats, and potential legal exposure occasioned by non-business use.

Third, for decades the National Labor Relations Board has agreed that Section 7 provides employees with no such right to use employer equipment. This has been consistently true with respect to each new technological development or increasingly common type of workplace medium: bulletin boards, public address systems, telephones, televisions, VCRs, photocopiers, and most recently, e-mail systems.

Over the course of several decades, these examples have changed, but the concept and the law has remained the same. There simply is no statutory right for employees to use them. If the board wishes now to create one, it would seem that the more measured and deliberative administrative rulemaking process or even statutory amendment by the legislature are far more appropriate avenues.

Thank you, again, Mr. Chairman, and I will be happy to take any questions the subcommittee might have regarding my testimony.

[The statement of Mr. Borden follows:]

SETH H. BORDEN, PARTNER, Mc KENNA LONG & ALDRIDGE
STATEMENT TO THE RECORD

"What Should Workers and Employers Expect Next
From the National Labor Relations Board?"
U.S. House Committee on Education and the Workforce
Health, Education, Labor & Pensions Subcommittee

June 24, 2014 – 10:00 a.m.

Good morning, Chairman Roe, Ranking Member Tierney and distinguished Members of the Subcommittee. It is a great honor and privilege to appear before this Subcommittee as a witness. My name is Seth Borden. I am a partner in the New York office of the law firm McKenna Long & Aldridge.

My testimony today should not be construed as legal advice as to any specific facts or circumstances. I am not appearing today on behalf of any clients. My testimony is based on my own personal views and does not necessarily reflect those of McKenna Long or any of my individual colleagues there.

I have been practicing traditional labor and employment law for 16 years. During that time, I have represented employers of all types and sizes, in a variety of industries, throughout the United States and Puerto Rico before the National Labor Relations Board. In 2010, I authored a chapter regarding new technologies and traditional labor law in the Thompson publication *Think Before You Click: Strategies for Managing Social Media in the Workplace*, the first treatise of its kind. Finally, since 2008, my team and I have maintained the *Labor Relations*

Today blog, which has received numerous accolades and has been archived by the U.S. Library of Congress. A copy of my firm bio is provided with the written version of my testimony.

Mr. Chairman, I request that the entirety of my written testimony, and the attachments thereto, be entered into the record of the hearing.

Mr. Chairman, my testimony this morning is presented within the context of this Subcommittee's examination of a number of pending National Labor Relations Board ("Board") cases wherein the Board appears poised to reverse longstanding precedents. Most specifically, my testimony focuses on the *Purple Communications* case, NLRB Case Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584, now before the Board. The Board has solicited amicus briefs in this case with an eye toward overruling longstanding Board law; and creating a new employee right to utilize employer equipment for union organizing and other Section 7 purposes.

The Board should decline to do so. There is simply no compelling reason for the Board to depart from decades of precedent, most recently outlined in the Board's 2007 *Register Guard* case, 351 NLRB No. 70 (2007), which provides that absent evidence of discrimination, employees have no statutory right to use employer equipment for Section 7 activity.

First, this is an issue of employer property rights – and not employee communication. Employers who invest their money in the purchase and maintenance of equipment and materials for the furtherance of their enterprise should be able to control the manner in which they are used. Other longstanding principles of labor law protect employees' rights to engage in communication, solicitation and distribution in furtherance of union organizing or other Section

7 activity, so long as their activity does not interfere with operations or other legitimate employer interests. The question in *Purple* is to what extent an employer must ***provide and pay for*** the means of employee communication and organizing activity.

Second, the General Counsel's assertion that email is the modern day, "virtual water cooler" is entirely misplaced. Employer computer networks and email ***are not*** the 21st century water-cooler; they are the ***21st century production floor***. The Board has long protected legitimate employer interests – most significantly the means of production – without which there would be no employees. Insofar as employees have at their disposal a wide range of means of communication with each other, an employer should not be compelled to open its network to additional burdens on efficiency, external threats, and potential legal exposure occasioned by non-business use.

Third, for decades the National Labor Relations Board has agreed that Section 7 provides employees with no such right to use employer equipment. This has been consistently true with respect to each new technological development or increasingly common type of workplace medium: bulletin boards, public address systems, telephones, television, photocopiers, and most recently email systems. Over the course of several decades, the examples have changed, but the concept has remained the same: there simply is no such statutory right. If the Board wishes now to create one, it would seem that the more measured and deliberative administrative rule-making process or statutory amendment by the legislature are far more appropriate avenues.

I. There Is No Compelling Reason For The Board To Depart From Decades of Precedent, Most Recently Restated In *Register-Guard*, Which Holds Employees Have No Statutory Right To Use The Employer's Equipment For Section 7 Activity.

In his *Purple Communications* decision, the Administrative Law Judge ("ALJ") properly noted that he was bound by the decision in *Register-Guard*, 351 NLRB No. 70 (2007), which held in no uncertain terms that "employees have no statutory right to use the Employer's email system for Section 7 purposes[.]"[1] The Board's simple standard set forth in *Register-Guard* is consistent with decades' old precedent and achieves the proper balance between legitimate employer interests and employee rights under the National Labor Relations Act. The policy preferences of the current Board majority and General Counsel are not compelling reasons for casually tossing such longstanding precedent aside to create a new substantive employee right to use employer equipment.

The Board has long recognized that an employer has a legitimate business interest in maintaining the efficient operation of the equipment it obtains for use in its enterprise. No matter what the specific type of equipment, the Board has held that absent discrimination, employees have "no statutory right ...to use an employer's equipment or media" for Section 7 activity. This has been the Board's holding with respect to the employer's televisions and VCR's, *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000), *enfd.* 269 F.3d 1075 (D.C. Cir. 2001); bulletin boards, *Eaton Technologies*, 322 NLRB 848, 853 (1997); *Honeywell, Inc.*, 262 NLRB 1402 (1982), *enfd.* 722 F.2d 405 (8th Cir. 1983); *Container Corp.*, 244 NLRB 318 fn. 2

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[1] The ALJ asserted that he was bound to follow Board precedent that has not been reversed by the Supreme Court. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), *enfd.* 736 F.2d 507 (9th Cir. 1984), *cert. denied* 469 U.S. 934 (1984).

(1979), *enfd.* 649 F.2d 1213 (6th Cir. 1981) (per curiam); photocopy machines, *Champion International Corp.*, 303 NLRB 102, 109 (1991); telephones, *Churchill's Supermarkets*, 285 NLRB 138, 155 (1987), *enfd.* 857 F.2d 1474 (6th Cir. 1988), *cert. denied* 490 U.S. 1046 (1989); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981), *enfd. in relevant part* 714 F.2d 657 (6th Cir. 1983); public address systems, *Heath Co.*, 196 NLRB 134 (1972). In *Johnson Technologies*, 345 NLRB 762 (2005), the Board held that employees have no statutory right to use employer property as "trivial" as a *piece of paper. Id.* at 779 (2005) ("...research has disclosed no definitive Board authority that would allow employees to use company assets, even of minimal intrinsic value, without the permission or authority of the company.")

Email, as commonplace as its use in the workplace has become, is not so fundamentally different than the technologies before it that the same principles of law cannot be applied.[2] Transmission of email from one party to another on the employer's network still requires the use and interaction of various pieces of employer equipment -- including some combination of

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[2] Proponents of the creation of this new employee right have focused the weight of their argument on the fact that there is something so profoundly new and transformative about email that requires a departure from all this precedent, and the re-application of the standard in *Republic Aviation*, 51 NLRB 1186 (1943), enfd. 142 F.2d 193 (2d Cir. 1944), affd. 324 U.S. 793 (1945). But that argument is both unavailing and somewhat disingenuous. It has rather always been the position of these proponents that the employer's property rights in its equipment should yield to the union organizing rights of the employees. Then Member Liebman advanced the same exact arguments in 2000 about an employer's televisions and VCRs, and even then casually lumped "email, the internet and new communication technologies" together with those -- and a variety of other -- 20th century technologies:

> The question posed here, whether the Respondent may lawfully deny employees access to its electronic equipment in a nonwork area to communicate prounion messages, is a novel one before the Board. ***Undoubtedly, we will face this or similar issues with increasing frequency given the expanding prevalence in the workplace of TVs, VCRs, fax machines, email, the internet, and new communication technologies.*** Clearly, both employers and employees are increasingly using this kind of equipment to disseminate and exchange views on a wide variety of subjects, including the advantages and disadvantages of unionization.

Mid-Mountain Foods, 332 NLRB 229, 232-233 (2000), *enfd.* 269 F.3d 1075 (D.C. Cir. 2001) (Liebman, dissenting)(emphasis supplied). And yet in that case, and in numerous subsequent cases, the Board's longstanding precedent denying an employee right to use employer equipment prevailed.

computer monitors, keyboards, hard-drives, host servers, client servers, routers, gateways, and numerous forms of software. This equipment may have greater capacity for transmission of information than a bulletin board or photocopier, but it has a finite capacity nonetheless. When the employer invests money in these hardware and software components, it does so in order that this capacity may be utilized in furtherance of the employer's enterprise. Employers invest even more money in the maintenance and repair of this infrastructure. Insofar as employees have a variety of other means to communicate with and solicit each other about Section 7 issues, there is no compelling reason upon which to force an employer to allow non-business use of these resources.

II. Forcing Employers To Open Networks To Non-Business Use Threatens Efficiency and Competitiveness, Exposes Them To External Hazards, and Compromises The Ability to Prevent Unlawful Harassment.

In *Register-Guard*, the Board began its analysis with the recognition:

> An employer has a "basic property right" to "regulate and restrict employee use of company property." *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663–664 (6th Cir. 1983). * * * The General Counsel concedes that the Respondent has a legitimate business interest in maintaining the efficient operation of its e-mail system, and that employers who have invested in an e-mail system have valid concerns about such issues as preserving server space, protecting against computer viruses and dissemination of confidential information, and avoiding company liability for employees' inappropriate e-mails.

351 NLRB 1110, 1114 (2007)

A. Increased system traffic impedes efficiency, increases employer costs and decreases employee productivity.

Incremental increases in the non-business use of business equipment necessarily result in a decrease in the availability of the equipment for productive, business-related use. The increased volume in electronic traffic over the employer's network slows down the responsiveness of the system itself, potentially resulting in delays and decreased efficiency in the delivery of the employer's products or services. Moreover, this increased use also increases burdens on the system, and the amount of money and effort required to maintain it. Finally, even under the best of circumstances, the amplified distractions encountered by employees forced to sort through an additional quantity of emails unrelated to their work duties, will necessarily hamper productivity.

To be sure, there are employers of the view that some non-business, personal and/or recreational use of their email and computer equipment is beneficial to their enterprise. They simply may not care to enforce such limited restrictions. That is their prerogative, and such employers cannot then turn around and complain if and when their employees also use the equipment for union organizing or other Section 7 activity. But those who have made the legitimate business decision to protect or promote their operations by prohibiting non-business use of their equipment should not be second-guessed or compelled to provide otherwise. It is well settled that "the Board should not substitute its own business judgment for that of the employer in evaluating whether an employer's conduct is unlawful." *Framan Mechanical*, 343 NLRB 408, 412 (2004).

B. Increased Non-Business Use Needlessly Makes The Employer's System More Vulnerable To Viruses, Malware And Cyber-Attacks.

Increasing the number of non-work-related emails, to or from an infinite range of unknown sources, obviously increases the prospect that opportunistic hackers, cyber-criminals or

simple mischief-makers might access the employer's system. The Department of Homeland Security notes:

> ...for all its advantages, increased connectivity brings increased risk of theft, fraud, and abuse. As Americans become more reliant on modern technology, we also become more vulnerable to cyber attacks such as Corporate Security Breaches, Spear Phishing, and Social Media Fraud. Cybersecurity is a shared responsibility, and each of us has a role to play in making it safer, more secure and resilient.

http://www.dhs.gov/combat-cyber-crime (last accessed, June 18, 2014); see also Chinn et al., *Risk and Responsibility in a Hyperconnected World: Implications for Enterprises*, McKINSEY & COMPANY and THE WORLD ECONOMIC FORUM (Jan. 2014) ("The risk of cyberattacks could materially slow the pace of technology and business innovation with as much as $3 trillion in aggregate impact.") Forcing employers to open access to its systems to an infinite number of connections for a variety of reasons unrelated to their operations does not advance this cause.

C. ***This New Employee Right Will Hinder Efforts to Comply With Other Employer Obligations, Such As The Requirement To Provide A Harassment-Free Workplace***

Employers are obligated by law to provide a workplace free from sexual, racial and other forms of harassment. *See* 42 U.S.C. § 2000e *et seq* (1964); 29 C.F.R. Sec. 1604.11(f); *see also Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Insofar as frequent use of profanity may constitute evidence of unlawful hostile work environment harassment, many employers employ a variety of email filtering technologies to prevent dissemination of objectionable material over its email system. The National Labor Relations Board is increasingly finding Section 7 protection for employees' profane and vulgar communications. *See, e.g., Starbucks Corporation*, 360 NLRB No. 134 (June 16, 2014); *Plaza Auto Center*, 360 NLRB No. 117 (May 28, 2014); *Hoot*

Winc LLC and Ontario Wings, LLC d/b/a Hooters of Ontario Mills, Cases No. 31-CA-104872, -104874, -104877, -104892, -107256, -107259, Slip Op. at 36-37 (May 19, 2014). If the Board creates a right for employees to use the employer's email system to communicate on Section 7 issues, it would seem the employer's use of a filter to quarantine emails containing profanity or vulgarity would in itself constitute a violation of Section 8(a)(1) of the Act which prohibits "interfere[ence]...with employees in the exercise of the rights guaranteed by Section 7." 29 U.S.C. §158(a)(1). This would put employers in the untenable position of having to choose which federal law it is better to violate.[3]

In sum, given the wide range of equally effective alternative communication vehicles available and easily accessible to employees, there is no compelling reason to force employers to undertake all these additional risks and complications.

III. If The Board Now Wants To Change The Decades Old Interpretation Of Unchanged Statutory Language, The Administrative Rulemaking Process Or Legislative Amendment Are The Proper Avenues.

