H.J. RES. 29, PROVIDING FOR CONGRESSIONAL DISAPPROVAL UNDER CHAPTER 8 OF TITLE 5, UNITED STATES CODE, OF THE RULE SUBMITTED BY THE NATIONAL LABOR RELATIONS BOARD RELATING TO REPRESENTATION CASE PROCEDURES

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH,
EMPLOYMENT, LABOR, AND PENSIONS

COMMITTEE ON EDUCATION
AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, MARCH 4, 2015

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C O N T E N T S

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Wednesday, March 4, 2015
House of Representatives
Subcommittee on
Health, Employment, Labor, and Pensions
Committee on Education and the Workforce
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:01 a.m., in room 2175, Rayburn House Office Building, Hon. Bradley Byrne presiding.

Present: Representatives Foxx, Walberg, Guthrie, Byrne, Carter, Grothman, Allen, Polis, Courtney, Pocan, Bonamici, Takano, and Scott.

Staff present: Ed Gilroy, Director of Workforce Policy; Marvin Kaplan, Workforce Policy Counsel; Nancy Locke, Chief Clerk; John Martin, Professional Staff Member; Zachary McHenry, Legislative Assistant; Daniel Murner, Deputy Press Secretary; Brian Newell, Communications Director; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Alexa Turner, Legislative Assistant; Joseph Wheeler, Professional Staff Member; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Austin Barbera, Minority Staff Assistant; Amy Cocuzza, Minority Labor Detailee; Denise Forte, Minority Staff Director; Melissa Greenberg, Minority Labor Policy Associate; Eunice Ikene, Minority Labor Policy Associate; Brian Kennedy, Minority General Counsel; Richard Miller, Minority Senior Labor Policy Advisor; Veronique Pluviose, Minority Civil Rights Counsel; and Rayna Reid, Minority Labor Policy Counsel.

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

Good morning. I would like to extend a warm welcome to our guests and thank our witnesses for joining us.

I would also like to note the continued absence of our dear friend, colleague, and subcommittee chair, Dr. Phil Roe. And I ask that all

my colleagues continue to lift Dr. Roe and his family up in your prayers.

We are here today to discuss House Joint Resolution 29, which provides for congressional disapproval under the *Congressional Review Act* of the National Labor Relation Board's recently released rule that would drastically affect longstanding policies governing union elections.

For those members who served on this committee in previous Congresses, our discussion today may elicit a dreadful sense of *déja vu*. That is because for nearly four years the Obama National Labor Relations Board has sought to radically alter longstanding policies governing union elections. And as the board pursued this misguided effort, House Republicans, led by this committee, have consistently fought to defend the rights of American workers and job creators.

The stated purpose of the board's rule is to shorten the time between the filing of a petition for a union election and the election date. The board achieves this in a number of troubling ways, such as limiting the opportunity for a full and fair hearing of issues that may arise during the election proceedings and denying parties an opportunity to raise certain contested issues to the board. The board's rule also grants union organizers unprecedented access to employees' personal information.

These are by no means modest changes, and they go far beyond simply modernizing the election process. In truth, the board's real goal is to dramatically tilt the outcome of elections in favor of union leaders by ambushing employers and workers without allowing them to fully understand their decision.

The American people are on the losing end of the board's extreme culture of union favoritism.

The board's rule eviscerates the right of employers to speak freely to employees during an organizing campaign. Roughly 70 years ago, Congress amended the *National Labor Relations Act* to ensure employers have an opportunity to communicate with employees about union representation.

Congress took this action not only to promote the voices of employers, but also to protect employee choice through a robust debate of important issues. And let's make sure we understand this: this affects employees as much, if not more, than it affects employers. The board is overturning by executive fiat what Congress has expressly permitted by law.

The board's rule also severely cripples the right of each worker to make an informed decision. Deciding whether or not to join a union is a deeply personal choice. The outcome of that choice will affect workers' wages, benefits, and other employment concerns for years.

And as the board itself has held in a union environment workers can get more, they can get same, or they can get less. That is what the National Labor Relations Board has said. So this could affect workers in a negative way.

Workers deserve an opportunity to get the facts and discuss these matters with their friends, family members, coworkers, and yes, their employers as well. Under this administration, the Na-

tional Labor Relations Board is determined to deny workers this fundamental right.

Finally, adding insult to injury, the board is placing the privacy and safety of American workers and their families in jeopardy. There is absolutely no reason why union organizers need employees' phone numbers, e-mail addresses, work schedules, and home addresses. Union coercion and intimidation is real, and it is our responsibility to help stop it.

It is for these reasons this resolution is so urgently needed. In the past, Congress has tried offering a legislative response to the board's ambush election rule—one that would ensure workers, employers, and unions continue to enjoy protections that have been in place for decades.

I want to thank Chairman Kline for his continued leadership in this area. Unfortunately, our Democratic colleagues in the Senate refuse to stand with us.

However, I am hopeful that with new allies in the Senate and the authority vested in Congress through the *Congressional Review Act* we will send to the President a resolution that reins in this activist board and rolls back this destructive regulatory scheme. The President will then have to decide whether he stands with big labor or with the nation's workers and job creators.

I urge the President and every member of Congress to choose the latter by supporting H.J. Res. 29.

With that, I will now recognize the subcommittee's ranking member, Representative Polis, for his opening remarks.

Mr. Polis?

[The statement of Mr. Byrne follows:]

Prepared Statement of Byrne, Hon. Bradley, a Representative in Congress from the State of Alabama

Good morning. I'd like to extend a warm welcome to our guests and thank our witnesses for joining us. I would also like to note the continued absence of our dear friend, colleague, and subcommittee chair, Dr. Phil Roe, and I ask all my colleagues to continue lifting Dr. Roe and his family up in your prayers.

We are here today to discuss House Joint Resolution 29, which provides for Congressional disapproval under the Congressional Review Act of the National Labor Relations Board's recently released rule that would drastically affect longstanding policies governing union elections.

For those members who served on the committee in previous congresses, our discussion today may elicit a dreadful sense of deja vu. That's because for nearly four years, the Obama National Labor Relations Board has sought to radically alter longstanding policies governing union elections, and as the Board pursued this misguided effort, House Republicans, led by this committee, have consistently fought to defend the rights of America's workers and job creators.

The stated purpose of the board's rule is to shorten the time between the filing of a petition for a union election and the election date. The Board achieves this in a number of troubling ways, such as limiting the opportunity for a full and fair hearing of issues that may arise during the election proceedings and denying parties an opportunity to raise certain contested issues to the Board. The Board's rule also grants union organizers unprecedented access to employees' personal information.

These are by no means modest changes and they go far beyond simply "modernizing" the election process. In truth, the Board's real goal is to dramatically tilt the outcome of elections in favor of union leaders by ambushing employers and workers without allowing them to fully understand their decision. The American people are on the losing end of the Board's extreme culture of union favoritism.

The Board's rule eviscerates the right of employers to speak freely to employees during an organizing campaign. Roughly 70 years ago, Congress amended the National Labor Relations Act to ensure employers have an opportunity to communicate with employees about union representation. Congress took this action not only to

promote the voices of employers, but also to protect employee choice through a robust debate of important issues. The Board is overturning, by executive fiat, what Congress has expressly permitted by law.

The Board's rule also severely cripples the right of each worker to make an informed decision. Deciding whether or not to join a union is a deeply personal choice. The outcome of that choice will affect workers' wages, benefits, and other employment concerns for years. Workers deserve an opportunity to get the facts and discuss these matters with friends, family members, coworkers, and yes, employers too. Under this administration, the National Labor Relations Board is determined to deny workers this fundamental right.

Finally, adding insult to injury, the Board is placing the privacy and safety of America's workers and their families in jeopardy. There is absolutely no reason why union organizers need employees' phone numbers, email addresses, work schedules, and home addresses. Union coercion and intimidation is real and it is our responsibility to help stop it.

It is for these reasons this resolution is so urgently needed. In the past, Congress has tried offering a legislative response to the Board's ambush election rule, one that would ensure workers, employers, and unions continue to enjoy protections that have been in place for decades. I want to thank Chairman Kline for his continued leadership in this area. Unfortunately, our Democrat colleagues in the Senate refused to stand with us.

However, I am hopeful with new allies in the Senate and the authority vested in Congress through the Congressional Review Act, we will send to the president a resolution that reins in this activist board and rolls back this destructive regulatory scheme. The president will then have to decide whether he stands with Big Labor, or with the nation's workers and job creators. I urge the president and every member of Congress to choose the latter by supporting H.J. Res. 29.

With that, I will now recognize the subcommittee's ranking member, Representative Polis, for his opening remarks.

Mr. POLIS. Thank you, Mr. Chairman.

Today we are holding yet another hearing showing the backwards priorities of the majority. The Republicans are using a very rare legislative tool, called the *Congressional Review Act*, to subvert a common-sense reform of the National Labor Relations Board election process.

But once again, like so many things that occur in this chamber, this is a process full of sound and fury, but signifying nothing, as Shakespeare would say.

With your permission, I would like to submit to the record a statement of administrative policy?

[The information follows:]

STATEMENT OF ADMINISTRATION POLICY
S.J.Res. 8- Congressional Disapproval of National Labor Relations Board Representation Case Procedures Rule
(Sen. Alexander, R-TN and 51 cosponsors)

The Administration strongly opposes Senate passage of S.J.Res. 8, which would overturn the National Labor Relations Board's recently issued "representation case procedures" rule. The Board's modest reforms will help simplify and streamline private sector union elections, thereby reducing delays before workers can have a free and fair vote on whether or not to form or join a union. The rule allows for electronic filing and transmission of documents, ensures that all parties receive timely information necessary to participate in the election process, reduces delays caused by frivolous litigation, unifies procedures across the country, requires additional contact information be included in voter lists, and consolidates appeals to the Board into a single process.

Instead of seeking to undermine a streamlined democratic process for American workers to vote on whether or not they want to be represented, the Congress should join the President in strengthening protections for American workers and giving them more of a voice in the workplace and the economy. Growing and sustaining the middle class requires strong and vital labor unions, which helped to build this Nation's middle class and have been critical to raising workers' wages and putting in place worker protections that we enjoy today. Giving workers greater voice can help ensure that the link is restored between hard work and opportunity and that the benefits of the current economic recovery are more broadly shared.

The National Labor Relations Board's representation case procedures rule helps to level the playing field for workers so they can more freely choose to make their voice heard. In doing so, it will help us build an economy that gives greater economic opportunities and security for middle-class families and those working to join the middle class.

If the President were presented with S.J.Res. 8, his senior advisors would recommend that he veto the Resolution.

* * * * * * *

Mr. BYRNE. Without objection, so ordered.

Mr. POLIS. In part, the statement of administrative policy from the President says that his senior advisors would recommend that he veto the resolution, meaning once again we are here with the process, talking about things that are not going to become law, that, like the Keystone XL bill that subverted the authority of the President to make the final determination with regards to whether that should occur, trying to bypass the President, obviously without the President's permission. And there will not be a veto-proof majority in either chamber to undo this, as we saw with the recent vote in the Senate—very, very close indeed.

So again and again, the majority is using words to attack the NLRB, holding more than 15 hearings and markups since the Republicans have taken control of Congress.

The board is charged with protecting workers' fundamental right to band together and exercise their voice in the workplace. Through the election process, workers can select representatives to bargain for better wages and working conditions. In fact, it is one of the answers to the growing income disparities that we face in our country is the ability of workers, as a stakeholder group, to organize and negotiate.

But unfortunately, under the current rules some unscrupulous employers have undermined the rights of workers to organize by using frivolous litigation to endlessly delay union elections. Last year, for example, more than one in 10 elections were still unresolved after 100 days. That is what these rules address—these outlier cases that linger on and on.

And there are examples of elections dragging out for more than a year. One example is a Mercedes-Benz dealership in California. The workers filed a petition for a union and the employer tried to stall at every opportunity, requesting extensions from the hearing, requesting extensions for filing the brief, appealing the decision of the board. Even after the election the employer continued to stall.

So this process at this Mercedes-Benz dealership in California took 428 days. With this new rule, the process could have been shortened into 141 days—hardly an ambush, and much more—much preferable to a process that lasts for more than a year to both the employees as well as the employer.

Now, why is delaying elections so bad? There is a direct and causal relationship between the length of time it takes to hold an election and illegal employer conduct. In other words, bad actors—the minority among the business community, but the ones that we are concerned with in this rulemaking process—stall the election progress so they have more time to illegally interrogate, threaten, manipulate, sometimes even fire employees in an attempt to coerce them to voting against the union—more than a year, in the case of the Mercedes-Benz dealership.

Brenda Crawford, our witness here today, will share her story of exactly her experience. Some employers, like Ms. Crawford's even sent anti-union text messages and e-mails.

Now, another item that these rules address is that unions haven't had access to the similar information as employers. It is almost like running a competitive election for Congress or state legislature, but the voter file can only be accessed by the Republicans

or only accessed by the Democrats, and the other party can't even solicit votes. Clearly, in a competitive election both sides need to be treated equally.

To the extent there is privacy concerns, they need to be addressed equally across both the corporation as well as those seeking to organize. If information like e-mail addresses exist, if one side can access them, the other side needs to be able to access them.

Many great employers, the vast majority, allow their employees to engage in fair elections, free from threats of unlawful coercion. And to be clear, this rule does nothing to affect those elections of the vast majority of good actors out there, and many companies and employees for whom this process works.

However, for the bad actors out there this rule is absolutely necessary and imperative. We have a responsibility to protect workers' rights, provide a level playing field for all parties to let employees decide how they want to organize.

This modest, common-sense reform goes a long way in doing that. It will standardize practices that are already common through many parts of the country. It will allow workers to make their own decision without manipulation, threats, intimidation, or indefinite delays.

Now, opponents of this rule have tried to characterize this rule as allowing elections on an extremely tight timeline, but the timeline those opponents have put forth is impossible under these rules. In every case, the employer is fully aware that organizing is occurring long before the petition is filed.

Additionally, the rule in no way abridges employers' free speech rights. Employers can continue to have the ability to talk to mandatory captive audience meetings in the workplace, e-mails, and messages, with any access to the contact information that they have. It simply allows those organizing to have access to similar information.

One noteworthy element of using a *Congressional Review Act* challenge is that if it were to be passed, and even if it were signed by the President, which this will not be, it would forever prohibit the NLRB from enacting a substantially similar rule. So that means that all modernizations that we can agree upon, including allowing parties to file election documents electronically, as this rule does, would be off the table. It is an overly broad mechanism to go after a rule.

Now, critics of this rule do not want a level playing field. They want a process that is open to delay and manipulation by bad actors. Rather than letting workers choose for themselves, bad actors would prefer to delay or prevent the choice from ever being made.

Now, instead of wasting time on a hearing on a bill that will not become law to hobble an agency that is dedicated to protecting workers' rights, we should be working together to find solutions that help Americans, help workers, help our families, help our economy thrive.

Finally, I would like to submit for the record a statement from the United Steelworkers International Union opposing the use of this congressional review?

[The information follows:]

Statement of

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

On

Hearing on H.J. Res. 29, Providing for Congressional Disapproval under Chapter 8 of Title 5, United States Code, of the Rule submitted by the National Labor Relations Board relating to Representation Case Procedures.

Before the

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

March 4, 2015

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 of the hearing.

The USW strongly opposes the use of Congressional Review Act (CRA) provisions on the National Labor Relations Board (NLRB) representation case procedures rule. The NLRB crafted modest Twenty-first Century updates to the representation case procedures, which will provide certainty for workers and businesses in the process of a representation election for unionization. The updates to the rule are designed to remove unnecessary barriers to the fair and expeditious resolution of representation questions. The final rule will streamline Board procedures, increase transparency and uniformity across regions, eliminate or reduce unnecessary litigation, duplication and delay, and update the Board's rules on documents and communications in light of modern communications technology.

The changes in the proposed rule are aimed at ensuring a fair process by cleaning up and modernizing a system paralyzed by delays, bureaucracy, and wasteful litigation. The proposed process is more uniform, transparent, predictable and efficient.

USW has long experience with the abuse of antiquated election procedures that delay, disrupt and otherwise derail workers' rights to collective bargaining. USW activist Faith Clark testified before the NLRB during a public hearing regarding the election rules when first proposed in 2011 and we strongly urge you to review Ms. Clark's testimony on how her former employer significantly delayed election procedures to attack the workers' organizing drive. (https://www.youtube.com/watch?v=Ioe3z4fAQfk)

Modern estimates place Congressional hearing costs at an excess of $125,000 which is more than double the median salary of a US household ($51,900). The US median salary is essentially unchanged from 2012, after adjusting for inflation, and is 8 percent lower than in 2007, before the recession began. The best method for reversing a flat-lined US median salary trend is to increase the collective bargaining power of workers so that they can negotiate for improved wages and benefits. For example, the median weekly earnings for union members in 2013 was $950, compared to $750 for non-union workers; a $200 weekly difference.

Allowing workers to access modern communication methods and have a fair and consistent election process is critical to maintaining a proper balance between employers and employees and reversing income inequality in the country. Finally, 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.

USW thanks you for the opportunity to comment and urges the Subcommittee on Health, Employment, Labor, and Pensions to not continue down a path that undermines worker's rights and we urge you to oppose Congressional Review Act procedures on the NLRB rule update.

Mr. BYRNE. Without objection, so ordered.

Mr. POLIS. Thank you.

And I look forward to hearing from the witnesses today, and I yield back the balance of my time.

[The statement of Mr. Polis follows:]

Prepared Statement of Hon. Jared Polis, Ranking Member, Subcommittee on Health, Employment, Labor, and Pensions

Today we are holding yet another hearing that shows the backwards priorities of the Majority. The Republicans are using an exceedingly rare legislative tool called the Congressional Review Act to reverse a common-sense reform of the National Labor Relations Board's election process. Again and again the majority has attacked the work of the NLRB holding more than 15 hearings and mark-ups on the Board since they took control.

The Board is charged with protecting workers' fundamental right to band together and exercise their voice in the workplace. Through the Board's election process, workers can select representatives to bargain for better wages and working conditions. But, under the current rules, some unscrupulous employers can undermine these rights by using frivolous litigation to endlessly delay union elections.

