

**AMBUSHED: HOW THE NLRB'S NEW ELECTION  
RULE HARMS EMPLOYERS AND EMPLOYEES**

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**HEARING**  
OF THE  
**COMMITTEE ON HEALTH, EDUCATION,  
LABOR, AND PENSIONS**  
**UNITED STATES SENATE**  
**ONE HUNDRED FOURTEENTH CONGRESS**

FIRST SESSION

ON

EXAMINING THE NATIONAL LABOR RELATIONS BOARD'S (NLRB) NEW  
ELECTION RULE, FOCUSING ON EMPLOYERS AND EMPLOYEES

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FEBRUARY 11, 2015

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## **AMBUSHED: HOW THE NLRB'S NEW ELECTION RULE HARMS EMPLOYERS AND EMPLOYEES**

WEDNESDAY, FEBRUARY 11, 2015

U.S. SENATE,  
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,  
*Washington, DC.*

The committee met, pursuant to notice, at 9:34 a.m., in room 430, Dirksen Senate Office Building, Hon. Lamar Alexander, chairman of the committee, presiding.

Present: Senators Alexander, Isakson, Scott, Cassidy, Murray, Franken, Warren, and Casey.

### OPENING STATEMENT OF SENATOR ALEXANDER

The CHAIRMAN. The Senate Committee on Health, Education, Labor, and Pensions will please come to order.

This morning we're having a hearing about the National Labor Relations Board's new rule on union elections. Senator Murray and I will each have an opening statement. Then we'll introduce our panel of witnesses. We thank them for coming. After our witness testimony, Senators will have 5 minutes for questions.

Last December, the NLRB issued a final rule that shortened the timeline between when pro-union organizers ask an employer for a secret ballot election and when that election takes place. I refer to this as the ambush election rule because it forces a union election before an employer has a chance to figure out what's going on. Even worse, it jeopardizes employees' privacy by requiring employers to turn over personal information, including email addresses, phone numbers, shift hours, and locations to union organizers. For that reason, Senator Enzi, Senator McConnell, and I have introduced a resolution of disapproval under the Congressional Review Act, which we expect the Senate will act on after the recess.

Today, more than 95 percent of union elections occur within 56 days of the petition filing. Under this new rule, elections could take place in as few as 11 days. The rule will harm employers and employees alike. Here's how.

If you're an employer who gets ambushed, on day 1 you get a fax copy of an election petition that has been filed at your local NLRB regional office stating that 30 percent of your employees support a union. The union may have been quietly trying to organize for months without your knowledge. Your employees have heard only the union's pitch.

By day 2 or 3, you must publicly post an election notice in your workplace and online if you communicate to your employees elec-

tronically. By noon on day 7, you must file with the NLRB what is called a Statement of Position. This is a comprehensive written document in which an employer sets out legal positions and claims, and under the new rule you waive your rights to use any legal arguments not raised in this document. On day 7 you must also present the union and the NLRB with a list of prospective voters, as well as their job classifications, shifts, and work locations.

On day 8, a pre-election hearing is held at the regional office and an election date is set. By day 10, you must hand the union a list of employee names, personal email addresses, personal cell phone numbers, and home addresses. Day 11 is the earliest day on which an election could be held. Under this new rule a union could postpone an election by 10 days at this point, but the employer has no corresponding power.

Under this new NLRB rule, before the hearing on day 8 an employer will have less than 1 week to figure out what an election petition is, find legal representation, determine legal positions on the relevant issues, learn what statements and actions the law permits and prohibits, gather information required by the NLRB, communicate with employees about the decision they're making, and correct any misstatements and falsehoods that employees may be hearing from union organizers. Making even the slightest mistake in the lead-up to an election can result in the NLRB setting aside the results and ordering a re-run election; or worse, the Board could require an employer to automatically bargain with the union.

It is the employees who stand to lose the most under this rule. First, because of this ambush, employees will hear only half the story about what unionizing will mean for them and their workplace. As the two dissenting members of the NLRB put it, employees will be asked to "vote now, understand later."

Second, employees lose their privacy because the rule requires employers to hand over employees' personal email addresses, cell phone numbers, shift hours, locations, and job classifications even if the employee has said he doesn't want to be contacted by union organizers.

This rule appears to be a solution in search of a problem. Only 4.3 percent of union elections occur more than 56 days after the petition filing, and the current median number of days between a filing and an election is just 38 days. These figures are well within the NLRB's own goals for timely elections. Unions won 64 percent of elections in 2013. In recent years, the union win rate has been going up.

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 the election in which both parties can present their viewpoints."

That was Senator Kennedy's view.

It's clear to see the rule is wrong. That's why we've introduced the Congressional Review Act resolution. We'll ask the Senate to disapprove the NLRB's new rule and prohibit it from issuing any similar rule. The House will follow a similar process. I hope the full Senate will agree.

Senator Murray.

OPENING STATEMENT OF SENATOR MURRAY

Senator MURRAY. Well, thank you very much, Mr. Chairman. I especially want to thank all of our witnesses who are joining us today and taking time out of your lives.

In Congress, we should really be working on ways to grow the economy from the middle out, not the top down. Over the last several decades, the middle class has gotten stuck with a shrinking share of America's prosperity, even as the biggest corporations have posted record profits, and even as American productivity has increased.

American workers' paychecks have stagnated, and many are struggling now to make ends meet on rock-bottom wages and poor conditions on the job.

Unfortunately, once again, instead of sticking up for workers, some of our Republican colleagues are rushing to the defense of the biggest corporations that have an interest in keeping wages low and denying workers a voice to improve their workplace.

When workers want to vote on whether to form a union, they aren't looking for special treatment. They are simply trying to exercise their basic rights. Too often, big corporations use loopholes in the current election process to delay a straight up-or-down vote.

Workers have the right to vote on union representation in elections that are free from unnecessary delays and wasteful stall tactics. Our country should not turn our backs on empowering workers through collective bargaining, especially because that is the very thing that helped so many workers climb into the middle class.

As a reminder, by law, workers have the right to join a union so they can have a voice in the workplace. Right now, the NLRB's election process is outdated. The NLRB's new representation rule makes important but very modest amendments to guarantee a free and fair election process in today's modern workplace.

For example, the old election rule is vulnerable to frivolous litigation, which could drag out elections and put workers' rights on hold. The new rule will reduce unnecessary litigation on issues that aren't relevant to the outcome of the election.

In the past, employers had to send out mail through the post office, which cost time and it cost money. This new rule brings the rules into the 21st century by letting employers and unions file forms electronically. It will allow the use of more modern forms of communication with employees through cell phones and email.

These changes aren't just good for workers. They are also good for employers by streamlining the election process. Some of my colleagues on the other side of the aisle take great offense to these modest changes. Instead of standing up for workers across the country who are struggling with stagnant wages, Republicans have chosen to challenge these common-sense reforms.

Let's be clear: This rule is about reducing unnecessary litigation, and using cell phones and email to transmit information in 2015 is just common sense.

A worker wanting to have a voice in the workplace is not an ambush. It is their right as guaranteed by the National Labor Relations Act and by the First Amendment of our Constitution.

Workers having a seat at the bargaining table is critical to America's middle class. It's not a coincidence that when more workers can stand up for their rights, wages increase, workplaces are safer, and access to health care goes up.

In short, middle-class Americans are better able to share in the economic prosperity that they have earned through hard work.

Instead of attacking workers who want to collectively bargain, I hope that our colleagues on the other side of the aisle reconsider this approach and work with us to protect workers' rights and increase wages and grow our Nation's middle class.

I do truly hope that Republicans and Democrats can break through the gridlock and work together on policies that help to create jobs and expand economic security and generate broad-based economic growth for workers and families, not just the wealthiest few.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Murray.

I'll now introduce our witnesses. Senator Murray, would you like to introduce Ms. Sencer?

Senator MURRAY. I think you're just going to go ahead and do it.

The CHAIRMAN. OK, I'll do it.

Charles Cohen is the Republican member of the NLRB from 1994 to 1996. Since his service on the Board, he's worked in private practice, specializing in NLRB proceedings.

Mark Carter is a labor attorney with extensive experience dealing with union organizing, corporate campaigns, and collective bargaining.

Elizabeth Milito is senior executive counsel with the National Federation of Independent Business Small Business Legal Center. She frequently consults small businesses dealing with labor issues.

Ms. Caren Sencer is an attorney with Weinberg, Roger and Rosenfeld in Alameda, CA. She regularly practices before the NLRB and has participated in more than 100 election hearings from which to draw examples for this testimony.

We welcome the four of you. If each of you would summarize your remarks in 5 minutes, we would appreciate it because that will give the Senators more time to have a conversation with you.

**STATEMENT OF CHARLES I. COHEN, SENIOR COUNSEL,  
MORGAN LEWIS LLP, WASHINGTON, DC**

Mr. COHEN. Chairman Alexander, Ranking Member Murray, and members of the committee, thank you for your invitation to participate in this hearing. I'm honored to appear before you today.

I am senior counsel in the law firm of Morgan Lewis and Bockius, LLP, where I represent employers in many industries under the National Labor Relations Act. As you mentioned, Senator Alexander, from 1994 to 1996 I had the privilege of serving as a member of the NLRB and was appointed by President Clinton and confirmed by the Senate.

My entire professional career, spanning more than 40 years, has been spent working under the NLRB. For the first 8 of those years,

I worked at the NLRB both at Washington and two regional offices. During that time, I personally conducted NLRB elections, served as a hearing officer, litigated in the courts of appeal, and performed the myriad of other functions of a Board agent, supervisor and deputy regional attorney.

Apart from my time with the NLRB, the remainder of my professional activity has been spent representing employers in traditional labor matters.

On December 15 of last year, the NLRB published its extensive rule, which revises on a wholesale basis the regulations regarding union elections. The final rule will, among many things, dramatically shorten the period of time between a union filing an election petition with the Board and the actual holding of the election. It will also undermine an employer's ability to mount a lawful, effective information dialog with its employees on whether or not to select union representation.

The final rule described by the two dissenting NLRB members as the Mt. Everest of regulations took 733 pages to print when issued, and occupied 200 pages in the Federal Register.

The final rule is, in my judgment, a transparent attempt to circumvent Congress on the issue of how, if at all, to reform the Nation's labor laws after the failure of the prior Congress to pass the Employee Free Choice Act, legislation supported by the labor movement that would have all but ended secret ballot elections at the NLRB in favor of card check recognition.

The changes that have brought us here today are of a different magnitude than anything the NLRB has done in the past. They represent no less than an attempt by the NLRB to put its thumb on the scale in favor of union representation.

In virtually every controversial NLRB initiative that I have witnessed in the past, the emphasis has been on enforcing the law while plugging opportunities for parties to violate the law or game the system. Unlike any of these other initiatives, however, this one transparently seeks to deprive law-abiding and non-games playing employers of the right to communicate their views under Section 8(c) of the Act. The entire employer community is presumed to be on the wrong side, standing ready to trample the rights of employees.

The final rule also deprives employees of their right to receive key information from all sides in order to be fully informed on how and whether to exercise their section 7 rights.

Some key facts are relevant to the final rule's background in our discussion today. Union density in the private sector has been on the decline and is currently below 7 percent of the private sector workforce. Whatever the cause, the scope of which is beyond this debate, it is obviously distressing to organized labor.

As virtually every NLRB agent knows, the longer the period of time between the filing of an election petition and an election, the less likely it is that employees will select a union. This is so whether or not unlawful or objectionable conduct has occurred.

Over the decades, there have been legislative calls from organized labor to dramatically shorten the period of time from petition to election, and the possibility of shortened election periods was

widely discussed during the policy debates surrounding the Employee Free Choice Act. No legislative change has occurred.

What does the Board come up with in its final rule? It has proffered the gimmick of a hurried and emasculated hearing, contrary to the statute; a binding Statement of Position under the threat of waiver; offers of proof instead of actual testimony; preclusive rules to limit issues; 2 days to submit employee lists with personal email and telephone contact information; and other frenetic timelines.

On top of these problems, the final rule will lead to far fewer elections where the parties obtain decisions on voter eligibility and supervisory status issues before employees vote. That's throwing many more election campaigns into chaos and confusion.

This concludes my testimony. I would be happy to answer any questions.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF CHARLES I. COHEN

Chairman Alexander, Ranking Member Murray, and members of the committee, thank you for your invitation to participate in this hearing. I am honored to appear before you today.

By way of introduction, I am Senior Counsel in the law firm of Morgan, Lewis & Bockius LLP, where I represent employers in many industries under the National Labor Relations Act (NLRA). From 1994 to 1996, I had the privilege of serving as a member of the National Labor Relations Board (NLRB or Board), and was appointed by President Clinton and confirmed by the U.S. Senate.<sup>1</sup>

My entire professional career, spanning more than 40 years, has been spent working under the NLRA. For the first 8 of those years, I worked at the NLRB, both in Washington and in two regional offices. During that time, I personally conducted NLRB elections, served as a hearing officer, litigated in the Courts of Appeal, and performed the myriad of other functions of a Board agent, supervisor, and deputy regional attorney. Apart from my time with the NLRB, the remainder of my professional activity has been representing employers in traditional labor matters.

On December 15, 2014, the NLRB published an extensive Final Rule, which revises on a wholesale basis, the regulations regarding union elections (Final Rule).<sup>2</sup> The Final Rule will, among many things, dramatically shorten the period of time between a union filing an election petition with the Board and the actual holding of the election. It also will undermine an employer's ability to mount a lawful, effective information dialog with its employees on whether or not to select union representation. The Final Rule, described by the two dissenting NLRB members as the "Mount Everest" of regulations,<sup>3</sup> took 733 pages to print when issued and occupied 200 pages in the Federal Register.

The Final Rule is a transparent attempt to circumvent Congress on the issue of how, if at all, to reform the Nation's labor laws after the failure of the prior 111th Congress to pass the Employee Free Choice Act (EFCA), legislation supported by the labor movement that would have all but ended secret ballot elections at the NLRB in favor of "card check" recognition.

I appreciate the difficulty and inherent tensions in working under the NLRA. The statute guarantees the right to engage in union activities. It also ensures the right to refrain from such activities. These tensions, since the early years of my career, have played out in ways that have become much more political, engrained, and contentious. In those beginning years, there tended to be slightly different emphases in NLRA interpretation based upon the prism through which the appointees at the Board viewed the Act. Over four of the last five presidential administrations, the proverbial envelope has been pushed. Appointees, supported by Republicans and Democrats alike, bear some measure of responsibility for the increased polarization.

<sup>1</sup> I am not speaking on behalf of Morgan, Lewis & Bockius LLP or any other specific organization, and my testimony should not be attributed to any organization. There is pending litigation challenging the implementation of the Final Rule in which I, and the firm, are involved. *Chamber of Commerce of the United States, et al. v. National Labor Relations Board*, Case No. 1:15-cv-00009-ABJ (D.D.C.). However, this testimony reflects my own personal views, although I wish to thank David R. Broderdorf for his efforts in helping me prepare this testimony.

<sup>2</sup> 79 Fed. Reg. 74,308-490 (Dec. 15, 2014).

<sup>3</sup> 79 Fed. Reg. at 74,430 (dissent).

But, the changes that have brought us here today are of a different magnitude. They represent no less than an attempt by the NLRB to put its thumb on the scale in favor of union representation.

In virtually every controversial NLRB initiative that I have witnessed in the past, the emphasis has been on enforcing the law while plugging opportunities for parties to violate the law or game the system. Unlike any of these other initiatives, however, this one transparently seeks to deprive law-abiding and nongames-playing employers of their right to communicate their views under Section 8(c) of the Act. The entire employer community is presumed to be on the wrong side standing ready to trample the rights of employees. The Final Rule also deprives employees of their right to receive key information from all sides in order to be fully informed on how and whether to exercise their Section 7 rights.

Some key facts are relevant to the Final Rule's background, and our discussion today:

- Union density in the private sector has been on a decline and is currently below 7 percent of the private sector workforce. Whatever the cause, the scope of which is beyond this debate, it is deeply distressing to organized labor.

- Over the past 20 years, unions have been seeking alternatives to winning secret ballot elections, typically through neutrality and card check procedures, often obtained through the pressure of corporate campaigns.

- As mentioned, unions have unsuccessfully sought legislation, through the Employee Free Choice Act, that would have functionally eliminated secret ballot elections conducted by the Board.

- As virtually every NLRB agent knows, the longer the period of time between the filing of an election petition and an election, the less likely it is that the employees will select a union. This is so whether or not unlawful or objectionable conduct has occurred.

- Over the decades, there have been legislative calls from organized labor to dramatically shorten the period of time from petition to election, and the possibility of shortened election periods was widely discussed during the policy debates surrounding the Employee Free Choice Act. No legislative change has occurred.

At the time I served as a Member of the Board during the Clinton administration, there were similar calls for more rapid elections and to change the Board's procedures following the Dunlop Commission's Report.<sup>4</sup> However, after considering these issues, the Board concluded that the requirement of a fulsome pre-election hearing prevented the Board from having an unfettered right to accelerate the election process. *Angelica Healthcare Services*, 315 N.L.R.B. 1320 (1995); *Barre National, Inc.*, 316 N.L.R.B. 877 (1995). The simple point was that the statute guaranteed an appropriate pre-election hearing.

