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

Chairman Roe and Distinguished Committee Members:

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

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

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

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

I. SECRET BALLOTS ELECTIONS ARE NEEDED

a) Card check and neutrality agreements destroy employee rights.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

union officials and employers desperate to avoid a corporate campaign.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

unrelated to the employees' desire to decertify the union.

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

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

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

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

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

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

Exhibit 1

GLENN M. TAUBMAN

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

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

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

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

Ex. 1

26, 2011); Dana Corp., 351 NLRB 434 (2007); L-3 Communications. Inc., 355 NLRB No. 174 (Aug. 27, 2010).

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

Publications: Union Discipline and Employee Rights, Lab. L. J., (Dec. 1998); Neutrality Agreements and the Destruction of Employees' Section 7 Rights, ENGAGE, May 2005.

Exhibit 2

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: November 30, 2007

TO : Willie L. Clark, Regional Director
Region 11

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Rescare, Inc.
Case 11-CA-21422

SEIU Local District 1199
Case 11-CB-3727

518-4001-5000
518-4040-0100
518-4040-0100
536-2548
712-5042-3380
339-2525
920-0150
440-3375

These cases were submitted for advice on several issues. We concluded that: 1) the Employer did not violate Section 8(a)(2) by entering into a neutrality agreement (EPA) providing that newly-organized employees will, upon recognition, be merged into the parties' existing state-wide bargaining unit and subject to the state-wide collective-bargaining agreement; 2) the Union did not violate Section 8(b)(1)(A) by refusing its new unit members' requests for a copy of the EPA; 3) union organizers' statements to two employees that authorization cards were only for the purpose of getting more information invalidated those cards; 4) the Union did not violate Section 8(b)(1)(A) by mistakenly announcing to employees that it had attained majority status, then promptly retracting the announcement; 5) the Employer and the Union lawfully placed newly organized bargaining employees in a state-wide bargaining unit rather than a single facility unit; 6) the Employer lawfully refused to withdraw recognition from the Union based on an employee petition received after the arbitrator's certification of a card majority; and 7) the International Union is not liable for the conduct of the Local Union.

FACTS

Rescare, Inc. (the Employer) is a national human services company, employing about 40,000 people nationwide. The Employer operates facilities that provide support to mentally retarded and developmentally disabled individuals who are unable to live independently. The Employer and SEIU Local 1199 (the Union) have been parties to a series

Ex. 2

of collective-bargaining agreements covering approximately 1300 employees in certain Employer facilities in Ohio and West Virginia. In 2001, negotiations on a successor agreement were unsuccessful. The Union struck and conducted a corporate-wide campaign against the Employer. In fall 2003, the parties resolved their dispute and executed successor state-wide collective-bargaining agreements in Ohio and West Virginia (expiring September and October 2006, respectively). The collective-bargaining agreements covered the terms and conditions of employment for bargaining units that existed at the time the respective agreements were executed. Units organized after the collective-bargaining agreements took effect negotiated their own separate agreements.

In May 2006,[1] prior to negotiations for successor agreements, the parties began meeting to discuss the development of a less acrimonious relationship. Among other things, the Union broached the concept of a neutrality agreement and the Employer broached an end to the Union's negative corporate campaigns. The parties did not exchange or discuss specific proposals or conduct negotiations toward a collective-bargaining agreement. On June 30, the parties executed the "Organizing, Neutrality and Election Procedure Agreement" (EPA). The EPA applied to all present and future Employer operations in Ohio and West Virginia providing services to the mentally retarded, developmentally disabled, or other similarly situated consumers. The EPA provided that upon recognition, "units organized will be merged into the respective state-wide collective bargaining units for Ohio and West Virginia, and the terms of the collective bargaining agreements for the respective states will thereafter govern the terms and conditions of employment for the newly organized employees." It also provided that if the parties failed to reach successor collective-bargaining agreements in Ohio and West Virginia, the EPA would be void.

The EPA stated that the Employer would remain neutral regarding employees' decision whether to choose union representation. It also established procedures for the organizing process, including the grouping of counties into

[1] Herein all dates are 2006 unless otherwise indicated.

organizing zones and an organizing timetable by zones.[2] The EPA also established guidelines for the parties' conduct during the Union's organizing efforts. It provided, inter alia, that during the life of the EPA neither the Employer nor the Union would engage in personal attacks or derogatory comments concerning the mission, motivation, leadership, character or representatives of the other; that neither party would seek to involve external organizations such as the media, legislators, regulators, or providers in matters of concern regarding the other without first giving notice of the specific concern and attempting to resolve the matter directly with the other party; and that before filing a complaint with an outside agency against the other, the parties would raise the concern with each other in a sincere attempt to resolve the matter.

In July, the parties met to negotiate state-wide successor agreements for Ohio and West Virginia. In August, the parties reached tentative agreement on both contracts and in October, they executed the agreements. The "Union Recognition" sections contained the EPA language, set out above, providing that any newly recognized units within the state organized pursuant to the EPA would be merged into the state-wide bargaining unit, and that the state collective-bargaining agreement would apply to those employees.

In September, the Union began its organizing campaign. On November 29, pursuant to the arbitrator's certification of majority, the Employer recognized the Union as the exclusive representative for Mercer County employees and absorbed them into the state-wide bargaining unit.

ACTION

1. The Employer did not violate Section 8(a)(2) by entering into a neutrality agreement providing that newly-organized employees will, upon recognition, be merged into the parties' existing state-wide unit subject to the state-wide collective-bargaining agreement

Parties in an existing bargaining relationship may lawfully bargain about subjects that apply to employees

[2] The initial EPA provided for an election process requiring a 55 percent showing of interest that was an alternative to a formal Board election. On August 31, the parties modified the EPA to also permit a card check procedure requiring a 60 percent showing of interest.

outside the unit if the subject is a mandatory subject of bargaining for the unit employees.[3] In "each case the question is not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the 'terms and conditions' of their employment."[4] The Board applies this principle to the negotiation of after-acquired clauses, "whereby the employer agrees to recognize the union as the representative of, and apply the collective-bargaining agreement to, employees in [facilities] acquired after the execution of the contract."[5]

Where an after-acquired clause applies to employees who would become part of the existing unit upon a showing of majority, the clause is deemed to "vitally affect" the terms of employment of the existing unit and thus be a mandatory subject.[6] Thus, in Houston Div. of Kroger Co., the employer violated Section 8(a)(5) by breaching a contract clause that would have added additional stores to the bargaining unit and applied the contract to those stores if the union obtained a showing of majority status at those facilities.[7]

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[3] See Allied Chemical Workers v. Pittsburgh Plate Glass Company, 404 U.S. 157, 178-179 (1971).

[4] Id. at 179.

[5] See Pall Biomedical Products Corp., 331 NLRB 1674, 1675 (2000), enf. den. on other grounds 275 F.3d 116 (D.C. Cir. 2002).

[6] Pall Biomedical Products Corp., 331 NLRB at 1676; Houston Division of Kroger Co., 219 NLRB 388, 389 (1975). See generally Allied Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. at 179; Local 24 of Intern. Broth. Of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. Oliver, 358 U.S. 283, 294 (1959).

[7] The Board interpreted the clause as a waiver of the employer's right to demand an election. 219 NLRB at 388-89. See also Raley's, 336 NLRB 374 (2001) (employer waived right to insist on election when it signed an after-acquired clause requiring employer to recognize all employees working within a certain geographical area as "an appropriate unit" upon proof of majority). Compare Supervalu, Inc., 351 NLRB No. 41, slip op. at (September 2007) (employer did not violate Section 8(a)(5) by refusing majority card check recognition at three new stores despite the parties' "additional stores" clause, where the new employees would not become part of the same unit and the General Counsel did not introduce evidence to support a

The after-acquired clause need not be included in the parties' collective-bargaining agreement so long as it vitally affects the terms and conditions of the existing employees. In Pall Biomedical Products Corp., for example, the Board held that a letter of agreement that extended recognition (but did not apply the entire contract) to new units in the same geographic area "vitally affect[ed]" existing employees because the agreement protected against the erosion of the existing unit's terms and conditions of employment and addressed employee concerns that work would be transferred out of the bargaining unit.[8] Thus, the employer violated 8(a)(5) by repudiating the letter of agreement.

In the instant case, the EPA provided that newly organized employees would become part of the existing state-wide unit covered by the state-wide collective-bargaining agreement upon a showing of the Union's majority status. Accordingly, applying Kroger, the application-of-contract clause was a mandatory subject of bargaining for existing unit employees and the Employer did not violate Section 8(a)(2) by entering into the EPA with the Union.[9]

2. The Union did not violate Section 8(b)(1)(A) by refusing to provide the EPA to organized employees

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finding that the "additional stores" clause vitally affected the terms and conditions of the existing employees).

[8] 331 NLRB at 1676-1677.

[9] The conduct that the General Counsel deemed unlawful in Dana Corp., (JD-24-05, 2005 WL 857114 (2005)), is not present here. In Dana Corp., an employer and a union negotiated a free-standing letter of agreement that, in addition to neutrality provisions, included numerous substantive terms of employment that generally limited the gains that the employees might realize at the bargaining table should a majority of them sign authorization cards. The agreement was not a product of collective-bargaining at any of the recognized facilities, did not bear any relationship to bargaining in any of those units, and thus could not "vitally affect" those employees' terms and conditions of employment. The General Counsel and other parties have filed exceptions to the ALJ's conclusion that the letter of agreement was lawful and the matter is currently pending before the Board.

Soon after the Employer had recognized the Union as the employees' exclusive bargaining representative, two Mercer County employees sent a letter to the Union requesting a copy of the EPA. By letter of December 23, the Union denied the employees' request, asserting that the EPA was a binding, legal document that the parties had agreed would not be disclosed to the general membership, to management, or to the public.

A union's duty of fair representation includes the obligation to provide employees with requested information pertaining to matters affecting their employment.[10] Employees are entitled to that information so that they can ascertain their rights and determine whether they have been fairly treated in regard to their terms and conditions of employment.[11] Thus, the Board has required unions to provide such information as copies of the parties' collective bargaining agreements,[12] grievance forms related to an employee's grievance settlement,[13] job referral

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[10] See Branch 529, National Assn. of Letter Carriers, 319 NLRB 879, 881-882 (1995) (union breached its duty of fair representation by refusing to provide employee copies of her grievance forms); Branch 47, National Assn. of Letter Carriers, 330 NLRB 667, 668 (2000).

[11] Branch 47, National Assn. of Letter Carriers, 330 NLRB at 668 (employee could not know whether he would file a grievance or an unfair labor practice charge until he had reviewed the overtime list and determined whether he had been incorrectly charged with overtime hours or been treated disparately); Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency), 260 NLRB 419, 420 (1982) (employee could not know whether he was entitled to medical expense reimbursements until he reviewed the health and welfare plan).

[12] Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency), 260 NLRB at 420 (the opportunity to examine the agreement is necessary for an employee "to understand his rights under [the contract] and . . . to determine the quality of his representation under them"). See also Vanguard Tours, Inc., 300 NLRB 250, 265 (1990) (union violated Section 8(b)(1)(A) when union steward withheld the collective-bargaining agreement from two bargaining unit employees).

[13] Branch 529, National Assn. of Letter Carriers, above, 319 NLRB at 882.

information in the operation of an exclusive hiring hall,[14] copies of the union's health and welfare plan,[15] and a union steward's list of employee overtime hours used to monitor the employer's distribution of overtime work.[16] By contrast, a union has no duty to provide to employees information that does not pertain to matters affecting employment.[17]

In the instant situation, we conclude that the Union was not obligated to provide the EPA to unit employees because the EPA does not establish any of the Mercer County employees' terms and conditions of employment, and thus, ipso facto, the EPA contains no information that employees need to ascertain their rights or determine whether they have been fairly treated in regard to their employment. Most significantly, the collective-bargaining agreement is clear on its face that the terms and conditions for existing and newly organized employees are governed by the collective-bargaining agreement and not the EPA. Specifically, the contract provides that "any new [u]nits within the state organized pursuant to the Organizing, Neutrality and Election Procedure Agreement shall, upon recognition of the Union pursuant thereto, be merged into the bargaining unit for the state, and that *the terms and*

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[14] Intl. Brotherhood of Boilermakers, Local 197, 318 NLRB 205, 205 (1995) (union's duty of fair representation includes an obligation to provide access to job referral lists to allow an individual to determine whether his referral rights are being protected).

[15] Law Enforcement & Security Officers Local 40B (South Jersey Detective Agency), 260 NLRB at 420.

[16] Branch 47, National Assn. of Letter Carriers, above, 330 NLRB at 668.

[17] See International Union of Operating Engineers, Local 12 (Nevada Contractors Association), 344 NLRB No. 131, slip op. at 1, 5-6 (2005) (union only required to turn over hiring hall information that was relevant to ascertaining whether hiring hall dispatchers were treating employee fairly); APWU Local 434, ALJD, 28-CB-5599, 2002 WL 506338 (NLRB Div. of Judges), slip op. at 6 (Mar 29, 2002) (union did not unlawfully refuse to provide name, address and telephone number of union's national business agent, where information was not needed for employee to pursue his substantive rights).

conditions set forth herein shall henceforth apply to such employees."[18] (emphasis added).

Further, a careful examination of the EPA itself reveals that it contains no terms and conditions of employment beyond those provided in the collective-bargaining agreement. Thus, the EPA contains an application-of-contract clause (providing that upon recognition, new facilities would be merged into the state-wide units and that the terms of the contracts for the respective states would apply); a neutrality agreement (providing that the Employer would remain neutral regarding employees' decision whether to choose union representation); procedures for the organizing process (such as the grouping of counties into organizing zones); and parameters for the parties' conduct during the Union's organizing campaign (such as that the parties will attempt to resolve disputes internally before contacting or filing complaints with outside entities). Accordingly, inasmuch as the EPA contains no information pertaining to matters affecting employees' terms and conditions of employment, the Union was not obligated to provide a copy of the EPA to newly organized employees.[19]

3. Union organizers' statements to two employees that authorization cards were solely for the purpose of getting more information invalidated those cards

In Gissel, the Board held that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature.[20]

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[18] Compare National Hockey League Player's Association, Advice Memorandum 2-CB-20453, dated June 30, 2006, p. 15. (union violated duty of fair representation when it failed to provide its members with copies of "confidential side letters" that were explicitly incorporated into the collective-bargaining agreement and that contained revenue information relevant to determining employees' salary caps).

[19] In investigating cases regarding a union's duty to make neutrality agreements available upon request to unit employees, the Regions should carefully evaluate the content of the agreement to ascertain whether it contains information relevant to employees' terms and conditions of employment.

[20] NLRB v. Gissel Packing Co., 395 U.S. 575, 606 (1969). Although Gissel assessed the validity of signed cards in

Thus, when dealing with single-purpose cards that unambiguously authorize union representation, union solicitors' representations to the effect that signatures are needed to get information or to get an election do not negate the written language of the card because they do not amount to a direction to the signer that the "only" purpose of the card is the one stated by the solicitor and not the one on the card.[21] By contrast, union solicitors' representations to the effect that the "only" purpose of the card is to obtain more information or get an election negate the written language on the card because they amount to a direction to the signer to disregard the written language.[22]

In the instant case, in obtaining authorization card signatures, a union solicitor told an employee that the card was "just to get more information," and told another employee that signing the card did not mean that she was joining the Union but that it was "only to get more information."[23] Applying the above principles, we conclude that the Union's representations to these employees to the effect that the only purpose of the cards was to obtain information negated the written language and invalidated their cards.[24]

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order to determine whether to authorize an interim bargaining order, the Board applies the same Gissel standard to determine the validity of signed cards used to obtain voluntary recognition. See Kroehler Mfg. Co., 243 NLRB 172, 184 (1979).

[21] Action Auto Stores, Inc., 298 NLRB 875, 881 (1990), citing Montgomery Ward & Co., 288 NLRB 126, 128 (1988).

[22] See Montgomery Ward & Co., 288 NLRB at 162-163, 166 (statements that cards were only for the purpose of getting information about the union or only for the purpose of obtaining an election invalidated the cards because the solicitor represented that the employees could ignore the language on the face of the card or that the cards were for a purpose other than indicated by the language).

[23] We agree with the Region that the card signed by employee Hearn was valid because the solicitor never told her that the purpose of the card was solely to obtain more information.

[24] After discounting the two invalidated cards, the EPA's requisite 60% of employees chose unionization.

4. The Union did not violate Section 8(b)(1)(A) by mistakenly announcing to employees that it had attained majority status, then promptly retracting the announcement

A union violates Section 8(b)(1)(A) when it provides misinformation to employees that tends to coerce them in their decision regarding whether to choose union representation.[25] With respect to the signing of membership applications, the coercive potential of misinformation suggesting that a majority had already signed cards would be the tendency to persuade employees that not signing a membership card would be futile.[26]

In the instant case, on November 7, after the Union had begun organizing the Mercer County employees, it inadvertently sent the employees a premature "welcome" packet indicating that a majority of employees had selected the Union. On November 14, upon realizing its mistake, the Union sent the employees a letter rescinding that "welcome" and informing them that they still had not reached majority status. Although three employees signed cards during that one week interval, the Union never sent those cards to the arbitrator.

Applying the above principles, we conclude that the Union's welcome packet did not violate Section 8(b)(1)(A) because the Union immediately informed employees that they had not reached majority status, the mistake had no effect on computation of the Union's majority, and there is no evidence that the misinformation tended to coerce employees in their decision regarding whether to choose union representation.

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[25] See, e.g., Monfort of Colorado, 256 NLRB 612, 613 (1981) (union violated Section 8(b)(1)(A) where organizers' statements to employees misleadingly indicated that the union was already their bargaining agent and led them to believe that signing a card was a mere formality). Compare Montgomery Ward, above, 288 NLRB at 129 (misrepresentations inflating the number of other employees who had already signed cards did not invalidate the cards where they were unaccompanied by coercive statements and did not amount to a union scheme to misrepresent union support).

[26] See UFCW 1099, 9-CB-9524, Advice Memorandum dated 1997 (no 8(b)(1)(A) violation where no coercion was found and there was conflicting evidence as to the importance of the misinformation in employees' decision to authorize the union).

5. The Employer and the Union lawfully placed newly organized employees in a state-wide bargaining unit rather than a single facility unit

The Board does not apply a single-facility presumption when parties to an existing multi-facility collective-bargaining agreement agree to absorb newly organized facilities into that multi-facility bargaining unit.[27] In the instant case, the Union and the Employer are parties to an existing multi-facility collective-bargaining agreement and have mutually agreed to absorb the newly organized facilities into that multi-facility bargaining unit. Accordingly, no single-unit presumption exists and the parties lawfully placed the newly organized employees into the state-wide bargaining unit.

6. The Employer lawfully refused to withdraw recognition based on an employee petition received after the arbitrator's certification of a card majority

A union enjoys an irrebuttable presumption of continuing majority status for one year after it is certified.[28] Where an employer extends voluntary recognition to a union, a comparable presumption of majority status arises and continues for a reasonable period of time.[29] The irrebuttable presumption of continuing majority status also attaches for the duration of a collective-bargaining agreement.[30] Thus, in Parkwood

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[27] See Kroger Co., 219 NLRB at 389 (employer waived right to insist on election where it agreed to include employees in existing multi-facility unit pending majority support); Raleys, 336 NLRB at 374 (same).

[28] Brooks v. NLRB, 348 U.S. 96, 104 (1954).

[29] In Dana, however, the Board reversed its recognition-bar doctrine pertaining to voluntary recognition and held that an employer's voluntary recognition of a labor organization does not bar a decertification petition that is filed within 45 days of the notice of recognition. However, the Board also held (slip op. at 14) that it would apply the revised recognition-bar requirements prospectively only, to voluntary recognitions that postdate the Dana decision. In any event, Dana only removed the bar to an election (i.e., QCR can be raised), and did not change the presumption of majority status.

[30] El Torito-La Fiesta Rests. V. NLRB, 929 F.2d 490, 492 (9th Cir. 1991); Tinton Falls Conva. Ctr., 301 NLRB 937, 939-940 (1991).

Development Center, Inc., the conclusive presumption of majority status during the life of a collective-bargaining agreement barred an employer from withdrawing recognition from the Union before expiration of the contract, notwithstanding evidence of a loss of majority.[31]

In the instant case, the Employer recognized the Union as the exclusive bargaining representative of the Mercer County employees based on a November 29 arbitral certification of card majority. On about December 21, the Employer received a petition signed by 77 Mercer County employees seeking to withdraw recognition from the Union. Applying the above principles, we conclude that on November 29, an irrebuttable presumption of majority status attached to the Union, based both on the Employer's extension of voluntary recognition to the Union, and on the absorption of the Mercer County employees into the state-wide collective-bargaining agreement. Accordingly, the Union's irrebuttable presumption of majority status precluded reliance on the subsequent petition to withdraw recognition.