The National Labor Relations Board's authority can be exercised either through formal rulemaking proceedings or by the more frequently utilized method of rulemaking through adjudication. *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996). As the Board has adopted an "evolutional" approach to its adjudicatory function, it has historically paid less deference to the value of precedent. As a result, labor practitioners have become accustomed to some degree of instability, with cases being overruled from one Board to the next. Many

[3] Similarly, legal principles regarding privacy expectations and the NLRA's prohibition against employer surveillance – or even creating the "impression" of surveillance – of employee Section 7 activity might needlessly be placed in conflict with each other.

commentators and practitioners have observed that during the last 15-20 years, there has been an increase in the frequency and intensity of these partisan pendulum swings. *See, e.g.*, Coxson, Jr., *The NLRB in the Obama Administration: The Pendulum Swings Dramatically*, ALI-ABA Employment Law Update (Fall 2010); Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 Ohio St. L. J. 1361 (2000). Former Board Chairman Wilma Liebman testified here years ago, and she called it the "notorious see-sawing with every change of administration". *See* Committee on Education and Labor, Health, Employment, Labor & Pensions Subcommittee, Joint Hearing with the Senate Employment and Workplace Safety Subcommittee, *The National Labor Relations Board: Recent Decisions and Their Impact on Workers Rights* (December 13, 2007). Neither employers, employees nor unions benefit from the deepening of this political divide – which results in a system where their obligations change drastically every 4 to 8 years.

But the developments before this Subcommittee today are perhaps even more problematic. *Purple Communications, Browning-Ferris* and other imminently anticipated decisions are not cases in which the current Board is just reversing course where its predecessor had previously reversed just a few years ago. These are cases wherein the current Board is looking to discard *decades* of precedent just to advance a different political worldview. A system where such longstanding, well-established and fundamental standards are cast aside so casually does not advance the industrial stability which the Act is intended to support.

The relevant text of the National Labor Relations Act has not been modified in decades. The significance of the employer's basic property rights in its business equipment, and the

import of its interests in the efficient operation of its enterprise have not changed. If anything, the other means of communication available to employees by which to discuss union organization and other Section 7 activity have grown exponentially. There is simply no reason why employers or employees should all of a sudden understand the language of Section 7 to convey an employee right to use employer business equipment for union organizing. The employer in *Purple Communications* – and thousands of other employers across America – ostensibly relied upon Register-Guard and decades of precedent before it in enforcing a perfectly lawful restriction upon the use of its business equipment. It would be manifestly unfair for the Board to now punish the employer because that lawful behavior does not comport with the new officials' view of what *should* be.[4] If there is to be an employee right to use an employer's equipment for non-business purposes, it should be created by a more thorough process of administrative rule-making or the more deliberative and representative process of legislative amendment.

CONCLUSION

For all the reasons set forth above, as well as many thoughtful arguments laid out in briefs before the Board, the Board should reaffirm the holding of *Register-Guard* that absent discrimination, employees have no Section 7 right to use employer equipment – including email and computers – for union organizing purposes.

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[4] The General Counsel concedes in *Purple* that the employer has not violated the longstanding principle restated in *Register-Guard*. The General Counsel simply believes that the conduct *should be unlawful* nonetheless. *See Purple Communications*, NLRB Case Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584, Slip Op. at 5-6 (P. Bogas, ALJ, Oct. 24, 2013); *see also* Counsel for the General Counsel's Limited Exceptions to the Administrative Law Judge's Decision and Brief in Support of Limited Exceptions, NLRB Case Nos. 21-RC-091531, 21-RC-091584 (Nov. 21, 2013).

Chairman ROE. Thank you very much.

Mr. Coppess, you are recognized for five minutes.

STATEMENT OF MR. JAMES COPPESS, ASSOCIATE GENERAL COUNSEL, AFL–CIO, WASHINGTON, D.C.

Mr. COPPESS. Okay. Thank you. Chairman Roe, Ranking Member Tierney, members of the subcommittee, the hearing today is focused on two cases in which the NLRB has called for amicus briefs, Purple Communications and Browning-Ferris Industries. It is not uncommon for the board to seek broader input from the general public when it sets about deciding particular cases. This is because the NLRB has chosen to elaborate the law under the NLRA by deciding particular cases, rather than engaging in rulemaking.

And, if it weren't for such notices calling for amicus briefs from the public, there is basically no way to tell what particular issues are coming before the board. Too many cases come up. You would have to follow all of the particulars of the underlying decisions.

One category of case in which this often happens is when reviewing courts have called upon the board to further explain what it is doing and some particular respect of interpreting the NLRA. Purple Communications is an instance of that case. The Seventh Circuit has a very long time ago now taken the board to task in its Guardian Industries case for its use of the word discrimination in deciding workplace communications cases. The Seventh Circuit suggested in that case that perhaps the board is using the term in a particular NLRA sense, which is, in fact, the case, and in the Register-Guard case, the board attempted to address the Seventh Circuit's concerns. That was the case involving e-mail communications at the workplace.

Unfortunately, the board's attempt on Register-Guard failed. Its ruling that one application of the employer prohibition there did not constitute discrimination was overturned by the D.C. Circuit, and that leaves employers and workers with basically no guidance on what sort of employee communications in the workplace will be protected.

I should emphasize that what we are talking about here is employee communication in the workplace and not union communication in the workplace. We are not talking about outsiders coming in. We are talking about people who are talking to each other at work being allowed to do so in the way they normally do.

And I should say that we fully agree with Mr. Borden's point that where employers allow people to use e-mail, their work e-mail addresses, to communicate on matters that aren't strictly business related, the employer has no grounds for objecting to the employees communicating about Section 7 protected activities. I fully expect that what the board will do in that case is answer the concerns of the Seventh Circuit and the D.C. Circuit and explain what sort of employee communications may be prohibited and what sorts may not with respect to e-mail.

The Browning-Ferris Industries case represents another category of case in which the board will often call for amicus briefs from the public. Where it perceives the workplace practices have developed in a way that are not perhaps adequately addressed by the board's current application of the law, it—the Browning-Ferris case—is a

textbook example of something we see increasingly frequently, where employers will subcontract out basically the employment function. Employees will be brought in to run the operation, essentially at the employer's—the ultimate employer, the owner of the facility's—direction, but they will be formally employed by a third party, and that makes it very hard to bargain because the third party that formally employs the workers doesn't ultimately control many of their terms of employment.

All that is at issue in Browning-Ferris, I should add—or I should emphasize—is the duty to bargain and only insofar as both entities control terms and conditions of employment, there is absolutely no risk to the franchise arrangement, and in cases where the franchisor doesn't control the terms of employment, they won't even have a duty to bargain over that much, because there is nothing for them to bargain over.

We think that these cases will be decided as they have been in the past when the board calls for broad input on the particular facts of the case, that the board will be applying long-established legal principles under the NLRA, and that in so doing it will clarify the application of those principles.

I thank you for listening to my testimony and look forward to questions.

[The statement of Mr. Coppess follows:]

Before the Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and the Workforce
United States House of Representatives

"What Should Workers and Employers Expect Next from
the National Labor Relations Board?"

Testimony of James B. Coppess,
Associate General Counsel, AFL-CIO

June 24, 2014

Chairman Roe and Ranking Member Tierney and other members of the subcommittee, I would like to thank you for giving me the opportunity to testify this morning.

I understand that the question "what should workers and employers expect next from the National Labor Relations Board" is directed at two specific cases in which the NLRB recently called for amicus briefs: *Purple Communications, Inc.*, Cases 21-CA-095151, *et al.*, and *Browning-Ferris Industries of California, Inc. d/b/a/ BFI Newby Island Recyclery*, Case 32-RC-109684. All indications are that what workers and employers should expect is that the NLRB will decide these two cases by carefully applying established legal principles to the particular facts of each case and that, in so doing, the Board will attempt to provide legal guidance to workers and employers who encounter similar situations in the future. The two cases involve very different kinds of issues, and I will take up each in turn.

Purple Communications – in which the Board received amicus briefs

just last week – concerns employee communications with one another using their work email addresses. The NLRB's last attempt to address this issue came in *Register Guard*, 351 NLRB 1110 (2007), *rev'd in relevant part*, 571 F.3d 53 (D.C. Cir. 2009), where, as it has done in *Purple Communications*, the Board called for amicus briefs addressing a wide range of issues related to employee use of work email. That attempt failed. A divided Board ruled that the employer had violated the NLRA by certain prohibitions on the use of work email for NLRA protected communications but not by other prohibitions, and, in the end, the D.C. Circuit reversed the Board's decision insofar as it found the particular employer prohibition on union emails at issue in that case was lawful. That outcome has left employers and workers uncertain of when email communications on NLRA-protected topics are protected and when they are not.

The employer in *Purple Communications*, like the employer in *Register Guard*, allowed employees to use their work email addresses to communicate with one another about various personal matters, both while they were at work and after work hours from home. This is exceedingly common. Indeed, as anyone who has a work email address knows, it could hardly be otherwise. Given the convenience of email communication, employees will inevitably use that means to engage in the same types of communication that takes place through face-to-face conversation in the cafeteria or breakroom. Any

employer attempt to stop that sort of casual email communication is doomed to failure. This is why employers generally do not even pretend to prohibit such personal communications.

The legal question that arises in these circumstances is whether the employer can prohibit its employees from using their work email addresses to communicate with one another about topics that are protected by the National Labor Relations Act, most specifically about union-related topics. The Board has long held that singling out NLRA-protected communications for that sort of content-based prohibition constitutes illegal "discrimination." The problem, however, is that the Board has not used the word "discrimination" in the way a court would use it – for example, in determining whether a government has engaged in "discrimination" in violation of the equal protection clause. Rather, the Board uses the term "discrimination" in the sense the Supreme Court did in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 793 n. 10 (1945), when it held that rules that erect "unreasonable impediment[s] to self-organization . . . are discriminatory."

The Board's somewhat eccentric use of the term "discrimination" in deciding cases of this sort has created problems. In the first place, reviewing courts have occasionally had trouble seeing how treating differently apparently dissimilar forms of communication constitutes discrimination. In

this regard, the Seventh Circuit remarked that "perhaps 'discrimination' ought to have a special meaning under the NLRA." *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 321 (7th Cir. 1995). Perhaps more importantly, the Board's use of the term "discrimination" in these cases has created confusion among employers and workers as to what constitutes a lawful restriction on workplace communications.

In *Purple Communications*, the employer, while permitting personal communication via email, maintained a rule that "strictly prohibited" employees from using their work email addresses to "[e]ngag[e] in activities on behalf of organization[s] or persons with no professional or business association with the Company." You could imagine such a rule being enforced in a formally nondiscriminatory manner, for instance, by prohibiting communications related to all sorts of organizations, like churches, sports clubs and so on. But it is settled NLRA law that the application of such a rule to prohibit employees from discussing union organizing in a place where they were otherwise free to engage in personal communications would be unlawful. For instance, there is no question that an employer could not lawfully apply a similar rule to prohibit union-related conversations in an employee cafeteria or breakroom. By the same token, an employer may not maintain a rule that, on its face, seems to prohibit such protected communications. This is all settled law. As a general matter, there is no

reason to treat employees' communication by means of their work email addresses any differently from other forms of employee communication.

To return to the question posed by the title of these hearings, what workers and employers should expect from the NLRB in *Purple Communications* is clarification that personal communication through work email addresses is, in principle, no different than other sorts of personal communication that takes place at work. An employer can no more prohibit union-related discussions through work email than it can prohibit union-related face-to-face conversations. Treating email communications like other communications leaves employers free to adopt those rules that are justified by actual practical needs; what employers may not do, however, is to bar protected communications based on their content without showing such a need.

In sum, the Board would be behaving responsibly were it to use this opportunity to provide clear guidance to workers and employers regarding the extent to which the NLRA protects employee communications with one another via work email.

The second case under consideration is *Browning-Ferris Industries*, in which the Board will be receiving amicus briefs next week. This case concerns the increasingly common practice of employers staffing their operations with workers who are directly employed by a third-party. Like

Purple Communications, *Browning-Ferris Industries* presents a typical example of a common phenomenon. While *Purple Communications* addressed the right of employees to individually communicate with one another, *Browning-Ferris Industries* concerns the right of employees to bargain collectively over their terms and conditions of employment.

Browning-Ferris is in the business of recycling trash. Approximately 300 employees work at the company's Milpitas, California recycling facility. Sixty of those employees are represented by Teamsters Local 360. The case before the Board arose from the effort of the other 240 employees to select Local 360 as their collective bargaining representative. The principal difference between the union-represented employees and the employees who are seeking representation is that the latter are directly employed by Leadpoint Business Services, a firm that Browning-Ferris has contracted with to staff the inside operations at the Milpitas facility. Browning-Ferris has maintained control over the operations, including the functions performed by the Leadpoint employees.

In petitioning for an NLRB representation election, Local 360 listed both Browning-Ferris and Leadpoint as joint employers of the inside employees. The union did so, because the terms and conditions under which the inside employees work are, in effect, controlled by both Browning-Ferris and Leadpoint. That circumstance makes it impossible to bargain over all

the terms and conditions of employment without both employers at the table.

Browning-Ferris owns the facility and all of the equipment within it, which gives the Company control over whether the facility and the equipment meet governing safety standards. Browning-Ferris controls the inside operation by determining when and how fast the sorting lines will run and by determining how the sorters will carry out their tasks on the lines. Browning-Ferris also limits the amount Leadpoint may pay the sorters and the length of time the sorters may be assigned to Browning-Ferris's facility. And, Browning-Ferris retains the right to dismiss any particular sorter from working at the Company's facility.

The Board has long held that two companies can be required to engage in collective bargaining as joint employers where they "share, or codetermine, those matters governing the essential terms and conditions of employment." *The Greyhound Corp.*, 153 NLRB 1488, 1495 (1965). As Justice Stewart observed, in his influential concurring opinion in *Fiberboard Products Corp. v. NLRB*, 379 U.S. 203, 222 (1964), "In common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment. What one's hours are to be, what amount of work is expected, what periods of relief are available, what safety practices are observed, would all seem conditions of one's employment."

By controlling the operation of the sorting lines on which the inside

employees work, Browning-Ferris controls their conditions of employment. Beyond that Browning-Ferris even controls some certain terms of their employment, like wage rates and tenure. Thus, it would be practically impossible for the inside employees to engage in collective bargaining over these matters without having Browning-Ferris at the bargaining table.

Although the bare statement of the NLRB's long-standing test would seem to clearly require joint-employer bargaining in the circumstances presented by this case, the Board's application of that test over the years has given rise to much confusion as the Regional Director's decision in *Browning-Ferris Industries* amply demonstrates.