What has the Board now come up with in the Final Rule? It has proffered the gimmick of a hurried and emasculated hearing, a binding statement of position under the threat of waiver, offers of proof instead of actual testimony, preclusive rules to limit issues, and frenetic time deadlines that disregard other obligations of employers and their counsel, all in an attempt to get to the election as soon as humanly possible and without giving the employer time to communicate with its employees. On top of these problems, the Final Rule will lead to far fewer elections where the parties obtain decisions on voter eligibility and supervisory status issues before employees vote, thus throwing many more election campaigns into chaos and confusion.

Open and free non-coercive speech and an opportunity to communicate is the law in place. As the Supreme Court stated recently, Congress's overarching "policy judgment . . . favor[s] uninhibited, robust, and wide-open debate in labor disputes," including the "freewheeling use of the written and spoken word."<sup>5</sup>

In the Final Rule, the Board majority acknowledged the perception of why these rules are being promulgated. As the Board said,

"[m]any comments additionally charge that the Board's motivation for issuing the rule are improper in that the Board seeks to act as an advocate for unions (rather than as a neutral overseer of the process), to drive up the rates of union representation, and to 'stack the deck' against employers in union organizing campaigns."<sup>6</sup>

<sup>4</sup>Dunlop Commission on the Future of Worker-Management Relations, Final Report at 41 (Dec. 1, 1994).

<sup>5</sup>*Chamber of Commerce v. Brown*, 554 U.S. 60, 67–8 (2008).

<sup>6</sup>79 Fed. Reg. at 74,326 n.83.

The Board went on to disclaim any such desire. Regardless of the Board's true motivations, this is the result of the Final Rule. The dissenting Board members aptly described the outcome:

"[T]he inescapable impression created by the Final Rule's overriding emphasis on speed is to require employees to vote as quickly as possible—at the time determined exclusively by the petitioning union—at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues."<sup>7</sup>

Employees will, in practice, be asked to "vote now, understand later."<sup>8</sup>

In light of all available objective data regarding the Board's election-related performance, the Final Rule is at best characterized as a "solution in search of a problem."<sup>9</sup> Most glaringly, the Board did not find the "problem"—significant delays, characterized as more than 56 days from petition to election—in more than a fraction of all cases. To the contrary, the evidence shows that significant delays occur in less than 6 percent of elections.<sup>10</sup> The Final Rule is not even targeted to those 6 percent of elections, but rather rewrites the procedures governing all elections. As the dissenting Board members put it, "[t]hese relatively few cases do not provide a rational basis for rewriting the procedures governing *all* elections."<sup>11</sup> Nor can the Board claim that the current process results in unions losing far too many elections, as in the past 4 years alone unions have won over 60 percent of elections held.<sup>12</sup>

This objective data confirms that prior initiatives, although not always welcomed by all, have been extremely effective in implementing the policies and purposes of the Act. The Final Rule, unfortunately, will add further fuel to a perception that the Board is casting its own vote in favor of union representation rather than safeguarding the process by which employees can make this choice for themselves after having a reasonable opportunity to get information from all sides.

Importantly, the Final Rule takes another inappropriate step by mandating that employers turn over employee personal telephone and email addresses to unions. Even worse, while acknowledging that "the privacy, identity theft, and other risks may be greater than the Board has estimated," the Board nonetheless asserted that those "risks are worth taking."<sup>13</sup> They are not worth taking.

I wish it did not have to be the case, but my time spent with the Act informs me that no public good will come from the Final Rule. There will undoubtedly be proposed budget cuts, congressional backlash and increased oversight, such as this very hearing, and more politicization of the NLRB. This is neither good nor fair for the NLRB as an institution, its staff, or indeed the country. As President Obama observed on June 29, 2011:

"We can't afford to have labor and management fighting all the time, at a time when we're competing against Germany and China and other countries that want to sell goods all around the world."

This Final Rule by the Board will result not only in increased fights between labor and management; it will embroil the U.S. Government in a most unfortunate way.

This concludes my prepared testimony. Thank you again for the invitation to appear today. I would be happy to answer any questions that members of the committee may have.

The CHAIRMAN. Thank you, Mr. Cohen.  
Mr. Carter.

**STATEMENT OF MARK A. CARTER, ESQ., PARTNER, DINSMORE  
& SHOHL LLP, CHARLESTON, WV**

Mr. CARTER. Well, good morning, Chairman Alexander, Senator Murray, and Senators of the committee. On behalf of the U.S. Chamber of Commerce, thank you for inviting me to testify on this very important and very time-sensitive issue.

<sup>7</sup> 79 Fed. Reg. at 74,460 (dissent).

<sup>8</sup> *Id.* at 74,430 (dissent).

<sup>9</sup> *Id.* at 74,449 (dissent).

<sup>10</sup> *Id.* at 74,434 (dissent).

<sup>11</sup> *Id.* at 74,456 (dissent).

<sup>12</sup> NLRB, Election Reports, <http://www.nlr.gov/reports-guidance/reports/election-reports> (last visited Feb. 4, 2015).

<sup>13</sup> 79 Fed. Reg. at 74,341–42.

My name is Mark Carter. I'm a partner with the law firm of Dinsmore & Shohl in the great State of West Virginia.

I have practiced law for nearly 29 years, focusing on labor relations, and this ambush regulation is the most dramatic revision to that process in that law that I have ever confronted.

The National Labor Relations Act requires that employers, unions and employees have a right to communicate regarding organizing drives. The Supreme Court has recognized that. The Act reflects a policy judgment which suffuses the Act as a whole as favoring uninhibited, robust, and wide-open debate.

Similarly, the Court has also held that an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board.

The pragmatic impact of the ambush election regulation is that it will effectively eliminate the opportunity of an employer to communicate his or her views regarding unionization with employees.

At least one situation from my career is illustrative of how important it is that employers are able to tell their side of the story. In 2011, I represented an employer that was presented with a petition by the NLRB. In the course of the union's campaign, the employees were told that their dues obligations would be significantly less than what the union had reported it charged members on a federally mandated form. The employer then published that form, which established what the union actually did charge for dues. Armed with this information, the employees voted not to be represented by that union.

I am convinced that the free speech and free exchange of information that took place during that campaign helped those employees make this a very difficult and important decision.

The ambush regulation shortens the time of an organizing drive from about 40 days to as few as 10 days. The fundamental principle behind the regulation is that it is far easier to win a campaign when the other candidate is unaware of the election. The companion principle is that if the other candidate is consumed by bureaucratic obligations for the period of the campaign, your chances of winning the election are nearly assured.

This scenario is going to confront employers under the Board's ambush regulation. First, the employer receives the petition and notice that they have to appear within 8 days, or in 8 days. Next, the employer has to find and hire a lawyer who understands labor law. Small employers generally don't know a labor lawyer or have ever used one. In my experience, it takes an average of 3 business days to find and hire a labor lawyer. If that is a weekend or a holiday, it could be 5 or 6 calendar days.

The day before the hearing, the employer must present a Statement of Position responding to 13 different areas of inquiry involving factual investigation, legal analysis, the composition of a brief, and the preparation of witnesses. If a lawyer fails to raise an issue that impacts those 13 areas, then that argument is waived. The NLRB has no obligation to consider supplemental argument, and all this must occur within 8 days. That simply is not going to happen.

What else won't happen is that the employer will not be able to operate their business because they're going to be consumed with filling out this form. More importantly, they will find it extremely difficult to communicate with their employees about the organizing campaign despite having the statutory right to do so.

Two days after the direction of an election, the employer must provide a listing of all employees and their phone numbers and their email address and all of that personal information. That's a major privacy issue. I've been involved in litigation involving violence by union officials in an organizing drive. There are good reasons employees do not want that information shared.

The sum and substance of this regulation is that it makes it highly unlikely an employer can obtain legal advice and present their mandatory positions within the maximum of 8 days. Simultaneously, it will frustrate or prohibit the employer from operating its business and will deny the employer meaningful review of pre-election determinations, and it frustrates or prohibits them from exercising their right to speak to their employees.

More onerous is the regulation is damaging to employees. They are unlikely to receive any other perspective other than the union's in an organizing campaign.

That concludes my prepared testimony.

[The prepared statement of Mr. Carter follows:]

PREPARED STATEMENT OF MARK A. CARTER, ESQ.

Good morning Chairman Alexander, Ranking Senator Murray and Senators of this committee. On behalf of the U.S. Chamber of Commerce, thank you, for inviting me to testify on this very important and time-sensitive topic. The Chamber is the world's largest business federation, representing more than three million businesses of all sizes, industry sectors, and geographical regions.

My name is Mark Carter. I am the Labor Practice Group Chair and a partner with the law firm of Dinsmore & Shohl LLP. I have spent most of my career representing employers in labor relations matters. This does not mean I never agree with unions. In fact, during my 7-year tenure as a member of the Federal Service Impasses Panel during the Administration of President George W. Bush, I frequently voted for unions in matters brought before the Panel. However, because I have represented employers in my private practice of law, I have a better ability to testify regarding their perspective and posture as it relates to the NLRB's "ambush" election regulation.

I have practiced law for nearly 29 years focusing on labor relations law and the NLRB's ambush regulation is, without question, the most dramatic revision to the processes surrounding that law I have ever confronted. Mr. Chairman, I have reviewed the very technical changes that this regulation makes to the union election process and I conclude that the changes wrongly accelerate the election process to the detriment of both employers and employees. But let me cut to the chase here. I have been involved in numerous union election campaigns and this regulation will, quite simply, stack the deck against employers while depriving employees of information they need to make a rational decision. While the purpose is clouded behind numerous technical adjustments to the current process, that will be the end result. And unfortunately we know that is indeed the very purpose of this regulation.

With your permission, Mr. Chairman, I hope to describe for the committee some of the challenges which will confront employers in not only complying with the regulation, but more importantly, the insurmountable challenge of exercising their rights as created by Congress in the National Labor Relations Act while complying with the regulation.<sup>1</sup>

<sup>1</sup>Of course, the Board's ambush election regulation does not occur in a vacuum. Rather, the final regulation comes at a time when the Board is pushing various policies to dramatically overhaul labor law in favor of their union allies. Chief among these is the *Specialty Healthcare* decision and the potential change in the Board's joint employer standard.

I. THE NLRB'S AMBUSH REGULATION RESTRICTS EMPLOYERS' STATUTORY FREE SPEECH RIGHTS

Before discussing the Board's "ambush" regulation, at the outset, I believe it is important to note that although it is not perfect, the current representation system works well. In my experience, I have seen unions win elections and I have seen unions lose elections. I have also seen both employers and unions effectively avail themselves of the Board's processes when they thought their rights were violated during a union organizing drive. Thus, in my opinion, there is simply no need for this regulation; which makes its true purpose—to increase union membership rolls—that much more apparent.

As already noted, the regulation is known in the management community as the "ambush election" regulation. The NLRB has described the regulation as the "final rule governing representation-case procedures." It has been referred to as the "ambush election" regulation because the regulation reduces the timeframe of a representational organizing campaign by a labor union from approximately 40 days to as little as 10 days. The dramatically shorter timeframe is seen by employers as an "ambush" in that the employer is unprepared for and unable to effectively respond to the petition for representation in the very short timeframe mandated by the new regulation.

Though couched in terms of fairness and efficiency, the fundamental principle of the ambush election regulation is that it is far easier to win a campaign when the other candidate is unaware of the election. A companion principle is that if the other candidate is consumed by bureaucratic obligations for the period of the campaign, your chances of winning the election are nearly assured.

The fundamental flaw in these principles for the National Labor Relations Board is that they are in direct contravention to the letter and intent of the statute they are obligated to enforce.

Section 8(c) of the National Labor Relations Act<sup>2</sup> states that:

The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this (Act), if such expression contains no threat of reprisal or promise of benefit.

The statute clearly anticipates that employers, unions and employees have a right to communicate regarding the benefits of, or negative impact resulting from, union organizing drives. The U.S. Supreme Court has recognized that § 8(c) of the Act reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust and wide-open debate in labor disputes." *Chamber of Commerce v. Brown*, 554 US 60, 67–68 (2008). Similarly, our Supreme Court in *NLRB v. Gissel Packing Co.*, 395 US 575, 617 (1969) recognized that,

"An employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board."

The pragmatic impact of the ambush election regulation will necessarily infringe upon an employer's free speech right by virtually eliminating the opportunity of an employer to communicate his or her views regarding unionization with employees. Similarly, the legislative goal of stimulating a full and robust debate amongst employees regarding union representation is stifled, if not eliminated, by engineering a process for a representational election where the employee only hears one side of the debate—and is deprived of engaging in a full discussion with everyone involved in the debate.

At least one situation from my career representing management is illustrative of how vitally important it is that employers are able to tell, and employees are able to hear, a side of the story that is not being told by union organizers. In 2011 I represented an employer that was presented with a representation petition by the NLRB. In the course of the union's campaign, it had represented to the employees that their dues' obligations would be significantly less than what the union had reported it charged members on a federally mandated form unions are required to file with the U.S. Department of Labor. The employer then published the LM-2 form filed by the union with the government which established what the union *actually* charged for dues. Armed with this information and other information that was disseminated by both the union and the employer during the campaign the employees voted not to be represented by the union. I am convinced that the free exchange of information that took place during that campaign helped those employees make this very important decision. When unions and employers are able to join in free

<sup>2</sup>29 U.S.C. § 158(c).

and robust debate regarding unionization, the employees are able to learn more and are better able to determine whom they believe and whom they discredit. This debate will not happen under the ambush election regulation.

Indeed, upon the effective date of the ambush election regulation, labor unions will be highly encouraged to organize by stealth without any bilateral debate. A labor union enjoys a distinct advantage in persuading employees regarding the benefits of union membership without the employer's knowledge of their effort because the employer is then unaware of any reason to communicate its views on the subject and is unable to rebut arguments that it is unaware of. The union is thereby in a posture to campaign toward an election that the employer is unaware of. In this way, the regulation very much mirrors the Employee Free Choice Act, which would have limited employers' abilities to communicate to employees because of its card check provision.

Ultimately, the employer becomes aware that an organizing campaign has been underway by the same mechanism existing under the current regulations: the employer will receive a copy of a petition for a representational election, and the election may occur in as little as 10 days after. The employer and employees are then at a distinct disadvantage. Moreover, as set forth in detail below, the burdens upon the employer from that point will be dramatically more difficult to accomplish at every successive step of the process.

## II. THE INITIAL HEARING AND STATEMENT OF POSITION REQUIREMENTS ARE UNDULY BURDENSOME

By way of illustration, the following scenario will confront employers under the Board's "ambush" election regulation. It is important to recall in reviewing this testimony that the median number of employees in a bargaining unit petitioning for representation before the NLRB from 2004 through 2013 was 23 to 28.<sup>3</sup> Employers who employ this volume of employees, in my experience, do not retain in-house counsel—much less counsel with experience practicing before the NLRB. Indeed, most of the employers whom I have served of this relative size were unfamiliar with any attorneys who focused on, or merely had experience practicing law before, the NLRB. As such, the first task facing an employer who desires to respond appropriately to a representational petition is the task of locating and retaining competent counsel. An ordinary timeframe for that task, in my experience, is approximately 3 business days (if the petition was filed on a Friday and/or holiday weekend that could extend the period to 5 or 6 calendar days.)

Under the final rule, the NLRB will schedule a representational hearing within 8 calendar days of the date the petition is filed. The day before the hearing the employer must present a Statement of Position articulating, *inter alia.*, **all** of the possible legal arguments it desires the NLRB to consider regarding the petition.<sup>4</sup> This Statement of Position is, for all intents and purposes, a legal brief—a combination of factual and legal analysis—which is an outrageous requirement to ask of employers, and particularly those small employers who do not have legal counsel. Worse, if the employer fails to include a particular argument in the Statement of Position, those arguments are **waived, meaning that the employer will not be able to raise them at the hearing.** Clearly, this raises serious due process concerns and is another example of how the rule stacks the deck in favor of labor unions.

There are 13 types of information and/or positions the employer is required to gather and present in the 7 days following a petition. A quick review of these 13 categories demonstrates how incredibly difficult it will be for employers—and particularly small employers—to provide such information to the Board in such a short timeframe. They are:

1. **Whether the employer agrees that the NLRB has jurisdiction.** This is a legal issue that an employer or lawyer unfamiliar with the Act would need to research.

2. **Whether the employer is in "interstate commerce" as defined by the Act.**

3. **Whether the employer agrees with the proposed bargaining unit.** This answer requires a legal analysis of the description and the propriety of the types of employees [statutory employee or supervisory] who are described.

<sup>3</sup> 79 Fed. Reg. at 7377 n. 46.

<sup>4</sup> The scope of issues which a hearing officer would consider at the hearing is not precisely defined, in part, because the necessary form the Respondent—or Employer—would be required to complete identifying the issues has not been published. The regulation anticipates the publication of a "Statement of Position" form. However, to date, one has not been available.