7. The International Union is not liable for the conduct of the Local Union

As discussed above, we have concluded that there is no merit to the allegations that the Local Union engaged in unlawful Section 8(b)(1)(A) conduct (i.e., by refusing to provide the EPA to organized employees, by mistakenly announcing that it had attained majority status, or by placing newly organized employees in a state-wide bargaining unit). Thus, there was no unlawful conduct for which the International Union could be liable. In any event, the International Union is not the 9(a) representative of those unit members, was not a party to the negotiations regarding the EPA or the state-wide collective-bargaining agreements, and did not participate in, authorize, or ratify the Union's conduct. Accordingly, the International could not be liable for the Union's actions.

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[31] 347 NLRB No. 95, slip op. at 6, fn. 9 (August 2006). See also Auciello Iron Works v. NLRB, 517 U.S. 718 (1996) (a union's acceptance of an employer's outstanding contract offer precludes the employer from raising a good faith doubt of the union's majority status based on events occurring after the acceptance. Thus, the employer's good-faith doubt based on subsequent events is not available to defend a refusal to execute a valid agreement or a withdrawal of recognition).

B.J.K.

Exhibit 3

A Moral/Contractual Approach to Labor Law Reform

ZEV J. EIGEN* AND DAVID SHERWYN**

When laws cease to operate as intended, legislators and scholars tend to propose new laws to replace or amend them. This Article posits an alternative: offering regulated parties the opportunity to contractually bind themselves to behave ethically. The perfect test case for this proposal is labor law, because (1) labor law has not been amended for decades, (2) proposals to amend it have failed for political reasons and are focused on union election win rates and less on the election process itself, (3) it is an area of law already statutorily regulating parties' reciprocal contractual obligations, and (4) moral means of self-regulation derived from contract are more likely to be effective when parties have ongoing relationships like those between management and labor organizations. The Article explains how the current law and proposed amendments fail because they focus on fairness as a function of union win rates, and then outlines a plan to leverage strong moral contractual obligations and related norms of behavior to create as fair a process as possible for employees to vote unions up or down.

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INTRODUCTION

A formidable body of literature and a growing set of empirical research confirm that people obey the law for a host of reasons independent from a positivist rationale of obeying for the sake of obeying.[1] Rationales offered include instrumental,[2] social/relational,[3] and

1. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006); Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1 (1985); *see also* PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW (1998).

2. *See, e.g.*, Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349,

moral.[4] Recent research on contractual obedience suggests that morally framing an obligation to perform as contractually obligated yields greater likelihood and magnitude of performing an undesirable task as compared to framing the request to obey the same contract in terms of a legal threat.[5] While extralegal effects like this are well recognized and, in some instances, may be more powerful than law by itself as a means of affecting behavior,[6] to the Authors' knowledge, they are not incorporated into plans for legal reform. That is, if tort law is *broken*, legislators and scholars most often suggest revising tort laws, not crafting nonlegal incentive structures like relational, social, or moral constraints that operate independently from the law or in conjunction therewith. We suggest doing just that as a means of reforming labor law. Specifically, we propose incorporating a set of *moral*[7] *principles* embodied in a *contract* to which union and management would both be incentivized to agree, which would make the process of certifying unions as agents of collective bargaining significantly fair and would result in a less costly administrative system.

Labor law is the perfect test case for such a proposal. Labor law involves state regulation of a tripartite relationship among labor

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1349–61 (2009) (presenting an instrumental view of contracts); Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 635 (2010) (describing the economic prediction of human behavior as one in which an individual will breach a contract if breaching yields an extra dollar earned); *see also* Simeon Djankov et al., *Courts*, 118 Q.J. ECON. 453, 454–57 (2003) (examining the cost of evicting tenants as a function of whether a judicial system is based on civil law or common law).

3. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473–74 (1998) (using sociological and social-psychological literature to explain behavioral economics in law); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61–62 (1963) (finding that parties in the automobile industry rely more heavily and often on relational grounds for enforcing contracts than on legal sanctions contained therein). *See generally* Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities*, 1 PERSONALITY & SOC. PSYCHOL. REV. 323 (1997).

4. *See generally* Zev J. Eigen, *When and Why Individuals Obey Form-Adhesive Contracts: Experimental Evidence of Consent, Compliance, Promise and Performance*, 41 J. LEGAL STUD. (forthcoming 2012), *available at* http://ssrn.com/abstract=1640245; Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?*, 100 GEO. L.J. 5 (2011); Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405 (2009).

5. Eigen, *supra* note 4 (manuscript at 23).

6. *Id.*

7. We use the term "moral" throughout this Article loosely. As noted by others, there is lack of convergence among scholars on what is meant by "morals," "ethics," or "values" broadly. *See, e.g.*, Steven Hitlin & Jane Allyn Piliavin, *Values: Reviving a Dormant Concept*, 30 ANN. REV. SOC. 359, 360 (2004). For the purposes of this Article, it is unnecessary to distinguish among the various conceptualizations and operationalizations of the term. We mean simply to refer to the set of constraints on behavior derivative from one's sense of obligation based on communal norms of acceptable behavior; ideals about desirable characteristics, states, or actions; or evaluative beliefs on how to orient ourselves in contemporary life. Short of picking an unnecessary etymological fight for which the Authors are woefully unprepared, we use this term as a synthetic catch-all of definitions.

organizations, employers, and employees. The interrelationship among these actors may be legally constrained, but ultimately, most of the means of enforcement already lie in nonlegal, quasi-legal, and informal mechanisms, perhaps more so than in many other areas of law.[8] By comparison, a dispute about how much federal income tax one owes will be resolved directly between the state and the individual, with the tax code as the legal standard indisputably relied upon by all. Unions and employers routinely rely heavily on their ongoing relationships to resolve legally valenced disputes (like employment discrimination) informally, leveraging the power of the parties' ongoing relationship to fashion remedies all can accept.[9] Labor law, therefore, has a built-in, preexisting basis for nonlegal compliance that heavily leverages the parties' collective set of norms of behavior, reciprocity, morality, fairness, and justice. Additionally, labor law is ultimately a means of facilitating parties' self-regulation via *contract*. Contract is deeply rooted in morality, social constraints, and norms of fairness and reciprocity, such that proposing extralegal ways of self-policing them may be *more* effective than purely legal means. These two factors make labor law an ideal space in which to test the Authors' extralegal reform hypotheses.

Before suggesting this reform, it is necessary to explain why such (perhaps) seemingly drastic reform is necessary. To do so, this Article asks two questions: Are the rights to be represented by a union and to collectively bargain with employers over wages, hours, and terms and conditions of employment worth saving, and, if they are, what is the best way to go about saving them? Considering the shocking lack of change to labor law since the passage of the National Labor Relations Act ("NLRA")[10] in 1935 relative to the steadfast and voluminous changes to other laws regulating the workplace passed since that time,[11] labor law reform is considered by many to be long overdue.[12] However, labor law reform has been a failed promise under the previous two Democratic administrations, and likely will be under the current one as well.

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8. *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1532 (2002); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 181 (1996).

9. *See* David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 418 (1990).

10. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2010)).

11. Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 584–93 (1992).

12. *See, e.g.*, WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW 9 (1993); Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 828 (1996); Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 374 n.8 (2001); Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 97 (1993).

President Carter proposed sweeping reform, including shortening the time for union elections, standardizing the rules for defining bargaining units, and increasing the penalties against employers who violate the law.[13] Carter's proposed reform lost on the Senate floor.[14] President Clinton proposed prohibiting employers from permanently replacing striking employees.[15] This proposed reform ended with the midterm elections of 1994.[16] President Obama announced plans for the most aggressive labor law reform of the three presidents: the Employee Free Choice Act ("EFCA").[17] Under EFCA, an employer would have to recognize a union as the exclusive agent of the employees for collective bargaining over terms and conditions of employment if the union

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13. Labor Reform Act of 1977, S. 1883, 95th Congress (1977). The following is an excerpt from a July 18, 1977, speech President Carter made to Congress:

> An election on union representation should be held within a fixed, brief period of time after a request for an election is filed with the Board. This period should be as short as is administratively feasible. The Board, however, should be allowed some additional time to deal with complex cases.
>
> The Board should be instructed to establish clear rules defining appropriate bargaining units. This change would not only help to streamline the time-consuming, case-by-case procedures now in effect, but would also allow labor and management to rely more fully on individual Board decisions.
>
> . . . .
>
> When employers are found to have refused to bargain for a first contract, the Board should be able to order them to compensate workers for the wages that were lost during the period of unfair delay. . . .
>
> The Board should be authorized to award double back-pay without mitigation to workers who were illegally discharged before the initial contract. This flat-rate formula would simplify the present time-consuming back-pay process and would more fully compensate employees for the real cost of a lost job.
>
> The Board should be authorized to prohibit a firm from obtaining Federal contracts for a period of three years, if the firm is found to have willfully and repeatedly violated NLRB orders. Such a debarment should be limited to cases of serious violations and should not affect existing contracts. . . .
>
> . . . . The Board should also be required to seek preliminary injunctions against certain unfair labor practices which interfere seriously with employee rights, such as unlawful discharges.

James Earl Carter, President of the U.S., Labor Law Reform Message to the Congress Transmitting Proposed Legislation (July 18, 1977), *available at* http://www.presidency.ucsb.edu/ws/?pid=7821.

14. On June 22, 1978, Senate Bill 1883 (renumbered S. 2467), was recommitted to the Senate Human Resources Committee and did not reemerge. 124 Cong. Rec. 18,393–400 (1978).

15. Cesar Chavez Workplace Fairness Act, H.R. 5, 103d Cong. (1993). The bill was passed in the House of Representatives but died in the Senate.

16. In a last-ditch effort to effectuate some form of labor reform, President Clinton instituted an Executive Order prohibiting government contracts with employers who permanently replaced striking workers. Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (Mar. 8, 1995). The Executive Order was overturned by the D.C. Circuit on the grounds that it was preempted by the NLRA, which guarantees employers the right to replace striking workers. Chamber of Commerce of the U.S. v. Reich, 74 F.3d 1322, 1339 (D.C. Cir. 1996).

17. Employee Free Choice Act of 2009, S. 560, 111th Cong.

presented the employer with "authorization cards" signed by employees stating that they want the union to represent them.[18] Essentially, this authorization-card method for obtaining recognition would supplant the secret-ballot election whereby unions petition the National Labor Relations Board ("NLRB")[19] asking that the unit of employees they seek to represent vote for or against the union some thirty or more days following the petition, typically after both the employer and the union campaign for their votes.[20] Under EFCA, the penalties for violations of the NLRA and related statutes would triple,[21] and parties that did not reach a first contract within 120 days would be forced to submit their proposals to interest arbitration.[22] Like with President Clinton, the midterm elections of President Obama's first term have, for all intents and purposes, terminated the possibility of legislative labor law reform, especially as sweeping as EFCA promised to be.[23] Labor law reform under President Obama, however, is not dead. Instead, the Obama administration's NLRB[24] has the power and, seemingly, the desire, to promulgate rules and hand down decisions that could satisfy organized labor's most pressing goal: increasing union membership by making it easier to organize.

It is understandable why labor seeks to increase union density in the U.S. At its height in the mid-1950s, organized labor represented about 35% of the U.S. workforce.[25] That percentage has declined steadily since that time, to 11.9%.[26] In the private sector today, only 6.9% of the

18. *Id.* § 2.

19. The NLRB was established by the National Labor Relations Act of 1935, 29 U.S.C. § 153 (2010). The NLRB is made up of five members appointed by the President for staggered five-year terms. *Id.* § 153(a).

20. S. 560 § 2(a).

21. *Id.* § 4(b)(1).

22. *Id.* § 3. Interest arbitration, traditionally used in the public sector, would result in an arbitrator deciding the wages, hours, and terms and conditions of employment for private-sector employees and employers.

23. The Democrats lost their majority in the House in 2010 and now are not close to the sixty votes needed in the Senate.

24. Traditionally, the NLRB consists of three members of the President's party and two members of the party not in power. WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR 54 (2000). When President Bush left office, the NLRB had only two members. Currently, there are four members, three of whom are Democrats. *See Board Members Since 1935*, NLRB, http://www.nlrb.gov/who-we-are/board/board-members-1935 (last visited Feb. 14, 2012).

25. PAUL OSTERMAN ET AL., WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET 46 (2001).

26. Barry T. Hirsch & David A. Macpherson, *Union Membership, Coverage, Density, and Employment Among All Wage and Salary Workers, 1973–2010*, UNIONSTATS.COM, http://www.unionstats.com (follow "html" hyperlink located below "All Wage & Salary Workers") (last visited Feb. 14, 2012); *see also News Release, Union Members—2011*, BUREAU LAB. STAT. (Jan. 27, 2012), http://www.bls.gov/news.release/pdf/union2.pdf (reporting an 11.8% union membership rate in the U.S. in 2011).

workforce is unionized[27]—the approximate level just before the New Deal.[28] What is unclear is whether labor law reform aimed at increasing union density is good for the U.S. economy, good for employees, good for employers and their customers, and whether employees ultimately want to unionize. Union leaders often answer these questions swiftly and definitively. According to organized labor, unionization benefits employees, customers, and the U.S. economy, and therefore should be encouraged whether employers like it or not.[29] With regard to employee choice, organized labor contends that nearly all employees want to be unionized (or at least would want to be organized once the benefits of unionization are explained), and only reject unions in secret-ballot elections because the organizing system unfairly favors employers by allowing companies to get away with coercing and intimidating employees.[30] Underlying these claims are some assumptions about the continued need for and utility of unionism in contemporary workplaces in the U.S. This Article evaluates these critical assumptions, addresses the most recent labor law reform attempt embodied in EFCA, and explains how an alternative reform approach endorsed by the Authors relies less on normative assumptions about whether unions should regain their dominance or should be allowed to continue to wither, and more on an essential underlying feature of modern liberal democratic theory: the right to freely elect one's representatives or to remain free from representation. The proposed reform also departs from pure reliance on legal amendments, shifting to reliance on unions' and employers' joint and symbiotic reciprocity and collective moral obligation as a means of leveraging enforcement that theoretically could result in a greater likelihood of election results that closer accord the ultimate preferences of employees and in lower administrative costs of enforcement.

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27. Hirsch & Macpherson, *supra* note 26 (follow "html" hyperlink located below "Private Sector").

28. OSTERMAN, *supra* note 25, at 46.

29. *See, e.g.*, *Unions Are Good for Business, Productivity and the Economy*, AFL-CIO, http://www.aflcio.org/joinaunion/why/uniondifference/uniondiff8.cfm (last visited Feb. 14, 2012); *see also* HARLEY SHAIKEN, CTR. FOR AM. PROGRESS, THE HIGH ROAD TO A COMPETITIVE ECONOMY: A LABOR LAW STRATEGY (2004) (arguing that unionization benefits the economy and productivity, and advocating for card-check authorization against elections).

30. *See, e.g.*, Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 546–600 (1993) (advocating against employer free speech in union elections and arguing that the existing process is wildly biased in favor of employers); Rafael Gomez & Morley Gunderson, *The Experience Good Model of Trade Union Membership*, *in* THE CHANGING ROLE OF UNIONS: NEW FORMS OF REPRESENTATION 92, 108 (Phanindra V. Wunnava ed., 2004) (concluding that the benefits of unions are opaque to nonunion members); *Interactive Map: Unions Are Good for Workers and the Economy in Every State*, CTR. FOR AM. PROGRESS ACTION FUND (Feb. 15, 2009), http://www.americanprogressaction.org/issues/2009/02/unions_workers.html [hereinafter *Union Map*].

Part I reviews research on the effects of unionization on employees and employers to address the question of whether a primary goal of national policy should be to abolish unions, champion their resurrection, or perpetuate the status quo. We conclude that existing scholarship does not support either abolishing or championing unionization, but that the status quo deserves to be revisited because the focus of advocates for reforming the current system is on win rates, and not sufficiently on employee choice. Part II then sets out a fair system maximizing employee free choice to unionize or not. Fairness ought not be defined exclusively by results, as in a distributive-justice-focused approach in which a high union win rate equals a fair system and a low union win rate equals an unfair system. Instead, we posit that a fair system is one that maximizes employees' opportunities to make fully informed choices free of coercion or intimidation—embodying a procedural-justice focused approach. Part III analyzes the current systems in use and being proposed and finds that neither the status quo nor proposals by legislators or the NLRB satisfy our conceptualization of procedural-justice focused fairness. Part IV outlines a system that does satisfy our standard of fairness by capitalizing on extralegal behavioral norms derived in part from the long-standing moral principle of "living up to one's word." This would result in a system with greater self-regulation by the parties, lower administrative costs, and greater opportunity for employees to exercise their rights to vote for their representatives or to vote not to be represented in the workplace based on more complete information, free from coercion and intimidation. We conclude by discussing the implications of adopting the proposal advanced, and opportunities for extending it to other areas of law.

I. ARE EMPLOYEES AND EMPLOYERS BETTER OR WORSE OFF WHEN ORGANIZED?

Unions may be assessed by how they impact the U.S. economy, employees, employers, and customers or recipients of the goods and services provided by organized workplaces. The ultimate question of whether the U.S. economy is better off with greater union density is complex and beyond the scope of this Article. Organized labor, industrial-relations theorists, and some academics, however, believe that unions are a net positive for the economy and that greater union density correlates linearly with improved economic prosperity.[31] According to

31. *See generally* Bruce E. Kaufman, *John R. Commons and the Wisconsin School on Industrial Relations Strategy and Policy*, 57 INDUS. & LAB. REL. REV. 3, 5–7 (2003) (discussing the early views of John R. Commons, a prominent institutionalist in the industrial-relations scholarship tradition, who came to believe that trade unions could improve the conditions of laboring people by using the "device of the common rule" and collective bargaining to "stabilize labor markets and equalize bargaining power, while also using methods of collective voice to replace industrial autocracy with industrial

organized labor, unions consistently provide higher wages and greater job security.[32] This in turn "primes the consumption pump" and increases demand for goods and services.[33] Increased demand requires employers to increase supplies of goods and services, which creates jobs (and therefore decreases unemployment) and increases GDP.[34] To support this contention, labor points to the 1950s as a time of unprecedented and subsequently unmatched growth in unionization, union density, parity between rich and poor, and economic prosperity. This argument has appeal, but may be too simplistic. In the 1950s there was no real threat of foreign competition to U.S. employers, particularly those in heavily unionized workplaces.[35] Europe and Japan were slowly recovering from the devastation of World War II, and the rest of today's current and rising powers were still developing. Moreover, 1950s transportation and information systems obviously impeded foreign competition.[36] Finally, the U.S. had seemingly unlimited natural resources. Thus, while it makes sense to credit unions with increasing wages, reducing the gap between rich and poor, and increasing consumers' purchasing power, one could argue that high costs of unionization forced U.S. manufacturers to produce their goods outside of the U.S. and, thus, instead of being a solution to America's economic woes, unionization was the cause. The positive union effect might have been short-term and conditional on historical context. Regardless of whether unionization is a reason for some of America's trade and economic woes, it seems naïve to argue that the solution to America's struggles in this global economy, where the U.S. has exported the vast majority of its manufacturing to reduce costs, is to increase wages through unionization. On the other hand, the argument that the gap between rich and poor depletes the middle class and reduces GDP because capital remains with the wealthy instead of being dispersed to those who will put the money back into the economy is very appealing.

There is ample academic literature devoted to whether employees are better off when unionized. The general conclusion is that employees are better compensated but less satisfied.[37] An early empirical examination of the impacts of unionization in the workplace begins with

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democracy").

32. *See* David Madland & Karla Walter, *Unions Are Good for the American Economy*, CTR. FOR AM. PROGRESS ACTION FUND (Feb. 18, 2009), http://www.americanprogressaction.org/issues/2009/02/efca_factsheets.html; *see also Union Map*, *supra* note 30.

33. *See* Madland & Walter, *supra* note 32.

34. *Id.*

35. *See, e.g.*, William G. Shepherd, *Causes of Increased Competition in the U.S. Economy, 1939–1980*, 64 REV. ECON. & STAT. 613, 620–22 & tbl.4 (1982).

36. Michael E. Porter, *Competition in Global Industries: A Conceptual Framework*, *in* COMPETITION IN GLOBAL INDUSTRIES 15, 42–45 (Michael E. Porter ed., 1986).

37. RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 20–21 (1984).

the observation that "unions alter nearly every . . . measurable aspect of the operation of workplaces."[38] This study has been credited as the first to stimulate scholarly interest in how unions affect factors beyond wages, including satisfaction, productivity, business profitability, investment, and the economy.[39] Labor-relations scholars have since endeavored to uncover unionism's effects on these various aspects.

While unionization results in an increase in wages,[40] it does not come with a concomitant increase in productivity, and therefore the increased salary expense reduces employer profit.[41] For example, a 2004 study of thirteen years of operating, financial, and employment data for major airlines found union-imposed wage increases correlated with decreased employee productivity, decreased airplane productivity, and overall decreased operating margins.[42] Interestingly, the study found that the "quality of labor relations" was a significant control variable.[43] Sandra Black and Lisa Lynch confirm this dimension.[44] In their analysis of a national survey of businesses, they found that firms with traditional labor-management relations had significantly lower productivity than did nonunion firms.[45] However, when controlling for the presence of certain employee-empowering practices (for example, total quality management and profit sharing), the impact of unionization on productivity dwindled to statistical insignificance.[46] Similarly, Harry Holzer analyzed a 1982

38. *Id.* at 19.

39. *See* James T. Bennett & Bruce E. Kaufman, *What Do Unions Do?: A Twenty-Year Perspective*, 25 J. LAB. RES. 339, 339 (2004); Barry T. Hirsch, *What Do Unions Do for Economic Performance?*, 25 J. LAB. RES. 415, 415 (2004).

40. That unionization increases wages is generally accepted among scholars. *See* FREEMAN & MEDOFF, *supra* note 37, at 20 (finding that unionization results in increased wages and fringe benefits); David G. Blanchflower & Alex Bryson, *What Effect Do Unions Have on Wages Now and Would Freeman and Medoff Be Surprised?*, 25 J. LAB. RES. 383, 406–07 (2004) (finding that unionization does not increase wages as much as it did in the 1970s but that the wage premium is substantial).

41. *See* John T. Addison & Barry T. Hirsch, *Union Effects on Productivity, Profits, and Growth: Has the Long Run Arrived?*, 7 J. LAB. ECON. 72, 92 (1989) (reviewing several studies and concluding that, on average, unionization is associated with decreased productivity); Hirsch, *supra* note 39, at 430–31 (reconciling a number of studies and concluding that unionization does not increase productivity, and thus that the increased wages may result in decreased profitability); *cf.* John T. Addison, *The Determinants of Firm Performance: Unions, Works Councils, and Employee Involvement/High-Performance Work Practices*, 52 SCOT. J. POL. ECON. 406, 416 (2005) (finding the small positive effect of unionization on productivity unable to compensate for the increased wage expense). *But see* Christos Doucouliagos & Patrice Laroche, *What Do Unions Do to Productivity? A Meta-Analysis*, 42 INDUS. REL. 650, 682 (2003) (reporting results of a meta-regression analysis that found a neutral or positive effect of unionization on productivity, especially in manufacturing).

42. Jody Hoffer Gittell et al., *Mutual Gains or Zero-Sum? Labor Relations and Firm Performance in the Airline Industry*, 57 INDUS. & LAB. REL. REV. 163, 174–77 & tbl.3 (2004).

43. *Id.*

44. Sandra E. Black & Lisa M. Lynch, *How to Compete: The Impact of Workplace Practices and Information Technology on Productivity*, 83 REV. ECON. & STAT. 434, 444 (2001).

45. *Id.*

46. *Id.* at 440–41.

survey of firms, finding the negative effect of wage increases on profit was greater if a union imposed the wage increase than if the firm itself imposed the increase.[47]

Despite higher wages, union workers tend to report lower job satisfaction than nonunion workers. Richard Freeman and James Medoff synthesized a broad range of research and concluded that, while unionization results in higher wages and fringe benefits, it also correlates with decreased employee satisfaction, especially with respect to working conditions and relationships with management.[48] Similarly, a 1983 national survey found that unionized workers reported higher satisfaction with pay than did nonunion workers, but lower satisfaction with respect to work duties, coworkers, supervisors, and promotions, leading to lower global satisfaction ratings.[49]

Scholars have posed a number of theories to explain this apparent paradox, including that: (1) "unions galvanize worker discontent in order to make a strong case in negotiations with management";[50] (2) the grievance and negotiation experience primes employees to perceive negative conditions more saliently;[51] (3) dissatisfied union workers continue working under conditions where their nonunion counterparts would quit, thereby self-selecting out of the dataset[52] (the "exit-voice"

47. Harry J. Holzer, *Wages, Employer Costs, and Employee Performance in the Firm*, 43 INDUS. & LAB. REL. REV. (SPECIAL ISSUE) 147, 161–163 (1990). Empirical studies have uncovered manifold other disadvantages that employers suffer as a result of unionization. *See, e.g.*, FREEMAN & MEDOFF, *supra* note 37, at 21 (less overall flexibility in business operations); Addison & Hirsch, *supra* note 41, at 99 (reduced investment in physical capital and research and development); David J. Flanagan & Satish P. Deshpande, *Top Management's Perceptions of Changes in HRM Practices After Union Elections in Small Firms: Implications for Building Competitive Advantage*, 34 J. SMALL BUS. MGMT. 23, 29–33 & tbl.4 (1996) (reduced ability to implement "innovative" human-resource policies, such as merit-based promotion and compensation and internal recruiting); Hirsch, *supra* note 39, at 436 (reduced investment in physical capital and research and development).

48. FREEMAN & MEDOFF, *supra* note 37, at 21.

49. Chris J. Berger et al., *Effects of Unions on Job Satisfaction: The Role of Work-Related Values and Perceived Rewards*, 32 ORG. BEHAV. & HUM. PERFORMANCE 289, 304, 308, 310, 314 (1983); *see also* Tove Helland Hammer & Ariel Avgar, *The Impact of Unions on Job Satisfaction, Organizational Commitment, and Turnover*, 26 J. LAB. RES. 241, 257 (2005) (synthesizing job-satisfaction research and concluding that the negative impact on satisfaction is explained by dissatisfaction with job quality, supervision, and the labor-management relations climate); Charles A. Odewahn & M.M. Petty, *A Comparison of Levels of Job Satisfaction, Role Stress, and Personal Competence Between Union Members and Nonmembers*, 23 ACAD. MGMT. J. 150, 153 (1980) (finding that union workers report significantly lower satisfaction with work and pay than do nonmembers). *But see* Luis R. Gomez-Mejia & David B. Balkan, *Faculty Satisfaction with Pay and Other Job Dimensions Under Union and Nonunion Conditions*, 27 ACAD. MGMT. J. 591, 600 (1984) (finding that union faculty had higher pay satisfaction, and finding no relationship between unionism and other aspects of satisfaction).

50. FREEMAN & MEDOFF, *supra* note 37, at 21.

51. George J. Borjas, *Job Satisfaction, Wages, and Unions*, 14 J. HUM. RESOURCES 21, 38 (1979); Hammer & Avgar, *supra* note 49, at 242–43.

52. Borjas, *supra* note 51; *see also* Joni Hersch & Joe A. Stone, *Is Union Job Dissatisfaction Real?*, 25 J. HUM. RESOURCES 736, 750 (1990) (reporting empirical results consistent with the exit-voice hypothesis).

hypothesis[53]); (4) poor labor-management relations drive dissatisfaction;[54] (5) union members seek out union jobs because these employees have higher aspirations and expectations;[55] and (6) unions organize where working conditions are worse to begin with.[56] Nonetheless, no single theory has garnered a consensus.

In addition to the firm-based research cited above, anecdotal evidence supports the argument that unionized businesses are less profitable than are nonunion firms in the same sector. An example of such anecdotal evidence is found in the hotel industry. Hotel owners and operators believe that their union properties are less profitable than their nonunion properties.[57] Industry experts claim that union work rules (regarding job duties and working hours) and health and welfare obligations will make an organized hotel less profitable than a nonunion hotel even if the latter has higher wages.[58] Indeed, one hotel evaluator stated that in evaluating a property for sale, unionization will, depending on the contract and the union, result in a 10% to 20% decrease in value.[59] Another real estate investor stated that because of increased costs, the

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53. ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970). Hirschman defined voice as the decision to complain about a perceived deterioration of a condition or set of conditions experienced at an organization. *Id.* at 4. He regarded voice as somewhat mutually exclusive to "exit" (the decision to remove oneself from the offending condition). *Id.* He theorized, somewhat tautologically perhaps, that the likelihood of voice increases with the degree of "loyalty" to the organization. *Id.* at 78. It should be noted that voice can be conceptualized as a form of complaining about work conditions, or it can be characterized by participation in a pluralist, democratic process. The latter is the view taken by institutionalists, see John R. Commons, *American Shoemakers, 1648–1895: A Sketch of Industrial Evolution*, 24 Q.J. ECON. 39 (1909), and industrial relations scholars, see JOHN W. BUDD, EMPLOYMENT WITH A HUMAN FACE: BALANCING EFFICIENCY, EQUITY, AND VOICE (2004); H.A. Clegg, *Pluralism in Industrial Relations*, 13 BRIT. J. INDUS. REL. 309 (1975).

54. Keith A. Bender & Peter J. Sloane, *Job Satisfaction, Trade Unions, and Exit-Voice Revisited*, 51 INDUS. & LAB. REL. REV. 222, 231–32 & tbls.3 & 4, 235 (1998); *cf.* James W. Carillon & Robert I. Sutton, *The Relationship Between Union Effectiveness and the Quality of Members' Worklife*, 3 J. OCCUPATIONAL BEHAV. 171, 178 (1982) (studying public schoolteachers and finding a positive effect on job satisfaction when the union excelled in five areas: economic bargaining, member protection, working-conditions bargaining, involving members in decisions, and improving relations with coworkers).

55. *See* Alex Bryson et al., *Does Union Membership Really Reduce Job Satisfaction?*, 42 BRIT. J. INDUS. REL. 439, 452 (2004) (studying unionized employees in the U.K.); Hammer & Avgar, *supra* note 49, at 258–59.

56. Borjas, *supra* note 51, at 28.

57. In November of 2008 Professor Sherwyn, who was serving as the academic director of the Center for Hospitality Research, hosted a real estate finance roundtable at the law offices of Proskauer Rose in New York City. The Roundtable featured hotel owners, operators, bankers, consultants, deal makers, and professors. The consensus of the group was that unionized hotels would provide lower returns than would nonunion hotels and that unionization could be a deal breaker in many situations. *See* Ctr. for Hosp. Res., Cornell Univ. Sch. of Hotel Admin., Real Estate Finance Roundtable (Nov. 10, 2008).

58. *Id.*

59. *Id.*

unionization status of a hotel will determine whether or not a company will purchase a property.[60] Hotel operators contend that the inefficiencies caused by union work rules discourage investors from investing in properties because they will not provide an adequate return, causing a reduction in those willing to build, own, or operate hotels.[61] The logical extension of this argument is that such investor decisions will not only reduce jobs in the hotel industry, but that related industries such as construction, food service, airlines, recreation, and retail will all suffer as well.

While unions contest the argument that union hotels are less profitable than nonunion properties,[62] they also ask, "so what?" Union advocates argue that exchanging profits for higher wages, increased job security, employee voice, and all other union benefits is a positive trade.[63] Indeed, union advocates can compare the wages and benefits in unionized cities like New York and Las Vegas to, for example, Dallas and Atlanta and show that in unionized hotels, housekeepers and banquet waiters lead middle-class and, sometimes, upper-middle-class lives.[64] Alternatively, employer advocates may point to the fact that nonunion hotels in Chicago and San Francisco pay higher wages than their unionized counterparts.[65] Unionists argue that it is the threat of unionization that causes the high wages and that the free-rider problem should be eliminated, not perpetuated.[66]

Despite the assertions from those on both sides of the debate that the U.S. would be better off were it to favor either labor or capital, there is no clear answer to this question and, thus, neither the parties' opinions nor their lobbying dollars should define national policy on this matter. Instead, we argue that the focus should be on the microdata. The evidence, however, is mixed. Employees are better off, but less satisfied,

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60. Paul Wagner, an attorney with Stokes, Roberts, & Wagner, was hired by a major real estate developer to examine whether the developer could open a nonunion hotel in a city with a neutrality agreement. Wagner reports that the developer stated that he could not afford to open the hotel if it were unionized. Interview with Paul Wagner, Attorney, Stokes, Roberts & Wagner, in Ithaca, N.Y. (Aug. 21, 2010).

61. *See* Real Estate Finance Roundtable, *supra* note 57.

62. In a 2006 speech at Cornell University's School of Industrial and Labor Relations, Workers United president Bruce Raynor stated that union hotels are more profitable and provide better service than nonunion properties. Raynor admitted he had no data to support this statement. Bruce Raynor, President, Workers United, Address at Cornell Univ. Sch. of Indus. & Labor Rel. (Oct. 26, 2006).

63. *Id.*

64. *Id.*

65. At the Tenth Annual Labor and Employment Roundtable sponsored by Cornell's Schools of Hotel Administration, Industrial & Labor Relations, and Law, hotel negotiators stated that many nonunion hotels in Chicago and San Francisco pay higher wages than do union properties. *See* Cornell Univ. Sch. of Hotel Admin., Labor & Employment Roundtable (May 15, 2011).

66. *See* Raynor, *supra* note 62; *see also* Ozkan Eren, *Does Membership Pay Off for Covered Workers? A Distributional Analysis of the Free Rider Problem*, 62 INDUS. & LAB. REL. REV. 367, 367–68 (2009).

when unionized. Unionized employers enjoy lower profits than nonunion firms. Without evidence to support either side's macro position, we should not enact labor law reform whose sole purpose is to either enhance or reduce union influence. Instead, we contend that national policy regarding union organizing should be to ensure that the system is fair. Below, we define what we believe to be fair and then analyze (1) the current system, (2) labor's preferred system (neutrality agreements with card check or EFCA), and (3) the latest proposed fix to the problem—short elections. After explaining why these systems fail to meet our definition of fairness, we introduce the moral principles of union organizing embodied in a contractual arrangement between management and labor and explain why this system should be enacted.

II. WHAT IS FAIR?

Commentators, scholars, legislators, and advocates seem to habitually overweigh the *results* of systems (such as adjudication outcomes or election results) to determine the fairness of systems being evaluated. For example, there is substantial literature comparing the results of discrimination cases resolved in litigation with those resolved in arbitration.[67] One underlying theme of this work is that systems are fair if they have comparable results.[68] Alternatively, according to some, there is a positive relationship between plaintiff victories and fairness.[69] Similarly, there are those who point to the results of union-organizing drives and elections and make conclusions about the fairness of the process by looking at the results.[70] The system is fair, according to some, if the union wins the majority of elections and is unfair when the union win rate drops. In fact, we contend that, standing alone, the results of an

67. *See, e.g.*, David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1567–78, 1586–91 (2005) (reviewing prior empirical research and presenting the results of a case study finding arbitration faster and more efficient than litigation); Frederick L. Sullivan, *Accepting Evolution in Workplace Justice: The Need for Congress to Mandate Arbitration*, 26 W. NEW ENG. L. REV. 281, 308–12 (2004); *see also* Curtis Brown, *Cost-Effective, Fast and Fair: What the Empirical Data Indicate About ADR*, METRO. CORP. COUNSEL, Nov. 2004, at 56, 70 (summarizing several empirical studies comparing litigation with arbitration); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44, 48 & tbl.1; Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 824 (2003); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46 (1998).

68. *See, e.g.*, Sullivan, *supra* note 67, at 309 (asserting that arbitration is fair to plaintiffs because they are more successful in arbitration than in litigation).

69. David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1262–63 (2009) (arguing that the empirical evidence tends to suggest that mandatory arbitration is unfair, as measured by aggregate pro-plaintiff dispositions).

70. Kate Bronfenbrenner & Tom Juravich, *The Impact of Employer Opposition on Union Certification Win Rates: A Private/Public Sector Comparison* (Econ. Policy Inst., Working Paper No. 113, 1994), *available at* http://digitalcommons.ilr.cornell.edu/articles/19/.

adjudication system or a union-representation election do not reveal anything about fairness, regardless of how many cases are analyzed.

An analogy illustrates our point. Assume one of the Authors of this Article, a middle-aged professor who was once an average high school basketball player on a bad high school team, is set to play ten games of one-on-one basketball. The rules are as follows: games to eleven, one point for each basket, the scorer keeps possession of the ball, and players call their own fouls. The professor loses all ten games 11–0. An argument that the rules of the games played were unfair based solely on the observed outcomes is flawed because it does not account for the identity of the professor's opponent. If it turns out that the opponent is Michael Jordan (regarded as one of the greatest players ever to play the game professionally), claims that the games were "unfair" are undoubtedly spurious at worst and grossly incomplete at best. Conversely, if Professors Sherwyn and Eigen were to play ten games and the rules were such that Eigen had to adhere to the regular rules of basketball, but Sherwyn got to shoot on a basket that was eight feet off the ground (two feet closer to the ground than a regulation basketball rim), did not have to dribble the ball, and was allowed to foul Eigen, we would hopefully agree that the rules were unfair, regardless of the results. Outcomes alone do not define fairness, nor should they automatically lead one to assume unfair rules or cheating.[71]

The fairness correlation between rules and outcomes can be assessed only if we have determinative information prior to the time that we invoke the system. In sports, we would need to know the abilities of the teams. If the teams are equal, then a fair system would result in each team winning about half the games. In discrimination claims, we would need to know if the employer violated the law. Thus, if plaintiffs who go to trial in discrimination cases were in fact discriminated against 90% of the time, a fair system should generate approximately a 90% employee win rate. If plaintiffs were discriminated against only 10% of the time, we should expect to see a 10% win rate. With respect to discrimination, because the trial determines liability, we cannot judge the fairness of the system merely by analyzing results. Put another way, the so-called "base

71. Interestingly, if instead of Sherwyn versus Eigen in the second hypothetical set of games, it were again Sherwyn versus Michael Jordan, and Sherwyn received the benefit not being bound by the standard rules, one might argue for a different view of the fairness of the system. If one expects the players to be unequal in terms of resources available, one would be more likely to perceive unbalanced rules as leveling a playing field and, hence, as more fair. In the employment setting, one might perceive employers as possessing more resources and information and, hence, if the rules of litigation applied to employers the same way as employees, one would expect outcomes to disproportionately favor employers. Ironically, attempts made to level the litigation playing field by giving employees greater access to adjudication on the merits via arbitration are sometimes perceived as a creating a less fair system than litigation.

rate fallacy"[72] underlies our complaint about fairness here. Without information on the reference category's base rate (how much employers discriminate in our example above), there is insufficient information on which to base a decision on fairness. This often does not stop people from making incorrect assumptions or backing into assumptions, as described above.[73]

Union advocates often argue that in union elections we do in fact know employees' desires prior to the election system. As explained below, to petition for an election, unions need 30%,[74] but often get over 60%, of employees to sign cards saying they wish to be represented by the union.[75] Because unions almost always have enough support to win an election before the campaign begins, they contend that the system is unfair because despite such support, unions lose anywhere from 28% to 69% of elections each year.[76] In fact, according to a recent study of 22,382 organizing drives occurring between 1994 and 2004 that filed an election petition, secret-ballot elections were held in only 14,615 (65%).[77] Of those 14,615 elections, unions won 8155, or 56%.[78]

However, many employees sign authorization cards not because they want a union, but because they are willing to vote for or against a union in a secret-ballot election.[79] This might be due to the low perceived cost of saying yes to such a process, or it might be due to employees not wanting to be a hold out if other employees want to vote. It might reflect employees' respect for the American ideal of the democratic process of voting for one's representative, even if employees sign cards planning to vote against the union. It might be due to lawful (or unlawful) pressure exerted by union organizers on employees. Moreover, the signing of cards represents the culmination of the union's unilateral attempt to organize the employees. During the card-signing time the employees hear only one side of the story. By the time of the election, employees have heard both sides and may make a more *informed* decision. Is it possible that employers intimidate and otherwise unfairly influence

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72. Jonathan J. Koehler, *The Base Rate Fallacy Reconsidered: Descriptive, Normative, and Methodological Challenges*, 19 BEHAV. & BRAIN SCI. 1, 1 (1996) (using an example of a coach on an Olympic basketball team trying to decide between two players to make a final attempt at shooting the game-winning basket, to illustrate the author's point on base-rate fallacy).

73. *Id.*

74. 29 U.S.C. § 159(e)(1) (2010).

75. *See* Andrew W. Martin, *The Institutional Logic of Union Organizing and the Effectiveness of Social Movement Repertoires*, 113 AM. J. SOC. 1067, 1072 (2008) (contending that many unions will not file for a certification election until a majority of workers sign authorization cards).