Last year, for example, more than 1 in 10 election cases were still unresolved after 100 days. And there are many examples of elections dragging out for more than a year. As an example, at a Mercedes Benz dealership in California, the workers filed a petition for a union, and the employer stalled at every opportunity—requesting and receiving an extension for the hearing, requesting and receiving an extension for filing the brief, and appealing the decision to the Board. Even after the election, the employer continued to stall; this entire process ended up taking 428 days. With the new rule, this process could have been shortened to 141 days, which is hardly an ambush and much preferable to a process that lasts for more than a year.

Why is delaying elections so bad, you may ask? There is a direct and causal relationship between the length of time it takes to hold an election and illegal employer conduct. In other words, bad actors stall the election process so they have more time to illegally interrogate, threaten, manipulate, and sometimes even fire their employees to coerce them into voting against the union. Ms. Brenda Crawford, a witness here today, will share her story of exactly this experience, which is sadly all too familiar.

There are also plenty of employers who stall elections in order to engage in legal coercion under the guise of "education." They hold frequent mandatory, captive-audience meetings in order to offer their dire predictions for a unionized workplace. Some employers, like Ms. Crawford's, even send anti-union text messages and emails. Unions have no similar access to employees. Right now, organizers only have access to employees' home addresses, while employers have unfettered access.

Many great employers allow their employees to engage in fair elections, free from threats or unlawful coercion. This rule will do little, if anything, to affect those elections. However for those bad actors out there, this rule is absolutely necessary.

We have a responsibility to protect worker's rights, and provide a level playing field for all parties involved. This modest, common-sense reform goes a long way in doing exactly that. It will standardize practices that are already common throughout many parts of the country. It seeks to allow workers to make their own decisions without manipulation, threats, or intimidation.

Opponents of the rule have tried to characterize the rule as allowing elections on an extremely tight timeline, but the timeline these opponents have put forth is virtually impossible under these rules. Moreover, in essentially every case, the employer is fully aware that organizing is occurring long before the petition is filed. To state that employers will be blindsided and have only a few days to "make their case" is, at the very least, stretching the truth.

Additionally, this Rule in no way abridges employers' free speech rights. Employers will continue to have the ability to subject their workers to mandatory captive audience meetings in the workplace and a barrage of emails and messages as they have access to their contact information.

One noteworthy element of using a Congressional Review Act challenge is that, if it were to pass and be signed by the President, it would forever prohibit the NLRB from enacting a substantially similar rule. So that means that simple modernizations that we can all agree upon—such as allowing parties to file election documents electronically, as this rule does—will be off the table.

Critics of this Rule do not want a level playing field, instead preferring a process that is open to delay and manipulation. Rather than letting workers choose for themselves, bad actors would prefer to delay or prevent the choice from ever being made at all. This Rule reduces the opportunity for bad actors to play games with the process.

Instead of wasting a time on a hearing on legislation intending to hobble an agency dedicated to protecting workers' rights, we should be working together to find solutions that help Americans, their families, and our economy thrive.

Finally, I would like to submit for the record a statement from the United Steel Workers International Union opposing this use of the Congressional Review Act and the Statement of Administrative Policy on S.J. Res 8.

Thank you and I look forward to hearing from the witnesses today.

Mr. BYRNE. Thank you, Mr. Polis.

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

It is now my pleasure to introduce our distinguished panel of witnesses.

Mr. Roger King is a Senior Labor and Employment Counsel with IRI Consultants and is testifying on behalf of the Retail Industry Leaders Association of Washington, D.C. Mr. King represents management in matters arising under the *National Labor Relations Act*. Prior to moving to the private sector, Mr. King served as a professional staff, covering labor issues in the United States Senate.

Mr. Glenn Taubman is a staff attorney with the National Right to Work Legal Defense and Education Foundation, of Springfield, Virginia. Mr. Taubman has been with the foundation since 1982. Prior to joining National Right to Work, he was a law clerk for Judge Warren L. Jones, U.S. Court of Appeals for the 5th and 11th Circuits.

I will now recognize Representative Takano to introduce our next witness.

Mr. TAKANO. Thank you, Mr. Chairman.

Today I would like to introduce our witness, Brenda Crawford. Brenda is a registered nurse who works in labor and delivery just outside of my district in Southern California. Actually, she lives outside of my district but she actually works in my district at Kaiser, a place I visit. I actually visited the maternity ward.

And she has been a registered nurse for 27 years, has been employed at Universal Health Systems for the past 21 years.

Our region suffers from a shortage of primary care providers, and it is registered nurses, such as Brenda, who help deliver essential care to the people of the Inland Empire. I look very much forward to hearing her testimony today and I hope my colleagues will listen to the perspective she has to offer on the NLRB election process and its impact on our nation's workers.

Welcome, Brenda.

Mr. BYRNE. Thank you, Representative Takano.

I will now continue with our introductions.

Mr. Arnold E. Perl is a member with Glankler Brown, of Memphis, Tennessee. Mr. Perl has more than 40 years of experience in assisting organizations in labor and employment law. Prior to en-

tering private practice, Mr. Perl was a National Labor Relations Board field attorney in Region 26, a board attorney in the NLRB's division of advice, and a board attorney in the NLRB division of enforcement litigation.

We welcome all of our witnesses today, and thank you for being here.

I will now ask our witnesses to stand and to raise your right hand.

[Witnesses sworn.]

Let the record reflect the witnesses answered in the affirmative. You may be seated.

Before I recognize each of you to provide your testimony, let me briefly explain our lighting system. You will each have five minutes to present your testimony.

When you begin, the light in front of you will turn green. When one minute is left, the light will turn yellow. When your time is expired, the light will turn red.

Now, for those of you who have been practicing law, you know what that means. When the light turns red—it is usually a judge, not a congressman—that means times up. I will ask you to wrap up your remarks pretty quickly, so please be prepared when it gets red to let me do that.

After everyone has testified, members of this subcommittee will each have five minutes to ask questions of the panel.

I will now recognize Mr. King to give his five-minute statement.

TESTIMONY OF MR. ROGER KING, SENIOR LABOR AND EMPLOYMENT COUNSEL, TESTIFYING ON BEHALF OF THE RETAIL INDUSTRY LEADERS ASSOCIATION, WASHINGTON, D.C.

Mr. KING. Thank you, Mr. Chairman, Ranking Member Polis. Thank you again for inviting me to testify before this Subcommittee.

Before I start, I would like to send my best wishes to Congressman Roe and his wife. I have had the pleasure of working with Congressman Roe and I wish him and his spouse the best.

I am testifying here today on behalf of the Retail Industry Leaders Association, RILA. RILA is a trade association that is made up of the largest and most innovative retailers in the country.

The organization consists of more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5—and that is trillion—$1.5 trillion in annual sales, millions of American jobs, more than 100,000 stores in your districts, manufacturing facilities, and distribution centers domestically and abroad. RILA is pleased to be part of this hearing.

Mr. Chairman and members of the subcommittee, I want to commend this committee and the House Leadership and the Senate Leadership for moving forward the joint resolution with respect to the National Labor Relations Board election rule. There are many negative aspects to this rule that are being glossed over, and it is being characterized as some type of technical adjustment to the *National Labor Relations Act*. Nothing is further from the truth.

I want to stress eight key points this morning, but particularly the first point.

The board's new rule is fundamentally unfair to employees. And you are absolutely right, Mr. Chairman, this is also about the employees and employers, and is an unprecedented—I want to underline unprecedented—partisan policy initiative by this regulatory agency.

Mr. Chairman and members of this subcommittee, can you imagine if we had an election process in this country where one party or one individual could spend months if not years campaigning, unilaterally decide when to start the election process, unilaterally decide who gets to vote, and then require a vote within 11 to 14 days? Can you imagine that process?

I don't know of any other process, from a local school election right up to federal elections. Even union officers, when they run for office, have a minimum period of candidacy and campaigning.

That is exactly what is happening here. Let's make no bones about it. This is just a raw agency political move. Nothing more, nothing less.

Unions have months, if not years, to campaign. They decide to file their petition with the NLRB when they reach the peak of their momentum in their campaign, and then have that petition processed, as you mentioned in your remarks, on a very expeditious basis today.

There is no need whatsoever for this legislation. It is fundamentally unfair.

One additional point I would like to make is that union elections have lasting consequences. Once a union is certified in a place of employment, essentially that union is there for the life of that business. While employees may come and go in that bargaining unit, the unit stays there.

This is unlike an election process that everybody in this room is most familiar with, where you have to stand for reelection every two years. The union is immune, essentially, from that type of analysis. That has to be emphasized here.

Number two, the new rule is a legal and procedural landmine for both employees and employers, and the due process rights that are being trampled here are considerable. This rule was articulated, if you want to use that word, in a 733-page document. Small employers in particular are going to have exceedingly difficult time understanding what this process is about.

As I state in my written testimony, which I would like to have submitted for the record, Mr. Chairman, and the appendices, there too,—thank you—if filing deadlines are missed, are not met, the employer waives all of its rights. We have virtually no hearing anymore under this rule.

You can't even file a post-hearing brief. People need to read the fine print here. This is procedurally unfair.

Point four—I am skipping a couple due to the time limitations, but point four is particularly, I think, important to this committee. The board's new rule is not consistent with the legislative history of the *National Labor Relations Act*—

Mr. BYRNE. Wrap up as quickly as you can.

Mr. KING. Yes. Yes, Mr. Chairman—and I would like to draw the committee's attention to page five of my testimony.

In 1959 the Congress considered this very concept of election first, hearing later. That concept passed the Senate but ultimately was rejected by the Congress.

Even Senator John F. Kennedy, who was a proponent of the "election first, hearing later" concept, said there must be a minimum of 30 days between the filing of the petition and the election. This committee needs to look at that legislative history and, indeed, look even at their Democrat colleagues at that point in time.

Thank you very much.

[The testimony of Mr. King follows:]

RILA
RETAIL INDUSTRY LEADERS ASSOCIATION
Educate.Collaborate.Advocate.

United States House of Representatives
Education and the Workforce Committee
Subcommittee on Health, Employment, Labor and Pensions
March 4, 2015
Hearing regarding H.J.RES.29
Providing for Congressional Disapproval Under Chapter 8 of Title 5, United States Code of the Rule Submitted by the National Labor Relations Board Related to Representation Case Procedures

Testimony of the Retail Industry Leaders Association (RILA)
by G. Roger King*
Email: gking@kinglaborlaw.com

*** Mr. King serves as Labor and Employment Counsel for RILA, Of Counsel with the McGinnis & Yaeger Law Firm, and Senior Labor and Employment Counsel to the Human Resource Policy Association. Mr. King was also in private practice for over 40 years representing employers in labor and employment matters.**

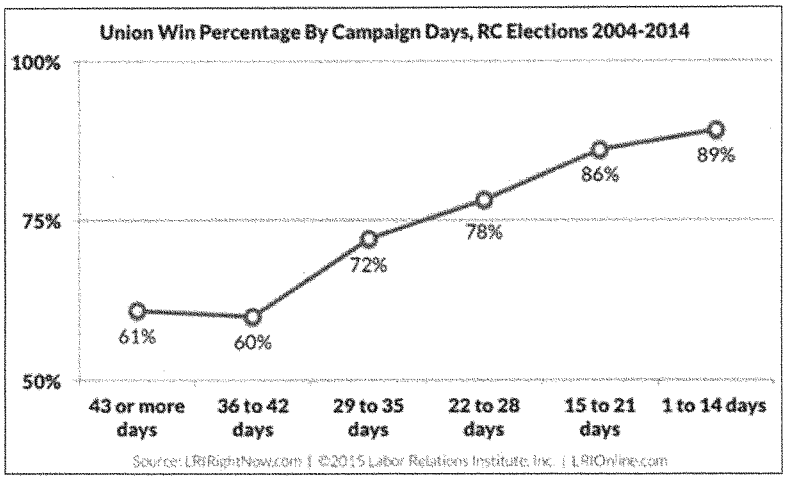
Chairman Roe, Ranking Member Polis and Members of the Subcommittee. Thank you again for inviting me to testify before this Subcommittee. I appear here today on behalf of the Retail Industry Leaders Association (RILA). RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

Mr. Chairman and Members of the Subcommittee, RILA fully supports H.J.Res. 29, and commends the leadership of the House and this Committee for introducing this legislation. RILA and many other employer organizations are encouraging both members of the House and Senate to vote to approve this initiative under the Congressional Review Act (CRA). There are eight (8) key points that RILA would like to emphasize to the Subcommittee today regarding the National Labor Relations Board's (NLRB's) new election Rule:

1. **The Board's new Rule is fundamentally unfair to employees and employers and is an unprecedented partisan policy initiative favoring organized labor.** Mr. Chairman and Members of the Subcommittee, are you aware of any election process that permits an individual or party to campaign for months, if not years, then unilaterally decide when to start the election process, unilaterally determine who gets to vote, and then trigger an election in as little as 11 to 14 days after requesting the election? I had never heard of any election procedures that fit the above description until the NLRB's recent actions. Indeed, the NLRB's new election Rule -- when combined with the Board's new overwhelming community of interest test -- appears to provide a process exactly as I described above. A union can campaign for months, if not years, file a petition with the NLRB at a time of its own choosing (generally when it reaches a certain level of support), carve out or gerrymander who gets to vote (including micro or fragmented voting units), and under the new Rule have an election in a period as short as 11 to 14 calendar days after it has filed its petition.

   The Board's new election Rule lacks even a scintilla of elementary fairness. Imagine, for example, if the tables were turned and a Republican NLRB adopted a new election Rule prohibiting an election until at least three months after the union filed its petition. There would be a great number of protests from organized labor and substantial opposition to such a rule from their supporters.

It is well established that the shorter the time period between a petition filing and the election date, the higher the union win rate. The chart below clearly shows this correlation.



At its core, the Board's new election Rule is just a regulatory codification of the results shown in the above chart. It is an "irrational need for speed" as noted by NLRB Republican members Phil Miscimarra and Harry Johnson, who dissented from the adoption of the new Rule. There can be no question that the underlying objective of the new Rule is to increase union win rates in NLRB elections.

Finally, I should stress that union elections have lasting consequences. When a union wins such an election, the certified bargaining unit often remains in place for decades if not for the entire life of the business where the unit is located. Scholars of labor law will readily admit that it is very difficult in most situations to decertify or remove a bargaining unit. Unions don't stand for election on an ongoing basis. Unlike Congressional elections and virtually any other election process where candidates for parties must periodically face the electorate, once a union is certified to represent a bargaining unit, it is virtually immune from removal. Therefore, the question workers face of whether to unionize presents them with a very serious decision, not only for them but for employers because although the employees who voted for a union can leave the employer, the employer may well have to contend with the union for the lifetime of the business. Accordingly, NLRB elections should only be held in an environment and in a timeframe where all parties have a full and fair opportunity for discussion and debate, and reasoned decision-making. The Board's new Rule prohibits in a number of ways any of these important objectives from being achieved.

2. **The new Rule is a legal and procedural "landmine" for employers and violates employer due process rights.** The new Rule, which is scheduled to go into effect on April 14, 2015, is contained in a 733-page document. Even experienced labor lawyers are challenged to understand all of the provisions in the new Rule. Indeed, this regulatory overkill will be even more difficult for employers, particularly for small business entities, to understand and comply with in all respects.

   For example, an employer who fails to "immediately" post (including electronically) the new Notice of Petition for Election Form transmitted to it by the NLRB can suffer the consequence of having the results of an election set aside. Further, an employer has only seven (7) days to prepare for a hearing and must file by noon the day before the hearing a newly created Statement of Position (SOP) pleading with the NLRB. Failure to timely file such pleading and to include in such pleading all potential issues that the employer desires to raise in the hearing will result in the employer being foreclosed from raising any such omitted issue in the future. Such a strict pleading requirement and its waiver and preclusion effect is extremely onerous and violates employer due process rights. In addition to its legal infirmities, this provision will be difficult for many employers to follow. A list of the potential issues that the Statement of Position may need to address is outlined in Appendix D, paragraph 3.

   Additionally, an employer will only have two (2) working days to compile substantial information regarding employees who will vote in a Board-conducted election. Failure of the employer to timely and accurately file such information again could be a basis for setting aside the election results.

   Finally, the hearing procedure provided for under the new Rule substantially limits the rights of employers to present evidence regarding voter eligibility issues and also precludes parties from filing post hearing briefs. Again, if an employer fails to properly and thoroughly raise an issue in the hearing, it is precluded under the new Rule from raising such issue at a latter point.

3. **The new Rule significantly curtails employee and employer free speech rights.** As noted above, the new Rule substantially shortens the time period from the filing of a union petition to an election, to as little as 11 to 14 calendar days. There is no factual or legal record to support this new approach. Presently, Board-conducted elections occur in a time frame on an average of 38 to 42 days from the filing of a union petition. By eliminating or substantially shortening the critical pre-election time period for all parties – employees, employers and unions – to engage in meaningful debate, the new Rule violates the free speech rights of all parties. Specifically, the elimination of the long established 25 to 30 day period, from date of issuance of the direction of an election to the election date, is one of the primary deficiencies of the new Rule and one of the primary reasons that the free speech rights of all parties have been significantly and materially curtailed.

Proponents of the new Rule argue that employers regularly educate their employees about unions and therefore are well prepared to respond if a union files a petition for an election. Indeed, some argue that employers have an unfair advantage over a union given their continued access to their employees and also have a considerable advantage to influence employee thinking regarding the unions. Proponents of the Rule argue therefore that a union should be permitted to select when the election process starts and have a short time period before an election is held. While some retailers communicate with employees about unions, this communication is necessarily more abstract to employees than when they are faced with making a critical decision about whether to vote in favor or participating in a very specific bargaining unit organized by a particular union. Often the key issues do not crystallize in a meaningful way until the petition is filed and employees and employer have a chance to assess what the impact will be. While employers and employees can discuss unions in theory, this cannot replace the debate and discussion regarding the potential impact of unionization that can occur during the period from a petition's filing until the election is held. The Board's new Rule for all practical purposes eliminates this time period and substantially infringes upon employee and employer free speech.