For instance, while the Regional Director recognized that Browning-Ferris controlled the speed of the lines and the time they ran, he discounted the effect this had on conditions of employment, because Browning-Ferris did not directly control how the workers on the line responded to its speed. While the Regional Director recognized that Browning-Ferris controlled the times and shifts of the facility, he discounted this because Browning-Ferris did not directly control schedule of the inside employees working those shifts. And, while the Regional Director recognized that Browning-Ferris determined whether overtime was necessary on a particular day, he discounted this on the grounds that Browning-Ferris did not assign particular inside employees to work overtime.

With respect to terms of employment, while the Regional Director recognized that Browning-Ferris had placed a cap on what Leadpoint paid the inside employees, he noted that "nothing in the Agreement would forbid Leadpoint from . . . lowering its employees' wages" – an especially dubious proposition as the employees in question were paid only the minimum wage. And, while the Regional Director noted that Browning-Ferris had effectively recommended discharge of certain inside employees, he discounted this by noting the requests had not been framed as mandatory directives.

In sum, it seems clear that the inside workers at Browning-Ferris's Milpitas recycling facility would not be able to effectively bargain over their wages, hours or conditions of employment if only their immediate employer, Leadpoint, was at the table. Nevertheless, the Board decisions applying its generally sound joint-employer test led the Regional Director to miss the forest for the trees. Given that employers are increasingly turning to the sorts of arrangements typified by this case, the Board has good reason to seriously think about what it has been doing in this area.

Once again, the Board would only be doing its duty were it to clarify the collective bargaining rights of employees whose terms and conditions of employment are effectively jointly controlled by two different entities.

The NLRB is presently comprised of five members, each of whom enjoys the full confidence of the President, who appointed them, and of the

Senate, which confirmed each of those appointments. The Board members are all experienced labor law practitioners, who have each demonstrated good, sound practical judgment throughout their long careers. There is no reason whatsoever that workers and employers should expect anything from the NLRB in deciding these cases other than a thoughtful, considered application of established principles to the particular facts of each case.

In short, there is every indication that the NLRB will perform well its assigned task in deciding these two cases and that there is no need for the legislative branch to have any doubt about that.

This is not to say that there is not important work for the legislative branch in the realm of labor relations and with respect to the National Labor Relations Act in particular. To the contrary, there is much constructive work that the legislative branch could do in this area.

The preamble to the National Labor Relations Act observes that "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association . . . depress[es] wage rates and the purchasing power of wage earners in industry." 29 U.S.C. § 151. The solution to that problem, in the words of the preamble, is to "encourage[e] the practice and procedure of collective bargaining and [to] protect the exercise by workers of full freedom of

association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment." *Ibid.*

For many years now, the Act has obviously failed to effectively encourage collective bargaining. The portion of the American workforce that is able to collectively bargain with their employees has steadily dropped. And the result has been that the wages of workers have been depressed. We would urge Congress to turn its attention to reviving the National Labor Relations Act so that it effectively serves its purpose and by so doing helps revive the American middle class.

Thank you for considering these comments.

Chairman ROE. Thank you very much.

Mr. King, you are recognized for five minutes.

STATEMENT OF MR. G. ROGER KING, OF COUNSEL, JONES DAY, COLUMBUS, OHIO

Mr. KING. Thank you, Mr. Chairman, Ranking Member Tierney, again, my congratulations, also, members of the subcommittee. My name is Roger King. I am of counsel with the Jones Day law firm, also the senior labor employment counsel for the Human Resource Policy Association.

I want to talk about not only Purple Communications and the Browning-Ferris case, but the agenda of this National Labor Relations Board and its ever-present changing policy orientation, I submit to you that the board should consider, first, as its priority to address the pending cases it has before it.

Based on checking with the NLRB Office of Executive Secretary yesterday, there are 383 cases pending decision of the board today. One of those cases has been pending for 2,582 days. Mr. Chairman, that is over seven years. That is the Roundy's case.

Before launching into what many of us at least from the employer community would submit is a very potentially unfriendly agenda, perhaps the board should address its present case backlog and get that order of business addressed.

Second, as the committee is well aware, the Supreme Court has pending before it the case of Noel Canning. I happen to be one of the counsel on behalf of the company in that case. Based on our research, depending on what the court does—and it is very difficult, of course, ever to predict what the Supreme Court may do—but if the Supreme Court affirms in whole or in part the District of Columbia Circuit Court decision in Noel Canning, approximately 4,000 cases will be found to be void and will have to be addressed in some manner or another by the board and its general counsel. That is a substantial amount of business, particularly given the backlog that I just mentioned.

Now, I want to comment about the suggestion of chilling the board. That is not the intent of my testimony. I have a very high regard for each and every one of the members of the National Labor Relations Board, a high regard for their integrity, and they are excellent practitioners of labor law. I know them personally. I also have very high regard for Richard Griffin, the general counsel of the board.

That is not the question. The question is the policy orientation. And no matter how well intentioned the board members may be, at least the Democrat board members that are pursuing this agenda and its general counsel, it is a policy disagreement. It is an order of priority disagreement. They should, as I mentioned, reprioritize their business and address at least initially the cases they have before them.

Now, I want to talk specifically about some of the initiatives just in the last few months this board has pursued. In spring of 2014, the board is again engaged in rulemaking to change the basic election procedure environment that has been in place for well over 30-plus years. There is no factual or legal predicate to do so, but yet that is being actively pursued again, I might add, after the board

was initially stopped through judicial challenges with respect to that area.

With respect to deferral of unfair labor practice charges in the arbitration arena, the board is again looking at that area without any factual or legal need to do so. It may be overturning over 59 years of precedent by that initiative. With respect to the issue of who is and who is not a managerial employee in a college or university setting, the board may be overturning years of precedent there, over 34 years of precedent in the Yeshiva case.

With respect to Purple Communications, excellent testimony on that point, we have had seven years of stability of the law under Register-Guard. We have no need to go back and review that. With respect to the joint employer doctrine, we just cannot understand—at least from an employer perspective—why that issue is even being raised by the general counsel. If the board pursues a change in the law there, we overturn 30 years of precedent.

With respect to Northwestern University and college football players, why the board is even in that area I think is a substantial legitimate policy question. But, if the board pursues to find those students—and we believe they are students—or those individuals to be employees, they will overturn at least 10 years of law going back to the Brown University case.

So when you start to do the math, Mr. Chairman, we are looking in a very few short months that this board would be overturning well over 100 years of precedent. That doesn't even count the issue with respect to board procedure on elections.

With respect to Noel Canning, of course, no one can predict how the court may decide. But we have 10 regional directors on this most recent recess appointee board that is being challenged where we believe are improperly approved. We have over 700, up to 1,000 cases that may come back just from that board, from 2012 to 2013. And we submit at least the board ought to wait until the Supreme Court makes a decision to determine what impact, if any, the Noel Canning case may have on its agenda.

In summary, Mr. Chairman and Ranking Member Tierney, there is a policy issue here. The board has business to do. It should go about that business. If it pursues its current agenda, including its general counsel, we submit it is setting a precedent, a very poor policy precedent for future boards. Are we going to get a continual swing in the pendulum back and forth in board law, after more hearings, more judicial briefs, more court challenges, lack of predictability in the law? That is not what this country needs.

Thank you very much. I will be happy to answer questions.

[The statement of Mr. King follows:]

US HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

What Should Workers and Employers Expect Next

from the National Labor Relations Board?

June 24, 2014

Testimony by G. Roger King[1]

Mr. Chairman and Members of the Subcommittee:

My name is Roger King. I am Of Counsel with the Jones Day law firm and a member of the Firm's Labor and Employment Practice Group. I also serve as Senior Labor and Employment Counsel for the Human Resource Policy Association. I appreciate the opportunity to again appear before the Subcommittee. The areas that I will discuss this morning in my testimony concern the unprecedented and ever-expanding policy-change oriented agenda of the present National Labor Relations Board ("NLRB," "Board," or "Agency") and its General Counsel and the practical

[1] Mr. King is a member of the Jones Day law firm's Labor & Employment Practice Group and also serves as Senior Labor & Employment Counsel for the Human Resource Policy Association. The statements and opinions contained in his testimony are those of Mr. King personally and are not being presented as views or positions of his Law Firm or the Human Resource Policy Association. Mr. King is one of the attorneys representing the Noel Canning Company in its Constitutional case challenge to President Obama's January 4, 2012 recess appointments to the National Labor Relations Board that is presently pending before the U.S. Supreme Court. Mr. King wishes to acknowledge the assistance of his associates, Bryan Leitch and Theresa Dean, also of the Jones Day law firm, in preparing his testimony.

and policy implications of such expanding agenda, particularly given the Board's current case backlog or inventory and the potentially considerable increased caseload it may face as a result of the Supreme Court's pending decision in the *Noel Canning* case.

SUMMARY OF TESTIMONY

Mr. Chairman and Members of the Subcommittee, the present Board and its General Counsel are pursuing one of the most activist agendas to change Board law and election procedures in the history of the Agency. Such initiatives, no matter how well intentioned, have significant policy and jurisprudence implications. Such initiatives over the last few months have included:

- The Board's recent Spring 2014 renewed rulemaking initiative to substantially change Board election representation procedures
- Its February 7, 2014 request for amicus briefs on the approach that should be taken for deferral of unfair labor practice charges to arbitration (*Babcock & Wilcox Constr., Inc.*, Case No. 28-CA-022625 (Feb. 7, 2014))
- Its February 10, 2014 request for amicus briefs on the question of Board jurisdiction over religiously-affiliated colleges and universities

(*Pacific Lutheran University*, Case No. 19-RC-102521 (Feb. 10, 2014))

- Its request also in the *Pacific Lutheran University* case for parties to submit briefs on the scope of the definition of employee "managerial" status under the NLRA (*Pacific Lutheran University*, Case No. 19-RC-102521 (Feb. 10, 2014))
- Its request last April for amicus briefs on the statutory right of employees to use employer-provided email communication systems in the workplace (*Purple Communications, Inc.*, Case No. 21-CA-095151, et al. (April 30, 2014))
- Its invitation again last month for stakeholder views regarding the scope and definition of "joint employer relationships" under the NLRA (*Browning-Ferris Indus.*, Case No. 32-RC-109684 (May 12, 2014))
- Its recent request for views with respect to whether individuals on athletic scholarships at private universities are "employees" or "students" (*Northwestern University*, Case No. 13-RC-121359 (May 12, 2014))

The agenda may also be expanded further based upon recent statements by NLRB General Counsel Richard Griffin. For example, General Counsel Griffin has indicated an interest in having the Board review the state of the law in the following areas: successorship, permanent replacement of economic strikers, employer duty to furnish financial information in bargaining, the applicability of *Weingarten* employee interview rights in non-union facilities, refusal of employers to furnish information related to business site and plant relocation, the validity of partial lockouts, at-will employment handbook provisions, and mandatory arbitration agreements which contain class-action prohibitions. *See* Memorandum GC 14-01, Mandatory Submissions to Advice (Feb. 25, 2014).

In addition to the above-stated policy agenda, and perhaps future additions to such agenda, the Board also has recently substantially changed the law in the representation area by applying a new "overwhelming community of interest" test. Such test, first articulated by the Board in its *Specialty Healthcare* decision, 357 NLRB No. 83 (2011), permits unions to petition for "fragmented units" and in certain cases very small "micro units." Additionally, in recent months, the Board has expanded the application of its protected concerted activity doctrine to the extent that it is now examining virtually every paragraph, sentence, and even punctuation mark in employer

policies and procedures.[2] This exceedingly expansive application of the NLRA has created substantial ambiguity, confusion, and a general lack of clarity in the jurisprudence in this area.

The Board and its General Counsel are pursuing such activist policy-change agenda on an extremely accelerated basis, perhaps desiring to conclude its agenda, to the extent possible, prior to the upcoming November 2014 federal elections and the subsequent term expiration of one of its Members in December of this year. This activist approach is being pursued notwithstanding the substantial inventory or backlog of cases awaiting Board decision and the unknown and potentially significant impact that the pending decision of the Supreme Court in the *Noel Canning* case may have on the Board's caseload and the enforcement obligations of its General Counsel. Indeed, an affirmance in whole or in part by the Supreme Court of the D.C. Circuit Court of Appeals decision in *Noel Canning* may cause up to 4,000 reported and unreported decisions of the Board over the last twenty years to be set aside. The potential impact of a *Noel Canning* decision affirming the D.C. Circuit also may

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[2] The Board continues to issue highly controversial decisions such as its recent decision in *Plaza Auto Center, Inc.* in which it overturned the discharge of an employee who was found to have cursed at his manager. 360 NLRB No. 117 (2014). According to the Board's decision, the employee "lost his temper and in a raised voice started berating" his supervisor, including "calling him a 'f****** mother f******,' a 'f****** crook,' and an 'a**hole,'… [and] told [the supervisor] that he was stupid, nobody liked him, and everyone talked about him behind his back." The employee was subsequently terminated. Despite this outburst, the Board found that the employee's conduct did not cost him the protection of the NLRA.

bring into question numerous appointments to NLRB regional director positions and delegations from potentially quorumless Boards to its General Counsel.

Further, such unprecedented activist agenda again raises the question, from the perspective of particularly the employer community, of Board neutrality and independence in fulfilling its statutory obligations, including its substantial responsibilities in issuing case law decisions. It is submitted that this potential wholesale change in Board law and election procedures, in the long term, is not desirable for any of the Board's stakeholders and will make it exceedingly difficult for employers, unions, and employees to be able to understand the requirements of the National Labor Relations Act and to properly comply with such requirements.

The Board and its General Counsel should reconsider the scope and pace of its present policy change agenda and place a greater priority on deciding its current case law inventory or backlog. The Board should also be mindful of the potential consequences on its workload of the pending Supreme Court decision in the *Noel Canning* case.

Finally, the present Board and its General Counsel should give substantial thought to the type of precedent that they may be establishing by pursuing the current agenda. Indeed, if such agenda is not reconsidered and continues to be pursued,

the Board and its General Counsel may very well set both precedent and expectation for future Boards to also engage in similar extreme changes in Board law and election procedures, albeit with different policy outcomes. Such extreme "swinging of the pendulum" in Board law and election procedures would continue to call into question the credibility of the Agency including, most importantly, its statutory obligation to be a neutral in deciding workplace disputes.

THE BOARD AND ITS GENERAL COUNSEL'S ACTIVIST AGENDA—MORE THAN MERE "POLICY OSCILLATION"

The often-referenced phrase "elections have consequences" is quite accurate with respect to administrative law developments after presidential elections. Certainly, the president and his or her political party that prevails in such an election have a right to implement policy decisions at various levels of the executive branch. Independent regulatory agencies should in theory, however, be immune, at least in part, from political party influence and should operate within their statutory mandate and applicable jurisprudence.