76. *See id.* at 1089 tbl.7, 1096 fig.A-2.

77. John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 INDUS. & LAB. REL. REV. 3, 6 tbl.1 (2009).

78. *Id.*

79. *See Terrible Tactics*, SEIU EXPOSED, http://www.seiuexposed.com/tactics.cfm (last visited Feb. 14, 2012).

employees? Of course. On the other hand, the drop in union support could be the result of more complete information. For example, few would argue that an election for political office was unfair if the following occurred: the voters were introduced to one candidate, were inundated with positive information about the candidate, overwhelmingly signed a petition approving the candidate's ability to run for office, and then voted for a second candidate who came onto the scene four weeks before the election and told a better story than the first candidate.

Union losses could also reflect significant change in American taste for organized labor and collective rights and voice in the workplace. For example, from the 1940s through the 1970s, the height of the private-sector union movement, pro-union messages abounded in popular culture. Anecdotally, but for purposes of illustration and comparison, Woody Guthrie sang about joining unions,[80] textile workers had little kids singing "look for the union label,"[81] and Sally Field won the Academy Award in 1979 for her role as employee and union organizer Norma Rae.[82] Even *On the Waterfront*, a 1954 Academy Award-winning film[83] that portrayed unions in less than positive terms, concluded with employees getting their union back and running it on the "up and up."[84] Today, in contrast, unions are the entities that cost us the World Series in 1994,[85] have parents and education advocates *Waiting for "Superman"* to break union power,[86] and are being blamed for driving states into near bankruptcy.[87] Accordingly, a 2009 Gallup poll indicated a sharp decline in Americans' approval of labor unions—48% approve, down from 59% the year before.[88] A corresponding poll in 2010 reported a 52% approval rating.[89] For comparison, in 1936 and 1957, the approval ratings were 72% and 75%, respectively.[90]

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80. WOODY GUTHRIE, *Union Maid*, *on* HARD TRAVELIN': THE ASCH RECORDINGS, VOL. 3 (Smithsonian Folkways Recordings 1999); WOODY GUTHRIE, *Union Burying Ground*, *on* STRUGGLE (Smithsonian Folkways Recordings 1990).

81. *See Look for the Union Label Commercial* (1981).

82. *See Oscar Legacy: The 52nd Academy Awards*, ACAD. MOTION PICTURE ARTS & SCI., http://www.oscars.org/awards/academyawards/legacy/ceremony/52nd.html (last visited Feb. 14, 2012).

83. *See Oscar Legacy: The 27th Academy Awards*, ACAD. MOTION PICTURE ARTS & SCI., http://www.oscars.org/awards/academyawards/legacy/ceremony/27th.html (last visited Feb. 14, 2012).

84. ON THE WATERFRONT (Columbia Pictures 1954).

85. *See Year in Review: 1994 National League*, BASEBALL ALMANAC, http://www.baseball-almanac.com/yearly/yr1994n.shtml (last visited Feb. 14, 2012);

86. WAITING FOR "SUPERMAN" (Electric Kinney Films 2010).

87. *See, e.g.*, *Can You Blame Unions for Golden State's Fiscal Problems?*, FOX BUS. (Oct. 27, 2011), http://video.foxbusiness.com/v/1243118545001/can-you-blame-unions-for-golden-states-fiscal-problems/.

88. Lydia Saad, *Labor Unions See Sharp Slide in U.S. Public Support*, GALLUP (Sept. 3, 2009) http://www.gallup.com/poll/122744/Labor-Unions-Sharp-Slide-Public-Support.aspx.

89. Jeffrey M. Jones, *U.S. Approval of Labor Unions Remains near Record Low*, GALLUP (Aug. 12, 2010) http://www.gallup.com/poll/142007/Americans-Approval-Labor-Unions-Remains-Near-Record-Low.aspx.

90. *Id.*

In Wisconsin, Governor Scott Walker introduced a "Budget Repair" bill on February 11, 2011, that directly targets unions.[91] As of the writing of this Article, several other states, including Tennessee, Ohio, and Nevada, are expected to follow suit.[92] Four states' attorneys general have announced their intention to "vigorously defend" state constitutional provisions mandating secret-ballot elections.[93] On February 1, 2012, the Indiana Senate voted 28–22 to pass a right-to-work bill, making Indiana the twenty-third state in the nation with such a law,[94] and legislators in Michigan (long known as the strongest of union states) are contemplating a proposal that would make that state the nation's twenty-fourth right-to-work state.[95]

Do employees want to be represented by unions? Are Americans now more anti-union than we were in the Fifties? Does full information lead to greater unionization or to union losses? Do unions fail to organize because employers intimidate employees? Because there are simply too many uncontrollable factors to judge, we contend that election *results* simply do not provide evidence of whether or not the system itself is *fair*. Accordingly, it is time to change the paradigm on how we judge fairness.

We contend that a fair system will result in employees believing that they had enough information to make an informed decision, that they were respected, and that they were not intimidated, threatened or coerced. Such a system would be fair regardless of whether unions win or lose the majority of elections held. Below, we examine the current and proposed systems to see if they are fair under our new standard. We also

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91. *See Governor Walker Introduces Budget Repair*, SCOTTWALKER.ORG (Feb. 11, 2011), http://www.scottwalker.org/news/2011/02/governor-walker-introduces-budget-repair.

92. *Republicans Challenging Unions in State Capitols*, ABCNEWS.COM (Feb. 18, 2011), http://abcnews.go.com/US/wireStory?id=12946800.

93. Letter from Alan Wilson, S.C. Att'y Gen., et al., to Lafe E. Solomon, Acting Gen. Counsel, NLRB (Jan. 27, 2011), *available at* http://nlrb.gov/sites/default/files/documents/234/ag4_letter_to_nlrb_gc_1-27-2011.pdf; *see also* Lawrence E. Dube, *Four States Defend Secret Ballot Laws, as GOP Senators Back Them with New Bill*, Daily Lab. Rep. (BNA) No. 18, at AA-1 (Jan. 27, 2011).

94. Susan Guyett, *Indiana Becomes 23rd "Right-to-Work" State*, REUTERS, Feb. 1, 2012, *available at* http://www.reuters.com/article/2012/02/01/us-unions-indiana-righttowork-idUSTRE81018920120201.

95. *See* H.R. 6348, 95th Leg., Reg. Sess. (Mich. 2010). For the twenty-two other right-to-work states' laws, *see* ARIZ. CONST. art XXV; ARK. CONST. amend. XXXIV; FLA. CONST. art. I, § 6; KAN. CONST. art. XV, § 12; MISS. CONST. art. VII, § 198-A; NEB. CONST. art. XV, § 13; OKLA. CONST. art. XXIII, § 1A; S.D. CONST. art. VI, § 2; ALA. CODE § 25-7-30 (2011); GA. CODE ANN. § 34-6-21 (2010); IDAHO CODE ANN. § 44-2003 (2011); IOWA CODE §§ 731.1–.8 (2011); LA. REV. STAT. ANN. § 23:981 (2011); NEV. REV. STAT. §§ 613.130, 613.230, 613.250 (2011); N.C. GEN. STAT. § 95-80 (2011); N.D. CENT. CODE § 34-01-14 (2011); S.C. CODE ANN. § 41-7-10 (2011); TENN. CODE ANN. § 50-1-201 (2011); TEX. LAB. CODE ANN. § 101.301 (2011); UTAH CODE ANN. §§ 34-34-1 to -17 (2011); VA. CODE ANN. §§ 40.1-58 to -69 (2011); WYO. STAT. ANN. §§ 27-7-108 to -115 (2011). New Hampshire's recent right-to-work proposal, H.R. 474-FN, 2011 Leg. (N.H. 2011), was vetoed by the governor. *See Governor Lynch's Veto Message Regarding HB 474*, N.H. OFF. GOVERNOR (May 11, 2011), http://www.governor.nh.gov/media/news/2011/051111-veto-hb474.htm.

analyze the current and proposed systems to see if they would solve the problems they wish to resolve and would produce desired results.

III. THE TRADITIONAL SYSTEM FOR UNION ORGANIZING AND ATTEMPTS TO REFORM IT

The union-organizing process begins in one of several ways. Sometimes, dissatisfied employees seek out a union.[96] Other times, unions initiate discussions with employees.[97] In fact, organizers may enter an employer's property and hand out authorization cards or set up picket lines at the entrances and exits to the property.[98] Unions may use current employees to "sell" the union to coworkers.[99] Finally, unions sometimes send their members to apply for jobs with nonunion employers the unions wish to organize.[100] Regardless of how the organizing begins, the union must soon meet with a number of employees to see if there is interest in organizing.

A. NLRB RULES FOR ORGANIZING AND SECRET-BALLOT ELECTIONS

The NLRA sets forth the laws regulating this form of employee organization.[101] Under those rules, before any labor organization can be certified as the exclusive bargaining representative for any group of employees, the employees in that group, called a bargaining unit, vote for or against union representation in a secret-ballot election monitored by the NLRB.[102] In most cases, the NLRB seeks to schedule such an election approximately six to eight weeks after the union initiates the process by filing a representation petition.[103] This time period may be extended if the

96. Employees often seek out unions because of perceived failures in one or more of five key areas: lack of recognition, weak management, poor communication, substandard working conditions, and noncompetitive wages and benefits. *See* MARTIN JAY LEVITT, CONFESSIONS OF A UNION BUSTER 49 (1993).

97. *Labor Union Organizing in the United States Workplace*, HRHERO.COM, http://www.hrhero.com/topics/union.html (last visited Feb. 14, 2012).

98. *See, e.g.*, Johnson & Hardin Co. v. NLRB, 49 F.3d 237, 240–42 (6th Cir. 1995) (enforcing a NLRB order finding that an employer unlawfully interfered with its employees' section 7 rights where the employer excluded union representatives from distributing union literature on state-owned property outside the employer's place of business).

99. *See Labor Union Organizing*, *supra* note 97.

100. The applicants' reason for seeking employment is to organize the *real* employees. This method, referred to as "salting," was the subject of a Supreme Court case in which the Court held that an employer cannot refuse to hire a "salt" simply because the real reason the employee seeks employment with the company is to organize it. *See* NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 96–98 (1995).

101. 29 U.S.C. §§ 151–69 (2010).

102. *Id.* § 159(e)(1).

103. *See Customer Service Standards: Representation Cases*, NLRB, https://www.nlrb.gov/customer-service-standards#representation (last visited Feb. 14, 2012). In 2010, the median time period between filing the petition and the initial election was thirty-eight days, and 95.1% of all initial elections occurred within fifty-six days of the filing. Memorandum GC 11-03 from Lafe E. Solomon,

employer contests the bargaining unit or if other issues arise.[104] In a recent study of 22,382 organizing drives from 1999–2004, the average case that went to election did so in forty-one days, and 95% of elections were held within seventy-five days of filing.[105] It is during this time period, often referred to quite appropriately as the "campaign period," that employers and unions try to persuade the voting employees. Unionists argue that more time translates into more opportunities for management to threaten, intimidate, and coerce employees into voting against the union.[106] Others posit that more time in the campaign period translates into a greater likelihood that employees will render informed decisions on voting day.[107] Regardless of which is correct, it is clear that delay helps management.[108] In fact, there is evidence to suggest that even a one-day delay can affect the election in the employer's favor.[109]

Under the NLRB's rules, a union may request the secret-ballot election only if a minimum of 30% of the employees in an appropriate bargaining unit have signed authorization cards.[110] As a practical matter, however, most national unions will not file a petition unless *at least* 60% of the employees have signed cards.[111] To prevail in the election, the union needs a simple majority of those who actually vote, not a majority of those who would be represented in the bargaining unit.[112] Thus, if fifty

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Gen. Counsel, NLRB, to Employees of the Office of the Gen. Counsel 5 (Jan. 10, 2011), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580434379.

104. GORDON LAFER, AM. RIGHTS AT WORK, FREE AND FAIR? HOW LABOR LAW FAILS U.S. DEMOCRATIC ELECTION STANDARDS 22 (2005).

105. Ferguson, *supra* note 77, at 10 n.9.

106. JOHN LOGAN ET AL., U.C. BERKELEY CTR. FOR LABOR RESEARCH. & EDUC., NEW DATA: NLRB PROCESS FAILS TO ENSURE A FAIR VOTE 2–4 (2011).

107. *See* Richard Epstein, *The Case Against the Employee Free Choice Act* 25–26 (Univ. of Chi. Law Sch. Inst. for Law & Econ., Working Paper No. 452, 2009).

108. *See* Ferguson, *supra* note 77, at 14 (noting the negative impact of delay on union election win rates). *See generally* Myron Roomkin & Richard N. Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence*, 1981 U. ILL. L. REV. 75 (presenting a model of election outcomes that includes delay as a significant predictor).

109. *See* Ferguson, *supra* note 77, at 14.

110. 29 U.S.C. § 159(e)(1) (2010).

111. Telephone Interview with Richard W. Hurd, Professor of Indus. & Lab. Rel., Cornell Univ. (June 28, 2001); *accord* Jack Fiorito, *Union Organizing in the United States*, *in* UNION ORGANIZING: CAMPAIGNING FOR TRADE UNION RECOGNITION 191, 200 (Gregor Gall ed., 2003); Martin, *supra* note 75, at 1072 (contending that many unions will not file for a certification election until a majority of workers sign authorization cards). Frankly, this is a conservative estimate based on conversations the Authors have had with union officials over the past seven years. Some assert that the percentage of employees the union considers supporters (based on authorization card signatures) is between 75% and 90%.

112. The relevant provision reads: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . . ." 29 U.S.C. § 159(a). Although this language seems to require a majority of all employees in a bargaining unit, it has been interpreted to require only a majority of those employees who vote. Martin-Rockwell Corp. v. NLRB, 116 F.2d 586, 588 (2d Cir. 1941).

employees are in the proposed bargaining unit but only twenty-one vote, the union needs only eleven votes to win. Employers win in the event of a tie.[113]

B. NLRB Rules Regarding Campaigning Before Elections and Arguments About the Effects of the Rules on the Process

The current rules state that during the campaign period, employers may not threaten,[114] interrogate,[115] make promises to,[116] or engage in surveillance of employees.[117] In addition, employers may not solicit grievances[118] or confer benefits.[119] If the employer violates these rules, the NLRB may either order the election to be rerun or issue a bargaining order.[120]

Under the law, employers may, however, engage in numerous campaign activities to convince employees to vote against the union. During the campaign period, employers provide employees with the management perspective of employees' rights and the consequences of voting in favor of the union.[121] To get their message across, employers can

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113. C.J. Krehbiel Co. v. NLRB, 844 F.2d 880, 884 (D.C. Cir. 1988).

114. *See* 29 U.S.C. § 158(c) (2010); NLRB v. St. Francis Healthcare Ctr., 212 F.3d 945, 962 (6th Cir. 2000) (finding that the employer unlawfully interfered with a representation election by threatening to close the facility if the union were elected).

115. *See* Tamper, Inc., 207 N.L.R.B. 907, 938 (1973) (finding an unfair labor practice where the employer coercively interrogated its employees about their union sympathies).

116. *See* NLRB v. Wis-Pak Foods, Inc., 125 F.3d 518, 522–23 (7th Cir. 1997) (finding that a promise to increase wages constituted an unlawful promise of benefit); Gen. Elec. Co. v. NLRB, 117 F.3d 627, 637 (D.C. Cir. 1997) (finding that a promise of a postelection gift constituted an unlawful promise of benefit).

117. *See* Cal. Acrylic Indus., Inc., 322 N.L.R.B. 41, 63 (1996) (finding that the employer violated the Act where it videotaped meetings between employees and union representatives).

118. *See* NLRB v. V & S Schuler Eng'g, Inc., 309 F.3d 362, 371 (6th Cir. 2002) (finding that the employer violated the Act by soliciting grievances when he had not done so before, creating a "compelling inference that he is implicitly promising to correct those inequities . . . mak[ing] union representation unnecessary" (quoting Orbit Lightspeed Courier Sys., 323 N.L.R.B. 380, 393 (1997))).

119. *Wis-Pak*, 125 F.3d at 522, 524–25 (finding that favorable changes to overtime and attendance policies constituted an unlawful grant of benefits).

120. NLRB v. Gissel Packing Co., 395 U.S. 575, 614 (1969) (upholding the NLRB's power to order the employer to bargain with the union where the employer's unfair labor practices are so severe that ordering a new election is not an adequate remedy, and where the union can demonstrate previous majority support). A bargaining order is an NLRB mandate requiring a company to "cease and desist from their unfair labor practices, to offer reinstatement and back pay to the employees who had been discriminatorily discharged, to bargain with the union on request, and to post the appropriate notices." *Id.* at 614.

121. As long as informing employees of the consequences does not rise to the level of a threat. 29 U.S.C. § 158(c) (2010). Employers typically raise some or all of the following issues, based in part on advice from counsel and from their unique circumstances, industry, and employee demographics: whether unions may "guarantee" increased pay, benefits, or anything else; how collective bargaining really works; what happens when strikes are called or picketing is conducted; what it costs to be a union member in terms of dues and initiation fees; where that money goes, how it is used, and by whom; whether the union's leaders are trustworthy and capable; the employer's record of

and will require all employees to attend so-called "captive audience" speeches,[122] will send letters home,[123] and will spend significant time and money on communicating their message, often employing law firms and consulting firms that specialize in crafting anti-union campaign strategies.[124] Management may mandate attendance at their meetings.[125] Unions may not hold captive-audience speeches[126] and, in fact, have no right to come onto an employer's property.[127] Unions are, however, entitled to a list of eligible employees[128] and, unlike employers, no rule prohibits unions from making promises, interrogating employees, or soliciting grievances.[129] Both sides may lie to employees but may not provide the employees with forgeries intended to deceive.[130]

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responsiveness to employee issues; the fact that employees will be paying someone to do what they may have been able to do (represent themselves) for free; whether the organizing drive has actually been beneficial in the sense that it has called attention to problems that need to be addressed whether the union is there or not; and whether the employer should make management changes (because an organizing drive seems to have been triggered by a perceived lack of leadership). *See* Arch Stokes, Robert L. Murphy, Paul E. Wagner & David S. Sherwyn, *How Unions Organize New Hotels Without an Employee Ballot: Neutrality Agreements*, 42 CORNELL HOSPITALITY Q. 86 (2001).

122. *See* KATE BRONFENBRENNER, UNEASY TERRAIN: THE IMPACT OF CAPITAL MOBILITY ON WORKERS, WAGES, AND UNION ORGANIZING 73 tbl.8 (2000) (finding that, of four hundred union campaigns studied, 92% included captive-audience meetings).

123. *Id.* However, in-person visits by management to employees' homes are per se prohibited. *See* Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948). The union, on the other hand, may make home visits, as long as those visits are not threatening or coercive. *Cf.* Simo v. Union of Needletrades, 322 F.3d 602, 620–21 (9th Cir. 2003) (discussing Supreme Court and NLRB cases suggesting that union home visits are permissible).

124. *See* Kate Bronfenbrenner et al., *Introduction*, *in* ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 1, 4 (Kate Bronfenbrenner et al. eds., 1998).

125. *See* Livingston Shirt Corp., 107 N.L.R.B. 400, 406 (1953); *see also* Estlund, *supra* note 8, at 1536–37.

126. *See* NLRB v. United Steelworkers of Am., 357 U.S. 357, 364 (1958) (stating, of captive-audience speeches, that unions are not "entitled to use a medium of communication simply because the employer is using it"); *see also Livingston Shirt Corp.*, 107 N.L.R.B. at 406.

127. *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 535 (1992); *see also* Republic Aviation Corp. v. NLRB, 342 U.S. 793, 803 n.10 (1945) (finding rules against solicitation during work hours presumptively valid); *cf.* NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1955) (creating an exception to the rule that an employer may bar nonemployee union members from the employer's property when the location of the employees' workplace and homes make reasonable nontrespassory efforts ineffective); Supervalu Holdings, Inc., 347 N.L.R.B. 425, 425 (2006) (finding a no-distribution rule invalid because it was enforced discriminatorily against union activity); Dillon Cos., 340 N.L.R.B. 1260, 1260 (2003) (finding unlawful a no-solicitation rule that was previously unenforced but resurrected at the beginning of the union's campaign).

128. Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1239–40 (1966) (establishing the disclosure requirement); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 767 (1969) (affirming the *Excelsior* rule).

129. Shopping Kart Food Market, Inc., 228 N.L.R.B. 1311, 1311 (1977); Shirlington Supermarket, Inc., 106 N.L.R.B. 666, 667 (1953). *But see* Stericycle, Inc., 37 N.L.R.B. No. 61, 2010-2011 NLRB Dec. ¶ 15,471 (Aug. 23, 2011) (holding that a union could not initiate litigation during the critical period).