4. **The Board's new Rule is not consistent with the legislative history of the National Labor Relations Act and violates the appropriate hearing requirement of the Act.** The concept of "election first and hearing later" is not new. This concept was considered in 1959 and rejected by the Congress during debate leading to the passage of the Landrum-Griffin Amendment (CS.1555,86 Cong. 1 Sess. 705 (as passed by the Senate on April 25, 1959). The Senate-passed version of the Landrum-Griffin Amendment in fact adopted the "election first and hearing later" approach. Interestingly, however, even proponents of the Senate-passed billed insisted on a minimum waiting period between the filing of the petition and the election. As noted in the dissent to the new Rule by NLRB Members Miscimarra and Johnson, then Senator John F. Kennedy – who chaired the Conference Committee regarding the legislation and who was a proponent of the "election first and hearing later" concept -- repeatedly stated that at least 30 days were required between the petition filing and an election to "safeguard against rushing employees into an election where they are unfamiliar with the issues". Senator Kennedy went on to state that "there should be at least a 30 day interval between the request for an election and the holding of the election." He opposed proposals that, in his words, failed to provide "at least 30 days in which both parties can present their viewpoints" See 105 Cong. Rec. 5770 (1959).

   The Congress in 1959, did not adopt the Senate-passed "election first and hearing later" concept. In fact, the Congress specifically rejected this approach. Representative Graham Bardan, who was the Chairman of the House Committee on Education and Labor and the ranking House Conference Committee Manager described the rejection of the Senate-passed bill in the following manner "Hearings have not been dispensed with. There is not any such thing as reinstating authority or procedure for a quicky election". Some were disturbed over that and

the possibility of that is out. The right to a formal hearing before an election can be directed is preserved without limitation or qualification". (105 Cong. Rec. 16629 (1959)) (emphasis added)

Previous decisions of the NLRB have also held that the "election first hearing later" concept violates section 9(c) (1) of the NLRA. Those decisions clearly conclude that an appropriate hearing is required in every representation case. See, e.g., *Angelica Healthcare Services,* 315 N.L.R.B. 1320 (1995) and *Barre National, Inc.,* 316 N.L.R.B. 877 (1995).

5. **The new Rule is an unwarranted intrusion into employee privacy rights.** For the first time in the history of the NLRA, employers will be required to furnish, if available, personal email addresses, personal cell phone numbers and personal home telephone numbers of eligible voters in Board-conducted elections. In adopting the new Rule, the Board majority unfortunately rejected the idea of permitting employees to opt-out of furnishing such information. The opt-out requirement was originally proposed in the Workforce Democracy and Fairness Act, which was sponsored by Chairman Kline and passed the House on a bipartisan vote. However, the Board's Rule neglected to include an opt-out option to give employees a choice. This unwarranted invasion of privacy by the Board majority is directly at odds with legislative initiatives of various states to protect employees from having to furnish such information.

   Further, the Board majority ignored the recent examples of privacy breaches by the Federal government and other entities, and the unfortunate consequences of such breaches.

   Finally, the Board rejected proposals from many employer groups including RILA, that there should be sanctions for any inappropriate use by unions of employee personal information. This was yet another example of the Board failing to give serious consideration to employer comments regarding the new Rule when it was in a proposal status.

   It is hard to understand the Board's rationale in this area. Hopefully, privacy advocates will note this unwarranted intrusion into employee privacy rights and join in on the opposition to this new Rule.

6. **The Board's new Rule will further erode its credibility as a neutral arbiter of labor relation issues in the workplace.** As the Subcommittee is well aware, the Board and its General Counsel have issued numerous decisions and are pursuing various initiatives that either have, or will have a considerable impact on federal labor law and adversely impact the interests of employees and employers. The Board's new Rule is just the latest step in that direction and continue the erosion of the Board's credibility that these initiatives have begun.

For example, as noted above, the Board's new overwhelming community of interest test also overturns decades of Board law and permits unions to establish "micro" bargaining units and fragmented units in the workplace. RILA is particularly concerned with this development as retail employers have already been subjected to micro and fragmented Board election decisions. In the recently decided *Macy's* case, the Board found a small unit of fragrance and cosmetics selling employees appropriate and permitted the union to carve out this small unit from the remaining selling employees in the department store. If the Board continues to follow this approach, some retailers could see bargaining units in the double-digits in each location. This approach fails the test of basic common sense, conflicts with decades of Board precedent, and will undermine the potential for a sound and productive employer-employee labor relations climate.

Other initiatives by the Board and its Counsel, include the mandatory access of employees to employer email systems for union activity, substantial negative changes to the deferral to arbitration process, excessive regulatory intrusion with respect to the wording of employer handbook, social media and other policies, and the current initiative to substantially change the law in the joint employer area. Indeed, under the theory of the Board's General Counsel virtually every relationship between non-business related entities could result in a joint employer relationship under the NLRA.

Presidential elections can substantially influence policy decisions by federal regulatory agencies, such as the NLRB. The scope and number of such changes that the current Board and its General Counsel have undertaken, however, far exceeds the actions of previous Republican and Democrat Boards. The Board's new election Rule far exceeds the reasonable boundaries of expected "policy oscillation".

7. **The Board's new Rule is an irresponsible rejection of Board Members' responsibility and accountability.** Board Members are nominated by the President and serve subject to Senate confirmation. The Board's new Rule removes Board Members from decision-making in many election-related disputes and transfers such authority to NLRB regional directors, hearing officers and other staff not subject to Congressional or public scrutiny. For example, regional directors and hearing officers under the new Rule have virtually unchecked authority to make evidentiary rulings and also to decide whether parties can present issues for review before an election is held. Moreover, decisions of such Board staff in many instances will not be subject to any review, especially before the election. Even after the election, parties will be precluded from obtaining Board review on critical issues such as in employee voting eligibility and unit composition. The Board majority's only answer to this is for the parties to work out any unit composition issues at the bargaining table.

   Simply stated, the new Rule removes those officials who were nominated by the President and confirmed by the Senate from making important election-related

decisions and places such decision making in the hands of individuals that have virtually no public or congressional accountability. This is poor public policy.

Finally, as a practical matter, leaving important election-related issues for decision by individuals in different regions will in all likelihood result in different decisions being issued in factually identical circumstances.

8. **The new Rule presents a dangerous precedent for future Boards.** The Board's extraordinary policy bias in favor of unions with respect to the new Rule only invites future Boards to respond in kind. This type of potential "pendulum swing" in Board law and procedure is poor public policy. The continued politicization of the Board strongly calls for enactment of NLRA reform legislation. Hopefully, this Subcommittee will undertake such an effort in the near future.

Mr. Chairman, attached to my testimony, as Exhibit A, is a copy of RILA's letter to the Members of the House of Representative in support of House Joint Resolution 29. Attached, as Appendix B, is a timeline of how the current NLRB Election process works. Attached, as Appendix C, is a timeline of how the NLRB election process is expected to be implemented under the new Rule. Attached, as Appendix D, is an outline of various provisions of the new election Rule. I ask that these Appendices be made a part of the record of my testimony.

Mr. Chairman and Members of the Subcommittee, this concludes my testimony. I will be happy to respond to any questions the Subcommittee may have regarding the Board's new election Rule.

Mr. BYRNE. Thank you, Mr. King.
Mr. Taubman?

TESTIMONY OF MR. GLENN M. TAUBMAN, STAFF ATTORNEY, NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., SPRINGFIELD, VIRGINIA

Mr. TAUBMAN. Thank you, Mr. Chairman, and distinguished committee members.
Mr. BYRNE. Turn on your microphone.
Mr. TAUBMAN. Thank you.
Thank you for the opportunity to appear today. I have been practicing labor and constitutional law for 32 years on behalf of individual employees only at the National Right to Work Legal Foundation.
I have a unique perspective on the NLRB's ambush election rule, which comes from decades of representing thousands of employees subject to the *National Labor Relations Act*. I have represented employees in countless elections arising under the NLRA, both certification elections, decertification elections, and deauthorization elections.
I start today with the premise that only employees have rights under the *National Labor Relations Act*. The Act is not about unions or employers; it is about employees making free and informed choices.
Given the centrality of employee free choice, I would like to address two major issues today.
The first is the way the NLRB's new ambush election rules skew the process to wholly favor unionization while invading employees' privacy and depriving them of their Section 7 rights to choose or reject unionization in an informed and thoughtful manner.
The second issue concerns the way in which the ambush election rules continue the odious practice of blocking decertification elections to entrench incumbent unions, while simultaneously speeding certification elections.
The NLRB's new ambush election rules contain aggressive procedures to help unions win elections and get into power, while hypocritically retaining blocking charges and election bars that make it almost impossible for employees to exercise their rights to rid their workplace of an unwanted union.
First, the ambush election rules mandate a serious invasion of employees' privacy. They force employers to disclose to unions employees' personal, private home or cell phone numbers, personal e-mail addresses, and work schedules, including for employees who may well not be in this bargaining unit and who may never be in a bargaining unit, including supervisors. The union gets all this information without even knowing whether these employees are in or out of the unit.
Despite employees' pleas to the board, the board cavalierly brushed aside all privacy concerns, creating illusory or toothless remedies for union misuse of employees' personal information. While Congress has mandated "do-not-call lists" and other consumer protections against spam and Internet abuse, the board has refused to apply those principles here and refuses to allow any em-

ployee to opt out of the forced disclosure of his or her personal information.

The board places no real restrictions or safeguards on how unions can use or disseminate this information. The only way to protect employee privacy is for the NLRB to not compel the disclosure of employee's private information.

Indeed, the American public would be appalled if they knew that the U.S. Government was forcing disclosure of their personal information to groups like the NRA, or ACORN, or the Sierra Club, but the NLRB has issued an edict doing just that for the benefit of a few politically active special interest groups called labor unions.

Secondly, I want to discuss the fact that this ambush election rule cuts employees out of the process. Employees have no right to intervene in any election that is called, no input into the scheduling of the election, no input into the conduct of the election, no input into the scope of the bargaining unit, and no input into their own inclusion or exclusion from the unit. They cannot file objections or challenges to a tainted election, and their voices are silenced by these rules.

For example, many employees may be unaware that a union organizing campaign is even underway in their shop until they are notified of an impending election just days away. But if these employees, even a majority of them, seek a delay in the election so they can learn more about both sides and the effects of the unionization, the NLRB will deny their request.

If they ask for clarity as to who will be included in the unit, the NLRB will deny their request. If they want time to research the union that has targeted their bargaining unit, the NLRB will deny the request.

All of these flaws were pointed out to the NLRB in comments that we and others filed, yet the concerns were all ignored and brushed aside. This is no way to run a democracy. It is akin to a mayoral election in which it is unknown, either before or after the election, whether up to 20 percent of the potential voters are inside or outside of city limits.

In conclusion, we urge the committee to vote to override these NLRB rules.

[The testimony of Mr. Taubman follows:]

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

Chairman Roe and Distinguished Committee Members:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

decertification in America.

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

Exhibit 1

GLENN M. TAUBMAN

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

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

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

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

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

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

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

Exhibit 2

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August 18, 2011

Via Electronic Filing

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

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

Dear Mr. Heltzer:

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

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

The Foundation strongly opposes the proposed rules because:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

76 Fed. Reg. at 36,824.

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

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

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[10] Section 9(a) provides that only "representatives designated or selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes*, shall be the exclusive representatives of all the employees *in such unit* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." 29 U.S.C. § 159(a) (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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RJL/wlm

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April 7, 2014

Via Electronic Filing

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

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

Dear Mr. Shinners:

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

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

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

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

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

Respectfully submitted,

Raymond J. LaJeunesse, Jr.

Raymond J. LaJeunesse, Jr.

RJL/wlm

Exhibit 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes*, shall be the exclusive representatives of *all the employees in such unit* for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

Respectfully submitted,

/s/ Glenn M. Taubman

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CERTIFICATE OF SERVICE

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

/s/ Glenn M. Taubman

Exhibit 4

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

Chairman Roe and Distinguished Committee Members:

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

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

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

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

I. SECRET BALLOTS ELECTIONS ARE NEEDED

a) Card check and neutrality agreements destroy employee rights.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

union officials and employers desperate to avoid a corporate campaign.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

unrelated to the employees' desire to decertify the union.

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

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

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

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

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

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

Mr. BYRNE. Thank you, Mr. Taubman.
Ms. Crawford, five minutes.

TESTIMONY OF MS. BRENDA CRAWFORD, REGISTERED NURSE, MURRIETA, CALIFORNIA

Ms. CRAWFORD. Good morning, and thank you, Chairman Byrne and Ranking Member Polis, for the opportunity to appear at this hearing.

My name is Brenda Crawford. I have been a registered nurse for 27 years and have worked at Universal Health Services in Murrieta, California for the past 21 years.

I am here today to share mine and some of my colleagues' views in support of the National Labor Relations Board's final rule on representation procedures. I am not representing UHS in any way.

In 2013, I participated in an organizing drive to form a union with my fellow registered nurses. A majority of the RNs signed cards supporting the union, and eventually the union filed an election petition.

All we wanted was to have a fair opportunity to vote on whether or not to form a union. However, it became clear to us that the NLRB's election procedures were rife with opportunities for the employer to create delay and uncertainty.

The company had recently insisted, in another nearly identical bargaining unit, on a pre-election hearing to argue that charge nurses were supervisors. We knew the company would raise the same argument in our case.

Charge nurses, who help to facilitate the floor operations, made up only a small percentage of the bargaining unit we sought. We knew that if the hearing was held to determine whether or not the charge nurses were supervisors, the resulting litigation would delay our chance to vote for weeks.

The organizing committee had to make a difficult decision. We could either go ahead with the hearing and have the election significantly delayed, or we could agree to the company's position. We ultimately conceded the charge nurses so as not to hold up the election any longer than necessary.

And that was not the only concession we had to make. The union had to agree to the election date the company wanted, again, to avoid the need for a hearing.

The NLRB's final rule will allow the parties to approach elections on a more even footing. The new rules give regional directors the discretion to defer questions of individual eligibility and inclusion for small groups of workers until after the election.

In our case, that means the charge nurses could have voted challenged ballots and their status would have been resolved only if it would have affected the outcome of the election. This removes the company's leverage to force a pre-election hearing to unnecessarily litigate these types of small issues and would offer greater protection for the rights of the workers.

The NLRB's final rule would also improve the union's ability to communicate with workers in a proposed bargaining unit. From before a petition for election was filed through the date of the election, the company ran a relentless anti-union campaign. The company communicated anti-union messages to us daily on every shift.

My fellow nurses and I were taken off patient care constantly to attend anti-union meetings. The company would send anti-union e-mails to the nurses, and even sent an anti-union text message to our personal phones when we were off work.

The company's anti-union campaign created a great deal of stress among the RNs, whose main concern was patient care. This stress was one of the main reasons we decided to concede the charge nurses, so that we could get to an election as soon as possible.

Since the only contact information the company was required was home addresses, the union could not communicate with the nurses in the same ways the company did. Additionally, the union didn't know shift times or other job information for the nurses who work 12-hour shifts.

Without that information, the union could not know when nurses would be home or how to avoid bothering them when they had just gotten off shift. For many nurses, 10:00 in the morning is the equivalent to 10:00 at night. If we had more information about the nurses than just their home addresses, we could have contacted them to set up a time to meet with them.

The NLRB's rule—final rule expands the information the union and organizing committee would receive regarding the workers in the unit. If we had this information, we would have had a better opportunity to communicate with our fellow nurses and use the same means of communication that the company was using.

The union lost the election. The company was able to manipulate the election procedure to delay the election date and communicated with the workers in ways the union could not. I am sure that the election results did not reflect the RNs' desire to join together to collectively bargain with our employer.

In closing, I ask that you do not support the *Congressional Review Act* resolution for disapproval of the NLRB's final rule on its representation procedures. The NLRB's changes to its election procedures are modest changes, but necessary to ensure its elections are free and fair for all workers.

[The testimony of Ms. Crawford follows:]

Statement of Brenda Crawford

Before the Subcommittee on Health, Employment, Labor, and Pensions
U.S. House of Representatives

H.J. Res. 29, Providing for Congressional Disapproval under Chapter 8 of Title 5, United States Code, of the Rule Submitted by the National Labor Relations Board Relating to Representation Case Procedures

March 4, 2015

Good morning, and thank you Chairman Roe and Ranking Member Polis for the opportunity to appear at this hearing. My name is Brenda Crawford. I have been a registered nurse for 27 years, and have worked at Universal Health Systems, Inc. (Company) in Murrieta, CA for the past 21 years. I am here today to share mine and some of my colleagues' views in support of the National Labor Relations Board's Final Rule on representation procedures.

In 2013, I participated in an organizing drive to form a union with my fellow registered nurses. A majority of the RNs signed cards supporting the United Nurses Association of California/Union of Health Care Professionals (Union), and eventually the Union filed an election petition. All we wanted was to have a fair opportunity to vote on whether or not to form a union. However, it became clear to us that the NLRB's election procedures were rife with opportunities for employers to create delay and uncertainty.

The Company had recently insisted in another, nearly identical bargaining unit on a pre-election hearing to argue that charge nurses were supervisors. We knew the Company would raise the same argument in our case. Charge nurses, who help to facilitate the floor operations, made up only a small percentage of the bargaining unit we sought. We thought they belonged in the bargaining unit, so they could exercise their rights with the rest of the RNs. But we also knew that if a hearing was held to determine whether or not the charge nurses were supervisors, the resulting litigation would delay our chance to vote for weeks.

The organizing committee had to make a difficult decision. We could either go ahead with the hearing and have the election significantly delayed, or we could agree to the Company's position that these workers were supervisors and thereby lose workers who really should have been in the union. We ultimately conceded the charge nurses so as not to hold up the election any longer than necessary.

Under the NLRB's current election procedures, employers have an unbalanced ability to demand when and how an election takes place. In our case, the Company had the leverage of forcing a hearing on the small issue of charge nurses. To avoid the delay caused by litigating this small issue, the nurses were forced to give up the rights of those charge nurses. And that was not the only concession we had to make. The Union had to agree to the election date the

Company wanted, again to avoid the need for a hearing. We had to agree to an election date that was a month and a half after the petition was filed, even though there were no longer any issues that needed to be decided for an election to take place earlier.

The NLRB's Final Rule will allow the parties to approach elections on a more even-footing. The new rules give Regional Directors the discretion to defer questions of individual eligibility and inclusion for small groups of workers until after the election. In our case, that means the charge nurses could have voted challenged ballots, and their status would have been resolved only if it would have affected the outcome of the election. This removes the Company's leverage to force a pre-election hearing to unnecessarily litigate these types of small issues, and would offer greater protection for the rights of workers.