Certain federal regulatory agencies, such as the Equal Employment Opportunity Commission are, for example, almost entirely policy oriented, subject only to the statutory structure creating the agency in question. The National Labor Relations Board, by contrast, is not only a statute-created

independent agency but it also is an entity with considerable quasi-judicial responsibilities including a mandate to issue case law decisions on a neutral and fair basis. Certainly it is well recognized that given the political makeup of the Board, which reflects on a majority-member basis the political party occupying the White House, there will be certain changes in Board law from one administration to another. Such changes have been labeled, according to one of my former colleagues, New York University School of Law Professor Sam Estreicher, as expected, "policy oscillation." Such policy oscillation on the whole, however, has historically been relatively moderate by both Democrat and Republican Boards and has not resulted in extreme changes in Board law and in Board election procedures.

The current Board and its General Counsel is engaged in an agenda that clearly goes considerably beyond moderate policy oscillation. Whatever the rationale may be to support the current activist and accelerated agenda of the Board and its General Counsel, no matter how well-intended, the end result clearly will be one of the most active pursuits of policy change in Board law in the history of the Agency.[3] A list of such initiatives, found in the Summary of Testimony on page 2 of this

[3] In a statement to the Associated Press in January 2012, Chairman Pearce announced, "[w]e want the agency to be known as the resource for people with workplace concerns that may have nothing to do with union activities." Such a sweeping aspirational role may indeed be one of the bases for the Board's current activist agenda.

Testiomny, represents examples of the Board's activist agenda, along with potential new initiatives from the General Counsel.

In addition to the above noted initiatives, the Board also has a substantial inventory or backlog of cases[4] that present important labor-management policy issues, including such issues as the access rights of third parties to employer private property (*see e.g.*, *Roundy's*, 356 NLRB No. 27 (Nov. 12, 2012)), supervisory status of various employment positions under the NLRA, off-duty access rights of employees to employer interior operational areas, successorship rights of unions and obligations of employers, and many other important issues. Finally, and perhaps most importantly, the Board may face a substantial increase in its work load, depending on the holding of the United States Supreme Court in the pending *Noel Canning v. NLRB* case - an area that I will review later in my testimony.

INCREASED BOARD SCRUTINY OF EMPLOYER HANDBOOKS AND RELATED POLICIES AND APPROVAL OF FRAGMENTED BARGAINING UNITS

The current NLRB, in addition to the initiatives noted above, has also recently issued numerous decisions expanding the rights of employees under the NLRA and the opportunities for unions to engage in organizational activity. For example, the Board has considerably expanded the application of its protected

[4] Based on available information, such inventory backlog includes approximately ___ number of cases dating back to ___.

concerted activity doctrine to virtually every paragraph and sentence of employer policies, including electronic communication policies.[5] Such expansive jurisprudence has resulted in a number of innocuous and neutral employer policies regarding such subjects as employer data confidentiality, customer service and satisfaction, and civility in the workplace to now be held by the Board to be a violation of the National Labor Relations Act. Even the most experienced labor and employment legal practitioners are having difficulty understanding this type of jurisprudence and the lack of clarity and consistency of decision making in this area. Such haphazard "checkerboard jurisprudence" is particularly negatively impacting small and medium-sized businesses that do not have the resources to attempt to understand the Board's expansive, and often changing, case law decisions in this area.

Additionally, the current Board and its Regional Directors have continued to apply a new "overwhelming community of interest" test to determine what groupings of employees are eligible to form voting and bargaining units and vote in Board-conducted elections. *Specialty Healthcare*, 357 NLRB No. 83 (2011). This "job description" oriented and extent of

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[5] To date the Board has issued 124 decisions concerning employer handbook policies and the General Counsel has released 78 Advice Memoranda concerning the same. *See* John N. Raudabaugh, *Overbroad or Ambiguous Rules and Policies, Organized Labor's Toxic Tactic*, (monograph)(2014).

organization doctrinal approach to bargaining unit configuration has led to the approval of fragmented voting units and also in some cases the approval of exceedingly small or "micro units." For example, one Regional Director of the Board applied this test and recently found that women's shoe department sales representatives working on non-contiguous floors of a major retailer constituted an appropriate voting unit (*Bergdorf-Goodman* Case No. 02-RC-076954 (May 4, 2012).) The logical extension of such "reasoning", for example, in a major department store could result in the establishment of 20 to 30 separate voting or bargaining units (e.g., men's shoe department, women's formal wear department, boys sporting goods department. . .). Similar results could occur under such "reasoning" in any other employment settings.

THE *NOEL CANNING* CASE

The President's January 4, 2012 recess appointments to the National Labor Relations Board has generated considerable litigation beginning with the decision of the United States Court of Appeals for the District of Columbia on January 25, 2013 in the *Noel Canning* case, where the Court held that the President's appointments failed to comply with the requirements of the Constitution's Recess Appointment Clause. In its 3-0 decision, the D.C. Circuit found that the recess appointments of

Richard Griffin, Sharon Block, and Terrence Flynn to the NLRB occurred while the Senate still was in session, and therefore such appointments were not made during an inter-session recess of the Senate, nor were such appointments made to vacancies that happened during such a session. Other federal courts of appeal have agreed with the D.C. Circuit Court[6] and also found that decisions and actions by the challenged recess appointee Board are void given the President's failure to comply with Article II, Section 2, Clause 3 of the Constitution—the Recess Appointments Clause. The potential implications of a holding by the United States Supreme Court affirming, in whole or in part, the decision of the D.C. Circuit Court of Appeals would be considerable, even by the Government's own admission.[7] For example:

- There were more than 700 reported and unreported decisions issued by the challenged recess appointees during the time

[6] *See NLRB v. New Vista Nursing & Rehabilitation LLC*, 719 F.3d 203 (3d Cir. 2013); *NLRB v. Enterprise Leasing Co. Southeast LLC*, 722 F.3d 609 (4th Cir. 2013).

[7] The Government contended, "because many of the Board's members had been recess-appointed during the past decade, [the D.C. Circuit's decision] could also place earlier orders in jeopardy. The National Labor Relations Act places no time limit on petitions for review and allows such petitions to be brought in either a regional circuit or the D.C. Circuit.... Thus, the potential effects of the decision below are limited by neither time nor geography." Government petition for certiorari at 30. *See also* the Government's opening paragraph in its reply brief stating, "Respondent's contention that the President has no authority to make recess appointments during intra-session recesses of the Senate would repudiate the Constitutional legitimacy of thousands of appointments made by at least 14 presidents since the 1860s." Government Reply Brief at 1.

period from January 2012 until August 2013 - all of these decisions could be invalid depending on the holding of the Supreme Court.

- Enforcement actions by at least ten regional directors of the NLRB who were approved by the 2012-13 recess appointee Board also could be subject to being set aside - a list of such regional directors is attached to my testimony as Exhibit 1.
- Delegations of authority from the 2012-2013 challenged recess appointee Board to its acting General Counsel, especially in the injunction area, may also be subject to litigation attack.
- Approximately 4000 reported & unreported decisions of potentially quorumless Boards over the last 20 years, as well as actions of regional directors approved by such Boards, may be invalid.
- There are 144 challenges to decisions of the President's January 2012 challenged recess appointees pending in the various federal circuit courts of appeal with at least one case challenge pending in each federal circuit court. All of those cases may be returned to the Board for reconsideration, depending on the holding of the Supreme Court in the *Noel Canning* case. A list of such cases is attached to my testimony as Exhibit 2.

- To the extent that NLRB Decisions after August 2013 relied upon cases that overturned or modified precedent established by the challenged 2012-13 recess appointee Board such decisions may also be subject to collateral attack. Stated alternatively, such "precedent" established by an allegedly quorumless Board would be without legal authority and could not be relied upon by the present Board or its successors in reaching case law decisions.

THE *NEW PROCESS STEEL* COMPARISON

The amount of time that the present Board may have to devote to addressing *Noel Canning*-related litigation may take years and substantially burden the Board and its General Counsel. For example, by way of comparison, when the Supreme Court in the case of *New Process Steel L.P. v. the NLRB*, 560 U.S. 674 (2010) held that the Board could not legally function with only two members and must have, at a minimum, three properly qualified members to decide cases and conduct other business, approximately 100 of the approximate 550 *New Process Steel*-impacted decisions were returned to the Board for reconsideration.[8] Indeed, each of those returned decisions had been decided on a unanimous 2-0 basis by the two members who were properly serving on the Board at the time, and therefore

[8] http://www.nlrb.gov/news-outreach/fact-sheets/background-materials-two-member-board-decisions

these case holdings were without controversy. Such decisions also did not overturn precedent. Notwithstanding the non-controversial nature of such decisions and the relatively small number of such decisions, it took the Board approximately three years after the issuance of the *New Process Steel* decision to address all of the returned inventory of cases.[9]

If the Supreme Court upholds in whole or in part the D.C. Circuit Court's decision in the *Noel Canning* case, there could be, as noted above, as many as 4000 cases returned to the Board for reconsideration. While in all likelihood any such number of potentially returned cases will not be that high due to such legal doctrines and practical considerations like mootness and settlement, the number of returned cases undoubtedly will be far in excess of what the Board experienced after the Supreme Court's decision in *New Process Steel*. Indeed, many of the potential inventory of returned *Noel Canning*-type cases involve highly controversial decisions made by the challenged 2012-13 recess appointee Board including decisions that overturned years of NLRB precedent. For example, one of the important issues decided in such cases was the question of whether a dues check off clause in a collective bargaining agreement expires at the termination date of the labor contract. The challenged recess-

[9] *See* "The End of an Error" by former-NLRB Member and General Counsel Ronald Meisburg, Proskauer Labor Relations Update Blog, February 13, 2013, available at http://www.laborrelationsupdate.com/.

appointee Board in that case (*WKYC-TV*, 359 NLRB No. 30 (2012)) overturned 50 years of NLRB precedent set by both Democrat and Republican Boards and held that such clause continues to be in effect after contract expiration absent a specific provision in the collective bargaining agreement in question stating that the dues check off requirement expires with the termination date of the contract. The practical impact of such precedent-changing decision is that employers are now deprived of an important option in difficult collective bargaining negotiations—the option to cancel the automatic collection of union revenue—after the contract in question that provided for such a procedure has expired.

Another case that falls in this category is the Board's holding in *Fresenius USA Manufacturing,* 358 NLRB No. 138 (2012). The Board's decision in *Fresenius* involved a situation where an employee lied to an employer during an investigation. The Board Majority concluded, nevertheless, that this conduct may still be protected under the NLRA and an employer's discharge of the employee who supplied inaccurate information may be unlawful. The Board Majority goes to great length to try to justify its holding in this case, but its efforts fall far short of providing any valid explanation for its decision. Indeed, as a practical matter, it is hard to understand why an employee's

outright fabrication of facts or failure to properly cooperate in an investigation, should be protected by Section 7 of the Act.

A representative listing of such controversial decisions decided by the 2012-2013 challenged recess appointee Board is attached to my testimony as Exhibit 3.

CONCLUSION

Mr. Chairman and Members of the Subcommittee, clearly the current Board and its General Counsel are pursuing an unprecedented, activist, and employer-unfriendly agenda. The end product of such a course of action, however, may result in increased loss of Board credibility in the circuit courts and a related substantial increase in National Labor Relations Act litigation in the courts. Such litigation challenges to these initiatives, in addition to the potential ramifications of a holding by the U.S. Supreme Court affirming, in whole or in part the decision of the D.C. Circuit Court of Appeals in the *Noel Canning* case, may result in an overwhelming litigation burden on the Board and its General Counsel, thereby delaying for years the resolution of many important labor law issues.

Given the above concerns and issues, the Board should establish, as its first priority, deciding its current considerable inventory or backlog of cases and certainly decide

such cases as expeditiously as possible before engaging in any type of activist agenda as described above. Further, the Board and its General Counsel should give considerable thought to the long-range policy implications on the Board before engaging in their current agenda. As noted above, the pursuit of such an agenda may create precedent for future Boards from other administrations to also engage in an extreme "makeover" of Board case law and election procedures. Such extreme policy change, it is submitted, is not sound public policy, and will result in the Agency's already strained credibility being questioned even further by the courts, the Board's numerous stakeholders, and the Congress. Finally, at a minimum, the Board, before embarking any further on its current aggressive policy-oriented agenda, should wait until the Supreme Court issues its decision in the *Noel Canning* case so it can then determine what additional caseload, if any, it may have to address in the future.

EXHIBIT 1

The following are examples of the most controversial decisions issued between January 4, 2012 and July 31, 2013 by the NLRB recess appointee board consisting of Chairman Mark Pearce and recess appointees and former Board Members Sharon Block and Richard Griffin.

- *WKYC-TV*, 359 NLRB No. 30 (Dec. 12, 2012) - In this case, the Board overturned 50 years of precedent and held that an employer's obligation regarding the checkoff of dues, if contained in a collective bargaining agreement, continues after contract expiration absent a specific contractual right to terminate such checkoff requirement.

- *Alan Ritchey, Inc.*, 359 NLRB No. 40 (Dec. 14, 2012) - The Board held that employers must give notice to a union and offer to bargain before initiating discretionary discipline policies regarding union represented employees, including in situations where a union was just certified and there is no collective bargaining agreement in place.

- *Application of the Board's New Specialty Healthcare "Overwhelming Community of Interest Test"—"Micro" Bargaining Unit and Fragmented Unit Cases* - There are a number of NLRB decisions wherein the quorumless Board supported the establishment of micro and fragmented bargaining units thereby permitting unions to carve out, on an extent of organization basis, very small or fragmented groupings of employees for bargaining unit configuration. One case to watch in this area is a voting unit case currently pending before the Board involving an employer appeal of an NLRB Regional Director ruling that women's shoe department employees at a Bergdorf Goodman Store in New York City constituted an appropriate voting unit pursuant to the *Specialty Healthcare* test.

- *Banner Estrella Medical Center*, 358 NLRB No. 93 (July 30, 2012) - The Board restricted the ability of employers in internal investigation matters from requiring confidentiality commitments from employees, including commitments for an interviewed employee not to reveal the scope and content of the interview and investigation. This approach has a potential to considerably interfere with an employer's ability to engage in internal investigations to comply with federal laws requiring employers to investigate allegations of workplace misconduct.

- *Iron Tiger Logistics*, 359 NLRB No. 13 (Oct. 23, 2012) - The Board reversed precedent and held that an employer is required to respond to a union's request for information even when such information may be irrelevant.