130. *See* Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 133 (1982) ("[W]e will no longer probe into the truth or falsity of the parties' campaign statements, and . . . we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is."); *see also*

Employers could argue that the ability to interact socially with employees provides unions with a level playing field (at worst), and a significant advantage (at best). Not surprisingly, unions often hold a very different view of campaigns. Union advocates contend that the reason for labor's failure to organize, and the consequential drop in union density, is that the rules of organizing unfairly favor employers.[131] The assumption is that employers intimidate employees and either violate the law with impunity because there is no real enforcement, or act within the law because objectionable and effective conduct is not unlawful, but should be. Indeed, union advocates claim that during most campaigns, employers illegally threaten, intimidate, and terminate employees who favor the union.[132] According to a 2005 report by the University of Illinois at Chicago's Center for Urban Economic Development, when faced with organizing drives, 30% of employers fire pro-union workers, 49% threaten to close a worksite if the union prevails, and 51% coerce workers into opposing unions with bribery or favoritism.[133] Unions point to the numerous unfair-labor-practice charges filed against employers, to evidence suggesting a connection between meritorious unfair-labor-practice charges filed and a lower likelihood of union election victories,[134] and to anecdotal evidence of outrageous employer behavior, and contend that because unions lose numerous elections, the system is unfair.

Others advance the related theory that employers pose stronger resistance to unions by pressing on the weak spots in the law and that the law has responded inadequately.[135] According to Paul Weiler:

> [T]he employer . . . will be tempted to utilize a variety of measures designed to make collective bargaining unpalatable to its employees: a vigorous campaign against the union in which management regularly raises the spectre of strikes and job losses, and adds credibility to the

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Metro. Life Ins. Co., 266 N.L.R.B. 507, 507–08 (1983); Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209, 209 (2008).

131. *See* William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560, 570–71 (1983) (concluding that employers' captive-audience speeches have statistically significant effects on voting in union-certification elections).

132. *Id.*; *see* Bronfenbrenner, *supra* note 122, at 73 tbl.8.

133. CHIRAG MEHTA & NIK THEODORE, AM. RIGHTS AT WORK, UNDERMINING THE RIGHT TO ORGANIZE: EMPLOYER BEHAVIOR DURING UNION REPRESENTATION CAMPAIGNS 5, 9 (2005); *accord* Bronfenbrenner, *supra* note 122, at 73 tbl.8 (reporting similarly staggering statistics, including that, of employers in 400 union campaigns, 34% used bribes or special favors, 48% made unlawful promises of improvement, and 25% discharged union activists); Bronfenbrenner et al., *supra* note 124, at 1, 4–5.

134. *See* Ferguson, *supra* note 77, at 15 tbl.6 (finding that meritorious unfair labor practice charges filed by unions against employers had a statistically significant impact on the likelihood of unions winning elections, reducing the success rate by 52%).

135. PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 111 (1990).

> threats through selective discriminatory action against key union supporters. If the union wins the election nonetheless, the employer will simply carry on its resistance at the next stage by stonewalling at the bargaining table, forcing the union members out on strike, and hiring permanent replacements to fill their jobs . . . .[136]

Weiler cites as evidence the increase of discriminatory discharges and bad faith bargaining during the period of decline in union density.[137] Craver contends that employers engage in tactics during organizing drives that chill employees from voicing pro-union opinions and regularly hire labor consultants to strategize the anti-unionization campaign.[138] They openly encourage dissatisfied union workers to file decertification petitions, contributing to the jump from 300 decertification elections in the 1960s to 900 in the early 1980s.[139] Given the choice, companies will prefer to invest in their nonunion plants rather than their union plants (which explains the growth of production plants in the Sunbelt—where workers are less supportive of labor organizations).[140] Similarly, Richard Freeman and Morris Kleiner analyzed employer and organizer surveys and concluded that employers' brazen opposition to unionization contributed to union decline.[141] They based this conclusion on the finding that supervisor opposition to unionization was the most significant determinant of representation-election outcomes.[142]

Other scholars argue that fundamental macroeconomic changes, like globalization, do much to explain the decline.[143] Kate Bronfenbrenner advances a combined theory of increased capital mobility and increased employer opposition.[144] She explains that employers have greater ability and willingness to close plants and outsource those activities, or to threaten to do so.[145] Between this and

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136. *Id.* (footnote omitted).

137. *Id.* at 112.

138. CHARLES A. CRAVER, CAN UNIONS SURVIVE? THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT 49 (1993).

139. *Id.* at 50.

140. *Id.*

141. Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 INDUS. & LAB. REL. REV. 351, 364 (1990).

142. *Id.* at 361. Interestingly, Freeman and Kleiner also found that the use of unfair campaign tactics by employers is positively correlated with the odds that the union will win, in seeming contradiction to the assertions of some union advocates. *Id.*; *accord* Julius G. Getman, *Explaining the Fall of the Labor Movement*, 41 ST. LOUIS UNIV. L.J. 575, 582 (1997) (acknowledging that his own research uncovered no relationship between employer success and illegal tactics). This finding is also at odds with recent findings by John-Paul Ferguson that nonmeritorious unfair-labor-practice charges had little impact on election results as compared to meritorious ones, which significantly decreased the odds that unions would win. Ferguson, *supra* note 77, at 18.

143. Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 6 (1993) (attributing the decline in part to the rise of competitive product markets).

144. Bronfenbrenner, *supra* note 122, at 53.

145. *Id.*

other employer anti-union tactics, employers are extremely effective at avoiding unionization.[146]

Employers and some scholars argue that unions have nothing left to sell to employees[147] because traditional labor-management relations simply do not serve employees' interests[148] and unions are perceived as less trustworthy due to their inability to carry through on promises made.[149] Others attribute the drop in union density to internal union weaknesses.[150]

We contend that organized labor has failed to adapt with the times, and part of this failure is due to unions' failure to connect to a new generation of workers. Younger workers may aspire less to be lifetime employees with great benefits and job security and more to be like management, independent contractors, entrepreneurs, inventors, or someone who attains celebrity status and avoids *work* for the rest of her life. Others have argued that *collective* employment rights have been eclipsed by the staggering enactment of legislation protecting *individual* employee rights.[151] Some point to shifts in the U.S. economy, in particular that it is moving towards an "enterprise based" system of industrial relations in private industry in which unions negotiate with single firms instead of with corporations or industries.[152] Such shifts preclude the kind

146. *Id.*

147. According to management-side labor lawyers, one of the key strategies in this regard is to examine what the union is selling and to explain to the employees that the costs outweigh the benefits. One problem for the unions, according to some, is that organized labor does not always have much to sell. For example, one lawyer discussed a union-organizing drive in which the union represented to employees that it would demand that the employer implement the union's health insurance plan if it were elected. The union extolled the fact that it would insist that the employer pay 100% of the cost of the plan, as opposed to their current plan under which the employees paid a portion of the cost. The employer held a meeting in which it compared the two plans side-by-side. While the union plan did not feature any up-front costs, the coverage was clearly so inferior that the employees concluded that they were better off with the employer plan and voted against the union. Employers contend that this insurance issue is a typical example of the current state of union organizing: at first, the union pitch sounds great, but after close examination the employees do not want to buy what the union is selling. Employers could argue that this is one reason why companies are able to defeat unions in elections.

148. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 56 (1999) (finding a desire among employees for an organization run "jointly" by both labor and management).

149. *See supra* note 147.

150. Bronfenbrenner et al. suggested that unions focused too little effort on recruitment during the 1970s and 1980s and failed to adapt their organizing strategies to new challenges. Bronfenbrenner et al., *supra* note 124, at 5–6. Julius Getman agrees that unions' failure to adapt their thinking contributed to the demise, and points to other internal weaknesses: internal politics, inability to coordinate with other locals, corruption, and a divide between leadership and rank-and-file employees. *See* Getman, *supra* note 142, at 583–93.

151. Michael J. Piore & Sean Safford, *Changing Regimes of Workplace Governance, Shifting Axes of Social Mobilization, and the Challenge to Industrial Relations Theory*, 45 INDUS. REL. 319, 301–04 (2006).

152. Ronald W. Schatz, *From Commons to Dunlop: Rethinking the Field and Theory of Industrial Relations*, *in* INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE 87, 88 (Nelson Lichtenstein & Howell John Harris eds., 1993).

of industrial democracy and industrial stability based on unionism that industrial-relations theorists and union advocates have contemplated.[153] Still others mark the advent of enlightened human-resource policies as explaining labor's inability to organize and the drop in union density.[154] In fact, management often contends that simply informing employees of the "truth" will allow them to prevail.[155] Therefore, employers argue that the system is fair because the lack of union density reflects the will of the people. These theories are consistent with the staggering decline in public support for unions.[156] Unionists argue that the statistics prove that the system is unfair.[157] We contend that the system is unfair not because of the results, but because of the process.[158]

Like the Sherwyn-versus-Eigen hypothetical one-on-one basketball game described above, the current system has two different sets of rules for the two sides. Employers have the advantage of access to employees. Captive-audience meetings and other impromptu conversations allow employers to get their respective messages across. Unions have the advantage of being able to make promises, visit employees' homes, and party with the employees. Employers have the inherent power advantage, while unions often have a head start in the race to the election. There are some rules that apply to both sides. Both sides can lie to the employees, trash the other side, and pressure the employees to vote one way or the other.[159] The result is that at the end of the campaign, the employees feel like the rope in a tug of war. The employees likely have little, if any, ability to gauge the accuracy of the information received; they often fear reprisals for voting for either side, and they likely feel like pawns in the age-old labor-versus-capital dispute where

153. *Id.*

154. Jack Fiorito & Cheryl L. Maranto, *The Contemporary Decline of Union Strength*, CONTEMP. POL'Y ISSUES, Oct. 1987, at 12, 16–17.

155. Surveys of union organizers and employees who have been through NLRB election campaigns seem to confirm this trend, at least indirectly. *See, e.g.*, *Workers Weigh in on Alleged Coercion During Card Check Campaign and NLRB Elections*, AM. RIGHTS AT WORK (Mar. 21, 2006) http://www.americanrightsatwork.org/press-center/2006-press-releases/workers-weigh-in-on-alleged-coercion-during-card-check-campaigns-and-nlrb-elections-20060320-239-345-345.html.

156. *See supra* notes 88–90 and accompanying text.

157. There are those who go beyond the statistics and make a normative assessment of the NLRA, arguing that it is biased in favor of employers. However, these analyses tend to omit or undervalue the advantages the Act accords unions and to emphasize the advantages accorded employers. *See, e.g.*, Getman, *supra* note 142, at 578–84.

158. Others, a rare minority by our account of the current state of this relevant scholarship, have suggested that systemic factors potentially account for a greater percentage of variation in win rates and union density than do the other factors described above. *See* Ferguson, *supra* note 77, at 18; Chris Riddell, *Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978–1998*, 57 INDUS. & LAB. REL. REV. 493, 495 (2004).

159. Note well that all of this can be done without engaging in, for example, threats, interrogation, or recording campaign activity—tactics that neither management nor the union can employ. *See supra* notes 114–17 and accompanying text.

their desires are subordinated to the desires of two large entities each claiming to care about employee well-being more than the other: Management swears that it learned a lesson from the experience and vows to change, while the union swears that no change management might implement would remain intact without the perpetual threat of organization attainable only by certifying the union as the employees' representative.[160]

C. Card-Check Neutrality Agreements and the Employee Free Choice Act

Perhaps the most discussed means of reforming the broken, outdated means of selecting workplace labor organization representation is card-check neutrality. This was most recently embodied, in part, in the proposed Employee Free Choice Act.[161] The logic behind EFCA focuses (incorrectly in our view) on results, not process, and in the end, would attenuate perhaps the most critical component of the process's fairness—employees' right to freely choose their representative or to choose not to be represented at all. With respect to neutrality agreements, five questions must be addressed: (1) what are they, (2) what effect do they have on unionization, (3) why do employers sign them, (4) what is their legal status, and (5) do they result in a fair system under our newly described criteria. We address the first four questions in this Part, and the fairness question in Part IV.

1. *What Are Neutrality Agreements?*

Although neutrality agreements come in several forms, the common denominator for all of them is that employers agree to remain neutral with regard to the union's attempt to organize the workforce.[162] Some agreements simply state that the employer will remain neutral but contain no specific provisions, while other agreements are more detailed.[163] For example, Hotel Employees and Restaurant Employees

160. Levitt, *supra* note 96, at 89.

161. Employee Free Choice Act of 2009, S. 560, 111th Congress (2009). As discussed above, EFCA provides for recognition based on card checks, *see supra* text accompanying notes 17–18, but does not require employer neutrality.

162. While most agreements contain a definition of neutrality, the definitions vary widely. Most Communication Workers of America, United Auto Workers, and United Steelworkers of America agreements define neutrality as "neither helping nor hindering" the union's organizing effort, yet still allow employers to communicate facts to the employees. *See* Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 47 (2001). A different approach is apparent from the Hotel and Restaurant Employees Union agreements that prohibit the employer from communicating any opposition to the union. *Id.* Less typical definitions provide that management will make an affirmative statement to their employees that it welcomes their choice of a representative. *Id.*

163. Agreements may state that the employer will not attack or demean the union; the employer

Union agreements stated that employers would not "communicate opposition" to the union's efforts.[164]

Neutrality agreements commonly give the union access to employees in the form of a list of their names and addresses (and, sometimes, telephone numbers), as well as permission to come onto company property during work hours for the purpose of collecting authorization cards.[165] This differs from the guidelines established by the NLRB and the courts, under which an employer has no obligation to provide the union with such sweeping access to its employees, and may actually be prohibited from doing so.[166]

Finally, most neutrality agreements include a "card check" provision, which requires the employer to recognize the union if a majority of the bargaining-unit employees sign authorization cards.[167] Under a card-check agreement, the employees do not vote for the union in a secret-ballot election monitored by the NLRB.[168] Instead, the employer recognizes the union if it presents the company with the requisite number of signed authorization cards, at which point the neutrality agreement is no longer needed and expires.[169]

2. *What Effect Do Neutrality Agreements Have on Unionization?*

Neutrality agreements radically change the landscape of union organizing. With the aid of such agreements, unions in one study prevailed in 78% of the situations in which they attempted to organize, compared to only a 46% success rate in contested elections.[170] The difference between 46% and 78% actually *understates* the effect of the neutrality agreement, in part because the sampled populations for the two figures are different. Elections only occur when the union can show that 30% of the employees have signed authorization cards.[171] As stated above, however, in almost every situation where a union goes to election,

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will not refer to the union as a third party; the parties will strive to create a campaign free of fear, hostility, and coercion; the parties will campaign in a positive manner; the parties will keep their statements pro-company or pro-union; and the employer will not state that it is corporate policy to avoid unionization. *See id.*

164. *Id.*

165. Arch Stokes, Robert L. Murphy, Paul E. Wagner & David S. Sherwyn, *Neutrality Agreements: How Unions Organize New Hotels Without an Employee Ballot*, CORNELL HOTEL & REST. ADMIN. Q., Oct.–Nov. 2001, at 86, 89.

166. Lechmere, Inc. v. NLRB, 502 U.S. 527, 534 (1992).

167. Eaton & Kriesky, *supra* note 162, at 47 tbl.1 (finding that 73% of neutrality agreements studied had card-check language).

168. Stokes et al., *supra* note 165, at 86.

169. *Id.*

170. Eaton & Kriesky, *supra* note 162, at 52 & tbl.3; *see also* Riddell, *supra* note 158, at 509 (finding a union success-rate difference of approximately 19% in British Columbia attributable to card-check procedures as compared to mandatory-voting procedures).

171. *See supra* note 110 and accompanying text.

it has more than 50% of the employees sign cards.[172] Thus, the sampled population in the 46% win figure includes only companies where it is likely that at least 60% of the employees signed cards. Companies where the union could not get at least 51% of the employees to sign cards did not go to election and never became part of that figure. Conversely, the sampled population in the neutrality side of the study includes all employers who signed such agreements. Those employers whose employees had no interest represent the 22% of companies that remained nonunion. In other words, it is likely that 100% of the companies that went to election would have been unionized under a neutrality with card check, and the 22% of those under card-check agreements would never have gone to election. The net effect is quite simple. Assuming there is enough employee interest to warrant an election in the first place, the company's chances of becoming unionized are less than 50% under the NLRB's election procedures and nearly guaranteed under a neutrality agreement with a card-check provision.

It follows that employers wishing to remain nonunion or to give their employees an opportunity to exercise their right to choose their elected representative by secret ballot should refuse to sign a neutrality agreement. This begs the question of why an employer would ever accede to a neutrality agreement.

3. *Why Do Employers Sign Neutrality Agreements?*

The question "why do employers sign neutrality agreements?" is perplexing to the casual observer. The answer is fairly simple. Employers sign neutrality agreements because they have to or because it makes business sense. There are two reasons why employers have to sign neutrality agreements. First, local governments may require neutrality agreements. For example, San Francisco enacted a labor-peace ordinance that required neutrality to get a building permit or to do business at the airport or other city-owned property.[173] Other cities have had similar such requirements.[174] Historically, there has been little public opposition to such requirements and even fewer legal challenges.

Second, employers who are parties to certain collective-bargaining agreements must agree to a neutrality agreement. For example, the collective-bargaining agreements covering the hotel employers' associations in New York City and Chicago contain neutrality agreements.[175] Because the major brands and operators are all parties to

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172. *See supra* note 111 and accompanying text.

173. *See* MICHAEL REICH ET AL., INST. INDUS. REL., LIVING WAGES AND ECONOMIC PERFORMANCE: THE SAN FRANCISCO AIRPORT MODEL, at 7 (2003).

174. For example, there is a similar ordinance in Los Angeles County. *See* L.A. CNTY., CAL., ADMIN. CODE § 2.201.050 (2011).

175. These agreements are on file with the Authors.

these agreements, any new owner who wishes to use an established operator or brand must agree to neutrality.

Of course, the next question is why the brands and operators agreed to neutrality. While it is difficult to state with authority why employers agreed to something so long ago, one can make some logical assumptions. Neutrality is a huge gain for the union, and unions should and do give up other demands in exchange for neutrality. An owner who does not plan on owning another hotel has no disincentive and, in fact, has an incentive to force the other brands and operators to sign neutrality agreements. During negotiations, the union's willingness to trade wage increases, for example, for neutrality has an immediate positive effect on current owners. In addition, it has a long-term positive effect. Now, if a brand opens a competing hotel, the unionized owner knows the new hotel likely will be union and, thus, the playing field will be level.[176]

Other times, neutrality simply makes business sense. For example, SBC Communications, a telephone company, and the Communications Workers of America entered into an agreement in which the parties executed neutrality agreements that included card checks for all current SBC employees and those employed by all firms acquired by SBC in the future.[177] SBC accepted the neutrality agreement in exchange for the union's promise to lobby on the company's behalf regarding antitrust complications arising out of present and future mergers and acquisitions.[178] Put simply, the company was willing, for all intents and purposes, to accept that all of its present and future employees would have one union as their exclusive representative in exchange for the union's lobbying assistance. While it may have been a good deal for the

176. *See* MORRIS A. HOROWITZ, THE NEW YORK HOTEL INDUSTRY: A LABOR RELATIONS STUDY 30 (1960) ("It was unquestionably becoming clear to the Hotel Association [of New York City], at this point, that with the growing strength of the unions, it was only a matter of time before a significant number of hotels would settle with any of the various unions in the field. If this happened, different hotels would deal with different unions on different terms, and . . . it would be most impractical to have different wage scales among competitive hotels. . . . [A] uniform union structure in all the hotels would be economically advantageous to the hotels . . . .").

177. Eaton & Kriesky, *supra* note 163, at 44; Harry C. Katz et al., *The Revitalization of the CWA: Integrating Collective Bargaining, Political Action, and Organizing*, 56 INDUS. & LAB. REL. REV. 573, 586–87 (2003).

178. Katz et al., *supra* note 177, at 587; *see also* Interview with Harry C. Katz, Dean and Professor of Collective Bargaining, Cornell Univ. Sch. of Indus. & Lab. Rel., in Ithaca, N.Y. (July 23, 2001); *CWA Tells FCC: Bell Atlantic-GTE, SBC-Ameritech Mergers Will Boost Competition and Benefit All Consumers*, COMM. WORKERS OF AM. (Dec. 13, 1998), http://www.cwa-union.org/news/entry/cwa_tells_fcc_bell_atlantic-gte_sbc-ameritech_mergers_will_boost_competitio (illustrating the antitrust lobbying the CWA performed on behalf of SBC); *Justice Dept. Approves SBC-Ameritech Deal*, COMM. WORKERS OF AM. (Apr. 1, 1999), http://www.cwa-union.org/news/entry/justice_dept._approves_sbc-ameritech_deal (same).

employer, and it certainly was a great deal for the union, the employees were deprived of information and choice.