4. **If not, the basis for the employer's contention that the unit is not appropriate.** This response requires a blended factual and legal argument focused on the type of work accomplished by the individuals who work within the described unit and a legal basis establishing why certain employees should not be included, certain locations should not be included, or why the unit should be expanded to include other employees.

5. **Description of the most similar unit that the employer concedes is appropriate.** This response would require the employer to describe a unit of its own making that is "most similar" to the unit described by the union and **admit** that the unit is appropriate, again, precluding the employer from challenging the propriety of the forced admission of an "appropriate" unit.

6. **Identify any individuals occupying classifications in the petitioned for unit whose eligibility to vote the employer intends to contest and the basis for each such contention.** To respond to this would be practically impossible in a large unit. Employers can object to the inclusion of workers being included in a unit for a variety of reasons. They may be supervisors, employed by contractors, professionals, or meet other descriptions. Given the cumulative obligations of the final rule, and the absence of a real opportunity to investigate, this burden is unrealistic and not likely to be complied with in any but the most modest of proposed units.

7. **Raise any election bar.** This response will require legal analysis and factual analysis involving previous union representation at the facility or past representational election history.

8. **State the employer's position concerning the type, dates, times and locations of the election and the eligibility period.** This response requires an understanding of what the final unit will be. The unit may involve two or more locations of an employer's business and where that issue is not resolved, an employer will be precluded from making a predictive or useful response.

9. **Describe all other issues the employer intends to raise at the hearing.** This response requires a comprehensive factual and legal identification of any objection or issue the employer **could** articulate and if it fails to do so, the issue is waived. This aspect of the required position is the single most unrealistic and unjust of the requirements of the position statement.

10. **Name, title, address, telephone number, fax number and e-mail address of the individual who will serve as the representative of the employer and accept service of all papers for purposes of the representational proceeding.** This response will ordinarily require retention of counsel or a representative.

11. **Full names, work locations, shifts and job classification of all individuals in the proposed unit.** Beyond being a laborious task (for example, many non-union represented employees do not have job "classifications") § 102.63(b)(iv) will require the employer to disclose the employees' telephone numbers, home addresses and e-mail addresses. This disclosure subjects employees, at a minimum, to the inconvenience of potentially unwanted and uninvited emails, telephone calls and home visits from union organizers. However, given the unsavory history of labor organizing, the risks associated with divulging this personal information are greater.

12. **Full names, work locations, shifts and job classifications of all individuals in the most similar unit the employer concedes is appropriate.** As with No. 5 above, this section requires the employer to identify and concede the propriety of the "most similar" unit to the unit identified by the petitioning union. Not only is the concession required, but an identification of the employees, their shifts and classifications is required.

13. **The list of names shall be alphabetized and in an electronic format approved by the Board's Executive Director unless the employer certifies that it does not possess the capacity to produce the list in the required form.**

Cumulatively the obligations recited above are in and of themselves onerous given the allotted time for a response; but two specific factors exacerbate the situation. First, the Statement of Position must be presented at the representational hearing which must occur within 8 calendar days. During this time, the employer would have to retain counsel, research and review all of the information mandated, as well as prepare witnesses to testify to support its factual allegations. This scenario is untenable.

The second reason is that during the period it is preparing this information, it is presumed that the employer is, of course, simultaneously: (1) continuing to operate its business; and (2) exercising its rights under § 8(c) of the Act to communicate with its employees regarding the petition to further the robust and full debate that is the goal of the statute. Under the ambush election regulation, the reality is that neither is likely to happen. Instead, the employer will be so consumed with

populating the Board's file regarding the petition that its ability to operate its business and its right to communicate with its employees will be at best frustrated if not flatly eliminated by the requirements of the regulation.

### III. THE VOTER ELIGIBILITY LIST RAISES CONCERNS FOR BOTH EMPLOYERS AND EMPLOYEES

But the employer's obligations do not end there. Within **2 days** of the receipt of a direction of election, which should follow the hearing in rapid fashion, the regulation requires the employer to produce a final voter eligibility list. The list,<sup>5</sup> in many respects, is anticipated by the Statement of Position, but here the regulation is very clear that the list must contain the employees' home address, telephone number, and e-mail address. This information currently is not required to be produced under NLRB regulation. This sensitive and personal information must be provided regardless of whether the employee authorizes its production. I have personally been involved in cases in which union officials engaged in violence when they did not get what they wanted, so I understand why divulging this sensitive information raises serious privacy concerns for employees.

For employers, the 2-day turnaround time will be very difficult to satisfy. Most employers, but especially small employers, do not have large Human Resources department staffs and often rely on one person to perform all HR functions. The task of assembling the voter eligibility list will likely fall on the shoulders of this individual who will also likely be occupied performing their daily activities: administering payroll, interviewing job applicants, processing FMLA requests, meeting with benefit vendors, etc. And what if this individual is out of town or otherwise unavailable during this 2-day period for illness, vacation, a funeral or training? Then the employer may be out of luck, and submitting an inaccurate or untimely voter eligibility list could be grounds for overturning the election results.

The regulation also eliminates the 25-day limitation on the scheduling of an election. Currently, the NLRB prohibits the scheduling of an election for at least 25 days after the issuance of the regional director's decision and direction of election in order to allow time for the Board to review any subsequent appeal. Further, the parties may currently seek review of a regional director's order of an election as of right on a variety of legal determinations such as who the eligible voters will be and what the proper bargaining unit voting will be. Under the final rule, there is no pre-election review as of right and the regional director is free to order an immediate election within his or her discretion as the 25-day period has been removed. Theoretically, the regional director could direct the election to take place the day after the hearing, or, only 10 days after the petition was filed. The elimination of this 25-day period pragmatically eliminates the possibility of an employer campaign, to the obvious detriment of employers, but also to the detriment of employees, who will only hear one side of the story.

### IV. CONCLUSION

The sum and substance of this regulation is that it:

(1) Makes it highly unlikely an employer can obtain legal advice to compile and present mandatory positions within the maximum 8 days between a representational petition and representational hearing;

(2) Simultaneously frustrates or prohibits the employer from operating its business while it is gathering and preparing the mandatory statement of position;

(3) Denies the employer meaningful review of pre-election legal determinations by a regional director; and

(4) Frustrates or prohibits the employer from exercising its § 8(c) rights to communicate with its employees prior to the election.

However, as onerous as the regulation is to employers, it is most damaging to employees. Employees, seemingly by design, are likely to receive only the union's perspective in an organizing campaign instead of the full and robust debate of the issues anticipated by Congress in creating the Act. They will be compelled to make this profoundly important decision on the basis of "half" of the facts in direct contravention to the purposes and policies behind the law. Moreover, in the process, their privacy rights will necessarily become diluted and the risks attendant to that status will multiply. The "level playing field" that Congress has sought to preserve in the area of labor relations will be abandoned in a plain effort to provide labor unions with the upper hand, and this imbalance will be the work product of a regulatory agency without any involvement by Congress itself.

<sup>5</sup>This list of employees is commonly called the "Excelsior" list.

For the reasons described above, the Chamber opposes the NLRB's ambush election regulation. Mr. Chairman and members of the committee, we thank you for the opportunity to share some of those concerns with you today. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division, if we can be of further assistance in this matter.

The CHAIRMAN. Thank you, Mr. Carter.  
Ms. Milito.

**STATEMENT OF ELIZABETH MILITO, SENIOR EXECUTIVE  
COUNSEL, NATIONAL FEDERATION OF INDEPENDENT BUSI-  
NESS (NFIB) SMALL BUSINESS LEGAL CENTER, WASH-  
INGTON, DC**

Ms. MILITO. Thank you. Good morning, Chairman Alexander and Ranking Member Murray and other members of the committee.

NFIB, the Nation's largest small business advocacy organization, appreciates the opportunity to testify about the impact on small businesses of the NLRB's new union election rule.

Today, employers in a small business contend with anti-discrimination laws, family medical and other protected leave laws, wage and hour laws, privacy laws, workplace safety laws, and labor laws. They often struggle to decipher the mysteries of overlapping and sometimes even conflicting Federal, State, and local laws.

The problem is compounded by the fact that small businesses generally don't employ a human resources specialist or attorney, or keep an outside counsel on retainer to advise the business owner.

Imagine, then, the challenge facing America's small businesses when it comes to understanding and complying with labor law. Holding a union election in as little as 10 to 14 days makes absolutely no sense unless the goal is to complicate the process and reduce an employee's chance to make an informed decision.

During my comments today, I want to emphasize the disadvantage that the small business owners face when it comes to responding to an election petition.

First, the abbreviated schedule and the new rule will make compliance exceedingly difficult for the small business owner, who will likely need to drop all other business duties to meet the NLRB deadlines. Without in-house expertise, small firms will need outside help, but finding help will take time. As Mr. Carter noted in his testimony, many employers can't name a single labor attorney. In fact, many NFIB members with whom I speak on a daily basis can't give me the name of a single attorney, period, much less a competent labor attorney.

Second, besides finding counsel who can handle the procedural and logistical issues associated with drafting and filing a Statement of Position within about 8 days, the employer really needs to develop and employ a strategy for communicating the business' position to its employees. Such communication is exceedingly tricky and fraught with landmines to the unskilled spokesperson. I can also assure you that the businesses with whom I work do not have any sort of anti-union inoculation program in place before an organizing drive starts. That's why NFIB has developed a guide in responding to a union organizing campaign. Our little handbook is no substitute for competent legal advice and learning about exactly what an employer can or cannot say during an organizing drive.

Communication with employees is a protected right of employers under the Act, and NFIB is very concerned that the rule's short timeframe will prevent employers from effectively communicating with their employees about the unionization process.

Finally, NFIB is also very concerned about requiring employers to disclose confidential information about employees to union organizers, including phone numbers and personal email addresses. Even assuming that the employer has this information, employees might have provided their employer with a personal email address, unlisted home phone number, or a personal cell phone number for emergency contact purposes only. Disclosing this information to a union organizer without the employee's consent would create a breach of trust and animosity on the part of employees and undermine employer-employee relations. This is particularly so in a small business, where the owner is often responsible for keeping personnel records and other sensitive information which the employee deems confidential.

Today, the union election process takes about 38 days, generally enough time for unions to make their case and for employers to make theirs, and for employees to have the information they need from both sides to make an informed decision. By issuing this ambush election rule twice now, the NLRB has on two occasions failed to demonstrate any need for change. The new rule will accomplish nothing more than the holding of elections at lightning speed while reducing employees' chances of making informed decisions about the issue. For these reasons, NFIB has objected to the rule.

Thank you for the opportunity to testify here today, and I look forward to answering any questions you might have.

[The prepared statement of Ms. Milito follows:]

#### PREPARED STATEMENT OF ELIZABETH MILITO

Dear Chairman Alexander, Ranking Member Murray and members of the committee, thank you for inviting me to testify today regarding the impact on small business of the National Labor Relations Board (NLRB) new union election rule. My name is Elizabeth Milito and I am senior executive counsel for the National Federation of Independent Business (NFIB) Small Business Legal Center.

NFIB is the Nation's leading small business advocacy association, representing members in Washington, DC, and all 50 State capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 350,000 independent business owners who are located throughout the United States and in virtually all of the industries potentially affected by these rules and decisions.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the Nation's courts through representation on issues of public interest affecting small businesses.

NFIB's national membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about \$500,000 a year. Roughly 15 percent of NFIB members employ 10-20 people and approximately 28 percent have 10 or more employees.<sup>1</sup> The NFIB membership is a reflection of American small business, and I am here today on their behalf to share a small business perspective with the committee.

<sup>1</sup><http://www.nfib.com/about-nfib/what-is-nfib-/who-nfib-represents> (last visited February 9, 2015).

Currently, small businesses in this country employ nearly half of all private-sector employees.<sup>2</sup> Small businesses pay 42 percent of total U.S. private payroll.<sup>3</sup> And small businesses generated 63 percent of net new jobs over the past 10 years.<sup>4</sup> Small businesses are America's largest private employer.

Today, small business owners contend with antidiscrimination laws, family, medical and other protected leave laws, wage and hour laws, privacy laws, workplace safety laws and labor laws. They often struggle to decipher the mysteries of overlapping, sometimes even conflicting, Federal, State and local laws. These laws and regulations also are expensive; according to the Small Business Administration, workplace compliance costs small business nearly 36 percent more, per employee, than it costs large businesses.<sup>5</sup>

The problem is compounded by the fact that small businesses often cannot afford human resources or legal departments to give them advice on the laws. Small business owners work hard to do what is right, but their informal and unstructured nature and more limited financial resources means that they sometimes require greater flexibility in creating policies and solutions. While changes to the Board's current rules on election procedures would affect businesses of all sizes, NFIB is primarily concerned about the impact on the country's smallest employers—those like the typical NFIB member who employs 10 people. When it comes to labor issues, NFIB's constituency is very unique as compared to most businesses represented by other trade and business associations:

- Very few NFIB members have a dedicated human resources professional.
- Even fewer, if any, NFIB members have a dedicated labor relations expert or in-house counsel.
- Typically all employment and labor matters are the direct responsibility of the small business owner.

Imagine, then, the challenge facing America's small businesses—the backbone of our economy—when it comes to understanding and complying with labor law. Suffice it to say that labor law is particularly difficult for a small business owner to understand. The current NLRB is changing the law by reversing precedential decisions, promulgating new rules, and expanding enforcement through increased penalties. And this is not new or unique to the current NLRB; with each new administration comes new direction at the NLRB. Even experienced labor lawyers struggle to keep up with an ever-changing legal landscape. It is doubly difficult for small business owners to understand the quirks and nuances of labor law, which sometimes can seem illogical and counterintuitive.

Today I will discuss how the NLRB's new election rule will impact small businesses. I will attempt to provide insight into how small businesses handle labor matters, and highlight some of the differences between how small business owners and large corporations operate.

#### THE AMBUSH ELECTION RULE

NFIB has 350,000 members across the country. They are honorable and fair employers, and they are troubled, confused, and scared by the decisions and rules coming out of the NLRB. Small businesses around the country cannot understand why the NLRB is trying to pass a wish list drawn up by organized labor. As I will discuss more below, few small businesses employ in-house counsel—leaving them to decipher complicated labor laws on their own. Holding a union election in as little as 14 days makes absolutely no sense unless the goal is to complicate the process and reduce an employee's chance to make an informed decision.

For this reason, NFIB has stood up for small businesses to challenge the actions of the NLRB. The Board's new ambush election rule will significantly undermine an employer's opportunity to learn of and respond to union organization by reducing the so-called "critical period," from petition filing to election, from the current median of 38 days to as few as 14 days. NFIB objected to the first version of this ambush election rule when it was issued in 2011. The 2011 rule was subsequently struck down by a Federal court, which noted the current election process allows enough time for unions to make their case and for employers to make theirs, after which employees have the information they need to make an informed decision. By

<sup>2</sup>[https://www.sba.gov/sites/default/files/FAQ\\_March\\_2014\\_0.pdf](https://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf) (last visited February 9, 2015).

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>Impact of Regulatory Costs on Small Firms, [https://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20\(Full\).pdf](https://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full).pdf) (last visited February 9, 2015).

issuing the identical rule again last year, NLRB completely abandoned its role as a neutral arbiter between employer and employee—and instead created a rule that makes unionization easier with a devastating cost to America’s job-creators.

Our Nation’s labor law was conceived for the purpose of protecting the free flow of commerce by encouraging collective bargaining to avoid disruptions. Under the 76-year-old National Labor Relations Act (NLRA), bargaining about employees’ terms and conditions of employment can only occur between employers and labor organizations chosen by employees to be their representatives. The starting point for representation is employee choice. Choice is the act of selecting freely following consideration of options. Section 8(c) of the NLRA encourages “free debate on issues dividing labor and management.” For an employer to engage, it must first become aware. As Canadian experience proves covert union campaigning results in significantly higher rates of union representation over an open exchange of views by both the union and the employer to inform employees and respond to issues raised.<sup>6</sup>

In its written comments in both 2011 and 2014, NFIB requested that the Board consider small business’ lack of experience, knowledge, and resources to defend their interests regarding labor law process and procedures. The Board ignored NFIB’s comments and proceeded with its rule. As a result, employee-informed choice and due process notice and hearing required by the NLRA’s Section 9 will be compromised, particularly in small businesses that lack labor relations expertise and in-house legal departments.

For a small business owner, nothing is a substitute for more time. Small-business owners are legally bound to follow, and therefore to know and understand, every rule and regulation that impacts them. That includes the differing requirements promulgated by every jurisdiction in which they operate. As a practical matter, this presumption is fiction. No small-business owner, let alone a reasonably large staff of experts, can recognize, understand, and implement the thousands of pages of rules that they must obey. Further, this continuing task must be undertaken while operating a business well enough to make its continuation worthwhile.

Despite a legal presumption that is impossible, most small business owners make a good faith effort to comply with all regulations and laws. So without in-house expertise, small firms will need outside help but finding help can take time. Because of the time it might take to find counsel, it is imperative that small businesses be able to request a postponement of the pre-election hearing and maintain the status quo with regards to the election timeframe.