- *Costco Warehouse Corp.*, 358 NLRB No. 106 (Aug. 27, 2012) and *Knauz BMW*, 359 NLRB No. 164 (Sept. 28, 2012) - The Board, in these cases and other social media and employer work rule cases, held that employer policies requiring employees to be courteous in the workplace, keep information confidential, refrain from making statements critical of employers and refrain from using profanity are unlawful under the NLRA, as such policies have the potential to "chill" employee free speech and to interfere with employee organizing rights under Section 7 of the Act.

- *Piedmont Gardens*, 359 NLRB No. 46 (Dec. 15, 2012) and *Hawaii Tribune-Herald*, 359 NLRB No. 39 (Dec. 14, 2012) - The Board, in these cases, reversed substantial precedent

and decided that an employer cannot withhold confidentially obtained witness statements from a union that were obtained by the employer in an internal investigation including interviews with union represented employees.

- *Finley Hospital*, 359 NLRB No. 9 (Sept. 28, 2012) - The Board held that pursuant to the "dynamic status quo" doctrine an employer that negotiates a wage increase with its union must continue to offer such wage increase post contract expiration and during renewal contract negotiations, notwithstanding the fact that the previous wage increase was only for the duration of the expired collective bargaining agreement. An appeal in this case is presently pending in the D.C. Circuit Court of Appeals.

- *D.R. Horton*, 357 NLRB No. 184 (Jan. 3, 2012) - The Board held that employers could not require employees, as a condition of employment, to sign an arbitration agreement prohibiting the filing of joint, class or collective claims. The United States Court of Appeals for the Fifth Circuit, in a 2-1 decision, refused to enforce the Board's order and the case is presently pending in the Circuit Court pursuant to the Board's request to permit it to file a request for a rehearing.

Chairman ROE. Thank you, Mr. King.

Mr. Tierney, you are recognized for five minutes.

Mr. TIERNEY. Thank you. First of all, I thank all the witnesses for their testimony. It was useful and helpful on that.

Mr. Puzder, I want to ask you a question. I mean, you would agree with me that the board hasn't decided the two cases that we are talking about here today. Is that right?

Mr. PUZDER. Yes, sir.

Mr. TIERNEY. Okay. So, again, you could hear yourself well, right?

Mr. PUZDER. I turned it off so I wouldn't hear myself during their—

Mr. TIERNEY. So, you know, I am a little familiar with franchisor-franchisee relationships. You can help me out if I go astray here. But the question would be whether or not the franchisor has control or the ability to control or co-determine terms and conditions of employment.

Now, generally—and a lot of the franchises that I think people are familiar with—the franchisor has its own operation, you know, staff people, everything, and the franchisor has its own people working for it, whatever it is doing. And so in that situation, do franchisors generally hire people for the franchisee? Or does the franchisee?

Mr. PUZDER. The franchisee hires their own employees completely.

Mr. TIERNEY. Same with firing?

Mr. PUZDER. Yes.

Mr. TIERNEY. Same with disciplining them?

Mr. PUZDER. Yes.

Mr. TIERNEY. Same with supervising them?

Mr. PUZDER. Yes.

Mr. TIERNEY. And giving them direction?

Mr. PUZDER. Absolutely.

Mr. TIERNEY. So there is no occasion—or generally no occasion—where the franchisors are directly or immediately doing any of those things.

Mr. PUZDER. Correct.

Mr. TIERNEY. Okay. So what—I mean, you don't claim some foresight or whatever what this board is going to do once it gets all the input and deliberates on this case, do you?

Mr. PUZDER. No, there is industry concern that the board may not completely understand the franchising model, so I think I was invited to testify to clarify that model.

Mr. TIERNEY. So you have five lawyers that Mr. King says—or five people that Mr. King says are very, very knowledgeable in the law, but your organization doesn't think they know about franchises?

Mr. PUZDER. No, I am sorry, we do know about franchising very well.

Mr. TIERNEY. No, no, you don't think they know about franchising, the board. You are concerned that they won't be able to grasp the heavy issue of franchisor-franchisee relationships?

Mr. PUZDER. No, I am sure they could grasp it. I think the idea is to make sure that the evidence or the testimony or the facts are

before them, and I believe that is why I was invited to testify. Obviously, I didn't invite myself, but I believe that is why I was invited.

Mr. TIERNEY. You are invited to tell us what you would like the board to hear?

Mr. PUZDER. Yes.

Mr. TIERNEY. Interesting. So have you shared this with the board? Are you going to file an amicus brief or—

Mr. PUZDER. We would be happy to do so. I believe the associations that we're involved with will file amicus briefs and will be helpful in that respect.

Mr. TIERNEY. Okay. Yes, I mean, I am just a little baffled to what we pretend to do at this hearing. I think that your position should be heard by the board. I suspect that they will and that they are quite confident and capable of taking it under consideration and giving it whatever weight that they think it should have on that part.

So I appreciate your concern. You know, I just—I don't know that it is going to be problem for you. As I look at it, with—as I say, the sum knowledge that I have of franchisor-franchisee, you know, it looks like you may be, you know foisting your shadows there a little bit on that, until you know what the board is doing or have some inclination of them going in the wrong direction.

Mr. PUZDER. Well, it is good to hear that, and it was good to hear from Mr. Coppess that we had no risk, so that was—just coming to the hearing, that made it worthwhile.

Mr. TIERNEY. The risk that you have is that the board may disagree with you, and then that is the risk that Mr. King takes. I mean, he has very clearly said he believes in policy and, you know, the board may disagree with you. There are occasions when past boards have disagreed with policies that other people sought with and Mr. King wasn't in here complaining then. He was in there thinking boy, they are geniuses and they are really going in the right track.

So, I mean, I just don't know, you know, that this is the appropriate forum to listen to how a board may make a decision in the future after it gets input from amicus and other sources on that. I mean, we are always going to have some distinctions or disagreements on the way that they interpret the law or its application on that. And I think that all of you have stated the considerations out there pretty well. I just haven't heard any evidence that indicates to me that there is any reason to believe that this board won't be fair-minded and won't try to do the best that it can do under its abilities to make a decision that it believes is correct and reflective of the law on that.

So I hear, you know, Mr. King's concern about the—a number of cases that are pending on that. And I think that the Noel Canning case may seriously impact that, in which case we are all going to be concerned about that. But I don't think that necessarily warrants the board abdicating its responsibility to make a determination of how it properly applies the law in Browning-Ferris or in the Purple case on that basis.

So I think that is going to be it. And other than that, I suspect that listening to all you gentlemen has been interesting. I suspect

the board will hear the same thing, and I trust that they will do their job. Thank you.

Chairman ROE. Thank the gentleman for yielding.

Now, Mr. Wilson, you are recognized.

Mr. WILSON. Thank you, Mr. Chairman. Thank you so much.

This title, "What To Expect Next from the National Labor Relations Board," has real meaning to the people of my home state of South Carolina, because I think that we are the prime example of abuse by the NLRB, which has made every effort to destroy jobs and destroy opportunity for the people in my state.

Three years ago, Boeing had completed a 1.1 million square foot building. There were 1,000 people employed. And out of the blue, the NLRB dictated it could not produce 787 jetliners. I mean, incredible. Think of this.

This was clearly due to the influence of the unions. They had placed $400 million into the President's campaign, and a response was to block the ability of Boeing to operate in our state. South Carolina is a right-to-work state. Workers have the right to freely choose whether to be part of a union or not. And they have chosen not to be part of a union.

South Carolina has fought back. I am very grateful that with the leadership of Governor Nikki Haley and the attorney general, Alan Wilson, that we fought back. Lawsuits were filed. It is very significant. We have the youngest attorney general and the youngest governor in the state of South Carolina. I am also proud we also have the first female governor in 340 years. They fought back.

Our delegation fought with them, and I am very grateful for the leadership of now Senator Tim Scott, Senator Lindsey Graham, myself, the very famous Trey Gowdy. Everyone fought back, and we were successful.

Now there are 7,000 jobs at the Boeing facility in Charleston. It is very important to me, because the suppliers are across the state. The Zeus Corporation of Orangeburg and Akin produced the tubing. The cables are produced by Prysmian of Lexington. Thermal Engineering of Columbia provides painting experts. AGY of Akin produces interiors. Bose in Blythewood produces the communications. Over and over again, thousands of jobs across our state, despite the NLRB.

Now, today I want to thank all of you for being here, particularly Mr. Puzder. I am a Hardee's biscuit 'n' gravy customer.

Mr. PUZDER. All right.

[Laughter.]

Mr. WILSON. And I want to thank you for the—and, hey, I love going by. The people working there, it just warms my heart to see people so enthusiastic, so positive, with good jobs. Does the franchisee or the franchisor hire, fire, discipline, supervise, and direct employees at a franchise store.

Mr. PUZDER. We do not.

Mr. WILSON. Wow. And what standards does the franchisor set? Why does the franchisor set any standards?

Mr. PUZDER. We set standards that basically relate to protecting the trademark so that it is not abused, which protects also the franchisees who pay a fee to use that treatment, and for consistency. You want consistency in the food. You go to Hardee's, you

want a biscuit to be a biscuit in every Hardee's you go to. Just like McDonald's or Burger King, you want a Whopper to be a Whopper no matter what store you are in.

But beyond consistency and protecting the trademark, the matters relating to employee discipline or hiring policies are all in the hands of the franchisees.

Mr. WILSON. Well, you do a great job.

Mr. PUZDER. Thank you very much.

Mr. WILSON. And, Mr. King, in the event the Supreme Court holds that the January 2012; recess appointments to the NLRB are unconstitutional, what will come of the thousands of decisions issued by the board?

Mr. KING. Excellent question. Up to 4,000 could come back. That is just over the last 20 years of board decisions. They would be void. The board would have to consider them anew. We also have, Congressman Wilson, appointments to regional director positions throughout the country by allegedly quorum-less boards. All the activities, actions, or decisions of those regional directors may be void. And we would also have delegations of authority from quorum-less boards, at least allegedly, to the general counsel of the board, enforcement actions that may be set aside. So the potential would be an overwhelming litigation burden and reprocessing of case burden on the board and its general counsel.

Mr. WILSON. And could the cases all be determined en banc? Or could it—would the—would citizens have an individual right to represent their case?

Mr. KING. Congressman, each and every case would have to be reconsidered. I know of no legal precedent that would permit the board to en banc, if you will, ratify or consider on whole all of the cases. They have their own individual facts, applicable law, and we do have some precedent, after the Supreme Court handed down its decision, a new process, still there about 100 cases of a potential 500 that had to be reconsidered, because the board had only operated with two members. The Supreme Court said, no, you had to have three.

So when those cases came back, it took the board over 3–1/2 years—and this is in my testimony—to process just that backlog of 100 cases. So if you look at 4,000 cases, we have no idea how long it would take for the board to process them.

Mr. WILSON. Thank you very much.

Chairman ROE. I think the gentleman failed to mention that the attorney general in South Carolina is his son.

[Laughter.]

Mr. Pocan, you are recognized for five minutes.

Mr. POCAN. Thank you, Mr. Chairman. And thank you to our witnesses.

I am relatively new to the committee and brand-new to the subcommittee. So I guess maybe I am a little surprised that this is our 16th time that this committee has been addressing the NLRB, when I thought, you know, perhaps when I get on the committee we would be talking about things like raising the minimum wage, making sure we had pay equity, dealing with other workplace protections, issues like ENDA, and then making sure that, I guess, NLRB was actually improving access for workers, because I know

things like minimum wage in my district, I have 59,000 people who would actually benefit from raising the minimum wage to $10.10. I think the gentleman who just spoke from South Carolina has about 50,000 people in his district that would benefit if we were doing that.

But I understand this is before us, so let me try to talk about this and from my background. I have been a small-business owner for 27 years, as of last month. I also have a union shop, so I kind of straddle both worlds, a union shop by choice, but a specialty printing business.

And one of the things I have seen a real trend in is specifically that employers are starting to use these outside entities, these third-party employers to hire workers, which seems to be getting around the law, right? It seems to make it harder for people to be able to organize in some of these situations, and I think what we saw with the Browning-Ferris Industries case specifically is exactly the problem that is happening more and more and why if the NLRB is going to try to address something, they might want to specifically look at this.

So, Mr. Coppess, I guess I have a couple questions to start with you. Specifically about—you know, if a parent employer doesn't determine the pay for an employee, how could that parent company effectively determine the conditions of employment for a subcontractor's employee, with this third-party relationship?

Mr. COPPESS. You mean the entity owner, Browning-Ferris?

Mr. POCAN. Yes.

Mr. COPPESS. Well, —if they exercise sufficient control over the terms and conditions of the direct employer, they would—in Browning-Ferris, they just dictated what wages, for instance, that wages couldn't come over a certain level. They controlled the speed of the line. They controlled the position of the employees on the line. They controlled what equipment they were using. All of those things are important conditions of employment that the direct employer wouldn't be able to bargain over.

The joint employer bargaining obligation is just simply limited—to the overall employer bargaining over what it controls. They both have to come to the table or, in fact, they don't both have to come to the table. The employer that owns the facility could authorize the direct employer to reach agreement on those matters and they would then just be jointly bound by that. But it is only the matters they control that they are required to bargain over.

Mr. POCAN. Right. So if we broadened the joint employer standard, if the NLRB did, how would that help workers engage in a more meaningful bargaining process?

Mr. COPPESS. Well, it is basically impossible to engage in effective bargaining if someone who is not at the table controls the terms. That is why going into a car dealer shop and bargaining with the direct salesman and he goes back to the manager, you don't—you don't really start bargaining until the manager is at the table.

Mr. POCAN. That is a visual memory of that.

Mr. COPPESS. Unfortunately, for me, too.

Mr. POCAN. Yes, thank you. If I can, Mr.—is it Puzder or Puzder? I am sorry.

Mr. PUZDER. Puzder.

Mr. POCAN. Puzder. Since you are here—and I happen to agree with you. I don't think—I looked at a franchise when I first opened the business, decided it wasn't the best route for me personally, but I don't see—I would be surprised if the NLRB went to the extent that you are talking about.

However, since you are here, can I just ask you, what is the average pay for a Hardee's employee, a new employee coming in to start?

Mr. PUZDER. I don't know what Hardee's is. I think it is in my brief the average restaurant level employee makes about $9 an hour. I think it is $8.96, if I recall.