4. What Is the Legal Status of Neutrality Agreements?

In assessing the legality of neutrality one needs to distinguish between that required by government and that entered into by private employers. The former may be unlawful; the latter is not.

a. Government-Mandated Neutrality

The legality of government-mandated neutrality suffered its first serious blow in 2001 when Judge Vaughn Walker of the District Court for the Northern District of California granted a preliminary injunction that prevented the San Francisco International Airport from enforcing its labor-peace and card-check rules against an employer who operated at the airport.[179] The court held that the airport's labor-peace rule was unenforceable because it likely conflicted with the so-called preemption principle of the NLRA,[180] which prohibits state and local regulation of activities that the NLRA "protects, prohibits, or arguably protects or prohibits."[181] Accordingly, a city, state, or local statute, regulation, or ordinance that conflicts or interferes with the disposition of issues under the NLRA is unenforceable.[182]

Chamber of Commerce of the United States v. Brown, handed down by the Supreme Court in 2008, further calls the legality of government-mandated neutrality into serious doubt.[183] In *Brown*, the Court struck down a California statute that prohibited employers who did business with the state from using state funds to "assist, promote, or deter union organizing."[184] Justice John Paul Stevens, writing for a 7–2 majority that reversed the en banc Ninth Circuit, held that the NLRA preempted the state statute, relying on a different but related preemption doctrine from that relied on by Judge Walker.[185] According to the Court, the Labor Management Relations Act (the "Taft-Hartley Act"),[186] a law passed to level the playing field of the pro-union NLRA, manifested a "congressional intent to encourage free debate on issues dividing labor

179. Aeroground, Inc. v. City of S.F., 170 F. Supp. 2d 950, 959 (N.D. Cal. 2001).

180. *Id.* at 955–56 (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959)).

181. Wis. Dept. of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 286 (1986).

182. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244–45 (1959).

183. 554 U.S. 60, 74 (2008).

184. *Id.* at 71–74 (quoting CAL. GOV'T CODE §§ 16645.1–.8 (2010)).

185. *Id.* at 76; Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm'n, 427 U.S. 132, 150–51 (1976) ("[A] regulation by the state is impermissible because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (quoting Hill v. Florida, 324 U.S. 538, 542 (1945))).

186. Labor Management Relations Act of 1947 ("Taft-Hartley Act"), Pub. L. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–197 (2010)).

and management."[187] The Court found both explicit and implicit congressional intent to leave noncoercive employer speech unregulated because it is impermissible to "chill[] one side of 'the robust debate which has been protected under the NLRA.'"[188]

Although labor-peace statutes differ in some respects from the statute at issue in *Brown*,[189] they raise many of the same concerns. The statutes deny employees the "implie[d] . . . underlying right" to information opposing unionization and discourage free debate of labor-management issues by stifling one side of the dialogue.[190] Labor-peace statutes thus embody state policies on organizing—policies that "stand[] as an obstacle" to the policy Congress pronounced on that issue in the Taft-Hartley Act.[191]

Even more on point is Judge Richard Posner's decision in *Metropolitan Milwaukee Association of Commerce v. Milwaukee County*.[192] In *Metropolitan Milwaukee*, the Seventh Circuit struck down a Milwaukee ordinance that required certain transportation contractors to negotiate neutrality agreements as a condition to receiving payment from the county.[193] The ordinance required that these agreements include clauses subjecting labor disputes to binding arbitration, prohibiting employers from holding captive-audience speeches and expressing "false or misleading" information intended to influence an employee's vote, and requiring the employer to provide the union with an employee contact list and "timely and reasonable access" to the workplace.[194] The court held that a state may regulate labor relations with its contractors only for limited purposes, such as increasing the quality or reducing the cost of the services performed.[195] However, a state may not regulate labor relations to promote a policy it views as superior to that embodied in the NLRA.[196]

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187. *Brown*, 554 U.S. at 67 (quoting Linn v. United Plant Guard Workers of Am., Local 1114, 383 U.S. 53, 62 (1966)).

188. *Id.* at 73 (quoting Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 275 (1974)); *see also* Healthcare Ass'n. of N.Y. State, Inc. v. Pataki, 388 F. Supp. 2d 6, 25 (N.D.N.Y. 2005) (striking down, as preempted by the NLRA, N.Y. LAB. L. § 211-a (McKinney 2004), which prohibited use of state funds to "encourage or discourage union organization"), *rev'd*, 471 F.3d 87, 109 (2d Cir. 2006) (reversing grant of summary judgment based on the presence of fact issues, but accepting the lower court's determination that the NLRA might preempt the New York statute).

189. For example, the statute at issue in *Brown* arguably was even more pro-union in that it permitted the use of funds toward expenses in connection with allowing union representatives access to the employer's premises or "[n]egotiating, entering into, or carrying out a voluntary recognition agreement." CAL. GOV'T CODE § 16647 (2010).

190. 554 U.S. at 68.

191. *Machinists*, 427 U.S. at 150 (quoting Hill v. Florida, 324 U.S. 538, 542 (1945)).

192. 431 F.3d 277 (7th Cir. 2005).

193. *Id.* at 277–78.

194. CNTY. OF MILWAUKEE, WIS., CODE GEN. ORDINANCES § 31.02(f) (2000).

195. *Metro. Milwaukee*, 431 F.3d at 277–78.

196. *Id.* at 278–79. The county argued in the alternative that the scheme was not regulation, but

b. Private Neutrality Agreements

There are three arguments why private neutrality agreements violate the law: (1) section 302 of the Taft-Hartley Act makes it unlawful for an employer to give or agree to give a "thing of value" to any labor organization and for a labor organization to receive a thing of value from any employer,[197] (2) the Taft-Hartley Act allows employers the right to campaign against the union,[198] and (3) the NLRA prohibits so-called "company unions."[199] Below we first describe why a private neutrality agreement violates the law. We then describe how the courts and the NLRB have ruled on these issues.

The first question is whether a neutrality agreement itself constitutes a thing of value provided to a labor organization. Courts use a seemingly broad interpretation of "thing of value" in section 302. For instance, in *United States v. Schiffman*, the question before the court was whether the request for a reduced room rate constituted a thing of value and thus violated section 302.[200] In that case, a union official who represented a bargaining unit at a Hyatt property in Florida requested that an Atlanta Hyatt provide the official with a room rate that was almost 50% less than Hyatt's corporate rate.[201] The court found that the room-rate reduction was a thing of value and that the requested favor violated section 302.[202] Similarly, in *United States v. Boffa*, the court found that an employer unlawfully provided a thing of value when it provided a union official with the use of a 1975 Lincoln Continental without charge for a four-month period.[203] This broad definition of "thing of value" in section 302 is consistent with the judicial interpretation of the same term when it is found in other statutes.[204] Those holdings *suggest*

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allocation of state funds. However, the court held that express regulation versus the use of the county's spending power was "a distinction without a difference." *Id.* at 279 (quoting Wis. Dep't of Indus., Labor, & Human Relations. v. Gould Inc., 475 U.S. 282, 287 (1986)).

197. 29 U.S.C. § 186 (2010).

198. 29 U.S.C. § 156(c) (2010).

199. *Id.* § 158(a)(2).

200. 552 F.2d 1124, 1125 (5th Cir. 1977).

201. *Id.*

202. *Id.*

203. 688 F.2d 919, 924, 936 (3d Cir. 1982).

204. *See, e.g.*, *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979) (holding that 18 U.S.C. § 641, which prohibits embezzling, stealing, purloining, or knowingly converting "any record, voucher, money, or thing of value" of the U.S. or of any department of agency thereof, includes actions involving "intangible" property). Other federal statutes use the phrase "anything of value." *See* 18 U.S.C. § 201 (2010) (defining criminal bribery and prohibiting any person from giving or attempting to give "anything of value" to a government official with the intention of influencing their official actions and reciprocally prohibiting any public official from receiving or attempting to solicit anything of value in return for official action); 18 U.S.C. § 666 (2010) (imposing criminal sanctions for soliciting or demanding corruptly for the benefit of any person, or accepting or agreeing to accept "anything of value" from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of

that a similarly broad interpretation would apply to a thing of value under section 302 of the Taft-Hartley Act.

Neutrality agreements almost always require the employer to provide at least four things that have been or logically would be characterized by the courts as things of value under this broad definition of the term: access to the hotel's premises so the union can speak to the employees, a list of employees, a card-check provision, and exclusivity to one union. If any of those are benefits that constitute a thing of value, the typical neutrality agreement would violate section 302 of the Taft-Hartley Act. Indeed, it seems clear that these four items are things of value. As explained above, the value of the card check is significant: it substantially increases the likelihood of union success in an organizing drive.[205] Similarly, access to employees, directories, and exclusive dealings[206] are not required by the law and seemingly would help the union in its efforts. One would presume that significant help in organizing an employer—the main goal of the union—would constitute a thing of value.[207]

The second argument that private neutrality agreements violate the law stems from section 7 of the NLRA, which grants employees the right to organize or to refrain from organizing.[208] The right to refrain from organizing was added to the NLRA in the Taft-Hartley Act.[209] To operationalize this right, Taft-Hartley allows employers and employees to file unfair-labor-practice charges against unions when the unions' conduct interferes with the section 7 rights of employees,[210] and gives employers the right to exercise free speech with regard to union organizing as long as they do not threaten, make promises to, interrogate, confer benefits on, or solicit grievances from employees.[211] It seems that the purpose of these free-speech guarantees is to allow employees access

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value of $5,000 or more).

205. *See supra* notes 170–72 and accompanying text.

206. Exclusive dealing means that only the union that was a party to the agreement, and not rival unions, would have access and directories.

207. *See supra* notes 173–79 and accompanying text.

208. *See* 29 U.S.C. § 157 (2010) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .").

209. Labor Management Relations Act of 1947, Pub. L. 80-101, § 101, 61 Stat. 136, 140 (codified as amended at 29 U.S.C. § 157).

210. *Id.* § 101, 29 U.S.C. § 158(b) (2010). Prior to Taft-Hartley, unfair-labor-practice claims could be filed only against employers. *See* Pub. L. No. 74-198, § 8, 49 Stat. 449, 453 (1935).

211. Uarco, Inc., 216 N.L.R.B. 1, 1–2 (1974) (holding that it is not the solicitation of grievances itself that is coercive and violative of section 8(a)(1), but the promise to correct grievances, and that solicitation of grievances raises a rebuttable inference that the employer is making such a promise); NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) ("[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.").

to information so that they can be fully informed before deciding whether to organize or to refrain from organizing. Consequently, an employer's decision to remain neutral seems to deprive employees of access to information critical of the union and thereby may interfere with employees' right to refrain from unionizing.

Finally, private neutrality agreements may violate section 8(a)(2) of the NLRA, which prohibits employers from assisting unions by giving them financial or other support, a provision that eliminated the so-called company unions of days past.[212] Like the employers' right to engage in free speech, the purpose of section 8(a)(2) is to preserve the free exercise of employees' section 7 rights. Because collusion between an employer and a union can detrimentally affect employees by interfering with their rights to refrain from organizing, it would seem that a neutrality agreement violates section 8(a)(2).

While there is no case on point, the NLRB's analysis of section 8(a)(2) supports this argument. In reviewing alleged 8(a)(2) violations, the NLRB has noted the Supreme Court's direction that courts need to carefully scrutinize "all factors, often subtle, which restrain an employee's choice and for which the employer may be said to be responsible."[213] Under this totality-of-the-circumstances test, the NLRB has found that the following factors may constitute evidence of a violation of section 8(a)(2): the employer's introducing the union to its employees, the employer's permitting the union to solicit employees to sign cards on the employer's property and during work hours, the employer's extending recognition to a union that had not collected valid recognition cards, and the employer's executing a collective-bargaining agreement before the union had demonstrated that it represented an uncoerced majority of employees.[214] Moreover, the NLRB has found that "signed cards . . . cannot be considered reliable representation of employee sentiments when there is evidence of the employer's assistance to the union."[215]

While allowing a union the use of company time and property is not a per se violation of section 8(a)(2),[216] that factor in addition to the fact that the employer has chosen which union it will introduce to its employees, along with the other neutrality requirements described

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212. *See* 29 U.S.C. § 158(a)(2) (2010) ("It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . .").

213. Windsor Place Corp., 276 N.L.R.B. 445, 448 (1985) (citing Int'l Ass'n of Machinists Lodge No. 35 v. NLRB, 311 U.S. 72 (1946)).

214. *Windsor Place Corp.*, 276 N.L.R.B. at 449.

215. *Id.*

216. *Id.* at 448 (citing Manuela Mfg. Co., 143 N.L.R.B. 379 (1963)).

above, compels the conclusion that such agreements violate section 8(a)(2).[217]

Despite the above arguments, the NLRB and the federal courts consistently uphold neutrality agreements. In *Hotel Employees and Restaurant Employees, Local 57 v. Sage Hospitality Resources, LLC*, the Third Circuit addressed the issue of whether a neutrality agreement was a "thing of value."[218] In three short paragraphs devoid of any real analysis, the court rejected the thing-of-value argument.[219] The basis for this rejection was the court's interpretation of the purposes of the statute and the effect of neutrality agreements.[220] According to the court, the prohibition against providing a thing of value was passed "to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers."[221] This prohibition, the court continued, is limited to bribery, extortion, and other corrupt practices conducted in secret and only addresses agreements to pay, loan, or deliver any money or thing of value.[222] The court then held that a neutrality agreement benefited both parties with efficiencies and cost savings and did not involve the payment, loan, or delivery of anything.[223]

This analysis is woefully lacking in an understanding of the relevant case law and of the nature of labor relations. For example, the reduced hotel room rate in *Schiffman* was neither bribery, nor extortion, nor corruption. Moreover, it did not involve the payment, loan, or delivery of anything. What it did do, rather, was create a situation where the union official may have felt indebted to the employer, arguably hindering his ability to fully represent the employees. We dispute that a savings of $20 would have such an effect, but the court held it could.[224] On the other hand, a neutrality agreement granting exclusive collective-bargaining rights to one union could result in dues of $35 to $50 per month from thousands of employees. Hundreds of thousands of dollars per month seems like a thing of value. Would a union, for example, give up its demands for increases in wages or health and safety measures in exchange for that kind of money and power? Of course it would. In fact, that is exactly what UNITE-HERE did in the summer of 2006 when it

217. Moreover, under a neutrality agreement, employers recognize unions based on signatures that result from employer assistance to the union. Those cards should not be considered reliable and the NLRB should not certify the union.

218. 390 F.3d 206, 218 (3d Cir. 2004).

219. *Id.* at 218–19.

220. *Id.*

221. *Id.* (quoting Turner v. Local Union No. 302, Int'l Bhd. of Teamsters, 604 F.2d 1219, 1227 (9th Cir. 1979)).

222. *Id.* at 219.

223. *Id.*

224. United States v. Schiffman, 552 F.2d 1124, 1126 (5th Cir. 1977).

threatened an industry-wide strike if employers did not agree to neutrality agreements and reduced demands that would have benefited the current employees in exchange for the ability to organize nonunion hotels.[225] This seems like what section 302 was designed to prevent. The courts, however, do not agree. In fact, the Fourth Circuit[226] and at least two federal district courts[227] followed *Sage Hospitality*. In addition, in *Dana Corporation*, the NLRB followed *Sage Hospitality*, holding that card-check neutrality furthers the NLRA's purpose of promoting labor peace.[228] In other words, an agreement that is provided at the expense of current members' wages, hours, and terms and conditions of employment and that jeopardizes the employees' section 7 right to refrain from joining a union is permissible as long as it furthers labor peace.

We believe that card-check neutrality agreements violate section 302 and the NLRA and therefore should not be enforced. Our belief, however, does not reflect the current state of the law and thus, for the time being, neutrality agreements are alive and well.

D. Legislative and Adjudicative Initiatives

EFCA would have put part of the section 302 issue to rest because it would have mandated employers to recognize unions as the exclusive representative of petitioned-for units of employees on the basis of signed authorization cards from a majority of employees in those units.[229] The midterm elections destroyed any chance of this statute being passed during President Obama's first term. While the passage of EFCA may no longer be viable, its aftereffects remain on both sides of the table. The concept of "free choice" ending the process of secret-ballot elections was an anomaly that not only doomed the statute, but that also resulted in proposed state legislation that would outlaw card checks. In November of 2010, voters in four states—Arizona, South Carolina, South Dakota, and Utah—voted to amend their state constitutions to require secret-ballot elections for union certification.[230] The NLRB has taken the position that these amendments are preempted by the NLRA and thus

225. Richard W. Hurd, *Neutrality Agreements: Innovative, Controversial, and Labor's Hope for the Future*, New Lab. Forum, Spring 2008, at 35, 36–37; David Sherwyn, Zev J. Eigen & Paul Wagner, *The Hotel Industry's Summer of 2006: A Watershed Moment for America's Labor Unions?*, 47 Cornell Hotel & Rest. Admin. Q. 337, 343–45 (2006).

226. *See* Adcock v. Freightliner, LLC, 550 F.3d 369, 376 (4th Cir. 2008).

227. *See* United Steel Workers Int'l Union v. Hibbing Joint Venture, No. 06-4820, 2007 WL 2580546, at *5–6 (D. Minn. Sept. 4, 2007); Patterson v. Heartland Indus. Partners, LLP, 428 F. Supp. 2d 714, 724 (N.D. Ohio 2006).

228. 356 N.L.R.B. No. 49, 2010-2011 NLRB Dec. ¶ 15,369 (Dec. 6, 2010).

229. S. 560, 111th Cong., § 2(a)(6) (2009).

230. Ariz. Const. art. II, § 37; S.C. Const. art. II, § 12; S.D. Const. art. VI, § 28; Utah Const. art. IV, § 8(1).

are unenforceable.[231] These issues will be played out before the NLRB and ultimately the courts.[232] In addition, as stated above, numerous states are discussing right-to-work legislation.[233] Currently there are twenty-three right-to-work states.[234]

On the other side of the ledger, organized labor is lobbying the NLRB to change its rules and shorten the time between the filing of the petition and the election. Commentators are proposing a time period of twenty, ten, or even five days between the filing of the petition and the election.[235] Labor argues that a shortened time period would allow a secret-ballot election but would curtail management's ability to threaten, intimidate, coerce, promise benefits to, and surveil employees.[236]

There are two problems with a shortened-election scheme. First, assuming that a fully informed electorate is desirable, five or ten days simply is not enough time for management to convey its side of the story. Unfortunately, this is a trade-off between interests that likely cannot be reconciled. The second problem, however, hurts both sides. Before holding a union election, several issues must be resolved, the most difficult one being the scope of the bargaining unit. Those advocating for quick elections argue that a "vote now and litigate later" approach will sufficiently address these issues.[237] This play on the classic collective-bargaining mantra, "work now and grieve later," will not work. Currently, management decides whether to contest the bargaining unit before the election.[238] While delay can help management in the election, employers often consent to the proposed unit to avoid the expense of challenging the proposal, the risk of losing the challenge, and the

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231. *State Constitutional Amendments Conflict with the NLRA*, NLRB (Jan. 14, 2011), http://nlrb.gov/sites/default/files/documents/234/statesfactsheet.pdf.

232. *See* Letter from Lafe E. Solomon, Gen. Counsel, NLRB, to Tom Horne, Ariz. Att'y Gen. (Jan. 13, 2011), *available at* http://nlrb.gov/sites/default/files/documents/234/letter_az.pdf (threatening litigation); Letter from Lafe E. Solomon, Gen. Counsel, NLRB, to Alan Wilson, S.C. Att'y Gen. (Jan. 13, 2011), *available at* http://nlrb.gov/sites/default/files/documents/234/letter_sc.pdf (same); Letter from Lafe E. Solomon, Gen. Counsel, NLRB, to Marty J. Jackley, S.D. Att'y Gen. (Jan. 13, 2011), *available at* http://nlrb.gov/sites/default/files/documents/234/letter_sd.pdf (same); Letter from Lafe E. Solomon, Gen. Counsel, NLRB, to Mark L. Shurtleff, Utah Att'y Gen. (Jan. 13, 2011), *available at* http://nlrb.gov/sites/default/files/documents/234/letter_ut.pdf (same).

233. *See supra* note 95 and accompanying text.

234. *See supra* note 95 and accompanying text.