The NLRB's Final Rule would also improve the Union's ability to communicate with workers in a proposed bargaining unit. From before a petition for election was even filed through the date of the election, the Company ran a relentless anti-union campaign. The Company communicated anti-union messages to us daily, on every shift. My fellow nurses and I were taken off patient care constantly to attend anti-union meetings. The Company would send anti-union propaganda emails to the nurses, and even sent anti-union text messages to the nurses' personal cell phones on off work time. The Company's anti-union campaign created a great amount of stress among the RNs, whose main concern was patient care. This stress was one of the main reasons we decided to concede the charge nurses, so that we could get to an election as soon as possible.

At the same time, the Union struggled to get accurate contact information from the Company. Since the only contact information the Company was required to provide was home addresses, the Union could not communicate with the nurses in the same ways the Company did. Additionally, the Union didn't know shift times or other job information for the nurses, who work 12 hour shifts. Without that information, the Union had difficulty knowing when nurses would be home, or how to avoid bothering them when they had just gotten off shift. For many nurses, ten in the morning is the equivalent of ten at night. If we had more information about the nurses than just their home addresses, we could contact them to set up a time to meet with them.

The NLRB's Final Rule expands the information the Union and organizing committee would receive regarding the workers in the unit. Had we had this information, we would have had a better opportunity to communicate with our fellow nurses, and use the same means of communication that the Company was using.

The Union lost the election. The Company was able to manipulate the election procedure to delay the election date, and could communicate with the workers in a ways the Union could not. These advantages make it very doubtful that the election results were an accurate reflection of the RNs' desire to join together to collectively bargain with our employer.

In closing, I ask that you do not support the Congressional Review Act resolution for disapproval of the NLRB's Final Rule on its representation procedures. The NLRB's changes to its election procedures are modest changes, but necessary to ensure its elections are free and fair for workers.

Mr. BYRNE. Thank you, Ms. Crawford.
Mr. Perl?

TESTIMONY OF MR. ARNOLD E. PERL, MEMBER, GLANKLER BROWN, LLC, MEMPHIS, TENNESSEE

Mr. PERL. Well, thank you, Mr. Chairman and Ranking Member Polis.

In private practice I have been very involved with the *National Labor Relations Act* on behalf of many employers in various industries. I served on the most recent NLRB advisory panel during the Clinton Administration, at the invitation of Chairman William Gould, and during that same period made a presentation to the Dunlop Commission on the Future of Worker-Management Relations.

I have served for over 40 years on the ABA's Practice and Procedure Committee, and most recently served as the leadoff witness before the NLRB's public meeting on rulemaking for this rulemaking procedure on July 18, 2011, where I appeared on behalf of the Tennessee Chamber of Commerce and Industry, and I appeared back before the board in 2014 during round two of the rulemaking procedures.

The divided board's issuance of the final rule, making sweeping changes—these aren't minor changes; these aren't procedural changes only. This blows up the whole system of representation elections, and it disregards the overriding goal of American labor law for more than 75 years, which has been to resolve representation questions not only quickly, but also fairly, and former Chairman Wilma Liebman stressed that in 2011.

What we have here is to steamroll elections in the name of streamlining the process. And by doing so, the board majority prevents and impedes reasoned and informed choice by employees.

The board's reformulation instead reduces the election process, as aptly stated by members Miscimarra and Johnson, to vote now and understand later.

Now, freedom of agencies exist to fashion their own procedural rules, but the Supreme Court's emphasize that such rules must be consistent with statutory requirements. And as board member Hayes stressed in dissenting from the original issuance of the proposed amendments in 2011, by shortening the time from petition to election date, the board broadly limits all employers' speech and thereby impermissible trenches upon protections that Congress specifically affirmed for the debate of labor issues when it enacted Section 8(c) in 1947.

Concerns about unreasonable delay in a particular case—the so-called outlier cases, the one-off cases—cannot justify blowing up the whole system to conduct elections at lightning speed in all instances. As board member Hayes stated in a strongly worded dissent, "the principle purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining."

The self-professed standard set by Chairman Pearce, that the final rule will result in improvements for all parties and represents a model of fairness and efficiency for all, ignores the fact that the

ambush election rule issued by the board majority is viewed highly unfavorably by employers. Just read the voluminous testimony given by employers at the two rulemaking procedures before the National Labor Relations Board.

Regrettably, the employer testimony that elevating lightning speed over fundamental fairness in representation elections fell on deaf ears before the NLRB. The board majority stresses that the rule enables the board to more effectively administer the *National Labor Relations Act* by eliminating unnecessary litigation and delay. Yet, the board rule actually will cause increased delays and increased litigation in ultimately resolving questions of representation.

And furthermore, the median time today for all elections is 38 days, and more than 94 percent of all elections occur within 56 days of the petition's filing. And these statistics are well within the board's own goals for timely elections.

So the bottom line is that the board's longstanding representation process is working today. And unions' win rate today isn't just 40 percent or 50 percent; the union win rate today in 2014 was 63 percent. So the system works for unions, as well.

As stated by the two dissenting board members, the new rule is a solution in search of a problem. And I think the committee is well-advised to continue on with this process to overcome an ambush election rule that is inherently unfair to employers, destructive of free choice of the employees, and really represents a travesty to the National Labor Relation Board procedures in representation elections.

I have submitted a written statement prior, and I would like it to be admitted into the record.

Mr. BYRNE. Without objection, it will be, Mr. Perl. Thank you.

Mr. PERL. Thank you.

[The testimony of Mr. Perl follows:]

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

H.J. Res. 29, Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the National Labor Relations Board relating to representation case procedures

Testimony of Arnold E. Perl
Member, Glankler Brown, PLLC
Memphis, Tennessee

March 4, 2015

I. The Ambush Election Rule

Chairman Roe, Ranking Member Polis, and Members of the Subcommittee: Thank you for your invitation to participate in this hearing. I am honored to appear before you today.[1]

By way of introduction, I am a member in the law firm of Glankler Brown, PLLC, in Memphis, Tennessee, where I represent employers in various industries under the National Labor Relations Act (NLRA). I have spent some 50 years working on matters involving the NLRA. The first four years were spent working for the National Labor Relations Board, initially in an NLRB regional office where I conducted elections, held pre-election hearings, and served as counsel for the general counsel in unfair labor practice hearings. Subsequently, in Washington,

[1] This testimony reflects my own personal views; however, I wish to thank Meghan K. McMahon for her efforts in helping me prepare this testimony.

D.C., I served in the NLRB Division of Advice and in the Division of Enforcement.

In private practice, I have represented employers for approximately 46 years. During this time, I have continued my close involvement with the NLRB and workplace issues. During the Clinton administration, I was appointed by Chairman William Gould, IV to serve on the NLRB Advisory Panel and made a presentation during this period to The Dunlop Commission on the Future of Worker - Management Relations. I also served for many years on the ABA's Practice and Procedure Committee under the NLRA. Most recently, I appeared as the lead-off speaker on July 18, 2011, at the NLRB's Public Meeting on its proposed new election rule. I appeared on behalf of the Tennessee Chamber of Commerce & Industry both then and on February 20, 2014, when the Board conducted round two of its rulemaking procedure.

The Board's Final Rule ("Ambush Election Rule," "Final Rule," or the "Rule")[2] – which was issued on December 15, 2014, and is scheduled to be implemented on April 14, 2015 – is nearly identical to what the Board originally proposed in 2011. As stated by dissenting Board Members Miscimarra and Johnson, the Rule's primary purpose and effect remain the same: to enable initial

[2] 79 Fed. Reg. 74,308-74,490 (Dec. 15, 2014).

union representation elections to occur as soon as possible.[3] The divided Board's issuance of a Final Rule makes sweeping and ill-advised changes to the NLRB's longstanding union representation election procedures and disregards the overriding goal of American labor law for more than 75 years – resolving representation questions not only quickly, but also fairly and accurately.[4] Clearly, the Ambush Election Rule does not meet the fundamental fairness test. As the dissenters observed, requiring that elections occur as quickly as possible curtails the right of employers and employees to engage in protected speech and impermissibly infringes upon protected speech.[5] Even if it were within the Board's authority to enact such a rule, the Rule is ill-advised and poorly serves the Act's purposes and policies.

Here, the Board majority's proposed Ambush Election Rule overhaul dramatically curtails the time allowed between the filing of a union election petition and the actual election. In doing so, it conflicts with the statutory policy in favor of free debate guaranteed under the First Amendment and Section 8(c) of the Act. As the Second Circuit so aptly stated in *Healthcare Association of New York State v. Pataki,*[6] Section 8(c) not only protects constitutional free speech rights, but

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[3] 79 Fed. Reg. at 74430 (dissent).
[4] NLRB, Statement by Chairman Wilma B. Liebman on Representation-Case Procedures Rulemaking, http://www.nlrb.gov/news-outreach/fact-sheets/amendments-nlrb-election-rules-and-regulations-fact-sheet/statement (last visited Feb. 27, 2015).
[5] 79 Fed. Reg. at 74431 (dissent).
[6] 471 F.3d 87, 97 (2d Cir. 2006).

also serves a vital function within labor law by allowing employers to present an alternative view and information that a union would not present, thus aiding the workers by allowing them to make informed decisions.

As far back as 1962, in *Sewell Manufacturing Company*,[7] the Board explained that it seeks to remove all obstacles which prevent or impede reasoned and informed choice by employees. Here the Board does just the opposite. It does not remove obstacles; it imposes them by steamrolling elections in the name of "streamlining" the process.

The period of time between the filing of the petition and the holding of the election is critical. During this period, management has the opportunity to communicate its position on unionization to its employees, many of whom would already have signed the union authorization cards that secured the election. An ambush election can leave an information void, heightening the risk that employees may vote without having the benefit of their employer's alternative viewpoints.

Moreover, after employees receive information from their employers, they need sufficient time before they are asked to vote to develop understanding, seek answers to any questions they may have, and consider each alternative. The drastic rule changes proposed herein minimize, rather than maximize, the likelihood that

[7] 138 NLRB 66 (1962).

all voters will be exposed to the arguments against, as well as for, union representation. The Board's reformulation instead reduces the election process, as stated by Members Miscimarra and Johnson to "vote now, understand later."[8]

Although the freedom of agencies to fashion their own procedural rules is a basic tenet of administrative law, the Supreme Court emphasized that "such rules must be consistent with statutory requirements."[9] As Board Member Hayes stressed in dissenting from the issuance of the proposed amendments in 2011, by shortening the time from petition to election date, the Board "broadly limits all employer speech and thereby impermissibly trenches upon protections that Congress specifically affirmed for the debate of labor issues when it enacted Section 8(c) in 1947."[10] Indeed, as the Supreme Court recently stated in *Chamber of Commerce v. Brown*, Congress's overarching "policy judgment . . . favor[s] uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken work . . . has been expressly fostered by Congress and approved by the N.L.R.B."[11]

Any concerns about unreasonable delay in a particular case cannot justify conducting all elections in as short a time as possible. As Board Member Hayes stated in his strongly-worded dissent, "the principal purpose for this radical

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[8] 79 Fed. Reg. at 74430 (dissent).
[9] *Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council*, 435 U.S. 519, 543-544 (1978).
[10] 76 Fed. Reg. at 36832 (dissent).
[11] 554 U.S. 60, 67-68 (2008).

manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining."[12]

Section 8(c) represents a sweeping Congressional affirmation of free speech. Concomitant with the right of free speech is the guarantee to a reasonable opportunity for both sides to convey their views to voters. The employer has a fundamental right to communicate information to its own employees. The Board's commitment to resolving representation fairly trumps any perceived benefit that may arise from resolving elections more speedily.

II. While the Board Purports to Eliminate "Unnecessary Litigation and Delay," It Disregards the Actual Increased Delays the Final Rule Will Cause in Resolving Questions of Representation.

In announcing the issuance of its Final Rule, the Board majority represents that it will, *inter alia*, eliminate unnecessary litigation and delay.[13] In actuality, however, attorneys and individuals who confront day-to-day real life problems in the field and who regularly practice before the NLRB know that the sweeping overhaul of the Final Rule will potentially lead to a litigation surge. Questions of representation will arise and cause insurmountable delays, and protracted litigation will be necessary to remedy the Final Rule's inherent deficiency.

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[12] 76 Fed. Reg. at 36832 (dissent).
[13] *See, e.g.* 79 Fed. Reg. at 74,386.

Under the Final Rule, parties will be limited in pre-election hearings to litigating only those issues that are necessary to determine whether it is appropriate to conduct an election. Parties would no longer have the right to litigate fundamental election issues like voter eligibility and supervisory status, since the Board majority concluded that they do not have to be resolved to determine whether an election should be held. Therefore, vital issues of supervisory determinations that often have far-reaching consequences will no longer be allowed to be litigated. By failing to resolve such critical issues prior to an election, the Final Rule's implications open the door for months, if not years, of necessary litigation following the election with the attendant delays in resolving important representation questions/issues.

The Board should have learned that protracted litigation results when critical voter eligibility issues are not resolved prior to the election after the results of the *ITT Lighting Fixtures*[14] case ("*ITT*"). In *ITT*, following the filing of a union petition for election, the company sought the exclusion from the bargaining unit of its group leaders at a pre-election hearing on the basis that they were statutory supervisors. Following the hearing, however, the Regional Director for Region 26

[14] *ITT Lighting Fixtures*, 249 N.L.R.B. 441 (1979); 252 N.L.R.B. 328 (1980); 658 F.2d 934 (2d Cir. 1981); 265 N.L.R.B. 1480 (1982); 712 F.2d 40 (2d Cir. 1983); 718 F.2d 201 (2d Cir. 1983); 104 S.Ct. 2361 (1984).

chose not to make a determination on the supervisory status of the company's group leaders, instead ordering group leaders to vote by challenged ballot.

Although the group leaders constituted less than 20% of the bargaining unit, their pro-union activities had the real potential of affecting the votes of rank-and-file employees. The company's hands were tied, however, by the NLRB. If the group leaders had subsequently been determined not to be supervisors, the company would have been precluded from interfering with the group leaders' pro-union activities for fear that such interference would constitute an unfair labor practice.

Following the union's election victory in 1979, there existed some five years of subsequent litigation all the way to the United States Supreme Court. This litigation resulted from the Board's order finding the company guilty of unfair labor practices for its technical refusal to bargain with the union in order to obtain court review. The company defended its actions based on the open and pervasive involvement of the group leaders (supervisors) in activities on behalf of the union. In the end, the Board finally found the group leaders to be supervisors, but by then it was too late. The courts proceeded to vacate the election.

The anatomy of *ITT Lighting Fixtures*, which is outlined in attached Exhibit "A," represents a clear and present danger of what can happen when the Board defers litigation of most voter eligibility issues until after the election. The result in

ITT, where a regional director conducted a pre-election hearing but nevertheless chose to vote group leaders by challenge ballot instead of first determining their supervisory status, now becomes the new normal under the Final Rule where pre-election litigation of voter eligibility is actually foreclosed.

Real world experience teaches that the best practice is to resolve unit issues sooner rather than later. The restrictions of the Final Rule are arbitrary, impractical, and the antithesis to the high standards which the Board has set for itself in the conduct of representation elections. In short, the proposed rule change herein can significantly delay the final resolution of representation questions and truly does not serve the interests of employees, employers, or even labor organizations.

III. Conclusion

The self-professed standard set by Chairman Pearce that the Final Rule "will result in improvements for all parties" . . . and represents "a model of fairness and efficiency for all"[15] ignores the fact that the Ambush Election Rule issued by the Board majority is viewed highly unfavorably by employers. This disconnect is demonstrated by the fact that virtually all employers who submitted testimony in 2011 and in 2014 or testified before the Board in the rulemaking proceedings were highly critical of the Rule's curtailment of fundamental rights of both employer

[15] NLRB Issues Final Rule to Modernize Representation-Case Procedures, NLRB (Dec. 12, 2014) (emphasis added), http://www.nlrb.gov/news-outreach/news-story/nlrb-issues-final-rule-modernize-representation-case-procedures.

free speech and employee free choice. Even assuming *arguendo* that the Board has the authority to make the dramatic sweeping changes imposed herein, why abandon an election process that has worked fairly for decades? There is no convincing need to speed up the election process, and elevating lighting speed over fairness is fundamentally unacceptable as a matter of public policy. Regrettably, it appears from the Board majority's Ambush Election Rule that employer testimony on the gross deficiencies of the sweeping overhaul of the new Rule has fallen on deaf ears.[16]

The Board majority stresses that the Rule enables the Board to more effectively administer the National Labor Relations Act by eliminating unnecessary litigation and delay. Moreover, the majority says that the Board will be better able to fulfill its duty to protect employees' rights by fairly, efficiently, and expeditiously resolving questions of representation. One cannot argue against eliminating unnecessary delay in the abstract, but the devil is in the details. Today, the median time for all elections is 38 days, and more than 94% of all elections occur within 56 days of the petition's filing.[17] These statistics are well within the NLRB's own goals for timely elections. The NLRB's longstanding representation process is working today and unions have seen their win rate increase in recent

[16] As shown in Exhibit "B," the comments and suggestions I made on behalf of the Tennessee Chamber of Commerce & Industry were not adopted.
[17] 79 Fed. Reg. at 74,434 (dissent).

years to where unions won 63% of all NLRB elections in 2014.[18] As stated by the two dissenting Board Members, the new Rule is "a solution in search of a problem."[19]

In a 1959 debate over amendments to the National Labor Relations Act, then-Senator John F. Kennedy warned against rushing employees into an election, saying, "There should be at least a 30-day interval between the request for an election and the holding of an election . . . in which both parties can present their viewpoints."[20] Yet the Board herein takes the exact opposite approach. Under the new Rule, elections could take place in as few as 11 days. As the two dissenting Members of the NLRB put it, employees will be asked to "vote now, understand later." [21]

The Board's assertion that the Rule enables the NLRB to fulfill its duty to protect employee rights ignores that employees have a fundamental right to make an informed choice before voting in a Board election that has long-term consequences to affected employees. These rights have been abandoned by the new Rule. As a result of quickie elections, employees may not be able to hear all the facts they need to know about risks of unionization. To the detriment of

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[18] NLRB, Election Reports, http://www.nlrb.gov/reports-guidance/reports/election-reports (last visited Feb. 27, 2015).
[19] 79 Fed. Reg. at 74,449 (dissent).
[20] 105 Cong. Rec. 5770 (1959), reprinted in 2 LMRDA Hist. 1085 (statement of Sen. Kennedy).
[21] 79 Fed. Reg. at 74430 (dissent).

employees, the new Rule imposes built-in obstacles which prevent or impede reasoned and informed choices by employees.