Unfortunately, the abbreviated schedule in the new election rule will make compliance with pre-election procedures—including the labor intensive project of producing a preliminary voter list with detailed information about each voter—exceedingly difficult for the small business owner who will likely need to drop all other business duties to meet NLRB deadlines. And the short timeframe will lead to more errors in election procedures by all parties and make it more likely that objections will be filed and elections set aside. As crafted, the NLRB’s rule deprives employees of making an informed choice, strips small businesses of due process, and compromises employee rights as set forth in the NLRA. In contrast, the current union election process takes a median of 38 days—generally enough time for unions to make their case and for employers to make theirs, and for employees to have the information they need to make a fully informed decision.

The new rule does not properly balance the rights of employees, employers, and labor unions in the pre-election period, and the shortened timeframes deprives employers of their due process rights under the Act. For those employers receiving petitions, the new rules would be virtually impossible to navigate without hiring specialized legal counsel on an emergency basis. Between preparation of a Statement of Position, dealing with required notice posting and managing the tasks necessary to prepare for an election, small entities will be running up significant legal fees at an alarming rate. Despite the NLRB’s repeated contention the rule would reduce litigation, its lack of clarity, compressed timeframe, and shifting of administrative burdens to employers is much more likely to increase litigation and, therefore, expense.

This short timeframe will also not provide small business owners with adequate time in which to obtain legal assistance and lawfully inform their employees of the consequences of choosing union representation. Communication with employees is a protected right of employers, and NFIB is very concerned that the rule will prevent employers from effectively communicating with employees about the unionization process.

<sup>6</sup>Chris Riddell, “Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978–98” 57 *ILR Rev. No. 4*. (2004), p. 498.

NFIB is also very concerned about the new rule requiring employers to disclose confidential information about employees to union organizers, including phone numbers and email addresses. Even assuming that the employer has this information, employees might have provided their employer with a personal email address, unlisted home phone number, or a personal cell phone number, for emergency-contact purposes only. Disclosing this information to a union organizer without the employee's consent would create a breach of trust and animosity on the part of employees and undermine employer-employee relations. This is particularly so in a small business where the owner is often responsible for keeping personnel records and other information, which the employee deems confidential.

NFIB also objected in its written comments to the NLRB's decision to limit the scope of pre-election hearing issues. The new rule will limit the pre-election hearing to determine only whether a question concerning representation exists. This means that many issues of voter eligibility, including supervisor status, would be deferred to post-election procedures. As a result, employees would vote in an election without knowing which employees will ultimately make-up the bargaining unit. And some employees who vote might be found ineligible to be part of the bargaining unit. For small businesses, deferral of issues essentially means waiver and defeat. A small business simply cannot afford on-going litigation and legal fees.

To ensure due process in representation case matters, Congress amended section 9 requiring the Board to investigate each petition, provide an appropriate hearing upon due notice, and decide the unit appropriate. With the Board's new election rule, NFIB believes that employee informed choice and due process notice and hearing required by Section 9 of the NLRA will be compromised, particularly for small businesses that lack labor relations expertise and in-house legal departments.

#### CONCLUSION

Today, the union election process takes a median of 38 days—generally enough time for unions to make their case and for employers to make theirs, and for employees to have the information they need to make a fully informed decision. By issuing this ambush election rule twice, the NLRB has, on two occasions now, failed to demonstrate any need for change. The new rule will accomplish nothing more than the holding of elections at lightning speed, while reducing employees' chances of making informed decisions about the issues. For all these reasons, NFIB has repeatedly objected to the rule and has now challenged the issuance of the rule in Federal court.

NFIB looks forward to working with the committee on this and other workplace issues important to small business and thanks the members for their time today.

The CHAIRMAN. Thank you, Ms. Milito.  
Ms. Sencer.

#### **STATEMENT OF CAREN P. SENCER, ESQ., SHAREHOLDER, WEINBERG, ROGER & ROSENFELD P.C., ALAMEDA, CA**

Ms. SENCER. Chairman Alexander, Ranking Member Murray, and members of the committee, thank you for this opportunity to testify about the National Labor Relations Board's rule to streamline and modernize election procedures.

I have brought exposure to the NLRB representation process and have assisted clients in well over 200 representation petitions, with direct involvement in 27 petitions in the last year alone.

The Board's first and utmost concern should always be the rights of workers seeking to use its process. The Board's efforts to update its election procedures to conform to modern technology and existing practice furthers this purpose.

In my view, the Board's rules are not radically different than the status quo. They reflect an attempt to standardize some of the best practices and create consistency among regions.

The rules reduce unnecessary delay, simplify the procedure, and provide more notice of the process while maintaining rights for review. This will save time and money for employers, unions, and the

government, while promoting the ability of employees to exercise their right to vote.

When an employer does not voluntarily recognize a union, the representation process starts with the petition being filed. A hearing is set for somewhere between 7 and 12 days. By requesting an extension supported by the thinnest of excuses, the hearing is postponed up to a week. During this time, while the employer is claiming it's trying to figure out which employees should be in the bargaining unit, the employer's anti-union campaign continues and goes into full swing. It is not uncommon for employers to have anti-union consultants talking to workers within 48 hours of a petition being filed.

Meanwhile, the region is attempting to mediate a stipulated election agreement. A stipulated agreement resolves all or nearly all issues without a hearing and, like most mediated resolutions, involves compromise. But because the current hearing process is regularly exploited, the compromising party is almost always the union.

The alternative to the agreement is a hearing, which may take a number of days, closing briefs a week later, and another week to 1 month until the regional director issues a decision and direction of election. This is followed by 25 days to seek review. The election takes place 65 days or more after the petition was filed. Based on this reality, unions often concede to the demands of the employer for a unit to be defined in a particular manner, and for the election to be held when the employer wants.

The NLRB's rules neutralize some of this leverage by eliminating opportunities for unnecessary litigation. The new Statement of Position form will focus hearings. A decision would issue faster because post-hearing briefs would be reserved for only complicated and novel cases. Briefs are not necessary in the vast majority of cases, which raise either a question of supervisory status or community of interest, two areas of settled Board law. The 25-day delay for pre-election review would be eliminated, but each party would retain the right to file a request for pre-election review or could choose to seek review as part of the post-election procedure if an issue still needs to be resolved.

When a petition goes to hearing, the election would be about a month later rather than two. The employers call this an ambush, but that's overly dramatic. Some elections would undisputedly be held sooner, but not in the 11 days some employers and trade associations have suggested. For that to occur, the petition would have to be filed on a day other than a Friday, the regional director would have to issue the decision and direction of election the day the hearing is held, and the union would have to waive all of the 10 days it's entitled to review and utilize the voter eligibility list. This series of events is extremely unlikely.

The employers also claim ambush in completing the Statement of Position form as some may not have counsel or other experienced staff available to respond. Most employers have some type of counsel and participate in at least one trade organization that can quickly put them in touch with labor counsel.

More importantly in my experience, nearly all employers have knowledge of a union organizing campaign prior to the filing of the

petition. The process should not cede workers' rights to a prompt election because of the employer's failure to act.

I'd like to use an example from my practice of how the new rules would make a position difference. Last year, a union petitioned for a unit of a single job classification. The employer asked to reschedule the representation hearing. The day before the rescheduled hearing, it was clear there would be no stipulation as the employer sought to double the size of the proposed bargaining unit. The employer informed the region it would not appear at the hearing. The union still had to appear and provide testimony about its labor organization status, the Board's jurisdiction, and the propriety of the proposed unit, which was presumptively appropriate.

The decision and direction of election issued a month later and included a 25-day waiting period for potential review, notwithstanding the employer's refusal to participate in the process. The employer then delayed in agreeing to a date for an election. Sixty-seven days passed between the filing of the petition and the election.

If the rules were in place, the continuance of the hearing would likely have been denied. Upon the employer's failure to appear, the regional director could have issued a decision without hearing testimony. The employer would have had 2 days to produce the voter eligibility list. If the rules were in place, the election would have been held around 46 days after the petition was filed. An employer argument that 46 days of an ambush is simply not compelling.

I would be happy to answer any questions, and I hope my experience with the Board's procedures is helpful to this committee.

[The prepared statement of Ms. Sencer follows:]

PREPARED STATEMENT OF CAREN P. SENCER

Chairman Alexander, Ranking Member Murray, and members of the Committee on Health, Education, Labor, and Pensions, thank you for this opportunity to testify about the National Labor Relations Board's rule to streamline and modernize election procedures.

I am a partner in the law firm of Weinberg, Roger and Rosenfeld based in Alameda, CA. Our firm, small by management standards, is one of the Nation's largest representing unions, working people and their institutions, including trust funds and apprenticeship programs. Our client base includes unions representing public and private sector, construction, agriculture, service and white collar workers. We are proud to represent some of the largest and smallest unions in California, and our work extends through most of the western States.

I have been with the Firm full-time since my 2004 graduation from the University of California, Berkeley School of Law. While at Berkeley, I served as the editor in chief of the Berkeley Journal of Employment and Labor Law. Prior to law school, I earned my Bachelors of Science at the New York School of Industrial and Labor Relations at Cornell University.

In my current work, I have had broad exposure to the NLRB representation process and have assisted clients in over 200 representation petitions with direct involvement in 27 petitions in the past year alone. The petition and Board conducted election is the statutory method for recognizing, through a democratic process, the existence of a collective bargaining representative.

The National Labor Relations Act is a recognition that business of our country flows more freely, and our economic system works better, when workers have the protection of the Act to join together to form unions for their collective good. The Act was and remains a response to strikes and other disruptions to commerce. Updating the election procedure rules to conform to modern technology and existing practice does not alter the purpose of the Act but rather streamlines procedure and furthers the purpose of the Act by providing more and clearer information to workers.

For the Act to be effective in its goal of protecting workers, the Board must do more than adjudicate or attempt to mediate disputes between employers and unions. The Board is charged with protecting the rights of employees to organize. Its first and utmost concern should always be the rights of workers seeking to use its process to establish, change or disestablish a collective voice in the workplace. That process should be easily understood and accessible. If something creates a barrier to free choice and self-organization, it should be rejected or modified.

To put the Board's new rules in context, let me first explain the basic election procedure under the current rules.

The representation process formally starts by a union filing a request for representation. The request is made in writing, using a provided form, and must be accompanied by a showing of interest that the union is authorized by at least 30 percent of the proposed unit to represent the employees for collective bargaining. This seems straightforward, but jockeying for tactical advantage quickly begins.

The Board operates out of 26 regional offices. Each regional director has the authority and discretion to operate her region as she sees fit. This currently includes when the showing of interest must be submitted to process the petition, when to set petitions for hearings, when to grant continuances, when and how subpoenas are issued, and when to extend filing deadlines. Practitioners are not generally aware of these variances between regional practices.

In most regions, a hearing will be initially scheduled between the 7th and 12th day after a petition is filed. Employers request and are routinely granted a continuance of up to a week. If the hearing is held, it may last several days, and the parties are given the opportunity to file a closing brief 1 week (or more) later. The record is thus closed, at the earliest, approximately 3 weeks after the petition is filed. The regional director then issues a Decision and Direction of Election or an order dismissing the petition.

This generally takes at least 2 weeks but can take significantly longer. The election is directed no earlier than 25 days after the regional director's decision, in order to allow either party an opportunity to seek pre-election review from the Board, even though the Board is not required to rule on the request for review prior to conducting the election and these requests are rarely granted. As a result, in cases where there is no stipulation and a hearing is held, the election is not held until a minimum of 65 days, and often longer, after the petition is filed.

The current system provides many opportunities for employers to delay the process. This puts enormous pressure on the union to agree to unreasonable demands from the employer regarding the composition of the bargaining unit and other issues. Under the current system, the employer can force a hearing solely for delay purposes to resolve issues not relevant to whether there is a question concerning representation requiring an election. This delays an election weeks and sometimes months, because the regional director does not have the authority to refuse to take evidence in the absence of dispute requiring resolution. By threatening to delay the election, the employer will often force the union to accept concessions to remove or add workers to an already appropriate unit, to include supervisors in the unit, to agree to a disadvantageous election day or other procedures that the employer believes are advantageous.

In many cases, the parties are able to stipulate to the scope of the bargaining unit and to the time and place for the election because of the efforts of the region to apply the Board's goal of an election being held within 42 days of a petition being filed. Most employers insist upon the 39th, 40th, or 41st day for an election. The union has no choice but to agree to this delayed election because, if the matter goes to a hearing without a stipulated election, the hearing will inevitably result in delay of the election for at least several weeks beyond the 42nd day. This is true even when there is no actual dispute between the parties as to the scope of the appropriate unit. The threat of delay by litigation throughout the petition procedure skews the pre-election process.

The NLRB's new rules take important steps toward reducing the opportunity for unnecessary delay. The regions would be permitted to grant an extension from the hearing date, normally scheduled for the 8th day after the petition is filed, only under special or extraordinary circumstances.

The hearing would be focused based on the petition and the responding party's written statements (statement of position form), due the day before, which would require: all parties to take a position on the appropriate unit; if there is a dispute on the unit description, an explanation of why the alternatively proposed unit is appropriate and the originally proposed unit is not; the appropriate time, place, and date for an election; and, confirming basic jurisdictional issues. The only issues to be addressed at the hearing would be those that truly present a dispute between the parties. And, based on the discretion of the regional director, some issues that

affect only a small percentage of potential voters could be postponed for resolution until after the election if the issue is still relevant. The hearing officer, at the direction of the regional director, would solicit offers of proof to determine whether the issues in dispute involve factual questions requiring introduction of evidence.

Written briefs would not be a matter of course but rather would be allowed only by special permission, for example, in complex cases. Most cases involve only one or two issues, and they are typically the same issues regarding supervisory status and community of interest.<sup>1</sup> As a result, oral closing arguments would become the norm, thus eliminating up to 2 weeks of delay caused by waiting for transcripts and subsequent briefs to be filed. Not only would this continue to create a complete record, but it would reduce the expense for all parties and allow regional directors to start their decisionmaking process sooner.

The NLRB's rule also eliminates the requirement of filing a pre-election request for review to the Board and instead allows for all appeals to be consolidated into a single post-election process. This would allow not only for prompt elections but would also allow both parties to retain the full right to request review. This creates efficiency by allowing parties to litigate, through the post-election review process, only those issues that remain relevant after the election. In contrast, under the current practice, elections are delayed for at least 25 days after a Decision and Direction of Election to allow the parties to seek pre-election review. This would bring the Board's rules in line with most other administrative agencies and courts where interlocutory appeals are discouraged.

Each of these changes to the pre-election procedure will likely reduce the number of hearings involving the presentation of evidence since there would need to be an actual dispute involving a question of fact for the regional director to receive evidence. The employer's leverage to push the union into the 42d day for an election is restricted in the absence of a true representational dispute. If the only issue between the parties is the appropriate date for an election, the regional director could rely on the statement of position form of the employer and the direction in the new rules to schedule the election for as soon as practicable and could set the election date without taking evidence. This would, of course, take in to consideration the requirement of posting a notice at the job site explaining the election process, time for the employer to produce the *Excelsior*<sup>2</sup> list and time, if not waived, for the union to use the list to contact employees away from the work site.

Eliminating delay serves the purposes of the National Labor Relations Act in promoting employee free choice. Employers will benefit because it will reduce the time period during which employees are distracted by the campaign and upcoming election. The new streamlined process will be less expensive for both the employer and the union and will be easier and more consistent for the Agency to administer. It is difficult to see how anyone is disadvantaged by eliminating unnecessary litigation and unnecessary delays before employees can exercise their free choice through the democratic election process.

These new procedures will equally apply to petitions that management can file to resolve a dispute about whether the union either initially or continues to represent a group of workers. This is the RM procedure permitted by Board rules. And the new procedures will apply to petitions filed by workers who wish to decertify an incumbent union. This is the RD procedure. The management community has not pointed to any reason why those procedures should not be modernized and streamlined.

The rules are not ground breaking, nor, to be perfectly frank, do they go far enough. The rules reflect practices that have been applied in some regions already and are not particularly controversial. Most of my practice is in the seven regions on the west coast. From my experience, representation hearings are regularly scheduled to be held 7 days after the petition is filed. Under the rules, this would be extended to the 8th day. Petitions are currently accepted by fax as long as the original signatures on the showing of interest are received by the regional office within 48 hours of the submission. Under the new rules, petitions may be filed electronically and the original showing of interest would have to be filed simultaneously with the petition.

When there is a dispute over scope of the bargaining unit, but the number of employees in the disputed classifications represents a small percentage of the unit, regional directors regularly approve stipulations for election allowing employees in the disputed classifications to vote subject to challenged ballots. The rule would leave

<sup>1</sup>The Board has issued several manuals and guides to the representation process which are available on its website, to explain both the process as well as substantive approaches to representation issues.

<sup>2</sup>*Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

the discretion with the regional director to approve a stipulated election agreement with some disputed classifications or positions but would not set a strict threshold and would add the discretion to decline to take evidence *pre-election* if there is only a limited dispute that is not relevant to whether a question of representation exists requiring an election and is not likely to affect the outcome of the election.