235. *See* 155 CONG. REC. S3, 636 (daily ed. Mar. 24, 2009) (statement of Sen. Arlen Specter) (proposing a quick-election scheme where the initial election would be held within twenty-one days of the filing of the petition); *Implications of the Employee Free Choice Act*, METRO. CORP. COUNSEL, Sept. 2009, at 12.

236. The NLRB held a hearing on June 18 and 19 to discuss shortening the elections, where professionals and academics opined on the topic. *See Open Meeting on Proposed Election Process Rules*, NLRB, http://www.nlrb.gov/openmeeting (last visited Feb. 14, 2012).

237. *See Proposed Election Rule Changes, Hearing Before the NLRB* 358 (July 19, 2011), *available at* http://www.nlrb.gov/sites/default/files/documents/525/publicmeeting07-19-11-corrected.pdf (statement of union-side attorney Joe Paller).

238. *See* Stokes et al., *supra* note 165, at 88.

potential of appearing obstructionist to employees. In contrast, if "vote now and litigate later" were the norm, once management lost, they would have every incentive to litigate. Management lawyers invoking the need for discovery, briefs, open hearing dates, and other litigation instruments could delay certification for months or even years. In effect, "vote now and litigate later" would provide employers with a legitimate excuse to tie up union victories in litigation for years, while under the current scheme employers lose credibility if they engage in such dilatory tactics.

IV. Developing a New System for Union Organizing

As stated above, we contend that a fair system would be one in which employees have full information (or as full of an opportunity to obtain complete information as possible) and feel that during the process they were treated with respect and not threatened or intimidated by either side. The current status quo, neutrality agreements, card checks (with or without neutrality), and quick elections all fail to meet our standard. Under current NLRB rules, the sides can lie to each other, employees report being fired and intimidated, and each side uses its respective weapons to defeat the other. Neutrality and quick elections axiomatically expose employees to only one side of the story, and card check is subject to intimidation by unions.[239]

It is our belief that some approach the conversation about how to improve the collective labor-representation election system with the preexisting belief that employees should be represented by a union (because that is what is in their best interest, whether employees realize it or not), and some approach the conversation with the view that employees should not be represented by unions (whether employees realize that it is in their best interest or not). Hence, some of the focus is on developing reform that tilts results in one direction or the other. For instance, the normative debate about neutrality reveals much of this paternalistic orientation. Some are willing to sacrifice what we believe to be one of the core tenets of democracy and workplace governance—namely employees' right to vote for their representative, or vote not to be represented at all—in the name of increasing union win rates, because of the belief that higher union density is better for everyone, including employers and employees, both represented and nonrepresented.

Our mantra is that a system for electing labor organizations needs to be focused on what is best for voting employees, deferring to them to

239. Some union advocates laugh at the concept of union intimidation. But union organizers make a name for themselves and remain employed if they are successful. It is naïve to assert that a union organizer two cards away from victory would not be more likely to resort to intimidation or other less than desirous means to secure success.

make the decisions that directly affect them before worrying about what is good for the U.S. economy or other employees across town. We therefore endeavored to find or develop a system that would operationalize our core beliefs, which are summarized as follows: (1) unionization will benefit some employees, but will not benefit others; (2) some employees want a union and others do not; (3) employee choice, rather than achieving labor peace regardless of the cost, should drive policy; (4) employees should have full information, or at least the maximum opportunity for exposure to full information; (5) employees should vote in a secret-ballot election; (6) management and unions have corrupted the current NLRA rules so that the goal is to win and not to facilitate employee choice; and (7) a union organizing system will be successful if, regardless of the result, at its conclusion the employees feel they have been respected, fully informed, not intimidated, and are satisfied that they made the choice they wanted to make.

A. The Principles for Ethical Conduct During Union Representational Campaigns

Before developing our own system, we looked to find a proposal or practice that satisfied our goals. There is one. We encourage unions, management, and ultimately Congress to adopt the *Principles for Ethical Conduct During Union Representational Campaigns* (the "Principles") developed by the Institute for Employee Choice.[240] However, we raise some significant questions about the way in which the Principles should be implemented. These questions carry important consequences, more broadly than in the labor-management relations context, about the differences between positivistic legal rules and normative, sociomoral, self-imposed constraints as optimal means of enforcement regimes.

The Institute for Employee Choice is the brainchild of Richard Bensinger and Dick Shubert. Bensinger is a long-time union organizer whose resume includes being the first head of organizing for the AFL-CIO, as well as working with UNITE-HERE, the United Auto Workers ("UAW"), and other unions.[241] Shubert is the former CEO of Bethlehem Steel and former Deputy Secretary of Labor under the Nixon and Ford administrations.[242] Both men grew frustrated by the current system and its perverse incentives for both unions and management.[243] Despite coming from opposite sides of a polarized issue, Bensinger and Shubert

240. Richard Bensinger & Dick Shubert, Inst. for Emp. Choice, Principles for Ethical Conduct During Union Representational Campaigns (unpublished manuscript) (on file with the Authors).

241. *Institute Directors*, Inst. for Emp. Choice, http://www.employeechoice.org (select "About Us") (last visited Feb. 14, 2012).

242. *Id.*

243. Richard Bensinger, Co-Chair, Inst. for Emp. Choice, Lecture at Cornell University (Feb. 13, 2012).

share the core beliefs listed above.[244] Their experiences and their beliefs led them to create an institute grounded on two principles: to do what is best for employees and to be governed by ethics—not law.[245]

The Ethical Principles are as follows:

> These principles define ethical conduct for both unions and employers and are based on the premise that employees will make the decision about organizing through a contested secret ballot election.
>
> (1): Truthfulness. The Employer and the Union should be truthful and accurate in their campaigns. Although the law does not regulate honesty, the parties have the ethical obligation to present accurate information to employees. If either side contends that a statement by the other is not accurate and truthful, the Institute for Employee Choice, a joint labor/management entity, will provide an opinion.
>
> (2): No threats, implicit or explicit. Neither the Union nor the Employer should make threats, implicit or explicit, in order to gain votes. A free choice requires that there be no coercion or fear. Under current law, veiled threats are tolerated and there are no meaningful penalties for direct threats. An atmosphere of fear is antithetical to free expression of employee choice.
>
> (3): No promises. Just as threats are not acceptable, neither are promises or bribes. Under the NLRA employers are prohibited but unions are allowed to make promises. Under these principles unions are also forbidden to make promises to gain votes.
>
> (4): It is not fair to imply that the exception is the rule. A common way of distorting the truth is by presenting an unusual situation, and implying that this is the norm. The parties must not use extreme examples to sway opinion. And also should tell the whole story.
>
> (5): Corporate campaigns. If employers agree to these principles, then unions should not undertake "corporate campaign" strategies designed to pressure the employer. These principles presume that both parties reach out to employees to present their case. Corporate campaigns are only ethical when there is an uneven playing field such that employee free choice is not meaningfully present.
>
> (6): Discharges. There should be no discharges, subcontracting of work, or layoffs aimed at discouraging union activity. This is the ultimate coercion, and immediately chills any possible free choice. Employers who terminate a known union supporter or member of the union's organizing committee should submit the termination to immediate arbitration. Penalties for discharging a union supporter should include quadruple back pay as well as punitive damages to discourage such conduct. The reason that multiple backpay and reinstatement is not a sufficient deterrent is because this behavior has such a drastic chilling [e]ffect on the rest of the workforce. Punitive damages as appropriate are essential to deter such conduct.

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244. *Id.*
245. *Id.*

> (7): Equal time, equal access, equal posting rights and all meetings are voluntary. The union must have equal access to the electorate including equal time for all meetings conducted as part of the employer's campaign. A series of debates between management and the union is encouraged. The employees should have a right to hear both sides, without any advantage to either side. There should be no one on one meetings about the union between supervisors and employees. The union must be granted equal space to post literature on company property.
>
> (8): Delays. The employer should agree not to engage in delaying tactics. Parties cannot ethically rely on lengthy legal maneuvers to thwart freedom of choice.
>
> (9): No pressure to sign union cards. The union should not pressure employees to sign cards. Peer pressure or coercion to get people to sign union cards is not ethical.
>
> (10): Respect. Neither party should demonize its adversary. An atmosphere of mutual respect is necessary for an ethical climate. Unions have an important role in a democracy. Employers also are entitled to be respected. Neither party should engage in smear tactics.
>
> (11): Stacking the deck. Neither party should attempt to "stack the deck." If employers accept these principles, then the union may not ethically plant undercover union-supporters (salts) into the workplace. Neither can employers seek to hire anti-union personnel in order to gain votes.
>
> (12): The final principle is not a specific ethical guideline, but the Golden Rule—do unto others as you would have them do to unto you. Both employers and unions have an important role to play in a vibrant democracy, and ethical behavior is an end in itself. The Institute for Employee Choice is available to support and commend employers and unions who agree to adhere to these principles[246]

The substance of the Principles appeals to us for a number of reasons. The obvious reasons are that they provide for elections, full information, and truthfulness, and they prohibit coercion and intimidation. More important, they address the more subtle issues. The NLRA prohibits explicit threats, but any good management lawyer can make sure that the company's implicit threats are lawfully conveyed.[247] In addition, we support the Principles because they have one set of rules for both sides. Employees will get equal access to both sides and neither side will be able to exploit the rules to gain an advantage. While employers may bristle at inviting the union onto the premises, the elimination of

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246. Bensinger & Shubert, *supra* note 240.

247. For example, compare what an employer cannot lawfully tell its employees ("If you vote for the union there will eventually be a strike, and there will be no wages, no health insurance, and strikers can lose their jobs when the strike is over") with what employers may lawfully tell employees, ("We will bargain in good faith, but will not agree to unreasonable union demands. If the union does not accept our offer its only choice will be to call a strike. The company hopes this does not happen, but if it does, there will be no wages, no health insurance, and strikers can lose their jobs when the strike is over. We hope this does not happen, but it's a real concern if you vote for the union.").

corporate campaigns, which are driven by union intimidation and management's fear of the loss of business, should make an acceptable trade.

In addition to satisfying our goals, the Principles are attractive because they may soon be operationalized. While the Institute has held only one election, the UAW recently announced a plan to operate under the Principles for all new elections.[248] The UAW is currently in negotiations with the major multinational car manufacturers to make the Principles the method for all future elections.[249]

Anecdotal evidence from the one past election showed that the employees who voted did, in fact, believe that they had full information to make a choice free from intimidation.[250] The fact that these Principles may be used allows us to make a call for future research. We propose a commissioned study where researchers survey employees who have gone through organizing under the NLRA procedures, neutrality, and the Principles to determine if any system truly satisfies the goals outlined above.

There are, of course, some issues that need to be addressed. The Principles prohibit one-on-one supervisor-employee conversations but do not address union organizers doing the same. We would allow supervisor conversations as long as they otherwise complied with the Principles. We would also allow union organizers to have similar conversations on an employer's property. After the petition is filed, we would prohibit off-site campaigning by either side.

B. ENACTING THE PRINCIPLES

Finally, perhaps the most interesting issue at the heart of this Article is determining the optimal way to maximize the enforceability of the Principles. There are three possible approaches: (1) codify the Principles statutorily and impose legal sanctions for violations, (2) codify the Principles as an optional component part of the law, and provide incentives for unions and employers to agree to them and to comply, or (3) leave the Principles out of the law books, keeping their authority and enforceability entirely derived from extralegal sources. We address each of these options below.

Codifying the Principles into law with legal sanctions in place for noncompliance seems like the mechanism least likely to yield the desired results. This mechanism most closely resembles the current scheme of the

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248. *UAW Principles for Fair Union Elections*, UAW (Jan. 3, 2011), http://www.uaw.org/articles/uaw-principles-fair-union-elections; *see* Joan Silvi, *Answering UAW's Call: Doing the Right Thing*, SOLIDARITY MAG. (Jan.–Feb. 2011), http://www.uaw.org/story/answering-uaw's-call.

249. Paul Ingrassia, *The United Auto Workers Test Drive a New Model*, WALL ST. J. ONLINE (Feb. 6, 2011), http://online.wsj.com/article/SB10001424052748704709304576123822184484398.html.

250. Telephone Interview with Richard Bensinger, Co-Chair, Inst. for Emp. Choice (Feb. 7, 2011).

NLRA; implementing the Principles this way would do little more than reform a law plagued by inefficient system gaming by piling on more law ready to be equally inefficient and gamed by management and unions seeking to win. As they have done for decades under existing statutory regulation, unions and employers would have their lawyers opine on optimal ways of subverting and circumventing the rules, testing statutory language for interpretive weaknesses (for example, what is a "delay tactic" under the eighth principle—what if something has the effect of causing delay, but is done for some ulterior purpose?). The assumption some could make is that the cost of the sanction to the violator, discounted by the likelihood of being found in violation, is less than or equal to the administrative costs of investigation plus the costs of imposing those sanctions. These costs could be weighed against the benefits of circumventing the Principles. The probability that more employers and unions would make this calculus their primary means of determining whether to adhere to the Principles, and would engage in strategizing ways to subvert the Principles, would be greater under this implementation because neither unions nor employers would have any *choice* in agreeing to the terms. The contractual element of the Principles would be stripped away.

There is substantial theory and some empirical evidence to support the argument we make here that entering into contracts (with the same terms) might make unions and employers more likely to feel bound by the terms of the agreement and to conceive of their obligations to perform the terms of the agreement out of moral or social/normative constraints instead of doing the cost-benefit calculus alone.[251] We submit that enacting into law what really amounts to a moral obligation to "do the right thing" in union campaigns tethered with sanctions penalizing violations is likely to be as effective as music producers relying on intellectual property rights protection laws to police music pirating. The lessons learned from the Recording Industry Association of America's difficulties fighting digital music piracy suggest that when moral obligations are framed as legal ones, with the threat of a sanction for failure to comply, less effective enforcement is likely to result.[252] In fact, it may be the case that building a fence (in the form of statutes) prompts those perceived as fenced out to conceive of ways of jumping over the fence, and perhaps even implicitly challenges them to do so. The fence

251. Robert J. Bies & Tom R. Tyler, *The "Litigation Mentality" in Organizations: A Test of Alternative Psychological Explanations*, 4 ORG. SCI. 352, 352 (1993) (identifying different psychological factors that could explain why employees consider suing their employers); Tyler, *supra* note 1, at 70–73 (suggesting that individuals comply because of their long-term commitment to membership in a society rather than because of their short-term self-interests).

252. *See* Sudip Bhattacharjee et al., *Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions*, 49 J. LAW & ECON. 91, 110 (2006).

shifts the perceived responsibility for the parameters on behavior to lawmakers and diminishes the moral responsibility for violations of the *spirit* of the law.

It seems this is true for treatment of new proposals to amend labor law that do little more than add more laws. For instance, when President Obama was elected and EFCA seemed likely to pass, labor-and-employment law firms responded by releasing memoranda to their clients advising them how to maximize management's existing goals, perpetuating the status quo, and how to challenge the law directly and indirectly.[253] Our claim is further bolstered by recent empirical work demonstrating that a legal threat to enforce a contract purporting to obligate individuals to perform an undesirable task is slightly *less* effective than a naked request to perform the same task.[254]

We have a more difficult time adjudicating between the second and third proposed enforcement mechanisms than we do rejecting the first. Under the second proposed enforcement regime, employers and labor organizations would still have existing regulation setting the floor for their behavior. For the reasons discussed above, this floor is suboptimal. However, it does enjoy the undeniable advantage of augmented predictability and certainty. This should not be underestimated. If the Principles were codified as optionally available, such that both sides had to jointly register their agreement with the NLRB, creating a public certification thereof, this would create opportunities for increased enforcement through administrative channels. This would cost more, surely. What effect would it have on the parties' behavior? In part, the effect likely would be a function of the kinds of incentives offered for agreement and compliance with the Principles. Two advantages of this enforcement scheme are incentives to agree to the Principles via a centralized agency, and casting a wider net to capture more organizing drives. We propose that the incentive for agreeing to the Principles is being listed in a publicly available database (that lists all petitions filed) as having agreed to the Principles. Employers and unions that agreed would also become eligible for tax incentives and for priority bidding rights on government contracting. Failing to agree would render an employer ineligible for such incentives and government contract work, and the public record would reflect which party or parties refused to sign the agreement. Parties that fully complied with the Principles (as determined by a neutral mediator-arbitrator, as described below, in the

253. *See, e.g.*, ROBERT J. BATTISTA ET AL., LITTLER MENDELSON, P.C., THE EMPLOYEE FREE CHOICE ACT: A CRITICAL ANALYSIS (2008); PETER D. CONRAD ET AL., PROSKAUER ROSE LLP, THE EMPLOYEE FREE CHOICE ACT: ARE YOU A TARGET? (2008); *The EFCA, Organized Labor's Legislative Agenda and Its Impact on Your Business*, FISHER & PHILLIPS LLP (Mar. 10, 2009), http://www.laborlawyers.com/shownews.aspx?Show=10884&Type=1122#Threat.

254. Eigen, *supra* note 4 (manuscript at 9).

event charges were filed alleging breach, or where no charges were filed at all) would be listed on the public database as having agreed to *and* complied with the Principles. Employers or unions that breached the agreement would lose their eligibility for tax incentives and government contract bidding, and would be listed on the public site as having agreed to the Principles and then failing to comply with them.

The main advantage of this enforcement scheme is the set of options available to the parties, but this could also be a disadvantage because parties would self-select into or out of an enforcement regime we might prefer to see applied to all employers and unions. In some respects, this sorting could be viewed as a kind of proxy for prioritization for the kinds of workplaces, employment, and labor organizations that would be able to benefit. For instance, entertainment-industry guilds like the Writers' Guild of America, the Screen Actors Guild, and the Directors Guild of America likely would be in the group that would benefit from this kind of incentive scheme, but perhaps not so for entertainment-industry unions that represent "below the line" employees like the Teamsters (representing transportation and casting directors), the International Alliance of Theatrical Stage Employees, or the National Association of Broadcast Employees and Technicians. The first category of labor organizations cares more about its public reputation than does the latter. However, one way this problem could be ameliorated is by requiring unions and employers to complete a form when they submit their response to either agree to be bound by the Principles or not, which essentially would place them in a supply chain. For instance, if the Teamsters represent truck drivers of the Acme Truck Company, a company with a mostly unknown brand name, it might be difficult to discover where that company is in a supply chain. However, if Acme delivered coffee to Starbucks, Acme would be more readily discoverable because of that affiliation, making it and other similarly situated employers and unions more accountable under our proposed system.

While this enforcement scheme seems better than the first one, it still might suffer from the *moral obligation framed as a legal enforcement scheme* problem identified above. Employers and unions will still see a cost-benefit analysis as the primary framing of the question of whether to agree to the Principles in a given election. Nonetheless, in the study cited above, morally framing *a legally valenced contractual obligation* sufficiently motivated parties to conform to the agreed-upon obligation.[255] That is, perhaps it is the moral obligation partially connected to obeying the law, not just "living up to one's word," that makes the effects of a moral framing of contract enforceability so powerful in the cited experimental

255. *Id.* at 27.

study. This conforms with other recent empirical research in this area.[256] It is therefore unclear whether this enforcement scheme would produce the benefit of the moral framing's powerful self-regulating motivation *and* the benefit of an instrumental framing's motivation. It is also unclear whether this regime is better than the one evaluated next, in which the moral component of the agreement is made independently from a codified legal obligation.

The third possible enforcement regime is perhaps the closest to a pure morally derived authority for enforcement as possible. Under this regime, the law would remain as it is now, and parties would be allowed to agree to the Principles on an ad hoc basis. The incentives to agree would be the same as they are now. This regime likely would result in the fewest number of total elections governed by the Principles, but perhaps also the lowest administrative cost of enforcement. The parties who agreed to the Principles under this regime probably would be the most likely to feel bound by the terms for moral reasons, or would otherwise have agreed because they had intended to behave in accordance with the Principles anyway, or because the employer would not have campaigned at all if indifferent to its workforce being unionized. Enforcement would be grounded in the same moral basis as some contracts are.[257] This should not be underestimated. It could be argued that this enforcement regime would do better than the second one *because* the moral obligation is divorced from a legal one. Perhaps where contracts are concerned, the moral obligation, derivative even from the Bible, to live up to one's word[258] works in spite of any positivistic power of contract obedience (that the law requires enforcement of valid contracts). Promise and doctrinal contract have clearly intertwined roots,[259] but there is little empirical evidence of how parties would interpret a promise like that embodied in the Principles and even less evidence of whether that promise would more likely be self-enforced with or without legal basis and obligation.