In addition, the new Rule tramples on employee rights of privacy. Thus, employers are required to turn over employees' personal email addresses, cell phone numbers, shift hours and locations, and job classifications, even if the employee says he or she does not want to be contacted by union organizers. The reality is that, despite the guise of protecting employee rights, the employees, like employers, come up big losers under the new Rule.

In sum, the Ambush Election Rule is manifestly wrong as a matter of law and policy and hopefully will never be implemented on April 14 or on any later date.

Thank you for your invitation to appear before the Subcommittee and your consideration of my comments.

EXHIBIT "A"

ANATOMY OF ITT LIGHTING FIXTURES

The Nightmare Scenario of What Can Happen When Unit Issues Are Not Resolved at a Pre-Election Hearing but Left to the Challenge Process

A. BEFORE THE BOARD

1) Union filed a petition for an election on December 14, 1978.

2) A hearing was held on January 3, 1979. The Regional Director issued a Decision and Direction of Election, directing an election in a unit of production and maintenance employees. However, no finding was made on the status of group leaders, who were alleged by the company to be supervisors and by the union to be employees. It was instead ordered that the group leaders should vote subject to challenge.

3) The election was held on February 16, 1979, in which 175 votes were cast for the union, and 153 against the union with 34 challenged ballots, including those of the 31 group leaders, a number sufficient to affect the results of the election.

4) Subsequent to the election, the company filed timely objections, alleging essentially that the group leaders were supervisors who should not have been allowed to vote by challenged ballot and whose pre-election conduct in support of the union interfered with employees' freedom of choice in the election.

5) On February 28, 1979, the Regional Director for Region 26 issued a Notice of Hearing on the challenged ballots and objections to resolve the issues raised by Respondent's objections and by the challenged ballots.

6) On April 23, 1979, the Hearing Officer issued his Report and Recommendations on Employer's Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election and Challenged Ballots in which he recommended *inter alia*, that the challenges to the ballots of the group leaders be sustained, that the company's objections be overruled, and that a certification of representative issue.

7) On July 10, 1979, the Regional Director issued a Supplemental Decision and Certification of Representative, adopting the Hearing Officer's findings that 11 of the group leaders were supervisors but that the company's objections were without merit.

8) On August 6, 1979, the company filed a Request for Review of the Regional Director's Supplemental Decision and Certification of Representative.

9) On October 2, 1979, the General Counsel issued an 8(a)(5) and (1) complaint against the company alleging in substance that on July 10, 1979, the union was duly certified and that commencing on or about August 6, 1979, the company refused to bargain with the Union.

10) On November 21, 1979, the Board granted the company's Request for Review in part, but did not grant review of the Regional Director's Supplemental Decision dismissing the company's objections.

11) On December 3, 1979, counsel for the General Counsel filed a motion with the Board entitled, "Motion to Transfer Case to the Board and for Summary Judgment."

12) On December 18, 1979, the General Counsel moved to withdraw its motion due to the pending review of the decision in Case 26-RC-5908 which was granted immediately.

13) On May 9, 1980, the Board issued its Decision on Review in Case 26-RC-5908, adopting the Regional Director's Certification of Representative issued by the Regional Director.

14) On May 19, 1980, the union renewed its request to bargain.

15) On June 3, 1980, the company stated that it was unwilling to bargain on the grounds that the activities of the group leaders had interfered with the election.

16) On June 23, 1980, the General Counsel filed a motion with the Board for transfer of the unfair labor case to the Board and for summary judgment.

17) On September 16, 1980, the Board granted the General Counsel's motion and found that the company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the union.

B. BEFORE THE COURTS (AND BOARD)

18) The company filed a Petition for Review in the U.S. Court of Appeals for the Second Circuit and the Board filed a cross-petition for enforcement.

19) On September 1, 1981, the Second Circuit reversed and remanded the case to the Board for further proceedings and action in light of the content of its opinion. The court concluded that the Board, and its designated finders of fact, had avoided the crucial issue: whether the pro-union statements and activities of many of the company's group leaders impaired the employees' freedom of choice in the election and affected any of the 175 pro-union votes cast.

20) On December 16, 1982, following remand, the Board issued a Supplemental Decision and once again found the employer guilty of unfair labor practices and ordered it to bargain with the union.

21) The company refused to bargain with the union and filed a Petition for Review once again in the United States Court of Appeals for the Second Circuit. The Board filed a cross-petition for enforcement.

22) On July 18, 1983, the Second Circuit vacated the Board's supplemental decision and the election

23) On September 20, 1983, the Second Circuit rejected the Board's Petition for Rehearing.

24) On May 14, 1984, the United States Supreme Court denied the Petition for Writ of Certiorari (Justices White and Brennan dissenting).

EXHIBIT "B"

COMMENTS AND SUGGESTIONS MADE ON BEHALF OF THE TENNESSEE CHAMBER OF COMMERCE & INDUSTRY

- We respectfully submitted that the litmus test for any proposed change to the conduct of representation elections must be whether quickie elections will ensure an informed electorate. It was submitted that the quickie elections do not meet this test and were therefore ill-advised as a matter of policy.
- We respectfully submitted that the proposed election rule should not defer voter eligibility issues until after the election, but that such issues, especially disputed issues involving supervisory status, should be heard and resolved in a pre-election hearing.
- We respectfully submitted that any changes to the conduct of representation elections should focus on areas of causing the greatest delays, not the overall election process. We cited the Board's blocking charge policy as a policy which has been identified at least since 1994 as a major culprit and urged that it should be totally eliminated as a matter of policy.
- We respectfully submitted that if the Board were to adopt a quickie election model, there should be a corresponding requirement imposed on labor organizations to notify the targeted employer at the outset of an organizing campaign to avoid being ambushed, causing harm to employees and employers.

None of the suggestions we made to the Board were adopted.

Mr. BYRNE. We will now proceed to members of the Subcommittee's questions.

I will recognize myself to begin for five minutes.

I completely agree with my colleague with regard to his characterization of employers in America. The vast majority of employers in America are good actors, as he said, and I completely agree with Mr. Polis about that. But I am concerned that this rule, which I gather is designed to get at bad actors, actually will have a substantial negative effect on good actors.

So, Mr. Perl, let me ask you: Will there be negative effects to the good actors out there from this rule?

Mr. PERL. Well, it absolutely does. And the notion that this rule affects only the bad actors and the vast majority of good actors are unaffected by the rule, that is just not so.

This rule applies equally to all employers—good actors and bad actors. The reason it is applicable to everybody is because these rules set forth a procedure that doesn't exist today that provides a straightjacket for employers once they get notice of a representation filing.

You know, in many cases, especially for small business, many employers aren't even aware that an organizing campaign exists. So now, under the new rule, they get a fax that a petition has been filed, and that fax now has set a timetable—an automatic countdown, if you will—for 11 days at least, that, "Here is what is going to happen in the next 11 days."

And it starts with the employer being required to set forth what its position is on the unit. And the unit description here is provided by the union.

As Roger King said, the union gets to choose its time when it files the petition and what the unit is going to be in this election. And the employer now has to state what its position is and file that at least one day before a hearing, which is held in no later than eight days.

And an election process here is going to go from a median time of 38 days to as few as 10, 11 days—and most, probably 25 days. So who are the losers in this? The losers are not only the employers that are going to be denied their ability to engage in free speech, but the employees, who have a basic right to make a clear and informed choice.

Now, I know Ms. Crawford—and I have been with Ms. Crawford before. She testified at the National Labor Relation Board hearings. And when she talks about the board providing additional ways to get information—the cell phone numbers, the private e-mail addresses of employees, and so forth—the original rule came from the Excelsior case, and it provided for names and addresses.

But in *Excelsior*, which the board has relied on, the board ignores the rationale of *Excelsior Underwear*, 156 NLRB at 1242. The board, in *Excelsior*, stressed that the opportunity for both sides to reach all the employees is basic to a fair and informed election. And now you are denying the employer the opportunity to reach the employees for a reasonable period of time.

One is assuming here that all employees work all the same shifts every day of the week. It ignores the fact, especially with larger employers, that you have rotating shifts. You may not see some

employees for six days because they are on a rotating shift schedule—

Mr. BYRNE. Let me interrupt you just a second, because I want to drill in on one point you made. I would like to ask Mr. Taubman a question about this.

The information that this rule would require be provided on personal information on employees—is there any protection that the NLRB has afforded to the employees for what happens to that information once it is disclosed?

Mr. TAUBMAN. What the rule says about protections is illusory and nonexistent. There are no protections for the use of this information that the NLRB is going to provide whatsoever, and there is no right to opt out.

I mean, as I said, Congress has all kinds of protections for do-not-call lists and whatever. People should be able to protect their own information.

Just because I may give information to my employer doesn't mean that I want the government to mandate that now my information goes to a whole host of political parties and actors against my will, and I should be able to control the use and the dissemination of my information, and there is zero protection for that in this rule.

Mr. BYRNE. Thank you, Mr. Taubman.

My time is up, and I recognize Mr. Polis for your five minutes?

Mr. POLIS. Thank you, Mr. Chairman.

Mr. Taubman, you kind of compared this to a, you know, mayoral or city council election. But at the same time, you are saying that it is somehow not an infringement on privacy what Ms. Crawford was subject to. She received texts, phone calls on their personal cell phone numbers from anti-union organizers that the company had given it to.

All we are talking about is not private information, not information that an employee has kept private; it is only what the employee has already shared with the company. How can you even have a competitive election process if you only allow one side to communicate to the voters?

Mr. TAUBMAN. I think first of all, Congressman, unions have ample opportunities to communicate with their voters. They have obviously gotten enough signatures of people in the plant. They have in-plant organizers, *et cetera*. That is the first thing.

The second thing is I would say an employer has a legitimate interest in having contact information for its employees. Maybe somebody has to come in—

Mr. POLIS. Well, reclaiming my time, again, it is up to the employee what they provide to their employer. If it is a personal e-mail address, many—it is entirely up to an employee whether they provide that to their employer. Many times there is an official e-mail address at the employer that would be the one used for official communications.

The choice of privacy that the employee has is whether to give their personal information to the company, whether to trust the company, if you will. The employees are legitimate stakeholders at the company, and when there is a competitive election process you have to allow both sides to campaign.

Ms. Crawford was subject to repeated texts and e-mails from one side. They were unable to even get the work schedules to find out when people were at home.

Under existing rules, as you know, they were able to get the addresses of the employees, but they weren't able to find out when those employees were at home, therefore making their at-home visits twice as ineffective as the employer's home visits, given that the employer had those work schedules and was able to, in effect, spend half as much doing home visits because they weren't wasting them when the employee wasn't home.

To have a fair election for mayor, for city council, you have to allow both sides to communicate equally. How can there possibly be an election for mayor when one side is not allowed to communicate via text and e-mail and the other side is?

Mr. TAUBMAN. Well, again, as I said, I think there are ample opportunities to communicate. The union had—

Mr. POLIS. Reclaiming my time, ample opportunities like mandatory employee meetings that employees have to attend?

Mr. TAUBMAN. If the union communicates with these people and says, "Please give us your e-mail address," then the people are free to give up their e-mail address. If my employer asks me for my contact information so it can contact—

Mr. POLIS. Reclaiming my time—do you think that the—when the employee—do you think that when the employees—if they chose to give their personal e-mail address or cell phone to the company, do you think they had in mind that the company might use it to lobby them against forming a union?

Mr. TAUBMAN. Well, I would hope that my company wouldn't have in mind that it was going to give my information to the NRA or the Sierra Club or ACORN—

Mr. POLIS. Reclaiming my time, I don't know what the NRA and the Sierra Club have to do with any of this.

Ms. Crawford, could you characterize what kind of texts you got from the company with regard to the union formation activity?

Ms. CRAWFORD. Well, the company at the time was only using our cell phones for texting our schedules, so when our schedules would be ready or it was time to put in for your schedule they would text us. At one time they did send a text over that text messaging system, which was only used for the staffing purposes. They did send that text—an anti-union, vote no, and—

Mr. POLIS. And I am not asking you to quote it verbatim, but approximately what did that say—that text?

Ms. CRAWFORD. What did it say?

Mr. POLIS. Approximately. Did it say vote no on something, or was it a message about why, or—

Ms. CRAWFORD. You know what, I don't—

Mr. POLIS. Yes. So basically the company lured employees into giving them their personal information by saying, "We will make your scheduling more convenient," and then they used that personal information that employees had trusted them with to lobby them about how they voted in an election without providing that same information to the employees who were trying to organize?

Ms. CRAWFORD. Correct.

Mr. POLIS. And finally, Mr. Perl, you referred to outliers that this rule is assigned to address. And certainly, as you mentioned, many of the issues are resolved within the mean period—think you said 36 to 56 days, or something along those lines.

Fully one in 10 efforts are unresolved after 100 days. At what stage does it cease to be an outlier and begin to be a problem for an expeditious and fair election?

Mr. PERL. Well, I think the case that Ms. Crawford talked about with the case that goes on for hundreds of days—that is clearly an outlier case. Again, the median time for all elections is 38 days.

Mr. POLIS. And to end my remarks, I don't think that the—you know, the median time is not an issue, it is the one in 10 that are over 100 days, including the Mercedes-Benz election of 428 days.

I yield back the balance of my time.

Mr. BYRNE. Thank you, Mr. Polis.

And I should have reminded the witnesses, when we ask your questions, it is hard to remember, please punch the button in your microphone. I am sorry. It is my fault for not telling you that.

Okay, we will now call on Mr. Walberg for five minutes.

Mr. WALBERG. Thank you, Mr. Chairman. And I appreciate having this hearing today. It is only right.

If we only dealt with issues that were going to pass and be signed by the President, nothing would have happened when I served in the minority on this same committee, with issues that were brought up that the President at that time would not have signed. This is our process and we ought to go through it deliberately, especially when we talk about common-sense reforms of the NLRB.

That is an oxymoron, in my point of view. To associate common sense with what this NLRB is doing, it just doesn't cut it.

Mr. King, under current procedures, once an election is ordered employers are required to provide the union with a list of the names and addresses of the employees who will be voting. The new final rule expands the information required under the so-called Excelsior lists to include available personal telephone numbers and available personal e-mail addresses, to be specific.

In your view, are there any issues that can arise from expanded access unions will have to employee personal information?

Mr. KING. Yes, Congressman Walberg.

And before I answer that specific question, the questioning about the privacy issue—it was proposed by RILA and other organizations to the board to have an opt-in or opt-out procedure, where employees could choose whether they wanted this information to be furnished. That was wholly disregarded. This board paid no attention to privacy issues whatsoever.

To answer your specific question, there is no protection whatsoever. A number of organizations proposed there be sanctions, if we have to go down this route, for misuse of this personal information. Totally disregarded.

This board has turned a deaf ear on any privacy issue.

Mr. WALBERG. To the employees?

Mr. KING. Absolutely.

Mr. WALBERG. I mean, we are talking about that. It is not an attack on the unions.

Mr. KING. Right. It has—

Mr. WALBERG. They will do what they want to try to gain support that they are losing right now—

Mr. KING. Right.

Mr. WALBERG.—including in my home state, with the *Employee Free Choice Act* that has been implemented and the support that has been there from employees who want the best opportunity, who aren't asking to be cut out of any decision, but they want to be protected.

Go on.

Mr. KING. You are absolutely correct. The employee interests here have been trampled all together. There is absolutely no protection for their information—private information that they may or may not provide to their employer.

Further, I would like to add to this discussion. My experience in private practice over 45 years is that unions have ample access to employee information—in fact, in many cases have more ample private information available to them than the employer. So this suggestion that somehow there is an advantage to the employer just doesn't meet with the facts that are out there.

Mr. WALBERG. Mr. Perl, in seeking to expedite the election process while shortchanging the pre-election dispute process, do you agree that the new rule will increase the likelihood of processing errors, such as costly misclassifications of employees?

Mr. PERL. I believe the new rule impedes really an opportunity here for the resolution of the issues with a stipulation being arrived at voluntarily among the parties, with the approval of the regional office, to avoid any kind of lingering disputed issues after the election.

The board rule puts all the disputed issues, basically—kicks the can down the road—and decides it after the election. If the union wins, then we will have to deal with these issues.

But the new rule does not allow a reasoned opportunity for an employer to discuss with the regional office how to resolve the issues raised by a petition. And there are some significant issues.

The issue that Ms. Crawford pointed out about the supervisory status of charge nurses—I mean, that is one of the critical issues of voter eligibility that will not get resolved in a pre-election hearing under the new rule. It is a critical issue for resolution. It is not some minor issue.

The board should have learned the lesson—and we cited it in our written testimony, your Honor—of ITT Lighting Fixtures. It was a 1970s case that went up to the 2nd Circuit on two occasions, and five years later it ended up on a petition for *certiorari* by the union.

The union won an election, but the NLRB regional director, who did hold a hearing on the status of some 31 group leaders, whether they were supervisors or not—he chose not to resolve it. Let it be decided by challenged ballot.

They were very involved on behalf of the union, so the employer's hands were tied. We couldn't—

Mr. WALBERG. Mr. Perl, wrap up as quickly as you can.

Mr. PERL. And that case illustrates the dangers of the new rule in terms of allowing parties to get it resolved on the front end.

Mr. WALBERG. Thank you, Mr. Chairman.

Mr. BYRNE. Thank you.

The chair now recognizes the ranking member, Mr. Scott, for five minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, workers deserve a fair process that allows them to decide whether or not to form a union. The current process has been long open to manipulation, delay, and drawn out pre-election maneuverings.

Delays cause unnecessary conflict and disruption. These disruptions damage labor relations and harm productivity. By exercising their rights to organize and collectively bargain, American workers have helped build a stronger middle class, the backbone of the U.S. economy.

And the current process to hold an election on whether to form a union is badly broken and it allows bad actors to use litigation to stall elections for months—even more than a year—after the workers petition to hold an election. Election delays provide opportunities for unscrupulous employers to engage in threats, coercion, and intimidation.