The above examples show how the rules simply codify existing best practices. By standardizing the regions' best practices, the new rules promote predictability and efficiency and reduce the opportunity to manipulate the procedure. Many employers have accepted these practices although they use the threat of litigation to extract concessions on the composition of the unit and the date of the election because they know the union wants to avoid a lengthy hearing process. It is very likely that, under the new rules, unions and employers will continue to stipulate to elections, and very few cases will actually go to hearing. The difference is that the discussions about what to stipulate to will take place in a context where employers will not have multiple opportunities to force delay. This will help to level the playing field.

I would like to give a few examples from my practice of how the new rules would have made a positive difference.

In the first case, the union petitioned on January 31, 2014, for a small unit that included all employees within a distinct job classification. The employer, a subcontractor of the Federal Government, is experienced in labor-management relations and had, at the time, six collective bargaining agreements with the international union who filed the petition. The employer asked for an extension of time to hold the representation hearing—"The parties are sure to stip," said the representative. The day before the rescheduled hearing, it was clear that there would be no stipulation because the employer sought to add an additional job classification, doubling the size of the proposed bargaining unit. The employer also informed the region that it would not be appearing at the hearing scheduled for the following day. The union still had to appear and provide testimony about its labor organization status, the Board's jurisdiction over the employer, and the propriety of the proposed unit which, under Board law, is a presumptively appropriate unit. That was February 12. The Decision and Direction of Election issued on March 11. It included the mandatory 25 day waiting period to allow the parties to seek review notwithstanding the employer's refusal to participate in the process. The employer then delayed in agreeing to a date for the election. The employees filed their petition on January 31. They finally had an opportunity to vote for union representation on April 7. Sixty-seven days passed between the filing of the petition and the election even though the employer did not raise *any* issue in the pre-election hearing.

If the rules were in place, it is questionable whether the continuance of the hearing would have been granted. If the employer had failed to submit the statement of position and failed to appear on the day of the noticed hearing, the regional director could have issued a Decision and Direction of Election without taking evidence. The employer would have had 2 days to produce the *Excelsior* List. Given the size of the unit, the union would likely have waived the right to a full 10 days with the *Excelsior* List. If the rules were in place, the election would have been held around March 10. Only 46 days would have passed between the filing of the petition and the election. The employees would have been able to exercise their right to vote 21 days earlier.

As another example, in 2010 a client filed a petition for a unit of approximately 45 automobile mechanics. Despite well-established Board law that automobile mechanics constitute a traditional craft unit that is presumptively appropriate, the employer insisted on a hearing where it took the position that service writers must also be included. The service writers would have constituted more than 20 percent of the unit. A hearing was held 2 weeks after the petition was filed. I did an oral closing. The employer requested and was provided with an extension to file a post-hearing brief. In its brief, the employer abandoned its position that the only appropriate unit needed to include the service writers. As a result, there were only 6 positions (representing less than 15 percent of the unit) in dispute. The regional director issued a Decision and Direction of Election 2 weeks later. The election was directed in the unit for which the union had originally petitioned. The election was set for 26 days later. On the 14th day after the Decision and Direction of Election issued, the Employer filed a Request for Review of the Decision of the regional director.

The election was held 78 days after the petition was filed. The employer filed objections to the election. The hearing on the objections was set for a month later and was held over 2 non-consecutive days. The second day was set for the employer to produce witnesses who had not been available the first day of the hearing. Those witnesses were not produced on the second day and the employer disingenuously bought additional delay. The Employer filed a closing brief a week later. One-hundred and sixty-two days after the petition was filed, the Administrative Law Judge

issued his recommended decision overruling each of the employer's objections and directing the challenged ballots to be counted. The number of ballots to be opened and counted was insufficient to affect the outcome of the election. The employer took exception to the report of the Administrative Law Judge. The Decision from the NLRB was issued 9 months later. Four-hundred and twenty-seven days after the petition was filed, the union was certified .

The rules, in addition to requiring the employer to commit to a position in writing regarding the service writers, would have reduced the time it took from the filing of the petition until the election. If the employer had retreated from its position regarding the service writers prior to the opening of the hearing, the remaining disputed positions would have likely voted subject to challenge, and the challenges would have been resolved through a post-election hearing scheduled for 21 days after the tally of ballots. The hearing would have been held on consecutive days—not 34 and 44 days later. The Board would have had the discretion to deny review of the decision regarding the challenged ballots as it was insubstantial and did not raise any issue or general importance. Such discretion would likely have substantially reduced the 9-month delay at the Board. Applying the rules, the time between petition and certification would have been reduced to around 141 days.

As is clear from these examples, the rules will unquestionably reduce the time between the filing of a petition and an election while providing more fairness and certainty to the process.

Employers complain that the new rules will rush elections and deprive them of a full opportunity to give their views on unionization to employees. The timing issue is a red herring. I have been involved in elections under the California Agricultural Labor Relations Act where, by statute, elections are conducted within 7 days of the filing of the election petition.<sup>3</sup> That process seems to run smoothly. The employers, their representatives and the Agricultural Labor Relation Board have adapted to the statutory mandate of elections within 7 days, a provision which has been in place since the statute was enacted in 1975. Employers mount full anti-union campaigns, and the persuaders who work in this field have tailored their message to the amount of time provided. So too will employers adapt here—although to be clear, nothing in the rules suggests that elections will take place anywhere near as quickly as under California's Ag Act.

Additionally, employers who want to mount an anti-union campaign have plenty of opportunity to do so—their opportunity is not limited to the period after the union's petition is filed. In virtually all the cases where clients have filed election petitions, the employers have been well aware of the organizing efforts prior to the filing. In many cases, employers have already started their overt anti-union campaign. In some cases, they have made a tactical decision, notwithstanding the organizing campaign, to wait to see if a petition is filed. They often wait until the last weeks before the election to mount their campaign.

Many employers have anti-union inoculation programs in place which seek to influence employees from the date of hire and throughout employment on a regular basis regardless of whether or not the employer has ever been a target of union organizing. In my experience, virtually every employer is aware of any union organizing effort and can begin its campaign, if it chooses to engage in one, long before any petition is ever filed or an election is set.

Finally, on the timing issue, the employer community generally asserts that its First Amendment right would be impeded by a shorter period between the filing of petitions and holding elections. There is no First Amendment law that supports the idea that employers are allowed, as a constitutional matter, the right to more extensive campaigning. They have had the right to campaign for a union-free workplace from the day each worker is hired and the processing of a petition for an election doesn't change that.

Finally, for the Board's election procedures to be effective, they must keep pace with technology and development. Several of the new changes simply adapt the Board's rules to reflect new technology and forms of communication. Very few businesses operate without computer systems and email. Electronic communication has become the norm. While the Federal courts have moved exclusively to electronic filing with electronic signatures, the Board allows electronic filing of only certain documents and, prior to the new rule, had not allowed for electronic filing of petitions or showings of interest. Now that can be done electronically. This is hardly radical.

Since the 1960s, employers have been required to provide the names and home addresses of employees in proposed bargaining units to the region under the *Excelsior* List rule. In the last decade, the list is always typewritten and appears to have come from an electronic recordkeeping system.

<sup>3</sup> California Labor Code 1140 *et seq.*

Since the 1960s, communication and technology has changed. Almost all employers maintain computer systems for processing payroll. Under the Fair Labor Standards Act, the pay stubs provided to employees are required to include the employee's home address. Almost all employees have a cell phone, email address or both. Employers keep this information in electronic files along with home addresses. There is no practical reason why the employer should not produce the eligibility list in an electronic document and do so directly to the region and the union. In the past year alone, I have seen an increasing number of employers have provided eligibility lists by email. Modern business and government depends on electronic delivery of information, and this should apply to the voter eligibility list as well.<sup>4</sup>

Some opponents of the Board's rules have expressed concern that providing email addresses and phone numbers is more intrusive on employee privacy than the current standard of producing home addresses.

This does not make sense. We choose when to read our emails, when to respond, and, most importantly, when to delete. The same is true of phone calls and voicemail. I would anticipate that in many cases, the union will use less intrusive means to communicate with employees in the bargaining unit once the *Excelsior* List requirement is expanded to require employers to provide available email addresses and phone numbers. Management has pointed to no record of abuse by unions of voter eligibility lists.

In my experience, incomplete addresses or PO Boxes are routinely provided, thwarting the purpose of the *Excelsior* list requirement. With the fissured work place and the dispersion of workers, communication at a single work site is less effective. For some groups of employees, including employees who work in multiple locations throughout the year, they use only a P.O. Box for mail. However, even if seasonal, their employer contacts them to recall them to work using the cell phone numbers that are already in the employer's electronic database. Providing this information is no more intrusive than providing a home address and works in favor of employee free choice as it provides meaningful ways to contact employees and provide information.

In conclusion, these rules are not radically different than the status quo. They reflect an attempt to standardize some of the best practices and create consistency across regions. Many of the changes attempt to align the Board procedures to procedures used by other agencies, bring the process into the 21st century and provide clear notice. The rules reduce unnecessary delay, simplify the procedure, provide more notice to all parties of the process, and permit the parties to seek Board review after the election at which time the parties know which, if any, differences over representational issues that may have existed prior to the election remain relevant or determinative. This saves time and money for employers, unions and the government, and promotes the ability of employees to exercise their right to vote.

I would be happy to answer questions, and I hope that my experience with the Board's procedures is helpful to this committee.

The CHAIRMAN. Thank you very much, Ms. Sencer, and thank you for being here.

Thanks to all the witnesses.

Now we will have a round of 5-minute questions.

Ms. Milito, how many businesses does your organization represent?

Ms. MILITO. We represent 350,000.

The CHAIRMAN. Is there an average size of those businesses?

Ms. MILITO. We say our average size of member business is around 10 employees or less.

The CHAIRMAN. Around 10? There's no small business exemption under the National Labor Relations Act, so a 10-employee business can be organized by a union, right?

Ms. MILITO. Yes, absolutely. I would point to the Board's own statistics, too, that show the average bargaining unit size as of

<sup>4</sup>Recent Board decisions recognize the growing importance of electronic communications. In *J. Picini Flooring*, 356 NLRB No. 9 (2010), the Board required intranet posting of its Order in addition to traditional bulletin board posting. In *Purple Communications*, 361 NLRB No. 126 (2014), the Board weighed the property right of the employer against the section 7 rights of the employees and found employees could use the employer's email system for mutual aid and protection.

2013 was about 24 employees. I think units have gotten smaller over the last—

The CHAIRMAN. You said you represent 350,000 small businesses?

Ms. MILITO. Three-hundred and fifty-thousand.

The CHAIRMAN. I'm just trying to imagine 350,000 small businesses around the country, with an average size of 10 employees. The picture I get is that they're all sitting around every day at breakfast with their labor lawyer just poised, waiting to be able to respond to an election, when the truth is that's probably the furthest thing from their mind, right?

Ms. MILITO. They don't have an attorney. Most of the members with whom I speak do not have an attorney. They may have consulted somebody to draw up their articles of incorporation, but they don't have an attorney.

The CHAIRMAN. How many small businesses of 4, 5, 6, 10, or 12 employees regularly consult their fax machine?

Ms. MILITO. Very rarely, unless they're looking for a timeshare or a business—

The CHAIRMAN. The notice of an election arrives on day 1, and then a whole series of things begin to happen. I mean, first you have to go find Mr. Carter, or some lawyer to advise you. If you make a mistake—perhaps a statement to an employee that is not strictly according to the National Labor Relations Act rules—what happens? What's the penalty for that?

Ms. MILITO. The consequences are very severe, as we've heard from the experienced labor practitioners here. I mean, they have to get it right. This hearing notice comes out, it's faxed on a Friday. They don't check their fax machine until maybe Monday.

I just want to back up there, too, and go back to the fax machine. This is legal ramifications, to your point about the seriousness of it. For business owners I talk with, too, anything legal related like a complaint or a civil procedure, they expect it to come in the mail, not through the fax. They're just not going to be checking the fax, and then not knowing what to do with this.

The CHAIRMAN. Mr. Carter, an employer who is about to be organized needs counsel, right?

Mr. CARTER. An employer who doesn't have counsel is in severe jeopardy.

The CHAIRMAN. What could that cost?

Mr. CARTER. Well, the cost of all that can be tens of thousands of dollars.

The CHAIRMAN. Even for an 8-, 10-, 12-, or 14-person unit?

Mr. CARTER. Absolutely. It's a matter of the hours spent by the attorney in preparing the materials. The cost will go up, Senator, because the amount of work that needs to be done under these regulations, under the new regulation, exceeds the amount of preparation that is currently anticipated.

The CHAIRMAN. Under the rule, from day one, you get a fax copy saying you've got an election petition filed, on day 2 or 3 you've got to publicly post an election notice, and you've got to do that correctly, right?

Mr. CARTER. If you don't do it correctly and the employees themselves decide not to vote the union in, the union can petition for

another election and put the employer through that same expense again.

The CHAIRMAN. You've got only 1 day to get legal advice before you post that notice or you might do it wrong. Is that right?

Mr. CARTER. Absolutely correct.

The CHAIRMAN. What's the reason for this? The median time-frame for an election is 38 days. This reminds me of Western movies about frontier justice and hanging judges. If you could do it in 8 days, why not do it in 2 days, 12 hours, or 6 hours? If the median is 38 days, and more than 95 percent of elections occur within 56 days, then a little over a month would seem to me to be a fair amount of time for both sides to make their point. Under the rule, if you get to the 11th day, the union has a right to postpone the election but the employer doesn't. Is that correct?

Mr. CARTER. It's even before that. The union can waive the time necessary after getting the Excelsior list—the list of employees—and that way they can make the election happen more rapidly. What is the reason for this? The NLRB had stated that it's because we want to cut out unnecessary delay. The U.S. Chamber of Commerce doesn't believe that due process is unnecessary. The Senate has confronted this issue in the past and has concluded, as Senator Kennedy stated in 1959, 30 days is necessary to ensure that we don't rush these people into making this decision. It's an employee right that's at stake, Senator.

The CHAIRMAN. Thank you.

Senator Murray.

Senator MURRAY. Ms. Sencer, can you respond? I'm confused by the fax machine on Friday discussion. Can you clarify that?

Ms. SENCER. Sure. First of all, if a petition is filed on a Friday and the union gives notice to the employer on a Friday, as would be required under the rules now where only the region gives notice currently, the hearing isn't scheduled for 8 days because you wind up—it's 8 days from the time the notice is effectively given and you don't count that day. You move over on the weekend.

You also aren't doing it necessarily by fax anymore. Prior to filing the petition, there's a box that the union has to refer to, has to answer, which says whether or not notice has been given to the employer. In almost virtually every case, notice is given to the employer before the petition is filed with the Board because the employees, as an act of solidarity together, give their request for organization to the employer, who then ignores it.

Under the new rules, in addition to fax service, email becomes an acceptable way to serve, which is something that employees use and employers use on a regular basis. It is served with a Notice of Procedure which explains how to post the notice that the Federal Government is going to require posting with it so that you're not walking into a trap of posting it incorrectly. Those things are taken care of by the new documents that will explain the process to the employer, a benefit that they do not currently have, and it makes it easier for an employer who does not have counsel right away to be able to respond in an appropriate manner.

Senator MURRAY. We've heard a lot about this rule permitting a quicker process for elections. In fact, that's what the title of the

hearing sort of implies. Can you tell me, in your view, is the point of this rule speed?

Ms. SENCER. No. It's to take out the parts that aren't necessary. Right now there's a lot of gamesmanship in how this process works. There's a lot of wrangling for position. The employers ask for an extension for a hearing date even in a unit of 10 people. In a unit of 10 people, the employer pretty much knows who their supervisor is. If the unit is requesting all 10 people in a unit of 10 people, there are not many legal issues or any legal issues that should have to be worked out such that it takes over a week to prepare for a hearing, or in fact that it necessarily even requires an attorney. There are many corporations that do these hearings without attorneys on a regular basis.

A week delay before the hearing is set, or even having consistency in when the hearing is set, would reduce unnecessary delay that is currently built into the system. A closing brief that has to be filed a week after the hearing is held is not necessary in a unit of 10 people. The only issue that's going to come up there, if all of your employees are part of it, is one of them is supervisor. There are longstanding Board rules and Board regulation as to what defines a supervisor. A closing brief is not necessary. We get rid of that week.

It also gets rid of the 25 days of review in-between the time a decision of direction of election issues and the time that the election can be held, but allows the employer, if there is a problem or a concern about the decision of direction of election, to seek review of that if it's still necessary after the election is held.

Senator MURRAY. Well, I heard Mr. Carter say that elections could take place in as little as 10 days, and Ms. Milito said in as little as 14. Does the rule set a specific timeframe for when that election should occur?

Ms. SENCER. No. There are only a couple of points that actually have timeframes. The first is the setting of the hearing, which is for the eighth day, unless there are extraordinary circumstances, and then there are extensions and discretion for those extensions. The other portion that has a definite time period is if there are objections to an election, they will be heard 21 days after the election is held. Other than that, time periods are all flexible under this rule.