Mr. POCAN. Okay. But you don't actually—the Hardee's—

Mr. PUZDER. I wouldn't break—I can't break Hardee's out from Carl's. I don't know it. I mean, I know—I mean, we run Carl's and Hardee's as one brand with two names. For us, it is really just one company.

Mr. POCAN. Got you. And do you know—and, again, I am not sure if this is in the brief, but, if you can separate it either together or separate, how many of the Hardee's and Carl's Jr.'s employees use food stamps or Medicaid?

Mr. PUZDER. I don't know that. I know that of the 22,000 employees we have over the age of 21, so taking out 16-to 19-year-old college and high school students, about 5 percent of our employees make minimum wage. And, you know, obviously, a high percentage of those are part-time. So I don't know how many get food stamps. I don't know how we would know that.

Mr. POCAN. And I appreciate that. I just think, as we talk about this issue, you know, you just mentioned 22,000 people who potentially would also benefit from the minimum wage increasing to $10.10, as well as the taxpayers in the jurisdictions that currently are subsidizing many of those folks—

Mr. PUZDER. They would benefit if the price of everything didn't go up. But, of course, as soon as you raise the minimum wage, everybody who has minimum wage employees—plus, there is sort of a tide lifts all boats impact. Higher—

Mr. POCAN. You will get additional business, yes. Okay.

Mr. PUZDER. So your labor costs go up, and when labor costs go up, you either automate or you increase your prices to cover the labor cost increase, which, of course, is why we are talking about increasing the minimum wage when we just increased it 5 years ago, because you—you know, you will always increase your costs to cover increased expenses, whether it is food costs, occupancy costs, or labor.

Mr. POCAN. I think a lot of people would say—

Chairman ROE. Gentleman's time is expired.

Mr. Kelly, you are recognized for five minutes.

Mr. KELLY. Thank the Chairman.

Being an automobile dealer, I don't share the same feelings you have about going to negotiate a price.

[Laughter.]

And I would look at the effect on the general economy when our automobile business is running the right way. It affects everybody, including the people who build them. So I don't want to get too far

out of whack here about who controls what, but I am very interested in what we are looking at right now today, and we are talking about an NLRB that continues to get involved in things.

And if we are trying to get this country back on its feet again, if we are really trying to get our economy back up and moving, if we are trying to take advantage of all the assets we have, then you have got to sit back and wonder, so why is this group looking—and, Mr. King, you made reference—how many years of precedent are we looking at now? How many—are we going to go back and look at how many?

Mr. KING. Just in the last few months, Congressman, this board is proposing in its general counsel to consider changing over 100 years—maybe up to 130 years of precedent in addition to changing over 30 or 40 years of established procedure and protocol on how the board runs elections without any justification at least that I can determine or others can determine.

Mr. KELLY. Yes, well, we have that—not just with the NLRB, but with a lot of other things that we are looking at are changing here very rapidly. Let me ask you this. There is a cost involved in both time and money to go back and do this. Can you peg it at all as to what that would be?

Mr. KING. I don't have a way of calculating it, per se, but the board, like every federal agency, Congressman, comes to this body and asks for resources. If these resources are being diverted to these policy efforts and not, as I mentioned, to addressing their current case load, which is approximately 383, one wonders about the priority of the board.

In the Browning-Ferris case that has been discussed here, why is this case even being considered? We went back and looked at the facts, Congressman. The subcontractor here, LeadPoint, has its own human resources department, employs no less than 17 supervisors and lead men to oversee the work at the site, Browning-Ferris site, maintains its own payroll, was responsible solely for hiring, discipline and discharge, and has separate business entity locations at other Browning-Ferris operations.

Why is this case even being considered? Back to your resource question. We don't know.

Mr. KELLY. Okay, but my question is also going to be—so all of these decisions, they are going to be reviewed again. My assumption is going to be, somebody is going to have to engage counsel, legal counsel. And so monies that they would have spent on other things, right now—when you talk, again—I am going back to the economy. We are trying to get people back to work. We are using very valuable revenue and assets that we have to go back and look at things that have already been established and, as you say, for 100 years and in some cases now we are going to go back on 40 years.

And my question is, so why now? What is the purpose in doing this? If we are really trying to help the economy to recover, why would we put this weight on their back? And I am talking about employers right now.

The other thing that is happening—and I think—because of what you do in your business, I have got to tell you, General Motors does not tell me how to hire people, how to fire people, what our policies

are, nothing. Now, neither does Hyundai, nor Kia, okay? I am an independent businessman. I rise and fall each month on the efforts of our total collective group and how they perform in the marketplace in a highly competitive marketplace.

So it is really important that we can kind of run our business without having—being run into the ground by a continuous government regulations that keep us from doing what we do. We sell cars and trucks. We service cars and trucks. But when you have to stop to go through these exercises in futility, that takes your eye off the ball.

In your business, especially—and I have got to tell you, being an employer for many, many years, you know the greatest relationship we have is between the people that work with us every day to serve our customer base and management. I have been to weddings and funerals and baptisms and—you name it, I have been there. There is a great relationship.

But that relationship is now being destroyed and picked apart by a government that continues to pit employer against employee, owner and operator against associate and puts one group as these are bad people who are taking advantage of you. Nothing could be further from the truth. We have destroyed the regular work week, and we continue to put a heavy burden on people who actually are trying to rebuild the economy.

In your business, it has got to be overwhelming what you go through with employees and you bring it—by the way, these are not permanent jobs. These are starting-level jobs. I have so many friends that started off in McDonalds or a Burger King or a Hardee's and now they are managing them or have their own stores, so let's not be confused about what these jobs are. It allows people to grow.

The numbers that you talked about in the turnover, if you could, because I don't believe—something we get caught up in this living wage. I believe it is a starting wage that allows you to build your own life.

Mr. PUZDER. Well, for me, I started out at minimum wage, which I think at the time was like $1.25 an hour scooping ice cream at a Baskin-Robbins. It never occurred to me that would be a job for which I should have a living wage or support a family of four, nor is it a job that would engender somebody supporting a family of four.

So we do have starting-level positions in our company. If you—our turnover at the restaurants, by the way, is about 100 percent a year. I mean, people come in and out. We support them getting educations. We encourage them to get an education. We help them through the process. We actually have tuition reimbursement while we reimburse employees that have been with our company over a year, up to $10,000 worth of tuition and books.

So we encourage people to move on in life. And then there are people in the restaurants who stay and enter the management stream, become general managers, district managers, regional managers. The guys who run Hardee's and the guy who runs Carl's Jr. started out as minimum wage employees working behind the counter and now are running businesses that do many tens of millions, if not hundreds of millions of—in EBITDA a year.

So it is—they are entry-level jobs. They are the way that you can get on the ladder. And I think the CBO came out recently and said that 500—

Chairman ROE. Would you wrap up your testimony, Mr. Puzder? We are over time.

Mr. PUZDER. —wouldn't be created.

Mr. KELLY. Well, thanks for relating the American history and American story. This is impossible any place else in the world and sometimes we forget it.

Chairman ROE. The gentleman's time is expired.

Mr. KELLY. Thank you, sir.

Chairman ROE. Mr. Scott, you are recognized.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, the gentleman from Pennsylvania in his district has, as I understand it, 62,000 of his hard-working constituents—67,000 of my constituents would receive a pay raise if we increased the minimum wage to $10.10 per hour. That is in addition to the tens of thousands of others who would benefit from the rising all tides effect where they are close to the minimum wage now, would get a raise in addition to that.

Mr. King, you mentioned the problem with the recess appointments. There are two questions involved in that case, one, whether they were intra-session appointments and—I guess the fundamental question, was the Senate in recess at all? If they decide that they are intra-session appointments, —if that part of the case is sustained, it is my understanding that 329 intra-session appointments have been made since 1991 and President Obama's 29 is the lowest since Ronald Reagan—would all of those decisions way back then have to be reviewed on all the different agencies in the NLRB?

Mr. KING. Potentially, Congressman Scott, yes. You are correct. There are actually three questions pending before the court, and the third one you alluded to is the pro forma session question. But depending on how the court rules, if it affirms in whole or in part the D.C. Circuit Court of Appeals opinion, certainly the appointments that you mentioned would be called into question by both Democrat and Republican presidents. You are correct.

Mr. SCOTT. And that would go back to 1981?

Mr. KING. At least, if not further.

Mr. SCOTT. Mr. Coppess, in the question of the e-mails, is there any question whether or not the employer has the right to restrict the use of e-mails? If they restrict e-mail use only to official business connected concerns, no personal use for any reason, is that—does an employer have the right to do that?

Mr. COPPESS. Yes, they have a right under the NLRA to do that. The problem comes, as everybody who has ever used a work e-mail knows, that it is practically impossible to do that. And any employer that were to actually try to do it would so annoy the employees that it would be at a great cost.

When the board last considered this issue in Register-Guard, there was interesting testimony from a witness who had been studying e-mail in general. And what he remarked on was that in the early days of workplace e-mail, employers often adopted rules that said no personal use. And they quickly discovered those rules

could never be enforced, so they—by the time of the Register-Guard hearing, this witness said over 90 percent of employers formally permitted non-business use of e-mail, and, of course, that has been all of our experience, that personal use is, in fact, permitted.

Mr. SCOTT. So once they allow personal use, can they legally then excise out NLRA-related communications?

Mr. COPPESS. No, I think all of us agree on that. Mr. Borden's testimony is to that effect. That is my understanding of the law. They can't engage in content-based restrictions on NLRA-protected employee communications.

Mr. KING. Pardon for interruption, I want to go on record, I do not agree with that last statement.

Mr. COPPESS. Okay. I mean—

Mr. KING. I have a considerable high regard for Mr. Coppess. He is an excellent lawyer. But on that point, we do not agree.

Mr. COPPESS. I am sorry. I didn't mean to speak for Mr. King. I didn't realize it was at all controversial.

Mr. SCOTT. Mr. Coppess, can you talk a little bit more about what the complication is when—we talked about the outside agencies supplying employers in a franchise situation. Is it different in situations that are not franchise situations?

Mr. COPPESS. Well, the operation at issue in Browning-Ferris is that the opposite removed from the franchise situation we have had described to, as there the employer—the jobs at issue in that case are very simple jobs. People stand along the line at assigned spaces, Browning-Ferris assigns them the spaces. They are fed trash along a conveyor belt that is run by Browning-Ferris, the speed of which is controlled by Browning-Ferris, and they sort trash.

Everything in the plant is controlled by Browning-Ferris. Certainly, the subcontractor has line supervisors telling people, yes, you continue to stand there, continue to sort the trash as it comes to you, but there is no much also to the job other than what they—the enterprise owner controls. So it is at the opposite remove from what we are hearing about the franchise situation.

And I would like to add that it is a really good example of why the board calls for amicus briefs. So here they are deciding a case that has nothing to do with franchises. And the franchise operations will have the opportunity to come in and say this may look like an easy case, but here are some things you ought to keep in mind so when you speak, you maybe don't get into trouble you don't want to get into. You know, telling them about it is the thing to do. They are deciding the case, and they have asked to hear.

Mr. KING. On that point, Mr. Coppess—

Chairman ROE. I think the gentleman's time has expired.

Mr. Byrne, you are recognized for five minutes.

Mr. BYRNE. Thank you, Mr. Chairman.

And, gentlemen, appreciate your being here today. I took labor law 35 years ago this year and spent the vast majority of my career representing people before the board and handling a lot of issues like this. I appreciate the level of professionalism I am hearing coming from the witnesses today.

I have got to agree with Mr. King. Maybe it is my age and having dealt with this for a long time, but we have got decades of

precedent that are literally being overturned or at least being considered to be overturned by this labor board. And I think it is extremely appropriate that this committee take this up at this point in time both because of our policymaking function, Mr. Chairman, but also I think Mr. King raised a very important point, and that is the role that the Congress plays in appropriating money to federal agencies that spend money on doing things when they need to be taking care of business where they have a backlog.

And if you have ever had a backlog for a client with the National Labor Relations Board, it is hard to explain to your client why that board can't get to their case, and it would be particularly so if they are trying to launch out in new policy areas, which brings me to Mr. Borden's testimony.

When I first started, Mr. Borden, the big thing was bulletin boards. We didn't have e-mails. And I remember telling client after client after client, don't let your employees use the bulletin board to advertise for a yard sale or their kids' Little League game or anything like that. And so we said that for years.

Then with these newfangled things called e-mails came along, and I may have read your treatise when I told my clients to do this, don't let your employees use the e-mail system at the office for anything other than business matters. And I am probably like thousands of labor lawyers that told their employer clients that.

And now to find that the labor board is considering making e-mails opened up for employees to use to make advocacy one way or the other on unionization really surprises me, and this idea, Mr. Coppess, that these employees are doing this on their own is ridiculous. They are being directed by the labor unions that they are in concert with. Yes, sir, they are. It is a concerted effort.

And what we would have in that circumstance is this very difficult situation within the workplace, where it interferes with workplace communications about the things that have to happen at the work. I think it is very troubling for the productivity for the American economy.

But I do have a question. I was listening to Mr. Coppess's statement. You said there is no reason whatsoever that workers and employers should expect anything from the NLRB in deciding these cases other than a thoughtful, considered application of established principles, established principles to the particular facts of each case.

Mr. King, admittedly, this is mostly a new board. However, is this statement considered—consistent with what we have seen from the Obama Administration's NLRB? Was this true in the specialty health care case?

Mr. KING. No, sir, it was not. In all due respect to the board members and its general counsel, we have not seen from an employer perspective a fair and even-handed approach to the facts and the law that it applies to the facts. Back to your point, the precedent that I am talking about, over 100 years of precedent, that was established by both Democrat and Republican boards. This should not be a partisan issue.

Specialty Healthcare case overturned on its head the way the board goes about determining who is appropriate to vote in an election. We have a regional director of the board applying Specialty

Healthcare in the Bergdorf Goodman case where the regional director found that women shoe department employees on noncontiguous floors of that department store constituted an appropriate voting unit.

If you take the average retail department store and apply that, quote—"reasoning," which is highly suspect, I would submit, you could have 30 or 40 different bargaining units in that store alone. I mean, what is next, the men's bowtie department?

Mr. BYRNE. Well, whether it is pro-management or pro-employee, they are not following established principles. I mean, we have all practices—we win or lose with the principles we have had. We have had an equilibrium before the board, practitioners have and parties have had, for decades. And the point is that they are not following established principles. They have decided to go off and create new principles. And that undermines the equilibrium we have had for years. Isn't that the case, Mr. King?