The delay can be exploited to violate workers' rights, including firing pro-union workers or threatening to close a plant if workers vote a certain way. In fact, research indicates that the more successful an employer is in delaying a hearing, the more likely that there will be unlawful conduct.

Let me ask anybody who wants to answer what is the sanction right now for unfair labor practice, such as firing an employee?

Mr. PERL. Well, the sanctions are considerable. It is an unfair labor practice.

Mr. SCOTT. Your microphone.

Mr. PERL. Excuse me. Thank you.

The final rule is passed under Section 7 of the *National Labor Relations Act*, which governs representation elections. The outlier cases, where there has been discussion about all of the things that have taken place by a bad actor, an employer that you referenced committing unfair labor practice—that is under Section 8 of the *National Labor Relations Act*.

There haven't been any changes that the board focused on in Section 8. So they took the problems that could arise under Section 8 and made sweeping changes, blowing up the rules under Section 7.

Mr. SCOTT. What is the sanction if you—

Mr. PERL. So the sanctions could be reinstatement with back pay. Also, in the cases of significant unfair labor practices, the NLRB has gone into federal district court seeking injunctions under Section 10(j) of the *National Labor Relations Act* for immediate reinstatement.

So there are significant remedies available for serious unfair labor practices.

Mr. SCOTT. The sanction, as you mentioned, is reinstatement with back pay minus whatever income they made during the long delay. Is that right?

Mr. PERL. That is. But the board increasingly has sought immediate injunctive relief to reinstate employees with almost no interruption in employment. And where the unfair labor practices have a reasonable chance of—for the board prevailing, the courts have

granted these injunctions and reinstated employees shortly after they were terminated.

Mr. SCOTT. So there is no real penalty.

What is the change in the rule, in substantive law as opposed to procedural law, that would just speed up the election and avoid the delays?

Mr. PERL. Well, what has happened is that in order to try to reach out to the kind of situations that you were alluding to, the board blows up the entire representation process, where employers have an opportunity to engage in free speech and employees have a right to engage in informed free choice.

And so we are dealing with changing the procedures in Section 7 to address certain issues that arise under Section 8 of the *National Labor Relations Act*, and that is a basic problem here.

The change—rule changes are not minor. They are not modest. They are blowing up the whole representation procedures to deal with certain outlier cases, and that is what is causing the major problem to which employers seriously objected during the NLRB procedure.

Mr. SCOTT.—I haven't heard the specific change in substantive law.

Mr. KING. Mr. Scott, if I may speak to that—Mr. Chairman, do I have a moment?

Mr. BYRNE. Certainly.

Mr. KING. They are many-fold. First of all, the hearing itself will not occur until after the election. In 1959, this Congress—

Mr. SCOTT. Well, there are a lot of—but there are a lot of hearings that you are talking about minor issues that do not affect the election. Why can't you go along with the election, form the union, and then decide these little frivolous, extraneous issues after the election? You are holding up the entire election for these little issues that can be done sequentially, one right after the other, and you never get an election.

Mr. KING. Mr. Scott, I know that sounds appealing but it is in contradiction—

Mr. BYRNE. Mr. King, wrap up very quickly.

Mr. KING. Yes. It is in contradiction to the *National Labor Relations Act* provision that requires a hearing to be held at all cases. In 1959, the Congress looked at that issue and specifically rejected election first, hearing after. It is not the law.

Mr. BYRNE. Thank you, Mr. Scott.

Chair now recognizes the gentleman from Kentucky, Mr. Guthrie, for five minutes.

Mr. GUTHRIE. Thank you, Mr. Chairman.

I am not an attorney. I have had one law school class and it is labor law. I actually thought I was signing up for employment law, but it was labor law when I showed up.

I was in a business program. So I know a little bit about this. So just the balance of power between management and unions.

So I guess, Mr. Perl, you are the right guy to ask this question: What if the management is egregious, if they conduct in a—during the campaign or leading up to the campaign, they deleterious—they delay, they are egregious, they create an environment where a court could say, "Well, there is not going to be a fair election?"

What is the remedy for the union in that case? What could be the remedy?

The Gissel bargaining order, right? What is that?

The court can order the union representation without a vote, right? Isn't that correct, if management conducts themselves in a way that is—

Mr. PERL. Yes. The Supreme Court ordered that in the famous case of *Gissel* decades ago. Where there are serious unfair labor practices, the board has the ability to order the imposition of a union on an employer after the employer has either won an election or without an election.

So there are significant remedies available for those outlier cases where an employer has committed serious unfair labor practices, and that is under Section 8 of the *National Labor Relations Act*. The rule blows up the process under Section 7 to address certain outlier cases, but the impact affects every single employer and every single representation petition.

Mr. GUTHRIE. Right. So there is a process for people to get fair representation if the board rules the employer to be unfair.

The other thing about communications, and that is one that I think is probably the most significant part of all of this. There are a lot of issues, but the communications.

And it seems to be implied by people today that if I give my information to someone, then all of a sudden that becomes available to the third party. And I think I have every expectation that if you are going to work for someone and be an employer you have to communicate, but I don't think that—and I think it is a bad precedent to say—"Well, just because I have given that information to this employer then third parties have the right to that information." That information should be private.

My one experience in law school—that law class, I would say—is that if you go through all the cases, there is a tension between access to workers, access to the job site, free speech for the employers, property rights for the employers, and how you kind of make all this work. And I came to the conclusion that if management practices within a business is so egregious that a union drive is organic—that is, employees working for that business—they have access to each other.

They sit in the break room together. They can share information. You can walk around with a clipboard and say, "I need your e-mail because the way management is treating us, we are going to go out and work for an organization—we are going to find an organization to represent us."

That is all readily available because employees are on the job site together. And there is—usually when there is a union drive there are a few, handful, or several employees—and they are protected by the law. Once somebody starts an organization drive they can't be fired. If they are, you have the remedies that you went through.

So access to workers in a union drive, if it is the workers driving the drive, is readily available on site, at work, everywhere they meet.

Mr. PERL. You know, it is hard to justify blowing up the whole representation process on the claim that unions are being deprived

of essential information. That doesn't explain the fact that unions are winning 63 percent of all elections.

Mr. GUTHRIE. Well, my point is if the unions are—if the drive is being driven by the workers, they have access to the information.

Mr. PERL. They absolutely have—

Mr. GUTHRIE. If there is an outside party trying to convince a set of workers that management is not treating them well then we can do it better.

I think there should be a high standard for that to happen, because it does change the dynamic of the workplace. And there are some places that absolutely need third party representation. You could point to places where management does earn the situation of a third party representation, or the workers deserve to have that.

So the whole case of not having access to workers—if the workers want to unionize, they absolutely have access to each other.

Mr. KING. Mr. Guthrie, I may, just on your privacy point—every time that you or I or anyone in this room furnishes information to our bank, to our credit card company, there is a privacy statement that flows back to us. We have an opportunity to opt in, opt out, or restrict the use of that information.

Nowhere is that contained in this rule. That approach was specifically rejected by the board.

Mr. GUTHRIE. Well, the implication, as some people have said, basically is that once you submit your information then you lose that expectation, and I think that is not any—you said banks. We give our information quite a bit.

When we had the hearing on—another hearing on this it was basically—somebody asked, "How did you know to come here today?" My e-mail address—by e-mail.

But the answer to that was, "You submitted your e-mail for us to contact you." And so I think that privacy is very important, and workers have the ability to organize in a way if they feel like that it is an internal—and organic to the business and not some outside party coming in—and should have that right.

Mr. BYRNE. Thank you.

The chair now recognizes the gentleman from California, Mr. Takano, for five minutes.

Mr. TAKANO. Thank you, Mr. Chairman.

Earlier the Excelsior case was mentioned, which set forth the longstanding precedent on providing unions with contact information. The case was clearly about creating a level playing field for unions and workers who are trying to exercise their right to free association.

Let me read you a little bit from the Excelsior case and—I can't seem to find it on here. You can find the—I want to get the Excelsior case excerpt—get that for me, please. The phone just switched off on me.

Anyway, well, communication has changed a great deal since then and we have the Internet and the e-mail. Clearly communication—well, here is the section.

It says any—"as one thoughtful commenter has said, since the opportunity for both sides to reach all the employees is basic to a fair and informed election, the reasons for requiring disclosure

seem just as strong as those leading to similar requirements under other provisions of the law."

Well, communications has changed quite a great deal since then and we have the Internet and e-mail. Clearly communication has not been fair. Ms. Crawford can attest to that.

Ms. Crawford, can you tell us a little more about how your employer contacted you?

Ms. CRAWFORD. Yes. The employer had contact with us every day, every shift. They contacted us, of course, when we were a captive audience—when we were at work.

We were forced to—or made to go to meetings, being taken away from our patient care to go to attend informational meetings that were one-sided information. We also, of course, had our work e-mails, where we received anti-union messages and information.

And then, like I said, our cell phones. We were texted, and actually attached to that text is our personal e-mail, so we got the same e-mail. But they had access to us.

Mr. TAKANO. So, Ms. Crawford, the union organizers did not have the same ability to communicate with employees, did they?

Ms. CRAWFORD. No. Not at all. The only information we had was address and where they worked. We didn't know what shift they worked; we didn't know any way to contact them except mail or going to their home.

Mr. TAKANO. So this, I mean, that doesn't seem like a fair election to me. The employer was able to contact you, they knew your shifts, they were able to contact you at the right times, and they were able to send you continuous—there was no limit on the messaging they were able to provide to you—the anti-union messaging.

Ms. CRAWFORD. Right. They had constant contact with us.

Mr. TAKANO. You know, the majority has characterized this new rule, which would allow union organizers to have the same sort of access and the ability to communicate with employees, as the ambush rule. I would think that is a very specious way to characterize this new rule. I mean, the ambush rule? Really?

It is just a matter—I would call it the fairness rule. They are trying to give the organizers fair access to the ability to communicate with employees while the employer was able to do this unfettered.

You know, I am just amazed at the misuse of the English language. I am a former English teacher. I mean, my sophomores would be able to detect this Orwellian use of the English language.

Mr. Perl, you know, in your testimony you assert: By shortening the time from petition to election date the board broadly limits all employer free speech. Isn't it true that the employer can relay their views on collective bargaining to their employees at any time, including when they are hired and at any point in their tenure with the company? Isn't that true they can do that?

Mr. PERL. Well, the employer has an opportunity to talk about a union—

Mr. TAKANO. So the answer is yes. Thank you.

Isn't it true that employers can mandate that their employees go to presentations—mandate their employees go to presentations, as Ms. Crawford stated, that relay the employer perspective on unionization and collective bargaining but unions are not afforded the same process because they can't communicate with them? I mean,

not on the same level. I mean, the employer has all this access to their—

Mr. BYRNE. The five minutes is up. Please wrap up your answer very quickly, Mr. Perl.

Mr. PERL. In terms of onboarding employees, the employers typically aren't spending the time of onboarding to talk about unions. They are talking about the competitive needs of business today, and what the culture of the company is, and about how we have to work together pursuing common visions and common goals—

Mr. TAKANO. We know that we are talking about in the context of an election.

Mr. PERL.—to achieve the business.

So what has happened in so many cases is that a union has spent weeks preparing for an organizing campaign, and the reason it is aptly dubbed "ambush elections" is because in many cases the employer is not even aware of the organizing attempt. Unions—

Mr. BYRNE. With that, we are really going to have to cut off. We are way over the five minutes.

Mr. TAKANO. Thank you, Mr. Chairman.

Mr. BYRNE. Thank you, Mr. Takano.

The chair now recognizes the gentleman from Georgia, Mr. Allen.

Mr. ALLEN. Thank you, Mr. Chairman.

And I have listened with quite a great amount of interest in the testimony here this morning. My experience has been the business world for 37 years. I founded a company 37 years ago.

Prior to that, my experience working in the business world in construction was with a union company, and so I understand that side of the business as well. In fact, as the secretary of the local contractors' association I actually negotiated union agreements with the unions that were represented in our industry.

So I am quite knowledgeable about the pros and cons of the union versus the non-union.

I will say that as the owner of a company, we do have company meetings. And, you know, some folks don't like them. But I can't help that.

I mean, you know, part of the process of establishing a vision for a business is to communicate that vision properly, and you have these meetings so that you kind of understand everybody's role, and where the company is going, and how the company is doing.

So, you know, it is possible that these meetings could be construed to be anti-union. I don't know.

Mr. King, what is your experience with that? I mean, as far as in your representation of businesses that—where companies have meetings, I mean, is automatic testimony that these—oh my goodness, these are anti-union meetings?

Mr. KING. Congressman Allen, absolutely not. Yes, there may be some content in those meetings regarding the negative aspects of unionization, but the worker today is far more educated than what the worker was many years ago—access to information through the Internet, through many other sources.

If anyone is here today to suggest that an employer can just brainwash an employee and threaten or coerce an employee to just vote for the union in one of these meetings, they are not in touch

with reality. In fact, I have seen it backfire when some employers go too far.

And on the remedy question, we have discussed the legal remedies. The remedy, frankly, for an employer that has a scorched earth campaign and fires employees and treats employees poorly—they are going to lose that election. The union is going to use that against them every time.

So it is a practical matter. The practical deterrent is you don't do that. You just don't do it.

But these meetings, to answer your specific question, no, there is no magic in these meetings. And frankly, some employers turn employees off in these meetings.

Mr. ALLEN. Thank you.

Yes, sir?

Mr. TAUBMAN. Mr. Allen, I would also like to add, in response to some of this about unequal access, since I do a lot of election cases—certifications, decertifications, what have you—I have seen in more and more campaigns today websites set up where a group of employees will set up a website. So once they set up a website and the word is out, "Hey, if you want information about our campaign you can sign up, you can voluntarily give us your information," it is out there.

I see websites in campaigns now constantly. But those employees have the option of voluntarily logging in and giving their e-mail information.

Mr. ALLEN. And while I have got you, under the final rule, employers would be required to provide an expanded Excelsior list, including each employee's name, address, phone number, and e-mail address, within two days of an election order. In your experience, do unions visit employees' homes, call their phones during an organizing drive, or have employees described these interactions?

Mr. TAUBMAN. Absolutely. There are many complaints of home visits—unwanted home visits, union people parking themselves outside of people's homes, abusive things like that. So there is plenty of access that union officials have and use.

Mr. ALLEN. Thank you.

Mr. Perl, in your opinion, what is the NLRB up to here? I mean, you said 38 days and now they want to take it to 11. What exactly is going on?

Mr. PERL. Well, I think we have to look at this in the context of what has happened in the last five to 10 years. It started in Congress with the *Employee Free Choice Act*, or EFCA, where the unions were seeking to gain representation with no elections at all. Congress refused to pass that desired legislation that labor was seeking to get passed.

So what is the bailout? This really is a bailout for organized labor.

Mr. ALLEN. Okay.

Mr. PERL. And what it provides is a greater opportunity to be even more successful in union organizing by totally blowing up the representation procedure at the expense of employer free speech and employee free choice.

Mr. ALLEN. Thank you, Mr. Perl.

I yield back. I have no time left.

Mr. BYRNE. Thank you, Mr. Allen.

The chair now recognizes the gentleman from Wisconsin, Mr. Pocan, for five minutes.

Mr. POCAN. Thank you, Mr. Chairman.

And let me just start off right off the bat, like I did at the last hearing, saying we have lawyered up well again today, but it would be nice to have business owners, who have some issues with this before us. Because usually when you bring lawyers that means you have got a problem, and it would be nice, like we have done before, joint employer rules—had some business owners. We brought an employee telling about their experiences. I just want to reiterate that point. I think it would be useful.

Let's talk about what this rule really is, all right? It is doing two things.

One, it is modernizing how we communicate. You know, you keep referring to cases from 1979, when we didn't have e-mails and we didn't have cell phones. This is just bringing us into an era that we are, 2015.

And secondly, it is kind of dealing with the bad actors. And let's face it, if you are a good actor this rule is not going to affect you negatively. This myth of this 10 or 11-day election is much like the myth of the Loch Ness Monster or Bigfoot. Some people believe in it but, you know, most of us don't, and we have opinions on those who do.

So that is the reality of where we are at.

Let's just talk about the communication side of it, all right? I am a small business owner. I have been for 28 years.

I have that employee basically a third of the day when they are working for me during their working days—if you think about it, half of the day that they are actually awake, because hopefully they are getting about eight hours of sleep. I have a lot of access points to that employee.

Now, it is being said that, you know, there are all these great concerns over privacy.

Let me start, Mr. King, with a quick question: Do you think it is all right to give the address of an employee to the union?

Mr. KING. I question that. I don't believe in the Loch Ness Monster either.

Mr. POCAN. Well, that is all right, but if you could answer this question, because my time is really short, I would appreciate it. And I am glad to know that.

Mr. KING. There is certain basic information both parties should have.

Mr. POCAN. Right. But the address, just real specifically. Yes or no? Do you think it is okay to—

Mr. KING. I think it is questionable. I think it is a considerable invasion of the privacy of—

Mr. POCAN. Mr. Taubman, how about the same question about an address?

Mr. TAUBMAN. I think your employees should have the opportunity to opt out if they don't want their personal—

Mr. POCAN. So is that a yes or a no? Real people use yes or no; lawyers don't. Yes or no?

Mr. TAUBMAN. So the question is, does—can you repeat the question then?

Mr. POCAN. Do you think it is okay to give the address of an employee to the union that is trying to organize?

Mr. TAUBMAN. I think if the employee—

Mr. POCAN. Boy, this is the longest yes or no, Mr. Chairman.

Yes or no?

Mr. TAUBMAN. I can't answer that question yes or no because I think if the—

Mr. POCAN. Okay. Well, see, here is the bottom line: I think it is far more intrusive to have someone at your door. There is the famous line, "Look, I know where you live." No one says, "Look, I know your e-mail."

I mean, "Look, I know where you live," is a little stronger. So the fact that now we are adding more modern ways to communicate, things like e-mails and phone numbers, just is a logical extension.

So let me talk about a couple things that T–Mobile did recently with their employees, all right, just to give you an idea on their union communication workers. Someone wore a t-shirt to work and talked about union activities. They were fired.

Now, you said very strong, there are rules that you can't fire. But we all know what that really means. And in this case, we saw exactly what they did.

The NLRB hearing in February of 24, local managers admitted they created unwritten policies which they used as excuses to fire him. No one is going to say, "We are firing you because you are organizing a union." They are going to come up with something else.