Senator MURRAY. OK. It's my understanding that the final rule set an election hearing to begin 8 days after the hearing notice is served. Isn't it true that a number of the Board's regions, maybe even a majority of them, regularly schedule hearings 7 days after the election petition is filed, and therefore the rule just actually standardizes that existing practice?

Ms. SENCER. I deal mainly in four regions in California. California has four regions that cover it. In three of them, the standard is already 7 days. In the other one, it is 10 days. This really is just conforming to the best practice that's already out there.

Senator MURRAY. OK. I want to ask you one more question. We've heard claims that providing employees' email and phone numbers will intrude on workers' privacy. The Board accepted tens of thousands of written comments over the course of 141 days and heard over 1,000 transcript pages of oral commentary over 4 days

of hearing. As far as you know, did any of that voluminous commentary reveal even a single instance of misuse of contact information contained in voter lists in the past 50 years the Board has required that such lists be provided to unions?

Ms. SENCER. I haven't seen any commentary to show it, and at the public hearings where I was on the panel about the new information, there was not a single concrete example provided of that. Currently, home addresses are provided, and unions have every reason to keep that information confidential to protect the workers that they're seeking to organize.

Senator MURRAY. Does the rule contain protections for workers' privacy?

Ms. SENCER. Yes, because the list is limited in what it can be used for, which it currently is not under the Excelsior Underwear rule.

Senator MURRAY. Thank you very much.

The CHAIRMAN. Thank you, Senator Murray.

We'll go to Senator Isakson; after him, Senator Franken.

#### STATEMENT OF SENATOR ISAKSON

Senator ISAKSON. Thank you, Mr. Chairman.

Ms. Sencer, reading from your prepared testimony, it says,

"The request for representation is made in writing using a provided form and must be accompanied by the showing of interest in which the union is authorized by at least 30 percent of the proposed unit represented by the employees for collective bargaining."

Is that correct?

Ms. SENCER. Yes.

Senator ISAKSON. To file the notice, to file the request, the union has to have 30 percent of the number of employees affirmatively signing a petition that they want to have this organization take place. Is that right?

Ms. SENCER. Yes, at least, although most unions have an internal guideline that requires them to have 65 percent before they even file a petition. But the regulation states 30 percent.

Senator ISAKSON. My point on this is that's day 1 when that filing takes place, and the hearing in 8 days is automatic?

Ms. SENCER. Yes.

Senator ISAKSON. Is that correct?

Ms. SENCER. Yes.

Senator ISAKSON. Is there any requirement of a union to notify an employer of an intent to seek 30 percent of the employees to get a petition to file for unionization?

Ms. SENCER. No, there isn't.

Senator ISAKSON. In other words, a union wanting to organize a business can start in June 1 of a year trying to contact employees for the purpose of getting their signatures to go to a filing of a request. They then have 8 days before a hearing. Is that correct?

Ms. SENCER. That is true, although if we have an average unit of 23, we would assume that a supervisor or manager or the owner is closely enough involved with their employees that they are going to know. In most cases, the employees are making public state-

ments to their employer prior to the petition being filed and, in fact, are making a request for voluntary recognition, which goes unheeded, resulting in the use of the NLRB process.

Senator ISAKSON. Your following sentence after the one I just read says the following: "This seems straightforward, but jockeying for tactical advantage quickly begins."

Ms. SENCER. Yes.

Senator ISAKSON. I take the inference there that immediately upon the company receiving the filing and all of a sudden they realize there's a movement afoot to organize the company, they immediately use every tactic they can to protract the period of time for the vote. Is that right?

Ms. SENCER. Yes.

Senator ISAKSON. Well, that average time is now 38 days. Is that correct?

Ms. SENCER. Thirty-eight days for everything to go to an election. This rule is really specifically geared to those cases that go to hearing before they go to election. Those cases have a much longer period of time for resolution.

Senator ISAKSON. OK. Ms. Milito, I should know this, and I apologize for not knowing in advance. Is there any small business exemption in the proposed rule?

Ms. MILITO. There is not.

Senator ISAKSON. So somebody with 10 employees could be affected by the rule?

Ms. MILITO. Exactly, exactly.

Senator ISAKSON. An intent to organize a 10-employee company could take 2 years to try and find three employees to reach the 30 percent threshold and then have a 38-day vote in the company once the notice is filed. Is that correct?

Ms. MILITO. That's correct, yes.

Senator ISAKSON. The point I would make is, we established a long time ago as a country that business needs to treat labor right. The labor laws exist today because American business didn't do a very good job during the Industrial Revolution of protecting workers based on their age, their health, or the time they worked, or anything else. During the last 100 years, labor law has evolved to a pretty fair playing field between labor and management to compete.

This appears to me to be analogous to the U.S. Senate passing a resolution that says any incumbent seeking reelection can only file 10 days before the vote. In other words, we shorten the period of time that we have to run, we increase the odds of us getting reelected because it takes a lot of time and effort to get up the momentum and the money and the issues necessary to elect a U.S. Senator. The American public would be outraged if we tried to manipulate the rules to tilt everything in our favor.

I would just suggest that it appears to me that this is not a middle-down versus top-down versus middle-up proposal. This is not trying to play favorites. This is trying to keep from playing favorites, and 38 days is not an inordinate amount of time for a company to have to make its case if the opposition to the company's case is going to have an unlimited period of time to try to reach

into those employees to induce 30 percent of them to file for the hearing.

I would just say it is tilting the playing field, and that's the whole issue I see and the reason I appreciate your testimony and all of you testifying today.

The CHAIRMAN. Thank you, Senator Isakson.  
Senator Franken.

#### STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. Thank you, Mr. Chairman.

There's a lot of talk about 38 days, and I think the Chairman said that 56 days is the most for elections. Is that what you said, Ms. Milito? You're nodding.

Ms. MILITO. Yes, 95 percent of elections occur within 56 days.

Senator FRANKEN. It's 95, so it isn't the most.

Ms. MILITO. Ninety-five percent of elections occur within 56 days.

Senator FRANKEN. OK. That's different, though. Can you give us examples of when companies really dragged this stuff out?

Ms. SENCER. In situations where it really gets dragged out, you're talking about an election being held about 100 days after, and that can happen by a postponement of the hearing, followed by a request for an extension that's granted regarding the closing brief. We don't have any control, and nothing in the rule designates how long a regional director will take to issue the direction and decision of election, which is something that is uncontrollable by either party. Then we have 25 days for review after.

In the case that an employer raises a question of review, which is a discretionary review for the Board to take at this point, if the Board takes that review it can either impound the ballots or postpone the election under the current rules, and in those situations you wind up looking at well outside of 56 days.

Even in the example that I just provided earlier, in a situation where the employer did not show up and participate in the process, based on how long it took for the regional director to issue the decision, amongst other factors, including the extension and the 25-day review period, we're outside of that 56 days. We're at 67 days without the employer even participating in the process.

Senator FRANKEN. It's your feeling that these rules—when I hear the other witnesses talk, it's like this is a radical departure from the way the rules are now, and you seem to have a different view.

Ms. SENCER. I do. Most cases don't go to hearing, and these rules really affect what happens when you go to hearing. Most cases—and by most cases, something like 91 percent have a stipulated election agreement. When you have a stipulated election agreement, the internal target is 42 days or less currently. And because of that, employers work that toward the outer edge because the cost of going to hearing is that you're outside of 56 days. Most unions will agree to something that results in somewhere in that 38 to 41 days because the stipulated election agreement will be accepted by the region.

That leaves only about 9 percent of cases that are on the outside that actually have a hearing. The ones that go to hearing, it does extend the process by a lot of time, and this would cut down the number of days for those cases.

Most significantly for them, it's not really the hearing that becomes most significant. Most significant is that week for the post-hearing brief and the 25-day review period after the decision and direction of election issues.

Senator FRANKEN. Thank you.

You know, I'm a member of—I've been a member of four unions, but one of them combined after, SAG. Very helpful to me and to the members of those unions. People who are organized who are in unions, on average, do a lot better. They tend to get paid more, they tend to have better benefits, health care, those kinds of things. As we've seen, the lower and lower percentage of people covered by unions, we've also seen—it has coincided with this incredible inequality in income in this country.

I think there's a correlation. What the causation is exactly is hard to say, but I think there is some causation.

Mr. Carter, listening to the testimony today, it seems like we're not talking about the same rules because this is so apocalyptic coming from you guys. To me, these seem pretty modest, especially compared to the way you describe them in your testimony.

In your testimony you argue that the rule infringes upon employers' free speech rights by "virtually eliminating" employer opportunities to communicate views against employees forming a union. However, you also note that under the NLRA, employers have the right to communicate with employees about how they feel about a union and collective bargaining, which I think is a good thing because everyone should have a right to express their views about what collective bargaining means for workers. In fact, employers can and many employers do communicate with employees about their concerns about collective bargaining even before they think the workers may want to join a union.

I'm sorry to go over a little, but let me ask this question. Does anything in this rule prevent employers from communicating with employees from their first day on the job that they, the employers, oppose efforts to form a union that would allow workers to collectively bargain for better wages or working conditions? Does anything in this rule prevent employers from requiring that their workers attend one-on-one meetings during working hours in order to persuade them to vote against joining a union?

Mr. CARTER. The candid answer, Senator, is there is no prohibition of communicating your feelings regarding the unions. The importance here is the context of the conversation. Most employers in my experience, Senator, don't make a habit of talking about unionization. They don't go to their employees and say, "hey, this is how I feel about unions." It's not a common topic in the workplace between a supervisor and an employee. They talk about their business. They talk about their livelihoods and improving them.

What this regulation does—and it is radical, in my judgment—is that in the critical period—and that's a legal term under the National Labor Relations Board precedent—of an organizing campaign when this is the most pressing issue on an employee's mind, as well as an employer's, the employer has virtually no effective opportunity to communicate its feelings because it is consumed with its bureaucratic obligations to prepare the form and get it ready.

In terms of gamesmanship, if you file on a Friday before a holiday weekend a petition and it takes you 3 days to find a lawyer, that employer is only going to have 2 days to prepare their form.

The CHAIRMAN. We need to move on to the next Senator.

Mr. CARTER. OK.

The CHAIRMAN. Thank you, Senator Franken.

Senator FRANKEN. Thank you.

The CHAIRMAN. Senator Scott.

#### STATEMENT OF SENATOR SCOTT

Senator SCOTT. Thank you, Mr. Chairman.

I would tell you that this rule is radical, it is ridiculous, and it is oppressive, and it applies to all employers no matter how many employees you have. That's what I meant. No matter how many employees you have, this rule applies. If 95 percent of the time within 56 days we are able to have an election or not, we're not talking about moving this from an average of 56 days to 50. We're not talking about moving it to 40 or 30 or 20, but to 10. If there's any sense of an ambush as an employer trying to create jobs, help families, this rule stands front and center to that point.

I have a short question but a long narrative, so please bear with me, Ms. Milito, as I ask you this question. You've highlighted it, and Mr. Carter did a pretty good job of articulating the position at the beginning as you were going through your opening remarks. You were talking about the actual process that an employer goes through to try to comply with something that he's completely unaware of, that she has no clue of the actual process until it is hitting her in the face.

You highlighted, Ms. Milito, the profound impact that small businesses have on our economy. There's no question the backbone of our economy are small businesses. I am fortunate enough to have been one of those small business owners for about 15 years, the last 15 years before I was given this wonderful opportunity and privilege to serve all Americans in the U.S. Senate.

When I look at this rule and the testimony offered by many of you here today, I am struck with a simple conclusion: The rule drastically tilts the playing field in favor of unions and chills both the rights of employers and employees. As a small business owner, I never faced an attempt to unionize my workplace. It is telling for me to imagine what this scenario would have done had I still been in business with one of the couple of businesses I was involved with.

I want to make sure that as I walk through the timeframe, that this is exactly what you all are talking about. "You all" means "all y'all," which is plural and singular in South Carolina.

[Laughter.]

Make sure we understand that.

The condensed timeframe between the filing of a petition and an election to as few as 10 days, with a hearing occurring within 8 days of the petition, would absolutely feel like an ambush. In other words, while I'm out there trying to secure business—I had an insurance business, a real estate business. I flirted with a janitorial business but got out of that right before I got started. I'm out there looking for business opportunities, trying to hire more employees,

and at the same time I'm ambushed with this prospect of getting something together that I'm completely unfamiliar with in 10 days. Is that so far so good?

Ms. MILITO. Very accurate.

Senator SCOTT. A small business owner with just a couple of dozen employees, 24 employees, and no in-house legal counsel, which I would imagine is completely consistent with the folks who are members of the NFIB, I would be expected all within a 10-day window to do a couple of things.

No. 1, understand what an election petition is.

No. 2, find a labor attorney with NLRB expertise and, by the way, one that I actually want to work with, which is—no offense, by the way—could take a little longer than 3 to 5 days, as you talked about in the beginning. Finding one is one thing; having one that you can actually work with and gel with, with the most important asset you will ever have as a small business owner, it's your business.

Most business owners go into business not to figure out tax loopholes or how to discriminate against people. You go into business because you have this vision of making a difference, growing a business, being a part of the American tapestry, talking about the American Dream. Yet you're going to do these two things and learn what can and cannot be communicated to your employees and figure out which employees are actually eligible to vote.

Then you're going to submit to unions the names of eligible employees, their addresses, email, cell numbers, work locations, their shifts, employee classifications, and ensure all legal arguments are raised at this point in time because if you don't raise them now, you can't raise them later, and any mistakes that you make, any single mistakes you make you're going to be liable for, all in 10 days.

Am I wrong at all?

How does this lead to a fair election for the employees or the employers when it comes to making this large of a decision in such a small window?

Ms. MILITO. It's not fair. It's not fair for either side. It's not the way it should be or the way it was intended.

Senator SCOTT. Mr. Carter, any comments after that?

The CHAIRMAN. Please go ahead and answer the question. Then we'll go on to the next Senator.

Mr. CARTER. Senator, you did a wonderful job describing the scenario, and the impact of the ambush election regulation not only doesn't help the situation but it injures employees whom we presume, Congress presumes benefit from hearing all sides of the story so they can decide who is telling them the truth and who isn't, and then they can cast their fate and exercise their right.

Senator SCOTT. Thank you, sir.

Thank you all.

The CHAIRMAN. Thank you, Senator Scott.

Senator Warren.

Senator WARREN. Thank you, Mr. Chairman.

## STATEMENT OF SENATOR WARREN

Congress requires the NLRB to oversee workplace elections so that workers can vote on whether they want to be represented by a union. According to NLRB data, more than 90 percent of the time this works just fine. Employees and employers agree about the process, and an election is held.

In the roughly 10 percent of the cases, I think it's actually 9 percent of the cases where the employer has some issue with the details of the vote, the rules on how to resolve these concerns have turned into a mess. Over time, a hodge-podge of different rules for resolving these disputes emerged in each of the country's 26 NLRB regions.

Now, to fix this, the NLRB has finalized one national regulation that draws on historic best practices and sets out clear procedures for pre-election issues and for conducting these elections. In other words, the NLRB is trying to make dispute resolution more efficient and more consistent throughout the country.

Some employers who simply oppose union votes altogether are lobbying against the new rules.

I just want to ask, Ms. Sencer, in the roughly 10 percent of cases where employers contest union elections, is there anything in the new rule that would stop an employer from having its concerns heard?

Ms. SENCER. No. The Statement of Position form allows for each issue to be put out there. There is still a hearing process. There is still a right to review. So everything that needs to be resolved will still be resolved.

Senator WARREN. OK. It seems like most employers, 90 percent or 91 percent, who don't contest elections, in those cases the employers who simply want their legitimate concerns heard if there's a dispute, they're not going to be affected in any way by this. The 90 percent that never contest and those who just want to make sure their concerns get heard, they're not going to be affected by this.

For the others who are complaining so loudly, this doesn't seem to be about fairness. It seems to be about taking advantage of inefficiency and delay. According to a 2001 study from the Berkeley Center for Labor Research and Education, long delays correspond with higher rates of labor law violations. The study points out that delay gives anti-union employers more time to break the law by retaliating against union organizers and intimidating workers into giving up, and evidently delay works. Nearly a third of the time, employees who file petitions and request an election never actually get it.

Ms. Sencer, is this finding consistent with your experience as a lawyer who works in election cases? Have you seen a correlation between delaying tactics and worker intimidation?

Ms. SENCER. Yes, and it's not necessarily even intentional. This rule doesn't change anything about what people can say to each other. Those rules are dealt with separately and go through the case law. The longer that your line supervisors or your lower level supervisors, who are not engaged in the discussions with labor counsel, are going to be interacting with employees prior to the

election, the more likely they are going to say something that runs afoul of the rules, and that's just based on the nature of the conversations that happen on an everyday basis.

Senator WARREN. Well, thank you. You know, I'm sure that employers who want to fight to keep their workers out of a union prefer a broken, inefficient system that they can manipulate to try to block workers from organizing. The NLRB does not answer to them. Congress has directed the NLRB to make sure that election disputes can be solved fairly between employers and employees, and I think that's exactly what the NLRB is doing with this rule. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Warren.