Mr. KING. That is certainly my position. And back to your colleague's question about interfering in the workplace, this board in over 100 decisions has gotten into the issue of employer policy statements, employer handbooks, the minutiae, every paragraph, every sentence, even punctuation marks, now are under scrutiny because they may somehow chill employees' rights. Is that a good use of the board's resources? I submit not.

Chairman ROE. Gentleman's time is expired.

Ms. Bonamici, you are recognized for five minutes.

Ms. BONAMICI. Thank you very much, Mr. Chairman. And thank you to the witnesses for testifying today. Like Mr. Pocan from Wisconsin, I am also fairly new to this subcommittee, and when I joined, I was pretty enthusiastic about having the opportunity to discuss workers' rights.

I certainly know from watching what has happened over history how important the labor movement has been in getting the rights to organize and collectively bargain for generations. It is really unfortunate that we spend a lot of time here talking about what looks like attempts to minimize the importance of the NLRB. I am concerned about that.

Yesterday, I had the opportunity to attend the White House Summit on Working Families, which was a great opportunity to listen to not only working people from across the country, but also business owners who share their stories about how family-friendly policies actually help with attracting and retaining good workers. That was a great discussion. I wish that is the discussion we were having today.

Some of the things that we talked about at the summit—equal pay for equal work, raising the minimum wage—are areas where—I know the labor movement has long been a leader in those areas.

I am from a state where the voters in Oregon years ago raised the minimum wage by initiatives. And it is linked to the CPI, so it automatically adjusts. It is one of the higher minimum wages in the country. It has actually been good for Oregon. I have about 43,000 constituents in my district who could actually benefit from raising the minimum wage to $10.10 an hour under the *Fair Minimum Wage Act.* And I know now there are many businesses talking about doing this because—to have a national standard would

be great for the country and also for the states that have lower minimum wages.

I know the gentleman from Alabama who just spoke. I also took labor law in law school many years ago. I am not going to say how many. You have about 54,000 people in your district who would benefit from raising the minimum wage.

Interestingly, I did not, like you, go into practicing labor law. When I was in private practice, before I discovered that my kids were more fun than lawyers, I had a practice in franchise law and I represented franchisees. So it has been an interesting discussion listening to Mr. Puzder.

And I certainly see, as Mr. Pocan did, the distinction between subcontracted employees and employees of franchisees. Big distinction there. But I appreciate the comment that was made about this is why the court asks for briefing.

So I wanted to ask, Mr. Coppess, in your testimony, you talk about how the NLRB will decide these two cases—and we are really predicting what the court might do and talking about that—by carefully applying established legal principles to the particular facts of each case. And in doing so, the board will attempt to provide legal guidance to workers and employers who encounter similar situations in the future. And I appreciate that statement.

And when I came in, I couldn't listen to your testimony because I was in a markup in another committee, but I did read your testimony. And I heard Mr. King talking about his contemplation about what might happen with regard to the Noel Canning opinion, if the Supreme Court does uphold the D.C. Circuit. Mr. Coppess, what is your thought on that? What is going to happen if the Supreme Court does uphold the D.C. Circuit? What do you see happening logistically?

Mr. COPPESS. Well, we know actually with a fair degree of certainty what will happen for the NLRB, because they have been through it before. The ruling for the NLRB will simply be whatever actions the board took within the period covered were taken without a quorum. That was the precise issue in New Process Steel.

The issue for the rest of the government is mammoth. I mean, it could eliminate the recess appointment authority as a practical matter, it could invalidate decisions of other agencies made by other appointees who aren't used to it the way the board is, so there could be far-reaching ramifications of that decision, but not for the NLRB. The NLRB has been through it before, has practice, unfortunately. It can grind out the cases again.

But that part of it we know what is going to happen, because we have been through it once before.

Ms. BONAMICI. Right. Well, I know we are all eagerly waiting for that opinion. And the Supreme Court did not—and I think it is common sense—that it is a different world now than it was at the framing of the Constitution. And we fly back and forth from the West Coast on a regular basis. And, you know, people used to take a stage coach and come in, be in D.C. for months at a time.

So it is a different world, but we are waiting to see what is going to happen. I am very concerned about the decisions that were decided during that period of time. And, of course, as you mentioned, Mr. Coppess, what happens in other areas of the government.

So with that, Mr. Chairman, I yield back the balance of my time.

Chairman ROE. I thank the gentlelady for yielding.

Dr. Bucshon, you are recognized.

Mr. BUCSHON. Thank you, Mr. Chairman. I would also like to point out interestingly that the CBO estimated 500,000 people would lose their job in America if we immediately raised the minimum wage to $10.10 an hour. I would be interested in the calculation in all of our districts how many people would lose their job if the minimum wage was raised.

This is for Mr. Borden. Mr. Coppess states in his testimony that the NLRB's last attempt in Register-Guard to address whether employees have the right to use employer e-mail for Section 7 activities "failed." According to Mr. Coppess, employers and workers are uncertain of when e-mail communications on the NLRA protected topics are protected and when they are not.

Mr. Borden, is this accurate?

Mr. BORDEN. I don't think so. I think it would be more accurate, with all due respect to Mr. Coppess, to say that the NLRB failed to give the AFL–CIO the decision it wanted in that case. I think the standard that was set forth in the Register-Guard decision was extremely straightforward and consistent with decades' worth of precedent. And that is simply that employers may promulgate and enforce a blanket ban on non-business-use of e-mail.

Absent discrimination, there is simply no employee right to use employer equipment for Section 7 purposes. I would submit that the issue that is currently before the board does not exactly have the same level of consensus that my friend here has suggested today. It is clear from the board's solicitation of amicus briefs that they are considering overturning that very clear and straightforward standard and creating a substantive right for employees to use employer equipment for Section 7 purposes.

Many employers across the country may choose not to enforce such a blanket ban on non-business use of their equipment. I have no quarrel with that. But I see no reason for those who have chosen to invest in this equipment and to dedicate it exclusively to business purposes, no matter how hard that may be to enforce, to force them to make it available otherwise. I think the thing that creates uncertainty for employers is when the agency tasked with interpretation and enforcement of a statute so drastically departs from precedent like this every four, six, or eight years.

Mr. BUCSHON. I mean, I would just also like to point out, my dad was a United Mine Worker for 35 years, so I understand that perspective. I mean, would you—I am just guessing—I mean, maybe the reason why unions want access to their business e-mails is because at many businesses people aren't really interested in what they have to say, and so they are having problems getting access to personal e-mail information. And this is a way of co-opting and passing on information to people that may or may not be interested in what they are trying to promote.

I mean, I don't think you necessarily need to comment on that, but that would be, I think, maybe something that could be.

In Register-Guard—also for you—in Register-Guard, the dissenting Democrat board member stated, if an employer has given employees access to e-mail for regular routine use in their work, he

would find that banning all work-related solicitations is presumptively unlawful, absent special circumstances.

Is this standard applied anywhere else?

Mr. BORDEN. I am unaware of any agency, court, or authority that requires employers to make employer equipment available to employees for non-business use. I don't—I am sure that—consistent with what we discussed earlier, there may be employers that choose to allow employees to do so. But I am unaware of, you know, a law or a principle that would require, for example, a freight delivery company to allow drivers to drive their trucks around on the weekend or to go to the store, or what have you. I am just unaware of any.

Mr. BUCSHON. Thank you very much. I yield back, Mr. Chairman.

Chairman ROE. Thank the gentleman for yielding.

Dr. Holt, you are recognized for five minutes.

Mr. HOLT. I thank the chair.

Let me begin by asking the gentleman who just spoke if he knows that 66,000 of his hardworking constituents and 43,000 of mine would receive a pay raise—

Mr. BUCSHON. Would the gentleman yield?

Mr. HOLT. —if—if the—I am asking you a question, so in a moment I will yield—would receive a pay raise if the gentleman supported raising the minimum wage to $10.10 an hour under the *Fair Minimum Wage Act*.

Mr. BUCSHON. Will the gentleman yield for a second?

Mr. HOLT. I would yield for an answer.

Mr. BUCSHON. I would be interested to know how many people in my district would lose their job if the minimum wage was raised to $10.10 an hour. I yield back.

Mr. HOLT. I would suggest that the gentleman talk with economists from Pennsylvania and Indiana and New Jersey and other universities that have said over and over again that job loss—net job loss—is not a major effect of increases in the minimum wage.

Mr. Coppess, a couple of questions. First of all, just to continue the discussion that was—well, it was the one-sided discussion with Mr. King that you did not get a good chance to answer. In how many cases has the current board actually overturned precedent, as Mr. King was suggesting has been happening a lot?

Mr. COPPESS. I haven't kept a tabulation. I can't on the top of my head think of any. I would talk about the Specialty Healthcare case in particular being—that has been brought up. What happened in Specialty Healthcare was the board had used a variety of formulations to describe what an employer would have to show in order to broaden a petition for a bargaining unit in an election case.

And the formulation the board chose to use as they thought being a particularly clear statement of the law was a formulation suggested by Judge Douglas Ginsburg of the D.C. Circuit, who was famous as a nominee to the Supreme Court by President Reagan. He is hardly a left-wing activist.

The Specialty Healthcare case itself was challenged in the Sixth Circuit, and the Chamber of Commerce—I believe Mr. King's firm maybe represented them—filed an amicus brief. The Sixth Circuit

unanimously upheld the board's decision in that case. The same issue was raised in the Fourth Circuit in a case that I argued for the machinists. Once again, the Chamber filed an amicus brief on the merits in that case. The Fourth Circuit said the board was right. They went on to do a recess appointment thing that has kept the case suspended.

But that particularly notorious example of overturning the law is a perfect example of them just clarifying the law and applying established standards and deciding cases.

Mr. HOLT. Thank you. You know, I find it interesting that we are even holding this hearing today. You know, I am always happy to speak about the NLRA. We sit here under the gaze and the portrait of Chair Mary Norton, who oversaw the Labor Committee when that was passed, which I think is a landmark in world history of setting up employer and employee rights and protections and collective bargaining and the associated legislation establishing wages, a floor on wages, and a limit on working hours.

I wish we were having a hearing about how we could strengthen and expand these protections, which I really think, as I said, have been a landmark in world history that make for a better economy, really, beneficial to everyone. This is not just about employee rights. This is about having a more efficient and, not incidentally, humane economy.

Mr. Coppess, another question. I am wondering whether there is a—kind of a red herring or an argument without content about—employers that have equipment, such as e-mail, that is dedicated exclusively to work-related use. First of all, I am wondering how common that is with respect to e-mail and, secondly, I am wondering whether anybody here or elsewhere has been talking about diverting these things that are—that are, in fact, existing for dedicated exclusively for worker use to labor organizing.

Mr. COPPESS. No. I mean, I can't emphasize strongly enough that what we are talking about here is application to e-mail of exactly the line of bulletin board cases that Congressman Byrne was talking about. And the problem arose in the first instance, because the Seventh Circuit in Guardian Industries reacted to what all we labor lawyers understood to be the law, was that don't tell those employees that they can put up sales notices on your bulletin board or picnic notices or anything like that, because the law will be, if you let them do that, they can put up union notices.

And the Seventh Circuit in Guardian Industries said, well, why is that? Maybe you are using the word discrimination in a way we don't understand. Maybe you need to explain the particular NLRA meaning of it, which is the case. They use the word discrimination in a particular way that traces its way back to Republic Aviation, and that is what you have at issue in the e-mail cases.

If an employer in—

Chairman ROE. Mr. Coppess, could you wrap up? Because the time is expired.

Mr. COPPESS. Yes. Actually, it was the subject of a lot of questions, so I will try and do it real fast. But if the employer restricts the use of e-mail to nothing but business use, they can do that. They do, in fact, do that, but if, in some fantasy world, someone did do that, it would not be illegal.

Mr. HOLT. And it is basically a null set.

Chairman ROE. Gentleman's time has expired.

I will now finish the questioning. Mr. King, I know that you mentioned—and this case should be the—the Noel Canning case should come up within a week or two, I think, the ruling. And it is a huge ruling. And I completely agree with you. How long, if you have a client that now has 380 cases in front—and you mentioned one client that thousands of days, years, to get to conclusion, that uncertainty creates a real problem for business out there going forward, expanding and growing their business.

I completely agree with you. What we expect of the NLRB is that, look, they should be a fair arbiter. Just like when you play in an athletic game, you know what the rules are, both teams know what the rules are, what the rules have been for 30 years. And my question to you is, how long would it take? And then, secondly, if the NLRB is not looking to change all these, why are they requesting amicus briefs to come before that, if they don't—if it is established policy, why are you fooling around with it?

Mr. KING. I wish I could answer your last question. I don't know what the intent is. I can only react to what the agenda is. One has to question whether this accelerated agenda is perhaps being pursued because we are in an election year environment and that the agenda will be pursued aggressively before November and/or that one of the members of the board's term expires in December this year.

But back to predictability. Mr. Coppess and I do agree amicus briefs make sense, but there have been significant cases overturned. And they are attached to my testimony, one of which, WKYC–TV, overturned 50 years of precedent, Democrat and Republican boards repeatedly, with respect to dues checkoff. So it would not be accurate to say that precedent has not been overturned. It has been overturned consistently.

Your initial question, Mr. Chairman, if it took the NLRB over three years in New Process Steel, where we only had 100 cases coming back, and we have at least on a 20-year look back—and we have done extensive research on this—4,000 cases, you can start to do the math.

Now, there is also a very important distinguishing characteristic that Mr. Coppess did not share with us, is that the New Process Steel cases, the 100 that came back, were by unanimous decision of a two-member board. They did not overturn precedent. They had no controversy associated whatsoever.

We are talking about an inventory of cases here, Mr. Chairman, in part that are highly controversial—they are attached to my testimony—that will take a period of time. So back to your initial question and conclusion. We have at least one case, the Roundy's case, that has been pending before this board for 2,582 days, over seven years. We have 383 cases that are pending for a long period of time. Why isn't that the first priority of this board?

Chairman ROE. And I would argue there are businesses out there that are yearning for a decision. Mr. Borden, I want to ask you. And I think this is hugely important, the new media and the way we communicate now. It has completely changed. Just ask the post office if new media hadn't changed their business model.

In Register-Guard, the NLRB held that employees have no statutory right to use employer e-mail systems for Section 7. What are Section 7 activities?

Mr. BORDEN. Section 7 of the *National Labor Relations Act* is essentially the heart of the act. It is what allows employees the right to form, join or explore union representation, to bargain through representatives of their choosing, to act in other concerted ways for their mutual aid and protection, as well as the right of employees to refrain from participating in all of those activities.