So is getting potentially fired from your job stronger than receiving an e-mail?

Okay. I will take silence as an answer that no.

How about when you have to, from day one, attend meetings about not joining a union. Is that stronger than receiving an e-mail?

All right. I will take your silence again—that is great. How about spying—

Mr. POCAN. Let me just—I have got to go through the list—spying on employees?

Mr. KING. Pardon me.

Mr. POCAN. Is it more intrusive to be spied on by the company than to receive an e-mail?

Mr. TAUBMAN. I would like to answer—

Mr. POCAN. Field that one? Sure, Mr. Taubman. Thank you.

Mr. TAUBMAN. I will field all of these, because I am not here to defend employers and employer conduct. I don't represent employers and I never have.

I represent employees who report to me that they feel harassed and abused by getting home visits from union organizers—

Mr. POCAN. But my question was—let's go back to my question that you said you were going to answer, all right? I mean, I know you are a lawyer, okay? It is tough. You have just got to kind of forget those law school years of not answering and just try to be the person you are and answer the question, all right? So go ahead and—

Mr. KING. I will give you a direct answer.

Mr. POCAN. Thank you.

Mr. KING. You can send e-mails, as you know, Congressman—hundreds in a period of minutes. You can send texts—hundreds of texts—in a period of minutes—

Mr. POCAN. But, you know, if they send 100 e-mails to me I know exactly what is going to happen. Either it is going in my spam folder or I am going to get pissed I got a 100 e-mails in a row. So they are not going to do that.

So again, it is back to Loch Ness Monster and Bigfoot.

Let me just try again. You have mandatory meetings over and over. Let's face it: The employers have plenty of access.

It is a red herring to put this out there that somehow this is overly intrusive since the employer already has all of these ways to contact someone. That is the reality.

And let me just close with this, Mr. Chairman.

You guys who really believe—if you really, really believe an election can happen in 10 or 11 days and how—we know it is very, very rare, but how wrong that is, in the state of Wisconsin, with less than two weeks notice they announce a right-to-work law that they are voting on. If you really believe in your convictions that is too short of a timeline, please—I will get you, if you would like, the address of our governor and our legislative leaders. Could you tell them how terrible it is that they are forcing that in such a quick time? I would appreciate it.

I yield back my time, Mr. Chairman.

Mr. BYRNE. Gentleman yields back.

The chair recognizes the gentlewoman from North Carolina, Dr. Foxx.

Ms. FOXX. Thank you, Mr. Chairman.

Mr. Taubman, in your experience, do unions routinely provide employees they seek to organize information about themselves? For example, do unions disclose their constitutions; bylaws; results of unfair labor practice charges; results of negotiations for first contracts; past records with other employers; bargaining history; and demands that could include grossly underfunded, defined benefit, multiemployer pension plans; past records of civil or criminal violations and misconduct; and their record toward members ordering union fines and member discipline?

Mr. TAUBMAN. Congresswoman, I can assure you that no union discloses any of that kind of information to any employee. They are oftentimes voting in the dark.

If they can get any of that information about the union that covets them, they are very lucky. And they need that information to make an informed decision.

And I would just like to quickly add, when employees in a shop seek to decertify a union, they don't get Excelsior lists; they have to go out and try to communicate with their fellow employees. So they are not given equal access in trying to rid themselves of an unwanted union.

Ms. FOXX. I am sorry my colleague left before he heard the answer to that question.

Mr. Perl, in Ms. Crawford's testimony she describes the inclusion of charge nurses in the bargaining unit as a small issue. The issue there was whether they were employees or supervisors.

Is this a small issue, Mr. Perl, and what are the possible problems with misidentifying a supervisor as an employee? Could the election be thrown out? Does the NLRB's ambush election rule solve this problem or make it worse?

I know I have given you lots of questions. I can come back if you need—

Mr. PERL. Well, no, your question is very clear, and it is very pertinent.

The case I cited in the written testimony, the ITT Lighting Fixtures case, I personally handled that case, and it took five years all because a regional director, which held a hearing, had refused to resolve the status of 31 working group leaders, whose supervisory status was challenged by the company.

And their pro-union activities influenced the outcome of the election, the employer filed objections to the election, and then there were multiple hearings, proceedings before the NLRB, it went to the United States Circuit Court of Appeals for the 2nd Circuit twice, and ended up five years after the petition was filed with a petition for *certiorari* being denied by the court. The election was vacated and the union was not certified.

This procedure here makes that the new normal, because the issue of supervisory status, which perhaps in most cases is the most vital voter eligibility issue that exists, will not be resolved by the NLRB. They won't even hold a hearing now under the new rules.

It is not a minor issue. It is a major source of dispute, often between employers and employees, and it needs to be resolved in preelection hearings before the election is held. Otherwise the employer doesn't know how to deal with these people.

The employer is entitled to the allegiance of its management team. If you don't know and have the assurance that these supervisors are on—are certified by the NLRB as supervisors and you can safely communicate, talk with them, ask them to do things, you run the risk of unfair labor practices if you do that. You do it at your peril.

And when some of the congressmen are talking about unfair labor practices and bad actors, by refusing to resolve the status of supervisors, we are running the risk of creating a situation that is fraught with peril and potentially creating unfair labor practices, which creates unnecessary litigation for employers, as well as for the National Labor Relations Board.

Ms. FOXX. Thank you, Mr. Perl.

I do want to add one quick thing, Mr. Chairman. And again, I am sorry my colleague from California has left when he talks about Orwellian language.

I would like to point out on this same subject that our friends introduced a bill called the *Free Choice Act*, related to imposing unions on employees. And if you want to talk about Orwellian language, I can match title for title any of them they want to talk about.

Thank you, Mr. Chair.

Mr. BYRNE. The gentlewoman yields back.

The chair now recognizes the gentlewoman from Oregon, Ms. Bonamici, for five minutes.

Ms. BONAMICI. Thank you very much, Mr. Chairman.

And thank you, to our witnesses, for being here.

I think it is a fascinating discussion. We are talking about a rule that was passed through a lengthy rulemaking process that is designed to streamline, modernize, and make more efficient, and reduce litigation in elections—that my colleagues are actually opposing this. It is a little bit baffling.

And I also want to mention the process. The NLRB went through a lengthy—quite lengthy—public process in implementing this rule with, I understand, thousands of comments under the *Administrative Procedure Act*.

Now, I know we are here under the *Congressional Review Act*. This is a fairly new experience for me because, frankly, it doesn't come up that often.

I don't know what the standard is under the *Congressional Review Act*, but in light of the steps that are needed to get through the rulemaking process under the *Administrative Procedures Act*, I submit that they should be high—very high.

And in fact, according to the Congressional Research Service, there has only been one rule that has been overturned since the *Congressional Review Act* passed in 1996. So this should be a very high standard.

And as we know, there has already been a veto threat issued. There is a process, and it was followed by the NLRB.

I want to say, Mr. Chairman, I am glad to serve on this committee and this subcommittee for many reasons, and among them is the role that this committee can play in protecting the rights of our hardworking constituents.

The *National Labor Relations Act* is intended to promote workers' rights and prevent employers from mistreating their employees, and the ability of workers to collectively bargain is what led to the rapid expansion of the middle class in America. And we in Congress need to continue to discuss how we can strengthen our economy and keep it on track, and we need to focus on supporting our workers.

I also want to mention that I was proud to—when I was in the Oregon legislature—to support and work on the *Worker Freedom Act*. Oregon is one of the states that has actually banned captive audience meetings.

Now, I wanted to mention also that this union election process should allow for fair consideration of union representation by all employees without undue employer influence, and the new rules from the NLRB are designed to serve that process.

And I wanted to ask you, Ms. Crawford—first of all, thank you for coming and explaining what happened in your situation. Your story is compelling and it is important that we hear from you. And, as my colleague from Wisconsin mentioned, we should be hearing from other employers.

Now, you describe a month-and-a-half delay from the time you filed your petition to the time your employer set a date. But given that the issue of charge nurses in your unit employee had already

been resolved, what reason did your employer provide for delaying the election?

Ms. CRAWFORD. As far as I know, it was just the date that they set that they wanted to have the election on, so we conceded and agreed to go along with that.

Ms. BONAMICI. So you are basically saying there was no good reason provided for delaying that.

Ms. CRAWFORD. No.

Ms. BONAMICI. So you describe your employer's relentless anti-union campaign. Was the union or those employees—who was advocating for union membership?

Were they able to match that campaign with a pro-collective bargaining campaign? Were they able to match that relentless anti-union campaign in getting those messages across?

Ms. CRAWFORD. No. We tried, like I said, but the only information we had were home addresses. Even at work I tried passing—giving out fliers, getting information on my break time in the break room, which we don't always get breaks.

And that information that is given that I had put in those rooms were—I would put it out, it would get thrown away, I would put it out, it would get thrown away. So it was very difficult to get out information.

Ms. BONAMICI. For you to communicate.

Now, there was a comment made earlier today—I believe it was Mr. King who said that unions campaign for a long time and employers don't.

And I wonder, Mr. King, are you contending that employers really don't know that their employees are attempting to unionize?

Mr. KING. Congresswoman, that is true in many cases, particularly for small employers. But put that aside. We have had this back-and-forth on elementary fairness.

It is true, employers communicate prior to the filing of the petition to the election. Unions do campaign for months, if not years. But this misses the whole point.

Similar to general elections, the electorate—the people that vote—don't really concentrate, often, on the issues at hand until shortly before the election. What we are saying here is there ought to be a minimum period of time for intelligent, thoughtful dialogue and debate, reasoned discussion, between the filing of the petition and the election.

Ms. BONAMICI. Understood. I am going to reclaim my time and ask one more question before my time expires.

And, Ms. Crawford, you know, for 50 years employers have had to provide employees' home addresses. Don't you agree that receiving an e-mail is less intrusive than having somebody knocking on your door?

Mr. BYRNE. Very quickly, Ms. Crawford.

Ms. CRAWFORD. Yes. Yes. I feel—

Ms. BONAMICI. Thank you. And I have—my time is expired.

Thank you, Mr. Chair.

Mr. BYRNE. The gentlewoman yields back.

The chair recognizes the gentleman from Wisconsin, Mr. Grothman, for five minutes.

Mr. GROTHMAN. My question is for Mr. Taubman.

What is the average time right now between a petition and the representation election?

Mr. TAUBMAN. I think those numbers are something like 40 days, under current law—40, 50 days, something like that, which seems wholly reasonable in any election, whether it is a certification or even a decertification.

Mr. GROTHMAN. They give us more than 40 days when we run.

About how many cases are delayed and how long?

Mr. TAUBMAN. I really can't speak to those numbers.

I can tell you, as I pointed at in my testimony, since I have many clients who try to do decertifications, which you would think should be dealt with fairly and equally under the *National Labor Relations Act*. The decertifications are constantly blocked by union unfair labor practice charges. They go on for months and years, and some of that is in my written testimony.

And when we asked the NLRB as part of this rule to just apply the rules across the board—whatever they were going to be, apply them across the board for certifications and decertifications—we were told, "No. Forget about it."

Mr. KING. Congressman, if I may, to answer your question, by the NLRB's own standards, less than 6 percent of the elections have any type of delay associated with them. But that is not the issue here. That is not the issue. That is a red herring issue at best.

Mr. GROTHMAN. Okay.

Again, for Mr. Taubman, in your experience, does knowing the identity of the employees during the campaign have any effect on the way the employees vote—knowing the identity of the employees?

Mr. TAUBMAN. I don't believe so.

Mr. GROTHMAN. Okay.

One final question for Mr. Perl: In your experience, both as an NLRB employee and as an attorney representing employers before the NLRB, following the petition, what kind of contact do employers and their representatives have with the regional director?

Mr. PERL. Well, employers, after the filing of a petition, would be communicating with members of the regional director's staff to work out the time, date, and place for the election. And sometimes those discussions are consummated in several days; sometimes it is eight, nine days.

But then that stipulation for certification agreement avoids a hearing, and it contributes to the fact that the median time for all elections held involving the National Labor Relations Board today is 38 days. And by any time target of the NLRB, the NLRB elections are timely held, by the board's own statistics.

Mr. GROTHMAN. How often do meetings like that lead to compromise in voluntary election agreements?

Mr. PERL. Well, compromises take place by discussions among the parties.

Now, there are some cases where a compromise cannot be reached. The case that Ms. Crawford cited involving the supervisory status of charge nurses—sometimes that is a litigable issue, and if it is not resolved pre-election and the charge nurses, for example, would vote, and if they are supervisors or not supervisors

that could affect the results of the election and involve years of litigation before a union would be certified or not certified.

So some issues must be litigated prior to the election. Many issues get resolved through voluntary compromises in the regional office with the regional director and his or her staff.

Mr. GROTHMAN. One final question: What—

Mr. BYRNE. You have time.

Mr. GROTHMAN.—what recourse does an employer have against a false statement a union makes or false information they give?

Mr. PERL. Well, the law doesn't outlaw false statements by labor organizations. There is no truth in lending law that is applicable to union statements.

The only way the employer can overcome that is with an ability for it to communicate what the true facts are to the workforce, and that is one of the reasons, Congressman, you point out, that an employer needs ample time to overcome any misrepresentations, and that takes some reasonable period of time and not an accelerated period of time that is provided in the new rules.

Mr. GROTHMAN. Just subjectively, do you think there are false statements made by unions in these elections?

Mr. PERL. Well, anyone who has gone through an election understands that there is an opportunity on both sides to dispute the representations made by the other side. And unions have been doing this during their entire organizing campaign before it even files a petition. The only time the employer really can address the vital issues, as Mr. King suggested, when people are focused on the issues involved in the election, is after a petition is filed.

The litmus test demonstrating—

Mr. BYRNE. Please wrap up quickly.

Mr. PERL.—that the most critical time between the petition and the election is the NLRB's own rules on what is the objectionable period that you could file objections to the election. It is not prior to the election; it is after a petition is filed and before the election is held. That is the critical period, and that is the period we are saying an employer needs reasonable time to communicate with its employees.

Mr. GROTHMAN. Thanks so much.

Mr. BYRNE. The gentleman's time is expired.

I think we have come to the end of questions from members.

I want to thank each and every one of you for your excellent testimony today, for your time to be here, for your patience with the committee and its members.

Mr. Polis, do you have any closing remarks?

Mr. POLIS. Thank you, Mr. Chairman.

I want to thank our witnesses for spending their time with us in this hearing this morning. The story of Ms. Crawford is really a powerful testimony and a story that we remember as an example of one of the hundreds, if not thousands, of examples where employers have illegitimately used the current rules to their advantage, using the threat of a difficult process and indefinite delays to extract concessions from workers, often successfully delaying elections to the point of detriment for workers, using the personal information of workers against the workers' efforts to form a union.

The relationship between the length of time it takes to hold an election and the illegal employer conduct is considerable, and the one in 10 cases where it takes more than 100 days to reach an election are far more than just mere outliers.

After having taken into account the thousands of comments on all sides of the issue, the NLRB has released a reasonable, common-sense rule that will reduce frivolous litigation, save resources and taxpayer dollars, standardize the election process, crack down on manipulation and threats, provide more predictability for both companies and employees, and promote a level playing field. A level playing field is all that workers ask for to improve the quality of our communities and the economy.

I yield back the balance of my time.

Mr. BYRNE. Gentleman yields back.

Let me sum up what I think we have heard today, very important testimony on a very significant issue.

Mr. Perl said that the present rule of the National Labor Relations Board blows up the whole system of elections. I couldn't agree more.

This system has been in place for 70 years. I took labor law in law school in 1979. I have been practicing law using this law for half the time of its existence.

And lawyers and both sides, unions and management on both sides, have lived with this system successfully—each side doesn't always get to win; that is not the nature—for 70 years. And it has worked. It has worked for unions, obviously. They are winning over 60 percent of their elections, so that is a pretty good win-loss record in this environment.

And to solve what problem? What problem are we trying to solve here?

Yes, there are going to be outlier issues, and Ms. Crawford gave really good testimony about a case that is truly an outlier. And we have outliers in legal proceedings. That happens.

But in only 6 percent of the cases, according to the NLRB's own data, do elections go more than 56 days. And in most cases, in the median cases, it is 38 days.

Now, when we run for office the time between when we have qualifying in and when people actually vote for congressmen is a lot longer than 38 days, because we believe our voters, before they elect us, should have the time to listen to us and think about who they want to be their representative, and it creates the representative democracy we have today.

So I have got to say, this is a dramatic change in the law for nothing, except to create problems for employers and employees.

And let me focus the employees in the second point. This is an employee decision. It is not the union's decision, and it is not management's decision.

It is the employees' decision. They are the ones that go in that little voting booth an NLRB agent sets up and marks the ballot—that paper ballot they give them, yes or no.

And that is a hard decision for them to make. They make it themselves, but also in talking with other employees and with their families because their families could be very definitely affected by this decision.

If a union takes employees out on strike, the employer has the right to cease paying that employee and providing benefits like health insurance, and that involves the family. And to give the employees the time to sit down with their fellow employees and their family members and say, "Is this a good decision for us—for me and my family" seems to me to be pretty fundamental if you care about employees.

Now, if you don't care about employees, if this is all about something else, then you wouldn't be concerned about that.

But I think we on this committee should be concerned about employees. And if you are concerned about employees, there ought to be time for these employees to make this decision.

And the last point, the third point, that is perhaps the most disturbing, is what this rule is doing to the privacy of the American worker.

You know, I don't have too many of my constituents that come up to me and say, "Well, I really would like to have a shortened time for union election." But I have plenty of people come up to me and say, "I am worried about the way my private information is accessed by people in a lot of different ways."

Now, employers have to get certain pieces of information from their employees. Sometimes it is because what we require them to get, and sometimes it is necessary. You have got to make sure you have information for providing health insurance, et cetera.

And that information is kept, I will tell you, in most H.R. directors' offices, kept in a locked cabinet with severe rules about who has access to it and what can happen with that information. And now we are going to tell employers that they have to divulge that information to an outside entity with no protections to the employee.

I think that runs very counter to what we should be doing to protect the working people of America. And if they were here to be able to be heard—and, Ms. Crawford, I appreciate you being here—if we had more of them here I think we would hear a lot of concerns from them about that.

So, I appreciate your testimony today. I appreciate the questions that came from the members. I think we have fleshed out this issue very well.