Senator Cassidy.

#### STATEMENT OF SENATOR CASSIDY

Senator CASSIDY. Mr. Cohen, Senator Warren just characterized this as a broken system, and yet you point out that unions are winning an increasing percentage of the elections. That seems incompatible with a broken, fixed, unfair system. What are your thoughts?

Mr. COHEN. I think you are exactly right, Senator. The system is not a broken system. The unions have been prevailing. If I might add, these proposed rules will change all elections. They are not geared to the 5 to 10 percent of the cases that go to hearing.

Senator CASSIDY. Now, can I pause you there for a second?

Mr. COHEN. Sure.

Senator CASSIDY. Ms. Sencer suggests this is best practices. She's out in California, which I will note is one of the most anti-business States there is, with a hollowing-out middle class. If it's best practices in California, would you, No. 1, agree with that? Or, No. 2, if you do, then why don't we? And if not, why not?

Mr. COHEN. I would not agree with the assertion. The General Counsel of the NLRB runs the regional offices. There are standards which are largely uniform. Are there individual variations in particular cases or if somebody comes up with a reason why they need a 3-day extension of time? But the standards are the same. The regional directors are evaluated based on their compliance with nationwide standards. I think that is not the case.

If I might, two of the points that have been made in terms of the need to help the middle class and the need to stop abuse of employers by giving them a campaign period of time because they will commit violations, the NLRB has specifically said that neither of those issues have anything to do with the 733 pages of new regulations. The NLRB states that it is all about economy and efficiency, none of the goals that have been alluded to by numerous Senators here.

Senator CASSIDY. Again and just to repeat that, the main rationale that we've been given is not the rationale used by NLRB to justify this.

Mr. COHEN. That's correct.

Senator CASSIDY. Ms. Sencer, I keep on thinking of that poor gal. She's got a business with 10 employees. She's not a member. It wasn't in your written remarks, but you mentioned—listen, every-

body belongs to a trade association, or many do, so they can call and get an attorney.

I can imagine a woman, she's got a Subway, she's got three of them, and she's busting her rear, and she's got 15 employees, five of them are related, and those five decide that they want to unionize. She's not a member of—she should be, of NFIB, but she's not.

I could also imagine that the union would decide to call the election maybe right when she had to meet with the Federal regulator to see if she's got all of her forms right for—you name it—the Affordable Care Act. Or maybe when she's about to buy another business. They know she's up to her elbows in this, and that's when they come at her.

Would that not be a wise strategy for a union if they wished to, as Mr. Cohen says, tie them up in frenetic activity?

Ms. SENCER. Well, presuming that the union knew when she was going to deal with her Federal regulators, and presuming that the union knew when she was going to be purchasing another business.

Senator CASSIDY. Small business. That could happen.

Ms. SENCER. It could happen. In real terms, it's not a question about what's most convenient for her as an owner. The question is what is it that the majority of the employees in that workplace are interested in—

Senator CASSIDY. Knowing that the convenience of the owners are short shrift in this answer, maybe her convenience is important for the business to survive. Has that thought occurred?

Ms. SENCER. In general, employees don't like to do anything that jeopardizes their own future employment. They are aware of that, as well.

Senator CASSIDY. I know of examples of businesses that shut down because they were organized. I can cite you examples. There's a dairy in Baton Rouge, LA, a hulk of a building which no longer exists because it was organized. I know that for a fact. Your face looks quizzical. I can show you the building.

Ms. SENCER. It's not a question of the building. It's a question of how you can so clearly draw that causation, because most unions do not enter into a contract with an employer that's going to result in—

Senator CASSIDY. Causal. Temporal. Reported in the paper.

Again, do you agree it would be a nice strategy? If they did actually know when she was about to open another franchise, that this is the one we kind of want to go after because, again, her elbows are up to that, and now she has to respond to this? Knowing that it's not for her convenience, but still it seems like a great strategy.

We're out of time, but I'm just saying I agree with Mr. Scott. It seems like we have a balance, it seems like it's tilting, and it seems like the convenience of that small business woman should be considered if her convenience means her ability to keep her business going.

I yield back.

The CHAIRMAN. Thank you, Senator Cassidy.  
Senator Casey.

## STATEMENT OF SENATOR CASEY

Senator CASEY. Mr. Chairman, thank you very much.

I want to thank our witnesses for being here.

We have some very strong disagreements, so there's no reason to not State that.

I've heard a number of words over and over again. I've heard the title of the hearing. I think the Chairman and I would disagree about the first word of the title of the hearing. You might want to read that definition later.

What I haven't heard a lot about here is voting. This Act is supposed to lead to a process where employees vote. They have the right to make a determination for themselves.

When this law was passed, now 80 years ago, the findings that undergirded that statute are pretty significant to remind ourselves. I'll just read one part.

“Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury—safeguards commerce from injury—impairment or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest.”

And it goes on from there.

It also talks about the impairment of commerce when unions don't do the right thing.

That's what this Act is all about. When barriers are erected in front of employees to organize or collectively bargain, it makes it very difficult to be consistent with that statute.

I believe that we should be doing everything we can to make sure that employees have the right to get all the information they need and make an informed decision.

Ms. Sencer, when I look at not just your testimony but some of the elements of what this rule is all about, this new policy, reducing unnecessary litigation, making the system more efficient, making it less expensive for both sides, speeding it up, I thought folks who supported businesses wanted to move things along and be efficient.

I'd ask you just a couple of questions here. One is if what you have asserted and what's been asserted here as the reasons for promoting and implementing this new policy, that employees will be less distracted, that the process will work better, why do you think there's the kind of opposition to this proposal that I would argue and I think you would argue modernizes and streamlines the NLRB election process?

Ms. SENCER. I really think it's because people don't like to share power, and people, owners are concerned that in the event their employees have a true right to vote in a prompt election where they have made their own decisions, that they are afraid that they will have to share their power.

Senator CASEY. One of the concerns I have is that there seems to be a real hostility to modern forms of communication—email, telephone numbers, information like that that you would think that both sides would want to have the benefit of.

The notion here that—and it's why I have a disagreement with the first word of the title of the hearing. I even looked it up. The first word in this hearing is defined as "surprise attack by people lying in wait in a concealed position." I hardly think that the possibility, the prospect of an election in a workplace is the equivalent to someone being in a concealed position and surprising someone by an act of violence or something else. That's really a stretch.

I hope we can continue to debate this and have legitimate disagreement. What I can't understand is the basic hostility to getting more information in front of people.

In my own experience—and this is anecdotal; it's not a study or a specific set of data. In my experience in the health care context in Pennsylvania, in a couple of instances, not all but in a couple of instances where folks at hospitals were trying to organize, they would hire a law firm which was a union buster. I'm not asserting that law firms here are, but in that context the conclusion I reached was that that law firm was hired simply to bust the union.

I know that's strong language. I know people don't like that, but if we can disagree about my phrase before the word "union" or after the word "union," then we can probably have a legitimate disagreement about the title of the hearing.

Thanks, Mr. Chairman.

The CHAIRMAN. I want to thank the witnesses for excellent testimony and for joining us today, and the Senators for participating.

Senator Murray, do you have any closing remarks?

Senator MURRAY. I just want to thank all of our Senators who participated, and our panelists too, for your insight into this.

I hope at the end of the day that we all agree that when workers want to vote to join a union, that the election process should be fair and transparent. I know we have a disagreement on this issue, and I'm sure we'll hear more about it, but I hope at the end of the day that we remember our role is to make sure that workers have a voice in that process.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Murray.

I listened carefully to Senator Casey's definition of the first word in the title. I think it's pretty accurate. The rule forces a union election before an employer has a chance to figure out what's going on.

We have differences of opinion. We'll have a chance to continue that on the floor of the Senate, when we'll ask the Senate to disapprove the NLRB's new rule and prohibit the Board from issuing any similar rule, which will come after the congressional recess.

The hearing record will remain open for 10 days. Members may submit additional information and questions for the record within that time if they would like.

All of us thank the witnesses for their time and for coming here today.

The committee will stand adjourned.

[Additional Material follows.]

## ADDITIONAL MATERIAL

## PREPARED STATEMENT OF SENATOR COLLINS

Thank you, Chairman Alexander and Ranking Member Murray, for holding this hearing on the National Labor Relations Board's (NLRB) so-called "ambush election" rule. In the 112th Congress, I was an original cosponsor of a joint resolution that disapproved of a nearly identical rule issued by the NLRB.

On December 15, 2014, the NLRB published new regulations—which will become effective on April 14, 2015—significantly limiting the time for holding union representation elections. This change would result in employees making the critical decision about whether or not to form a union in as little as 10 days. The rule also requires employers to disclose personal employee contact information to possible union representation, which raises real privacy concerns.

Back in 1959, then-Senator John F. Kennedy explained that "the 30-day waiting period [before a union election] is an additional safeguard against rushing employees into an election where they are unfamiliar with the issues . . . there should be at least a 30-day interval between the request for an election and the holding of the election" to provide "at least 30 days in which both parties can present their viewpoints." I agree with our former President and Senator. An expedited timeframe would limit the opportunity of employers to express their views and leave employees with insufficient information to make an informed decision.

According to the fiscal year 2014 NLRB Performance and Accountability Report, union representation elections were held in a median of 38 days. That is already below the NLRB's stated target to hold 95 percent of its elections within 56 days. Therefore, this begs the question of why yet another regulation is even necessary.

Our Nation's job creators, the engines of any lasting economic growth, have been saying for some time that the lack of jobs is largely due to a climate of uncertainty, most notably the uncertainty and costs created by new Federal regulations.

According to the National Federation of Independent Business, the National Association of Manufacturers, and the U.S. Chamber of Commerce, this ambush election rule will negatively affect employers and employees, and small businesses in particular. Small business owners often lack the resources and legal expertise to navigate and understand complex labor processes within such a short timeframe. In our current economy, it is critical that we do everything possible to advance policies that promote U.S. economic and job growth. I fear this rule will do the opposite.

The NLRB's goal should be to ensure fair elections and a level playing field for all. Again, Mr. Chairman, thank you for calling this hearing.

SOCIETY FOR HUMAN RESOURCE MANAGEMENT (SHRM),  
ALEXANDRIA, VA 22374-3499,  
FEBRUARY 10, 2015.

Hon. LAMAR ALEXANDER, *Chairman*,  
Hon. PATTY MURRAY, *Ranking Member*,  
*Senate Health, Education, Labor, and Pensions Committee*,  
428 Dirksen Senate Office Building,  
Washington, DC 20510.

DEAR CHAIRMAN ALEXANDER AND RANKING MEMBER MURRAY: The Society for Human Resource Management, the U.S. Chamber of Commerce, the Coalition for a Democratic Workplace, the National Association of Manufacturers, and the National Retail Federation thank you and the other distinguished members of the Senate Health, Education, Labor, and Pensions (HELP) Committee for holding today's full committee hearing on how the National Labor Relations Board's (NLRB) recent "ambush" elections rule will harm both employers and employees.

As organizations representing workplaces across the country and across industries, we believe the "ambush" rule violates the National Labor Relations Act, the Administrative Procedure Act, and the Free Speech Clause of the Constitution of the United States. We have joined together to file a lawsuit in U.S. District Court for the District of Columbia challenging the rule, and asking the court to vacate and set aside the rule. We respectfully request that our attached complaint, motion for summary judgment, and memorandum of points and authorities in support of that motion be entered for the record.

Sincerely,

*Society for Human Resource Management,  
U.S. Chamber of Commerce,  
Coalition for a Democratic Workplace,  
National Association of Manufacturers,  
National Retail Federation.*

#### **Attachment**

SOCIETY FOR HUMAN RESOURCE MANAGEMENT (SHRM),  
ALEXANDRIA, VA 22374-3499,  
FEBRUARY 10, 2015.

Hon. LAMAR ALEXANDER, *Chairman*,  
*U.S. Senate*,  
*Committee on Health, Education, Labor, and Pensions*,  
428 Dirksen Senate Office Building,  
Washington, DC. 20510.

DEAR CHAIRMAN ALEXANDER: On behalf of the Society for Human Resource Management (SHRM) and more than 275,000 HR professionals, I am writing to express strong support for S.J. Res 8, a joint resolution of disapproval that would block the National Labor Relations Board's (NLRB) representation election rule. SHRM greatly appreciates your leadership on this important issue and commends you for convening a hearing on "Ambushed: How the NLRB's New Election Rule Harms Employers & Employees."

The representation election rule is commonly referred to as the "ambush" election rule because of its focus on speeding up the union election process at the expense of employees and employers who will have insufficient time to understand and address the relevant issues about the impact of unionization. SHRM has long supported the fundamental right, guaranteed by the National Labor Relations Act (NLRA), of every employee to make an informed, private choice about whether or not to join a union. While estimates vary, elections could occur in as little as 11 days after the employer is notified of an election petition. In addition, the rule severely limits an employer's ability to challenge aspects of the process prior to the election thereby promoting speed of elections over all other goals and requirements of the NLRA. At issue is the opportunity for a full and informed debate before an election is held.

SHRM is particularly concerned about the rule's mandate that employers provide their employees' personal phone numbers and email addresses to labor organizations. HR professionals, who are tasked with protecting employee privacy and personal information, have expressed grave concern throughout the rulemaking process about providing this information to organized labor.

In addition, the boards of 96 SHRM State councils and chapters lent their names in support of SHRM's comments. Over 4,600 individual SHRM members submitted

their own comments cautioning the NLRB about the impact this proposal would have on fair representation elections. Unfortunately, in issuing its final rule, the Board did not make substantial changes based on concerns identified by SHRM and other stakeholders.

Given SHRM's serious and pervasive concerns with this rule, the Society was compelled to file a lawsuit challenging the NLRB ambush election rulemaking—notable in that it is only the third time SHRM has challenged a Federal rule in court. SHRM's lawsuit, filed in the U.S. District Court for the District of Columbia, asks the court to deem the rule unlawful and set it aside because it violates the NLRA and the Administrative Procedure Act, as well as the First and Fifth Amendments of the Constitution of the United States.

As you know, the Congressional Review Act (CRA) establishes procedures for the Congress to disapprove of Federal agency rules by enacting a joint resolution of disapproval. It is critically important for Congress to quickly pass a joint resolution of disapproval under the CRA so this damaging rule cannot take effect. There is also precedent for Congress successfully using the CRA's procedures to nullify Federal rules—OSHA's ergonomics rule was blocked in 2001.

Again, thank you for sponsoring this important joint resolution of disapproval. SHRM strongly recommends its swift passage.

Sincerely,

MICHAEL P. AITKEN,  
*Vice President, Government Affairs.*

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RESPONSE TO QUESTIONS OF SENATOR KIRK BY CHARLES I. COHEN

*Question 1.* This new rule issued by the NLRB specifically limits the ability for employers and employees to determine the bargaining unit in question prior to a Union election. What happens if there is a dispute over the members of the bargaining unit and the Union wins the election? How would an employee who cast a contended ballot be treated?

Answer 1. Assuming the Union wins the vote tally, the new rule will limit the ability of an employer to obtain a regional director or Board determination on contested employees prior to the Union being certified as the bargaining representative. Specifically, under the new rule, the regional director will only entertain and resolve post-election disputes over voter eligibility and bargaining unit inclusion if the number of disputed ballots is great enough to affect the election outcome. 79 Fed. Reg. 74, 391, 74,393, 74,413 (Dec. 15, 2014). In other words, if the number of disputed individuals is sufficiently small so that their votes would not alter the outcome, the regional director will decline to address their status and instead issue a certification to the Union and require the employer to recognize and bargain thereafter.

The Board has stated in the new rule that an employer has only two possible post-election avenues to have unresolved voter eligibility and bargaining unit inclusion issues addressed, including: (1) mutual agreement with the Union as part of the first contract bargaining or (2) a unit clarification ("UC") petition filed after negotiations begin, which can be resolved by a regional director, subject to discretionary review by the Board.

*Question 2.* Is there precedent for this lack of clarity in the establishment of a bargaining unit?

Answer 2. Although under existing rules it is possible for a bargaining unit to be certified with voter eligibility and inclusion issues left unresolved, the new rule will lead to a significant increase in the number of bargaining units that are not clearly defined following a union election victory. In this regard, the new rule's expansion of uncertain bargaining units post-election is unprecedented, as under prior procedures, the Board was required to take evidence on voter eligibility and bargaining unit inclusion disputes before the election, and in most cases regional directors rendered a decision on those matters prior to an election, subject to potential Board review. Now such disputes, in the vast majority of cases, will be wholly deferred for evidence-taking and decisionmaking purposes, until after the election, and resolved only if the number of disputed ballots is sufficient to affect the election outcome.

RESPONSE TO QUESTION OF SENATOR KIRK BY MARK A. CARTER

*Question.* Under the NLRB rule, employers are required to furnish employee names, personal telephone numbers, personal email address, job classification, shift times, in addition to mailing address within 2 days following direction of election. These so-called "Excelsior lists" are required without significant direction on how the Union may use the contact information following the election. What, if anything,

would prohibit a Union from selling this private contact information to third parties?