And that is essentially what the board dissent in Register-Guard wanted to use as the foundation for this right of employees to use an employer's e-mail system no matter what the employer's perspective on restriction of that system would be. If the issue were truly as simple as it has been presented today by Mr. Coppess, it may even be more troubling, because there would be absolutely no reason for the board to solicit amicus briefs in this issue. They would just be relying on the Register-Guard decision.

Chairman ROE. One just very quickly, because my time is getting close to it. I have an office, 125,000 square foot office building, that we contract out to get cleaned. I might not like the cleaning in one section. This is a contractor that I have a relationship with. And I say, look, this is not getting done over here. It is the same person cleaning it. If they get fired, am I now responsible for that person? Did I have control over what happened? Because that is what I think that I am hearing you say, is they are trying to do with this ruling.

Mr. PUZDER. I would hope that is not the case—I would hope that wouldn't be the case. And I think a key determinant would be, when you had a problem, you went to the contractor, you didn't got the contractor's employees.

Chairman ROE. That is correct.

Mr. PUZDER. And it is the same thing, if we have a problem with a franchisee, we go to the franchisee, not the franchisee's employee. So I would hope that situation would never be covered, even if there is a rule change.

Chairman ROE. Well, I have to gavel myself. My time has expired.

Mr. Tierney, closing remarks?

Mr. TIERNEY. Well, fine, I was going to do this in closing remarks. I was going to ask for five more minutes to do that, but, look, I just know that we have been making a comparison here today that if we could change the committee's function off of trying to usurp a decision by the board that hasn't been made yet, we could talk about raising the minimum wage, which in your district, Mr. Chairman, would be 67,000 people getting a boost, in my district, 41,000, and that would be a good discussion for us to have. You could tell us why that shouldn't be. We could explain why it would be important.

But I want to talk a little bit about why the National Labor Relations Board is involved in reviewing cases at all. One of my colleagues said, why are they even reviewing it? Our witness, Mr. Coppess, did note that in the preamble to the *National Labor Relations Act,* it observed that the inequality of bargaining power between employees who do not possess full freedom of association or

actual liberty of contract and employers who organize in the corporate or other forms of ownership association depress wage rates and the purchasing power of wage earners in industry. So that is a concern on that.

And I think when we have even people like the International Monetary Fund and others decrying the inequity and inequality that is now in our economy and saying this is not good for democracy, this creates instability, this tampers down mobility, that we know we have a problem in that regard. Economists of all persuasions are telling us and speak to the fact that the reasons that we have growing inequality, one of the major reasons is a decrease in organized labor membership and the lack of employee bargaining power, and that has caused wage stagnation. When wages are stagnant for one group of people, they tend to take away the incentive for employers to keep pace and have their pay system be more robust.

So one of the things that the preamble to the National Labor Relations Board cites as what would be a solution to that—and is also in our witnesses' testimony—is that they would encourage the practice and procedure of collective bargaining and protect the exercise by workers of the full freedom of association, of self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment.

And that is the whole idea. This Act is set here so that people can negotiate the terms of their employment and their conditions. If an employee can't get to the table, the person who is actually setting those terms and conditions, that right is defeated. The National Labor Relations Board has an obligation, I would think, to take a look into why would that be?

If you have an employer who is making—who is saying to you at the table, well, I don't really make that decision, I am just a subcontracted third party and I have hired you, but it is really the guy that contracted to me that is making the decisions, but he is not at the table, it defeats that whole purpose of the National Labor Relations Board, which is to make sure that people can negotiate the terms and conditions of their contract. I think that is what the board in at least one case is going to try to get at. What would be the standard that we set to enable people to make that decision?

So there is a purpose for the National Labor Relations Board. There is a purpose as to why they review these cases, and that is to make sure that employees have the full benefit of what the law intended, their ability to negotiate with the persons making the decisions on the terms and conditions of their employment.

In that sense, I think it is important for the board to take in all the information it can possibly take in and make a consideration of how that purpose of the statute is best accomplished. And I hope the board will do that. I suspect they would. I have seen—I heard nothing today that would lead me to believe that they won't.

And again, I think that I wish that we had a hearing on some of the other things that are pressing about equal pay for equal work, about raising the minimum wage, about conditions in the workplace and so on, on that, but I hope, Mr. Chairman, we will

get to those things sooner, rather than later, and I thank you for the opportunity to close.

Chairman ROE. Thank you very much. And I appreciate very much, the panel has been excellent as usual. And I think this—we did have every reason to bring up the issues with the NLRB with this hearing today. And let me go over just why I believe that.

Mr. Wilson mentioned at the beginning that the NLRB basically tried in South Carolina, in Charleston, South Carolina—I have been to that plant down there—to close a plant that had 1,000 people working, South Carolinians working, making good money and supporting their families, along with all the other thousands of jobs that went along with that. That was beyond me. Not a single person in Everett, Washington, lost their job. Not anybody did. As a matter of fact, we are adding jobs with the Dreamliner that they are currently building. Great company, Boeing, and they were able to go to a right-to-work state and expand their business there and to make money for Americans and to expand opportunity.

We have also seen this ambush election, where the average election median time is 35, 37, 38 days for an election. It is not a long time at all. Both employees and employers need time. I could not in my business in one week get a labor lawyer like you up to speed with my needs, and these elections could occur in as little as 10 days. That is activist, folks, when you do that.

And I can tell you, a lot of things that are done quickly like that are done poorly. They need to be thought-out, well-thought-out. And the micro unions, I don't know how in the world you would run a retail business with five, six, eight, 10, 12, 15 unions in that business with different bargaining units that you would have to go to. That is activist, and that is why we should be here today hearing this.

I think free speech, the secret ballot protection, I can't think of anything in America more precious than a secret ballot, being able to vote for who you want to. And I say this as a joke. It is not. The secret ballot—my wife claims she votes for me. I don't know that she does, because it is a secret ballot. She claims she does.

That is why it is important to have that protection for that employee, for every person in this country is elected—Mr. Tierney was elected like that. The President and the United States, the president of the unions are elected like that. We should protect that right.

I put on a uniform. I left this country 41 years ago to serve near the demilitarized zone in Korea for people to have that right. I think also that—and there is income inequality. I agree with you completely on that. I think the problem is the skills gap in this country. We traveled around—we had CODEL—a couple of weeks ago. And you look at—and Southeast Asia.

I look in my own district where I live, there is one county we have, and it is not a large county, with 1,000 jobs open today. One is in a manufacturing plant that has 50 jobs open today, and they don't have the skills to line up. And so we have to—and that is what this particular committee is very, I think, committed to, is closing that skills gap so we have workers that match up with the high-tech jobs of today. So that is an issue, I think.

And Mr. Puzder, I don't know how many or what percent of the people in this country have entered the workforce through a Hardee's, a McDonald's, or any of the other number of franchisees. It is a huge percentage, I have read it. And these people that go on to be CEOs of companies and—you mentioned the—look, I want everybody to make more money. I think that is a good thing. I agree with that. But you can't just pay more people. You have to have somebody who earns that money.

And if you want to make these things affordable for the people that go in, that buy it, and I think that one other thing we can do in this single most important thing, I think, in America today that affects the people around the kitchen table, where I live, is the price of energy. When the price of energy goes up, everybody goes up. I mean, it is—and when someone is on a fixed-income—and I live in an area of Tennessee that is a very low-income—our median income is not as high as it is in America. And when you see the price of a gallon of gasoline go to $4.00 or 4.50 a gallon, when you are on a fixed-income like my mother is and like a lot of elderly people are, it affects the food they buy, everything they purchase.

So the thing we can do is get a coherent energy policy in America that makes sense, that lowers energy, makes us energy independent, and will make us free of the Middle East. I think you can do more for the American people by doing that and their jobs than anything I can think of right now.

And I would like to work with Mr. Tierney and the other side to do just that. And we could start by approving the Keystone pipeline. I think that would help immediately. We could reduce our consumption of Middle Eastern oil by almost half by doing that one step.

I think it has been a great hearing. And, Mr. Tierney, welcome to the committee, a great addition to the committee. I appreciate your being here.

With no further business, this hearing is adjourned.

[Additional Submissions by Mr. Tierney follow:]

Statement of

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW)

On

"What Should Workers and Employers Expect Next From the National Labor Relations Board?"

Before the

Subcommittee on Health, Employment, Labor, and Pensions
Of
Committee on Education and the Workforce
United States House of Representatives

June 24, 2014

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) is North America's largest industrial union representing 1.2 million active and retired members. We are pleased to comment on the subject of today's important hearing, and review our concerns with the committee regarding some of the topics in today's hearing.

The title of the subcommittee's hearing "What Should Workers and Employers Expect Next from the National Labor Relations Board (NLRB)?" is a critical question. Unfortunately, as has been seen in the over 16 union rights related hearings held since 2011, the focus of the Republican Majority has been on restricting, limiting, and otherwise repealing worker rights.

These efforts only serve to further drive the race to the bottom in the form of low wages, income inequality and unbalanced trade that that millions of American workers face each day. An NLRB that will actively enforce the rights of employees to act together to try and improve their pay and working conditions, with or without a union is necessary to confront these challenges.

However, consistent congressional efforts are undermining the ability of workers to find meaningful remedy. The desire of a few to place blame on one agency trying to uphold the law in a twenty-first century environment is shameful. It is critical that Congress focus on methods to improve labor rights access and remedies for the

millions of workers who have a labor union and the millions more who want to bargain collectively, but are unable to given the limitations under current labor law.

A topic of critical importance today to 86 employees (56 full time, 4 regular part-time, and 26 PRNs) at a facility formerly known as Specialty HealthCare and Rehabilitation Center of Mobile Alabama, Inc. is not whether janitors, secretaries, and other non-medical personal should have been included in the representation election held in **2008**, but why - after six years and three different employers - the NLRB cannot compel the company to achieve a first contract through binding arbitration or through injunctive relief for workers when employers refuse to participate in the process. USW implores members of the committee to read the letter sent to Ranking Member George Miller from the Employee Organizing Committee of Specialty Healthcare & Rehabilitation Center Mobile, Alabama (attached) in 2011. These workers taking care of close to 170 elderly individuals want the protections that the National Labor Relations Act provides. Through failed policy, lackluster enforcement, and quite frankly a congressional environment fearful of offending big business, these workers struggle for the guarantee of a first contract between them and their employer, who at one point was owned by a Fortune 500 company with annual revenues of $4.9 billion. It is categorically unfair to the workers at this facility and to countless other workers seeking a voice at their work place.

Often in previous hearings and likely today, a few representatives rail against the uncertainty that the NLRB creates through its interpretation of the law. However, USW

would like to point to the uncertainty created for workers as House leaders choose partisanship over America's workers.

Another area the NLRB has recently addressed and should actively pursue is updating the agency's rules and regulations governing representation-case procedures. The ability of workers to file important representation case documents electronically is just plain common sense. This statement for the record will be submitted to the committee electronically. If it's good enough for Congress, it's good enough for the NLRB. Efforts by the NLRB to streamline and create efficiencies with election procedure to ensure pre- or post-election hearings are held in a timely and consistent manner will help not only workers who are seeking union recognition but many employers as well. Any employer with facilities in more than one NLRB region will now be able to have a consistent reliable guideline to follow.

The ability of a union organizing committee to express their first amendment rights through a voter list that contains relevant communications tools such as emails and phone numbers also is common sense procedure that the NLRB should enforce as soon as possible. Just the same as today's technology allows US House of Representative member election campaigns to gather publically available data and contact potential voters, unions and employers should have an equal access to twenty-first century communication methods to inform potential voters in an union representation election.

The United Steelworkers urges the Education and Workforce Committee to re-examine its current approach to today's NLRB and labor rights. The NLRB is working within the authority granted to it via Congress and should be applauded for tackling twenty-first century issues such as email communication, social media policies, and improving agency effectiveness.

Going forward, USW urges the committee to address the significant worker injustices that today's labor law permits. It is time to include more workers in the National Labor Relations Act, allow for workers to take meaningful actions to protect the value they create for employers, and strengthen the NLRB's role and ability to seek remedy for workers who have their basic rights to organize attacked.

Employee Organizing Committee of
Specialty Healthcare & Rehabilitation Center
Mobile, Alabama

October 23, 2011

Congressman George Miller
Ranking Member
House Committee on Education & The Workforce
2205 Rayburn HOB
Washington, D.C. 20515

Re: Specialty Healthcare

Dear Congressman Miller,

We are Certified Nursing Assistants (CNAs) working at Specialty Healthcare in Mobile, Alabama. Specialty Healthcare is a medium-sized nursing home with 170 beds. It is our job to tend to the elderly clients at the nursing home. Our jobs are difficult, back-breaking and tiring, but we are proud of them – we are proud to take care of your parents and grandparents when they can no longer take care of themselves.

In return for our service, we simply want respect, fair wages, decent hours and safe working conditions. In 2008, we decided that organizing with the United Steelworkers (Union) would help us to achieve these things. With this hope, we filed a petition for election with the National Labor Relations Board in December of 2008 on behalf of all 50-some CNAs at the nursing home. The ballots of the resulting election were finally opened this past summer, and we won overwhelmingly, with 39 votes in favor of Union representation and only 17 against. Little did we know that this petition would become the subject of a national debate over the right to organize – a debate which we understand is now taking place in the halls of Congress.

As of now, we have waited almost 3 years to have union representation. And, we continue to wait as our ability to have this representation is continuing to

wind its way back through the NLRB and then through the courts. In the meantime, our wages remain stagnant and we have no say over our working conditions. Meanwhile, some of us are being harassed and ill-treated by Specialty Healthcare because we supported the Union in the first place. And, sadly, we still don't have the Union here to protect our rights.

We beg the members of Congress – many of whom, frankly, do not know the pains of a day of honest labor but who will nonetheless depend upon people like us someday to take care of them – to refrain from interfering in our representation case and to allow us to have our Union so we have some basic protections in the workplace.

Sincerely yours,

Gloria Harris
Captoria Franks
Valerie Bell
Kimberly L Johnson
Mr. Christopher Sad
Jamika Dumas
Lola F. Forest
Mary Sumner
Connie Hall
Sherrell Autry
Dawn Sigler
Brigitte Hallmon
Omnie Durham

Latisha Woods
Jamika Hardin
Nakish Mosley
Anna Young
Shafonda Ingram
Brittnee Greyear
Kishia Caldwell
Tara mahimis
Bridgett Hallmon

[Whereupon, at 11:43 a.m., the subcommittee was adjourned.]

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