I look forward to the action that will be taken on this matter. And at this point, this hearing is adjourned.

[Additional submissions by Mr. King follow:]

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Appendix A

February 9, 2015

The Honorable John Kline
Chairman
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Kline:

On behalf of the Retail Industry Leaders Association (RILA), I write to express our strong support for H.J. Res. 29 and its Senate companion, which will nullify the National Labor Relations Board's (NLRB) rule on ambush elections from taking effect on April 14. We appreciate your leadership to address the efforts by the NLRB to violate the privacy rights of employees while denying them access to critical information and time to consider the issues prior to voting in a union election.

By way of background, RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

The NLRB's rule on ambush elections will (1) limit the issues and evidence that can be presented at a pre-election hearing, which may leave important questions unresolved prior to a union election; (2) restrict employer arguments to only those identified prior to a pre-election hearing; (3) make all Board review of Regional Directors' decisions discretionary; (4) impact employees privacy by forcing employers to provide private phone numbers and email addresses of their employees; and (5) eliminate the current 25-day "grace period," ultimately stripping management the time needed to educate employees. Shortening the election time frames also debilitates the employees' ability to make an informed decision.

According to the NLRB's own statistics, the current election process is taking place within a reasonable amount of time. Over the past ten years, elections have occurred within a median time of 38 days after filing a petition. Substantially more than 90 percent of those elections occurred within 56 days. The result of the ambush elections rulemaking for employees would be two-fold: there would be far less ability to learn about the issues and hear equally from both the union organizers and the employer; and a higher likelihood that a well-meaning but unprepared employer would inadvertently violate employee rights by making improper statements.

Additionally, this rulemaking would make an unprecedented intrusion into the private lives of employees.

Recent rules from the NLRB, including this one, are blatant attempts to circumvent Congress and enact the principles of the "Employee Free Choice Act" (EFCA). Combined, they pose similar threats to individual workers, job creators and our economy as a whole. Congress should not stand idle, as the NLRB continues to by-pass the legislative body in an attempt to pass law through rules and regulations.

RILA members are leaders in the workforce arena and we offer our support to help maintain an appropriate balance between employer and employee rights under the National Labor Relations Act. We thank you for introducing this joint resolution and urge immediate passage of H.J. Res. 29 and its Senate companion. Absent Congressional action, the actions of the NLRB will needlessly trample privacy rights and exacerbate tensions between employers and employees, increasing economic uncertainty for the entire retail industry and its millions of employees.

Sincerely,

Kelly Kolb
Vice President, Government Affairs

EXHIBIT B

EXAMPLE OF CURRENT NLRB ELECTION PROCEDURE TIMELINE

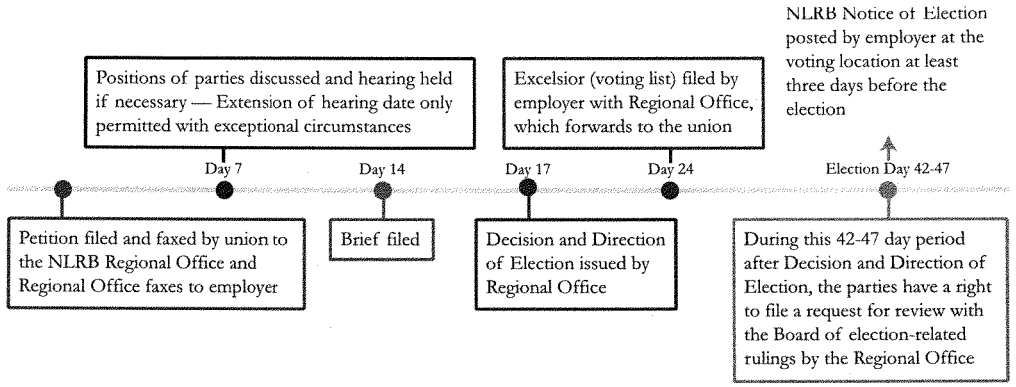
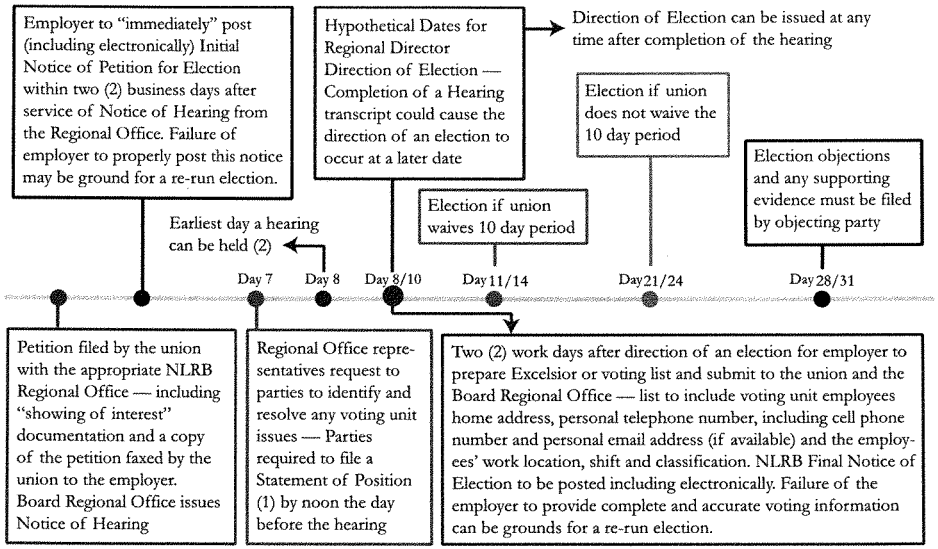


EXHIBIT C

NLRB PROPOSED NEW ELECTION RULE WITH NO POST-HEARING BRIEF



(1) Employer's Statement of Position (SOP) to be filed by noon before the hearing date and is to include commerce information, name of voting unit employees, any issue to be litigated, and the employees' work location, shift and classification. SOP also is to include the employer's position on the appropriateness of the unit and suggested dates, times, and location of the election and the cut-off eligibility date and served on the union and the Regional Director.

(2) The hearing only is to involve "questions concerning representation." At any time during the hearing, if the hearing officer determines that the only issue remaining in dispute concerns the eligibility or inclusion of individuals to be eligible to vote, the hearing officer in consultation with regional director, will immediately close the hearing. At the conclusion of the hearing, parties would be permitted to make oral arguments on the record. Parties would be permitted to file post-hearing briefs only with the permission of the regional director and within the time permitted by and subject to, any other limitations imposed by the regional director.

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APPENDIX D

THE NEW NLRB ELECTION RULE
WEDNESDAY, MARCH 4, 2015

G. ROGER KING, LABOR COUNSEL FOR RILA AND
OF COUNSEL FOR MCGUINESS & YAEGER
EMAIL: GKING@KINGLABORLAW.COM

1. **New NLRB Election Rule – Key Points**
   a. Shorter time frames for elections – elections to be held in as short a time period as 11 to 14 calendar days after the union has filed its petition had for election
   b. Prevents parties from litigation virtually all employee voting unit eligibility issues before an election
   c. Curtails the ability to challenge pre-election rulings by NLRB Regional Directors
   d. Permits petitioning unions to obtain personal email, cell phone and home phone numbers of voting unit employees
   e. Substantially increases authority of Board Regional Directors and other Board civil service staff and decreases Board Member accountability for, and oversight of, the election process
   f. Rule to be implemented on April 14, 2015

2. **New NLRB Election Rule – Filing of the Petition**
   a. Petitions filed by unions with NLRB Regional Offices to include "showing of interest" documentation, i.e., the 30 percent employee signature requirement – change from prior practice of permitting the union to have 48 hours after petition filing to furnish "showing of interest" documentation
   b. Petition filing can be made electronically to appropriate NLRB Regional Office by union
   c. Union to also fax a copy of the filed petition to the employer
   d. Employer required to post, including electronically, initial Notice of Election to employees within two (2) working days of receipt of Board's new Notice of Petition for Election form (such form not currently required to be posted)
   e. Failure of the employer to properly post such form could result in election results being overturned and a new election ordered

3. **New NLRB Election Rule – Filing of the Statement Position (SOP)**
   a. An employer will be required to file a Statement of Position (SOP) by noon before the day of the scheduled hearing
   b. The SOP will be required to contain a statement of the employer's position regarding the proposed unit, any issues the employer desires to litigate at the hearing, a listing of the names of employees in the proposed unit and their classification, shift and work location
   c. The SOP must also contain the employer's position on any jurisdiction issues, supervisory issues, managerial issues and confidential employee issues. Employer also must include in the SOP proposed date(s), time(s) and location(s) for the election

d. SOP may also have to include employer position on the following issues:
   i. Election bar, contract bar and recognition bar
   ii. Eligibility period for voting unit employees
   iii. List of employees that the employer desires to exclude from the proposed unit
   iv. List of employees to be added to the petitioned-for unit
   v. Labor organization status
   vi. Employer business closing or expansion information
   vii. Seasonal employee issues
   viii. Professional employees to be excluded
   ix. Any issue regarding guards
   x. Any other issue raised by the petition
e. If the employer fails to raise in its SOP any of the above matters that would be applicable in its case it will be foreclosed, absent special permission from a Regional Director, from raising such matters at the hearing and may also have been deemed to have waived its right to raise such issues in any post-election proceedings
f. The SOP is a new "strict pleading" procedure that employers and their counsel will have to pay particular attention to and be prepared to properly file prior to the commencement of the hearing
g. The only "positive" news for employers regarding the new SOP requirement is that unions will also be foreclosed from raising issues at a hearing or on an appeal if they fail to respond to issues the employer raises in its SOP

4. **New NLRB Election Rule – The Hearing**
   a. A hearing (if any) will be held eight (8) days after the union has filed its petition – Regional Directors may postpone the opening of the hearing for up to two (2) business days on request of a party showing special circumstances, and for more than two (2) business days upon request of a party showing extraordinary circumstances – it is doubtful any such request will be granted
   b. The hearing officer will only permit parties to raise issues that have been included in their SOP and such issues are limited to whether there exists a "question concerning representation", a term that is not defined in the NLRA. Questions concerning supervisory, managerial and confidential employee status generally will not be permitted to be raised at the hearing
   c. The hearing officer, in consultation with the Regional Director, will make rulings on evidentiary issues and rulings on whether issues can be considered at the hearing
   d. The concept of "offers of proof" will be regularly utilized
   e. Under the new Rule, the scope of a hearing will be substantially reduced and the right to file a post hearing brief, which as a general rule has been filed seven (7) or more days after the conclusion of the hearing, is as a practical matter eliminated
   f. A hearing once started shall by the new Rule continue in subsequent days thereafter until concluded – motions for continuances, will not, as a general rule be granted

g. Failure of the Board to resolve pre-election supervisory, managerial and other unit placement issues presents serious legal and practical issues for the employer – what if an individual believed by the employer to be a non-supervisory employee is found post-election to be a supervisory employee? – the conduct of such individual during the election could be attributed to employer and may be grounds for a re-run election

5. **New NLRB Election Rule – Requests for Board Review**
   a. The new Rule eliminates the automatic rights of parties in stipulated elections situations to file a request for review with the Board – in the past stipulated election agreements have been the way that a high percentage of representation cases have been processed by the Board
   b. Requests for review of Regional Director decisions may be filed at any time during the hearing or within 14 days after a final disposition of the case – requests will only be granted, however, for compelling reasons
   c. Under the new Rule parties will have an extremely limited opportunity to obtain Board review of pre-election determinations by Board Regional Directors and hearing officers
   d. The new Rule increases the possibility that individual regions of the Board will reach different decisions on un-reviewed results in factually identical or similar circumstances
   e. The new Rule substantially increases the authority of Regional Directors who are not subject to Senate confirmation and substantially removes Board members from their oversight role in representation cases and their ultimate accountability for this important area of the law
   f. The new Rule will no doubt increase the number of "test of certification" cases where employers refuse to bargain after the union prevails in a Board conducted election, because the employer could not obtain pre-election Board review of Regional Director voting unit issues
   g. A number of election related issues, including voter eligibility and unit placement issues, will never be reviewed by the NLRB – the Board majority's position under the new Rule is that such unreviewed issues will have to be resolved by the parties at the negotiating table

6. **New NLRB Election Rule – Filing the Voter Unit Information – Excelsior List Issues**
   a. Under the new Rule an employer will only have two (2) working days after issuance of the Regional Director's decision and direction of election to file the following information with the Board's regional office and with the Union:
      i. Name of all voting unit employees and their home address
      ii. Classification, shift and work location of such employees
      iii. Personal email address of voting unit employees (if available)
      iv. Personal telephone numbers of voting unit employees (if available)
   b. The new Rule is a substantial change from past practice as employers had seven (7) calendar days after the direction of election to file voting unit information – such information also did not have to include personal telephone numbers and

email addresses of such employees nor classification, shift or work locations and of voting unit employees

c. This aspect of the new Rule places considerable pressure on employers, especially in cases where there is a large number of voting unit employees including multi-site voting unit situations
d. Failure of the employer to meet the requirements of timely and accurately submitting the voting unit information can result in the overturning of results of an election
e. This aspect of the new Rule raises substantial employee privacy issues
f. The Board majority failed to include in the new Rule any remedy for union misuse of employee personal information
g. Board also failed to include opt-in/opt-out procedure for employees regarding the furnishing of their personal information
h. Board left open the distinct possibility that it may in the future also require employers to furnish to a petitioning union work email and work telephone numbers of voting unit employees (see page 118 of the rule)

7. **New NLRB Election Rule – The Union's Decision as to Whether to Waive the 10-Day Period**
   a. Unions have the opportunity after the issuance of a direction of an election to have up to 10 calendar days to review and utilize voting list information in their campaigns
   b. Unions however can waive this 10-day rule to accelerate the time period in which an election is held
   c. A union's decision on this point will have a substantial impact on the timing of the election and a waiver of such 10-day period may result in elections being held as early as the 11th or 14th day after the petition for election has been filed

8. **New NLRB Election Rule – Reduced Election Timeframe**
   a. Current medium timeframe from filing a petition to election is 38 days (average is 35 days) with elections generally held in contested petitioned cases between 42/47 days
   b. 94.3 percent of all elections are currently being held within 56 days from the filing of the petition
   c. "Rule squarely rejects any reasonable minimum time between petition filing and election: and our colleagues explicitly disclaim responsibility even to identify an appropriate target timeframe that should – or will – result from the Rule" – page 529 of dissenting NLRB members Phil Miscimarra and Harry Johnson
   d. Under the new Rule Regional Directors are to set elections at the "earliest date practical"
   e. The new Rule eliminates the 25 – 30 day period after the decision and direction of election before an election can be held – this aspect of the Rule has the greatest impact on the timeframe from petition filing to election date – elimination from this time period substantially curtails the ability of employees to become educated regarding the issues associated with union representation

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9. **The Election and the Objection Time Period**
   a. As a general rule, an election will go forward and ballots counted notwithstanding any employer challenges. Further, there will no longer be a stay of an election date or the impoundment of ballots
   b. The period for any party filing an objection to election remains at seven (7) calendar days under the new Rule. Any party filing an objection must provide evidence on or before the seventh day supporting its objection – this is a change from prior practice which gave objecting parties an additional seven (7) days to file their evidence supporting their objection

10. **New NLRB Election Rule – Other Issues**
   a. The new Rule when combined with the Board's Specialty Healthcare overwhelming community interest test provides new opportunities for unions to have organizing success, especially in situations involving unions' petitions for micro or fragmented voting units
   b. The substantially abbreviated nature of the hearing process under the new Rule will make it virtually impossible for employers to overcome the application of the Board's new overwhelming community of interest test regarding the composition of the voting unit
   c. The Board's new Rule, as previously noted, raises substantial employee privacy issues and may be the "Achilles Heel" of the new Rule
   d. The new Rule would appear to apply to all types of elections including decertification elections
   e. The new Rule contains only minor changes in the Board's "blocking charge procedure" including a new requirement that any party filing an unfair labor practice charge which would block the holding of an election must submit a summary of its evidence and the names of its witnesses at the time it files such blocking charge – much more should have been done in this area as blocking charges are often the major source of election delay
   f. The new Rule may result in unions obtaining employee personal telephone and personal email addresses, then withdrawing their petition, using such information to further campaign, and then re-filing a petition for an election at a later date
   g. Potential approval for unions to file electronic signatures on union authorization cards --the majority in approving the new Rule directed the NLRB General Counsel to develop guidelines permitting unions to electronically file union authorization cards with employee's electronic signatures

[Additional submission by Ms. Wilson follows:]

Statement of the Honorable Frederica Wilson
Subcommittee on Health, Employment, Labor, and Pensions, House Committee on Education and Workforce
Hearing on the CRA Resolution to block the NLRB Election Rule- H.J. Res 29

- Thank you Chairman Poe and Ranking Member Polis for holding today's hearing.
- The Congressional Review Act (CRA) is yet another attack on employees' rights to organize and to limit the National Labor Relations Board's (NLRB) ability to safeguard those rights and protect our nation's workers from unfair labor practices.
- It is outrageous that the rights of employees are attacked, particularly at a time when we have a jobs deficit, a shrinking middle class,

and are struggling to recover from the Great Recession.

- The NLRB has made modest attempts to modernize its election procedures, and reduce unnecessary litigation and delay in the election process.
- These are common-sense fixes that should not be controversial.
- The CRA would freeze in place the Board's current flawed election procedure. The Board would be prohibited from adopting rules to utilize new technology or modernize its procedures.
- The NLRB is an expert agency and should be trusted to determine the appropriate use of electronic voting or rules to safeguard ballot secrecy.

- Furthermore, I am not aware of any other government agency that has to seek Congress' permission before modernizing its rules for voting that takes place under its jurisdiction.
- Dismantling the NLRB would only serve to weaken, undermine, and jeopardize the economic security of the middle class. It is bad for business, bad for families, and bad for our economy.
- The National Labor Relations Board is the last line of defense for workers.
- We shouldn't be attacking our nation's employees; we should be supporting them, investing in them, and protecting them.
- Let's come together to create jobs, protect the middle class, and make the investments we need to grow our economy.

- Thank you Mr. Chairman, I yield back the balance of my time.

[Whereupon, at 11:46 a.m., the Subcommittee was adjourned.]

○