Answer. While the final regulation of the National Labor Relations Board<sup>1</sup> would prohibit the use of Excelsior Lists for purposes other than matters “related” to a representation proceeding, the NLRB has expressly chosen not to identify any meaningful enforcement mechanism for that direction.

In its Order implementing the ambush election regulation<sup>2</sup> the NLRB wrote:

. . . even when the voter information is disclosed to the non-employer parties in a particular case, such parties will not be able to use it for whatever purpose they desire. Rather, they will only be allowed to use employee contact information for limited purposes. As discussed below, the final rule provides that “parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and *related matters*.” Thus, *employees need not fear that their contact information once disclosed, will be shared with or sold to entities having nothing to do with the representation proceeding. And should such misuse of the list occur, the Board will provide an appropriate remedy, as discussed further below.*

79 Fed. Reg. 74,344 (Dec. 15, 2014) (emphasis supplied)

However, employees should be concerned for a variety of reasons.

First, the “appropriate remedy” the NLRB references that would punish misuse of their contact information is expressly **not** identified by the NLRB. In the section of the Order implementing the final rule dealing with “Restriction and Remedies for Misuse of the Voter List,” the Board recognizes that,

. . . it goes without saying that non-employer parties would run afoul of the restriction if, for example, they sold the list to telemarketers, gave it to a political campaign or used the list to harass, coerce or rob employees.

79 Fed. Reg. 74,358 (Dec. 15, 2014)

However, while strictly warning “non-employers” (*aka* Unions) that the practice is prohibited, and repeatedly announcing its authority to fashion an “appropriate remedy,” the NLRB avoids the obligation to identify what an appropriate remedy is.

. . . the Board has concluded that it would not be appropriate at this time to specify a remedy, or set of remedies, that would be appropriate in all situations.

79 Fed. Reg. 74,359 (Dec. 15, 2014)

As such, the agency has expressly identified a *right* and failed to identify a corresponding *remedy*. Beyond that, the NLRB goes on to identify several scenarios where it does **not** deem circumstances appropriate to announce that specific remedies are available.

- Union misuse of voter list **after** an election by selling it to telemarketers should not warrant setting aside an election result;<sup>3</sup>
- Misuse of voter list should not always warrant setting aside an election result;<sup>4</sup>
- Misuse of voter list should not prohibit a future organizing drive targeting the victimized employees by the perpetrating Union;<sup>5</sup>
- Misuse of voter list should not always result in injunctive proceedings by the General Counsel to prohibit the continuation of the violation of the prohibited misuse of information by a Union;<sup>6</sup>
- Misuse of the voter list should not always be construed as a violation of “§ 8(b)(1)” of the Act; and<sup>7</sup>
- Unions should not be required to establish and follow security protocols to safeguard employees’ personal information.<sup>8</sup>

<sup>1</sup> 79 Fed. Reg. 74,308, *et seq.* (Dec. 15, 2014) (to be codified at 29 CFR Parts 101,102 and 103).

<sup>2</sup> *Id.*

<sup>3</sup> 79 Fed. Reg. 74,359 (Dec. 15, 2014).

<sup>4</sup> *Id.* The NLRB did not conclusively rule out the potential that misuse of the voter list could result in the setting aside of an election but plainly indicated that a distinct—and unidentified—remedy was more appropriate. “At the same time, the fact that misuse of the list could not warrant setting aside the results of an election does not mean that the misuse should be remedied in a manner appropriate to the circumstances;” (*Id.*)

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* Again, the NLRB recognized that misuse of the information “may be a violation of Section 8(a)(1) or 8(b)(a) [sic]” However, the Agency also wrote the same conduct may be “objectionable.” In the final analysis the NLRB offers little or no guidance as to whether the misuse of the voter list is remediable at all.

<sup>8</sup> *Id.*

Far from deterring unions desiring to, *inter alia.*, sell employees' personal contact information to telemarketers, among other abuses of that sensitive information, the NLRB both declines to identify one single remedial measure that should consistently be utilized to address misuse, and, provides an extensive list of misuse of the employees' information for which it would take **no** remedial action.<sup>9</sup> The prohibitions authored by the NLRB could easily be interpreted as endorsements of the misuse of employees' personal information.

This is particularly concerning given the propensity of labor unions to misuse employee information in the past. On March 19, 2015 the Education and The Workforce Committee of the U.S. House of Representatives issued a press release reciting several examples of union misuse of personal information of employees.<sup>10</sup>

In 2006 Jennifer Parrish was visited by a stranger asking her to sign a union authorization card at her home. She repeatedly declined to sign the card at which point the stranger became angry. To get him to leave she agreed to sign;

When a Patricia Pelletier and her co-workers decertified the union representing them, union operatives responded by allegedly forging her signature on numerous magazine subscriptions and consumer product solicitations. She was billed thousands of dollars by magazines jeopardizing her credit rating;

When 33 AT&T union members resigned from their union and ceased paying dues, the union posted their names and social security numbers on a publicly accessible bulletin board stating that the employees had resigned from the union and ceased paying dues.

Now, the agency charged with policing the misuse of such personal information is vastly expanding its proliferation and is identifying no consistent remedial measures to insure the security of that information.

In sum, while the NLRB has announced that non-employer parties to representation proceedings—or unions—are prohibited from misuse of this sensitive information by selling it to telemarketers, that agency has failed to identify any consistent remedial measure to enforce that prohibition. Moreover, the agency has identified an extensive listing of scenarios where unions would not be held accountable as a result of engaging in the misconduct that they assert is prohibited. The agency has identified a right with no assured remedies.

Thank you for the opportunity to address the committee on this important issue for workers in our Nation. I am happy to supplement this response at your invitation.

#### RESPONSE TO QUESTIONS OF SENATOR KIRK BY ELIZABETH MILITO

*Question 1.* The NLRB has required that Unions send the filed petition to the employer via fax. This is not only a nearly 200-year-old mode of communication, but also a potentially unreliable one. What impact on election preparation will this requirement have on small businesses? Particularly those companies founded since the invention of more instantaneous and reliable methods of communication that may not rely on fax machines in their normal operations.

Answer 1. Today's fast-paced work environment, which depends on the use of computers, cell and smart phones makes fax machines increasingly outdated and unnecessary in the business environment. Email, including PDF transmission of documents, has become the preferred method of communication with small business owners who contact me for information. Moreover, fax machines can fail and since they are rarely used, it might be days before an employee or the business owner notices that a machine has run out of paper or that the cartridge is out of ink. In addition, documents transmitted via fax may not be as safe and secure as the sender and/or recipient would like. For this reason, I find business owners prefer to have documents emailed since this form of communication better ensures that documents are received by the intended recipient and do not end up in the wrong hands or sitting on the fax machine or an employee's desk unread.

*Question 2.* Given that the option to send both an email and a fax as notice of the petition being filed lies with the Union, the employer could be intentionally left in the dark if they do not have immediate access to a fax machine. Under what sce-

<sup>9</sup>It is noteworthy that in an interpretive memorandum from the General Counsel of the NLRB issued on April 6, 2015 (GC-Memorandum 15-06) the chief attorney for the agency writes that "(a) party may decide to raise allegations of misuse by filing objections to the election or an unfair labor practice charge." (*Id.* at p. 36) However, as the NLRB Order opines that misuse of the voter list will not always warrant setting aside an election result or constitute a violation of § 8(b)(1) the utility of such an allegation is highly questionable, if not absent.

<sup>10</sup>[http://edworkforce.house.gov/news/document\\_single.aspx?DocumentID=398591](http://edworkforce.house.gov/news/document_single.aspx?DocumentID=398591).

nario would the Union be likely to send both an email and a fax, when it is neither mandated, nor in their interests to do so?

Answer 2. Since time is of the essence in responding to a petition, it would most certainly work to the Union's advantage to give the employer as little amount of time as possible to respond. By sending the petition by fax, without email transmission, the Union better ensures that the employer will be delayed in learning about the filing of a petition. The shift in the last 10 years toward e-commerce means that fax machines are not routinely checked in the office and a transmission might sit for days unnoticed whereas an email is likely to be read much sooner.

RESPONSE BY CAREN P. SENCER TO QUESTIONS OF SENATOR ALEXANDER AND  
SENATOR KIRK

SENATOR ALEXANDER

*Question 1.* On Monday, February 9, 2015, NLRB Chairman Pearce issued a statement in which he said "it is undeniable that modernizing and streamlining the [union election] process is far overdue." Given the statistics we heard during the hearing—that the timeframes for more than 95 percent of union elections surpass the NLRB's own goals, and that unions are winning 64 percent of union elections—do you find Chairman Pearce's statement accurate?

Answer 1. I believe that Chairman Pearce's statement is correct. The percentage of elections that Unions are winning is irrelevant to whether the procedure is working as efficiently as it could or should be for all parties.

The internal guideline to conduct elections within 42 days was adopted in 1997 by the General Counsel's office. The goal was set within the confines of the existing regulations and then current technology. It was clear that elections could be conducted in significantly less time but 42 days was set as a goal because it was believed to be achievable. Now, unnecessary delay and gamesmanship can be further reduced. Thus, the statistic that 95 percent of elections are held within the NLRB's own goal is misleading because that goal took into consideration inefficient rules, obsolete technology, and then permissible delay tactics.

*Question 2a.* In your testimony, you claim—as the NLRB did in its final rule announcement—that the rule would expedite the union representation process. Are you at all concerned that rushing through elections and not addressing important issues up front may lead new, longer delays in first contract negotiations?

Could the rule actually make the overall process longer by increasing the number of cases that must be litigated in court? (For example, "refusal to bargain" cases.)

Answer 2a. I do not believe that the final rules will result in "rushing through elections." Additionally, in my experience, the discourse prior to an election does not address the issues that are later addressed in contract negotiations. Much employer campaigning has to do with matters unrelated to the workplace issues that need fixing in negotiations. Much employer discourse consists of union bashing, promises of change and entreaties for "one more chance" to make things right without a union. Completing the election process faster will result in employers being encouraged to get down to contract negotiations sooner where workplace issues can be discussed and resolved. It is unlikely that a shorter period between filing a petition and certification would have an impact on the average time until a first contract is reached. The issues that are resolved through the election procedure have to do with the scope of the unit to be represented, not the ultimate bargaining positions of the parties.

*Question 2b.* One tenant of the Employee Free Choice Act was to have an outside arbitrator impose all terms of a labor agreement on the parties if they failed to reach an agreement in 90 days. Is this an idea that you support? Please explain.

Answer 2b. Although the Employee Free Choice Act is outside the scope of my testimony, I'm happy to respond to this question. An arbitrator's imposition of terms of a first collective bargaining agreement is a provision of the California Agricultural Labor Relations Act. In that procedure, the arbitrator, who always must be an "outsider" to be impartial, reviews the final proposals made by both parties and the background information which supports them, including bargaining history, wage rates in the area, and the relative size of the employer to others in the industry in the geographic area, and can impose a first contract when the parties are unable to reach agreement. Frequently, the use of a mediator or arbitrator in any contract negotiation results in an agreement that both parties support. The analysis is the same in negotiations for a first contract. Anything that helps parties reach a resolution which both find acceptable should be encouraged. The threat of an imposed contract keeps both parties on track for good faith negotiations. I would sup-

port some form of first contract arbitration as part of a package of labor law reform to modernize the National Labor Relations Act. It has worked in California under our Agricultural Labor Relations Act and there is no reason it would not work at the Federal level.

*Question 3.* Under the new NLRB rule, an employee could be forced to vote on whether to form a union without knowing which fellow employees would be a part of the bargaining unit. As many as 20 percent of the proposed bargaining unit may be contested—but the NLRB would still force an election. Are you concerned about situations where an employee’s “yes” or “no” depends on which other employees would be cast in the group? (For example, cashiers may not want to bargain with loading dock employees because they have different priorities.)

*Answer 3.* First, a point of clarification: the 20 percent rule referenced in Senator Alexander’s question was taken out prior to the final rule. However, the final rule does provide discretion for the regional director to allow some percentage, that she finds reasonable in the given specific case, to vote by a challenge ballot procedure.

While employees have some choice in designing their unit, that choice has always been limited by the National Labor Relations Act which requires the unit to share a community of interest. That long standing rule has served to create bargaining units in various industries that make sense for employees, employer and unions.

I am not aware of any situation in which a group of employees have said, “I don’t want to be in the unit if that other group of employees is too” and the union has not petitioned for them separately to ensure that their interests are kept separate. In addition, in larger groups that include multiple classifications when it comes to having their interests heard, each has an opportunity to be heard at the bargaining table and have their views represented.

*Question 4.* In your testimony, you State that there is “no record of abuse by unions of voter eligibility lists,” but are there examples of unions misusing employees’ personal information in other contexts? (For example, as retaliation for rescinding union membership or for filing decertification petitions.)

Should employees have the ability to “opt-out” of having their contact information sent to union organizers? Please explain.

*Answer 4.* I have no direct or indirect knowledge regarding any cases of unions misusing employee’s personal information in any context. I have never heard of it happening. The union is a voluntary organization. If employees, either at a specific employer or other employers in the industry or the area, knew that the union was misusing confidential or private information, the union would be punished in the market place by people refusing to affiliate with it. The union has no incentive to misuse employee information as it results in harm to its credibility with the very people it is looking to serve. In my experience unions keep information about members and others strictly confidential for these reasons.

There should not be any process to opt-out of having contact information sent. The goal of the *Excelsior* rule is to provide each individual employee an opportunity to receive all available information so they may make an informed choice. One of the original goals of that rule was to make the election process work better so that both sides would have a list of eligible voters to assure that only eligible voters would cast votes. Without that list, it was difficult to achieve that goal since neither party nor the NLRB knew who was eligible. Having all employees on the *Excelsior* list streamlines the process for all parties as each knows who is designated to vote.

In addition, in the event there was an opt-out process, unless that process was completely overseen by the National Labor Relations Board, thus adding work for its already stretched staff and further delaying the election procedure, the employer would know which employees opted-out. The employer would have the opportunity to coerce employees to opt-out, and could use the choice of employees to opt-out as a way to survey the bargaining unit. This polling regarding employee’s union sympathies would violate Federal law.

As was stated at the hearing, the National Labor Relations Act does not exempt small employers based on the number of employees, as most labor and employment statutes do.

*Question 5a.* Should the NLRA be brought into line with other labor and employment statutes in this way?

*Answer 5a.* It is unclear what other labor and employment statutes are referred to in the question. Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act apply to employers of 15 employees or more. The FLSA applies regardless of the number of employees if the commerce threshold is met (\$500,000 in sales per year) or the employer is engaged in interstate commerce. In some States, like California, the thresholds are even lower with either no exemption based on the

size of the employer for general employment law and five employees for anti-discrimination laws.

Although unions sometimes petition for units smaller than 5 or 15, these employees are generally part of a larger organization. For example, there may be eight mechanics at a garage where a fleet of school buses is housed. Although the unit of mechanics is small, the employer may have over 50 employees. This is not a small employer and would be subject to all labor and employment laws. All employees are entitled to the protection of the NLRA as long as they are in a bargaining unit larger than one and certain jurisdictional standards are met. In this way, the NLRB's refusal to take jurisdiction over any petition seeking only one employee or over an employer with low annual revenue is a *de facto* exemption for small employers. The right to engage in collective action should not be limited because of the size of the employer that you work for.

*Question 5b.* Do you agree that the burdens of this rule will fall most heavily on small employers that are unfamiliar with labor law?

Answer 5b. In my experience, unions are not organizing small employers. The continual repetition of the impact of this rule on small employers is just a red herring. If an employer is small, the burdens are small. For example, producing an *Excelsior* list, providing the names of contact information of members in the sought for bargaining unit, is an easy task if there are only eight individuals in the bargaining unit and is, in fact, a more difficult task when you have a larger employer with a larger unit of employees involved. While it is true that larger employers are more likely to have in-house resources or counsel on retainer or individuals inside their organization that are likely to be addressing these types of issues, it is not a significant burden for an employer with eight employees to pull from its electronic system or to simply type out the contact information of those eight individuals.

SENATOR KIRK

*Question.* Under the NLRB rule, employers are required to furnish employee names, personal telephone numbers, personal email address, job classification, shift times, in addition to mailing address within 2 days following direction of election. These so-called "Excelsior lists" are required without significant direction on how the Union may use the contact information following the election. What, if anything, would prohibit a Union from selling this private contact formation third parties?

Answer. This question is similar to question 4 from Senator Alexander and results in the same response. Any union that sold its private information to a third party would wind up unable to organize any future workers and would likely feel push back from its current and existing membership. There is no incentive for a union to do this. Even in the event that a union is not successful in organizing a group of employees, they would have no incentive to sell the information because it would ruin their ability to organize these employees at any other point in time. And you can be sure that if a union did sell contact information, management would make an issue out of it in future campaigns. The requirement to produce an eligibility list has existed for decades and I have represented hundreds of unions that have received such a list. None of those unions have misused the list in any way. It just has never happened.

[Whereupon, at 10:48 a.m., the hearing was adjourned.]

○