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256. Feldman & Teichman, *supra* note 4, at 25–27; Wilkinson-Ryan & Baron, *supra* note 4, at 420–23; Yuval Feldman & Tom Tyler, Mandated Justice: The Potential Promise and Possible Pitfalls of Mandating Procedural Justice in the Workplace 2 (June 7, 2009) (unpublished manuscript), *available at* http://ssrn.com/abstract=1133521.

257. *See* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 17 (1981) ("An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function is to give grounds—moral grounds—for another to expect the promised performance. To renege is to abuse a confidence . . . . [T]o abuse that confidence now is like . . . lying: the abuse of a shared social institution that is intended to invoke the bonds of trust."). *But see* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 652–59 (1979) (discussing the decline in the acceptance of a moral basis for contractual obligations).

258. "If a man . . . takes an oath to bind himself . . . he shall not violate his word . . . ." *Numbers* 30:2 (New Am. Std.).

259. Marion Fourcade & Kieran Healy, *Moral Views of Market Society*, 33 ANN. REV. SOC. 285, 297 (2007).

In sum, it is difficult to determine whether embedding the Principles in the law as an optional, incentivized moral contract would result in less instrumentally minded decisionmaking and more moral-based decisionmaking than would leaving the Principles entirely outside of the law as a pure creature of contract. However, given the significant advantages of casting a wider net with the positive-incentive scheme identified above, especially the public accountability unavailable in the third regime-implementation option,[260] we espouse the second option over the third.

C. Enforcing Agreements to Be Bound by the Principles

In this Subpart, we address how we envision disputes over violations of the Principles being adjudicated and resolved. The NLRB would assign a mediator to each petitioned bargaining unit in which the parties agree to the Principles. If either side alleged a violation of the Principles *before* the election were held, the mediator would mediate this dispute. If the parties were unable to resolve their dispute through this process, the mediator would render a decision that could take one of four forms. The mediator would be empowered to conduct an arbitration hearing, taking testimony and evidence in the traditional manner. The mediator-arbitrator then would determine whether the alleged offense violated the parties' agreement, and if it did, what remedy to fashion. If the offense by management was so egregious that it poisoned the chances of conducting a fair election, the arbitrator might issue a bargaining order. The bar for such an order should be significantly lower than it is under current NLRB law. That is, the penalty associated with highly egregious violations of the Principles should be high. If the offense by the union was so egregious that it poisoned the chances of conducting a fair election, the arbitrator might rule that no election was to be held and that the union was barred from attempting to organize the employees for up to three years. For nonegregious violations of the Principles by management or the union, or in the event that employees (not privy to the agreement itself) were found to have done something that violated the terms of the agreement, the arbitrator would be empowered to fashion awards as she deemed necessary to facilitate a fair election procedure. This might include, but certainly would not be limited to, requiring management and the union to issue joint statements, or requiring one or the other to issue unilateral statements that ameliorated any tainting effects of conduct found to violate the Principles.

After elections were held, the results would be not be released or publicized in any way for six days. Employers and unions may use this

260. This is because it would be very difficult to ensure that all petitions—even ones in which the union does not propose agreeing to the Principles—would be tracked.

time to determine whether any violations of the Principles occurred and to bring a claim to the mediator. If no claims were lodged, after this time the results of the election would be released and both sides by default would have waived their rights to allege any violations of the Principles or to challenge any of the votes for any reason other than issues relating to interpreting intentions of voters from their ballots. If charges were filed during the six-day period, the mediator would mediate the dispute and, failing successful mediation, arbitrate in the same manner as described above. Again, the mediator-arbitrator would be empowered to issue any manner of award, including issuing a bargaining order for egregious employer violations, or an election bar for up to three years for egregious union violations.

A mediation/arbitration system like this one is likely to work best because it offers informality and flexibility, two important qualities of a dispute-resolution system for resolving claims arising out of a morally valenced contract.[261] More control over the process should beget more control over the resolution of disputes and should result in more creative integrative solutions than would an adjudicatory process by itself.[262] The opportunity for greater ownership over the dispute-resolution process and the ability to exert more influence over the outcomes of disputes should also be held out as a significant incentive for agreeing to the Principles.

There are two primary means of evaluating the effectiveness of our proposed system. First, one would expect to see an increase in the number of elections held as a percentage of petitions filed where the Principles are agreed to as compared to instances where the Principles are not agreed to. This would be a victory in and of itself. Currently, the rate at which elections are held as a proportion of petitions filed is 65% by one estimate.[263] Whether unions withdraw their petitions because of newly discovered information, because events that transpire that lead them to believe that they can no longer win, because the employer commits unfair labor practices that the union believes render victory impossible, or because the costs of victory appear too great, we suspect that where the Principles were agreed to, this rate would go up significantly. This would be considered a victory under the conceptualization of fairness advocated herein because more employee choice would determine the ultimate question of whether employees

261. Roy J. Lewicki & Blair H. Sheppard, *Choosing How to Intervene: Factors Affecting the Use of Process and Outcome Control in Third Party Dispute Resolution*, 6 J. OCCUPATIONAL BEHAV. 49, 63 (1985); *see also* ANN DOUGLAS, INDUSTRIAL PEACEMAKING 3–4 (1962); RICHARD E. WALTON, INTERPERSONAL PEACEMAKING: CONFRONTATIONS AND THIRD-PARTY CONSULTATION 117–21 (1969).

262. Corinne Bendersky, *Organizational Dispute Resolution Systems: A Complementarities Model*, 28 ACAD. MGMT. REV. 643, 650–651 (2003).

263. Ferguson, *supra* note 77, at 6 tbl.1.

wish to be represented or not than would other considerations such as union strategy, union expenses, employer strategy, gamesmanship, or other factors that further divorce election results from true employee preferences.[264]

Second, we expect that employees would perceive the election procedure under the Principles as more fair. Increased perceived procedural fairness likely would lead to greater acceptance of the final outcome and, hence, less industrial strife.[265] As mentioned earlier, the UAW has proposed following the Principles.[266] Anecdotally, reports indicate improved perceived fairness, but no empirical work has been done to date that shows this to be true.[267] Ideally, it would be useful to observe how employees regard the process under the Principles as compared to traditional campaigns pursuant to the NLRA (the current status quo) and as compared to the process when employers sign neutrality agreements. No such study has been done as yet, but such data would be instrumental in evaluating the ultimate effectiveness of the reform proposed herein.

CONCLUSION

The right to collectively organize in the workplace is an important one, even when union density is at such dismal levels. Public reaction to then-recently elected Governor Walker's proposal in Wisconsin to eviscerate collective-bargaining rights for some public-sector unions shows that even if unions are unpopular, Americans seem to believe in the right to vote for or against a union and collectively bargain with employers.[268] This core belief in the principle of the right to democratically elect one's representatives—in public office or in the workplace—is at the heart of the conceptualization of fairness espoused herein. We propose aiming for revised procedures that most accord with this American ideal, without regard to election results. The focus should be on making the process as fair and just as possible, independently of the goal of turning around dwindling union-density trends. The law should not simply perform the function of a teeter-totter—pushing win-rates up and then, at some time in the future when union density rises, pushing rates back down. This position should not be confused for a

264. The rate of contracts reached in the data noted in Ferguson, *supra* note 77, is only about 38% of the petitions filed. This rate would hopefully also go up significantly for petitions guided by the Principles as a function of the instances in which unions won elections.

265. E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 224 (1993).

266. Silvi, *supra* note 248.

267. Bensinger, *supra* note 243.

268. *See* Lydia Saad, *Scaling Back State Programs is Least of Three Fiscal Evils*, GALLUP (Feb. 22, 2011), http://www.gallup.com/poll/146276/Scaling-Back-State-Programs-Least-Three-Fiscal-Evils.aspx (finding 61% of Americans would oppose the kind of bill proposed in Wisconsin).

desire to see union rates remain low or to decline further. To the contrary, the Authors recognize that there are serious gains that ought not to be overlooked that come from collective democratic participation by workers.[269] However, reforming a system by presuming what employees want because they should want it seems backwards and even counterproductive if the end goal is increasing union density. Perhaps the focus ought to be shifted away from counting union shops and win rates, and towards revising the electoral process for collective representation in the workplace—something that American citizens seem to regard as a sacred component of our democracy.

This does not stop us from wondering what effect the Principles incorporated into law as proposed would have on union density. As noted above, we expect the percentage of elections held as a function of petitions filed to go up, but there could also be a rise in the number of petitions filed. The leverage of the public specter of dishonesty or failure to abide by American principles of letting employees fairly vote up or down on a union could incentivize labor to file more petitions. Increasing the rate of petitions filed could inflate the denominator such that even if win rates remained constant, the win-rate percentage could drop. The question is whether improved procedural fairness will end up reflecting what unionists have told us—that employees really do want to be represented by unions but have been afraid to vote their true desires for fear of retribution. Or, will employers *voluntarily* imposing on themselves procedurally fair conditions signal the opposite of threats of retribution—that the employer is willing to respond reasonably to employee concerns—and *lower* the likelihood of unions winning more elections? An alternative signal to be gleaned from an employer signing on to the Principles is that it took the threat of unionization to make the employer *honest*. Or it could signal that the employer and union are able to agree on things contractually, so maybe employees could envision life under a collective-bargaining agreement as an improvement. Such signals would increase the likelihood of unions winning more elections. Clearly, more empirical research on the UAW's experience with the Principles is warranted, if not urgently needed, in order to increase the chances that this proposal is taken seriously—something that could be critical as a means of reforming labor law without political loggerheads.

A more interesting question is whether the Principles are applicable to other areas of employment and, ultimately, other areas of law. We believe that in the employment context, the adoption of a Principles-like standard could lead to a more efficient and humane work environment beneficial to employers, employees, taxpayers, and an overburdened

269. *See, e.g.*, Clegg, *supra* note 53, at 311; John R. Commons, *Institutional Economics*, 26 AM. ECON. REV. 237, 247 (1936).

judicial system. Perhaps the only ones who would not benefit would be labor and employment lawyers.

An examination of the nonunionized private sector reveals that the law alone incentivizes management to behave in ways that are risk averse because the floor of behavior the law creates makes exceeding the minimum inadvisable. In fact, there are situations in which enlightened human-resource procedures exceed the law's protections, but they put the employer at risk for legal action and are therefore discouraged or avoided in spite of their clear benefits. For example, in sexual-harassment law, employment policies that make it easier for employees to report harassment (such as 1-800 reporting numbers) *increase* the likelihood of employer exposure to liability.[270] Some wage-and-hour laws prohibit employees and employers from agreeing to things that might be mutually beneficial without being exploitive, such as longer work days in exchange for time off, tip pooling, and modifying exempt and nonexempt statuses.[271] There are situations in which both employees and employers would like to create their own work rules but are prohibited by law from doing so.[272] We contend that employers who agree to the Principles should be able to enter into contracts with the employees that benefit all concerned. Thus, instead of enforcing laws drafted with the most unethical employers in mind, why not let ethical employers establish contracts with employees that are fair and benefit both?

In the 1930s, labor and management were enemies. Each side thought it needed weapons to ensure peace. Today, the enemy is neither labor nor management. Instead, increased global competition, diminishing natural resources, environmental concerns, and sustaining a high standard of living are what both labor and capital must battle. Perhaps the Authors are overly optimistic, but one way to win this battle may be to have the former enemies stop trying to manipulate the law, and instead be guided by ethics, in order to compete with their real rivals. The hope is that affording parties the opportunity to succeed in this way will create an avenue to test whether we are overly optimistic. The costs of finding out are low, and the rewards could be significant.

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270. David Sherwyn, Michael Heise & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1294 (2001) (arguing that providing reporting mechanisms makes employees more likely to report harassment, making it harder for employers to satisfy their duty of care).

271. *See* 29 U.S.C. § 213 (2010).

272. *Id.*

Exhibit 4

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 20, 2012 Decided May 28, 2013

No. 11-1314

TENNECO AUTOMOTIVE, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

LOCAL 660, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,
INTERVENOR

Consolidated with 11-1353

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Gregory J. Utken argued the cause for petitioner. With him on the briefs was *Brian R. Garrison*.

Glenn M. Taubman was on the brief for *amicus curiae* Lonnie Tremain in support of petitioner.

Greg P. Lauro, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were *John H. Ferguson*, Associate General Counsel, *Linda Dreeben*, Deputy Associate General Counsel, *Jill A. Griffin*, Supervisory Attorney, and *Jeffrey Burritt*, Attorney.

Stephen A. Yokich argued the cause and filed the brief for intervenor. *Barbara J. Hillman* entered an appearance.

Before: ROGERS and TATEL, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.

EDWARDS, *Senior Circuit Judge*: This case arises from a protracted labor dispute between Tenneco Automotive, Inc. ("Tenneco" or "Company") and Local 660, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW ("Union"). Tenneco designs, manufactures, and sells automotive products. From 1945 until December 4, 2006, Tenneco recognized the Union as the exclusive bargaining agent for a unit of production and maintenance employees at the Company's Grass Lake, Michigan facility. In 2004, Union and Company representatives pursued negotiations in an effort to reach a new collective bargaining agreement to replace the one that expired on May 12, 2004. Negotiations failed, however, and the Union called a strike on April 26, 2005. Tenneco continued operations by hiring permanent replacements, using employees who decided not to participate in the strike, and contracting out work to another employer.

Relations between the parties soured during the strike and a number of incidents arose that brought the parties before the

National Labor Relations Board ("NLRB" or "Board"). The Union filed unfair labor practice charges with the Board on February 1 and 15, 2006. On February 10, 2006, some bargaining unit employees filed a decertification petition with the Board. That petition was held in abeyance pending resolution of the Union's unfair labor practice charges. However, on December 4, 2006, a substantial majority of the unit employees presented another petition for decertification to the Company. Based on this second decertification petition, Tenneco gave notice that it would no longer recognize the Union as the employees' bargaining agent.

In the matter before the Board, the NLRB's General Counsel sought to prove that Tenneco had committed multiple violations of Section 8 of the National Labor Relations Act ("Act"), 29 U.S.C. § 158, including, *inter alia*: Section 8(a)(1) for directing employees not to say or do anything that could "evoke a response" from other employees; Sections 8(a)(1) and (3) for disciplining employee Joseph Helton because of his pro-Union Activities; and Sections 8(a)(1) and (5) for refusing to provide the Union with information regarding the possible installation of video cameras in the workplace, unilaterally promulgating a rule requiring supervisory approval prior to the posting of signs, letters, or printed material at the Company's facility, and withdrawing recognition of the Union. The Administrative Law Judge ("ALJ") found that some of Tenneco's challenged conduct violated the Act, but rejected many of the claims advanced by the NLRB's General Counsel. *See Tenneco Auto., Inc.*, 2008 WL 1786082 (Apr. 16, 2008). Most significantly, the ALJ concluded the employees' disaffection with the Union was not attributable to Tenneco's unfair labor practices and, therefore, the Company's withdrawal of recognition was lawful as of December 4, 2006. *Id.* (citing *Master Slack Corp.*, 271 N.L.R.B. 78 (1984)). The General Counsel and the Union filed exceptions to the ALJ's findings, and the Board ruled for

the Union on all unfair labor practice charges. With regard to the withdrawal of recognition, the Board held "that certain of the[] unfair labor practices tainted the [employees'] petition [for decertification], and that the withdrawal of recognition was therefore unlawful." *Tenneco Auto., Inc.*, 357 N.L.R.B. No. 84, 2011 WL 4590190, at *9 (Aug. 26, 2011). Tenneco now petitions this court for review, and the Board cross-petitions for enforcement of its order.

We grant Tenneco's petition for review with respect to the charge relating to the Company's withdrawal of recognition. On the record before the court, there is no substantial evidence that the Company's unfair labor practices "significantly contribute[d]" to the employees' petition for decertification. *See Williams Enters., Inc. v. NLRB*, 956 F.2d 1226, 1234 (D.C. Cir. 1992). However, with respect to the remaining disputed unfair labor practice charges, we grant the Board's cross-application for enforcement. Although the Company has raised vigorous challenges to the Board's holdings, we find substantial evidence to support the Board's determinations that Tenneco's conduct violated Sections 8(a)(1), (3), and (5) of the Act. *See Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) ("[T]he Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.").

I. Background

A. Facts

Tenneco has a prototype engineering facility at Grass Lake, Michigan, where the Union represented between thirty and forty employees. On April 26, 2005, following failed collective bargaining negotiations, the Union commenced an economic strike. Some employees resigned from the Union and chose not to strike. The Union excused one unit employee, Joseph Helton, and allowed him to continue

working during the strike. Ten employees resigned from the Union and crossed the picket line during the strike. As the strike continued, Tenneco hired sixteen permanent replacements for strikers.

On August 29, 2005, Union Representative James Walker was informed that Tenneco planned to install video cameras in its test lab due to alleged incidents of tampering with Company property. The Union contended that installation of video devices in the workplace is a mandatory subject of bargaining and requested documentation of the alleged tampering so that it could bargain effectively. Tenneco never responded and ultimately decided against the installation of video cameras.

On January 19, 2006, while the strike was still ongoing, Helton wore a tee shirt to work displaying the slogan, "Thou Shall Not Scab." Company Supervisor Dan Eggleston told Helton to change his shirt because, he believed, some employees would not like the message. Instead, Helton covered the word "scab" with a piece of tape on which he had written the word "steal," so that the slogan read, "Thou Shall Not Steal." Eggleston objected to this message and told Helton to tape over the word "steal." Helton taped over "steal" and wrote the words "be a low life" on the new piece of tape. Eggleston again objected, and ordered Helton to tape over the slogan and leave it blank. After further discussion, Helton and Eggleston agreed that Helton should go home for the day. The next day, Helton received a written reprimand for wearing the "scab" slogan on his shirt and then altering the message to "goad fellow employees inappropriately and unnecessarily." Br. for NLRB at 9.

On January 27, 2006, Walker requested information about the persons hired as striker replacements, including their home addresses. Tenneco declined to provide the addresses because of concerns that the Union might use the

information to harass or intimidate the replacement workers at their homes. Tenneco sent a letter reminding the Union that it already had multiple means of communicating directly with replacements by posting notices on the Union bulletin board and by having the Union President, Vice President, and Steward (all of whom were working in the Company facility) interact with the replacements before and after working hours and during breaks. The Union later explained that, because the replacements were permanent employees and thus members of the unit, it needed the contact information to be able to communicate with these employees about working conditions, collective bargaining proposals, grievances, and other representational matters. Walker claimed that "mailing addresses are the only practical way for the Union to communicate with these bargaining unit members in a private fashion that cannot be monitored by Tenneco." Br. for NLRB at 10.

On January 27, 2006, after ten months of striking, the Union made an unconditional offer to have the striking employees return to work. The first four strikers returned on February 6, 2006, and Company Manager, Mark Kortz, held a meeting with all employees at the start of the shift. The work force then consisted of permanent striker replacements, returning strikers, and employees who had previously abandoned the strike. During his presentation, Kortz instructed the employees to refrain from inciting tensions. He amplified by saying that employees should "not . . . engage in taunting, verbal or physical threats, or in other conduct that is confrontational or meant to evoke a response from a co-worker." *Tenneco Auto., Inc.*, 2011 WL 4590190, at *7. Kortz also instructed employees not to post items in their work areas without approval. He made no reference to postings on bulletin boards. Following the February 6, 2006 meeting, Union officers posted items on bulletin boards, including notices of Union meetings, and employees also continued to

post items on the employee bulletin board. Union officers also communicated directly with the striker replacements without interference.

On December 4, 2006, an employee presented Tenneco with a petition signed by seventy-seven percent of the employees (twenty-four out of the thirty-one bargaining unit employees) asking Tenneco to withdraw recognition from the Union. After verifying the signatures on the petition, Tenneco notified the Union that it had received the petition and that it was withdrawing recognition of the Union.

B. Proceedings Below

After the Union filed unfair labor practice charges, the Board's Regional Director issued a consolidated complaint against Tenneco on July 31, 2007. The complaint alleged that Tenneco, throughout the course of the strike and upon its withdrawal of Union recognition, had committed multiple violations of Sections 8(a)(1), (3), and (5) of the Act. 29 U.S.C. § 158(a)(1), (3), (5).

In October, 2007, a three-day hearing was held before an ALJ. The ALJ found that Tenneco's denial of the Union's request for the replacement workers' home addresses was permissible; that the discipline of Helton over the tee shirt incident did not constitute an unfair labor practice; that Kortz's instruction not to "evoke a response" was reasonable; that Kortz did not create a new posting rule without first consulting with the Union; and that, while Tenneco's denial of the Union's request for information about the installation of security cameras violated the Act, "under the circumstances," the violation was "very close to de minimus [sic]," because the cameras were never installed. *Tenneco Auto., Inc.*, 2008 WL 1786082. The ALJ credited several other allegations of unfair labor practices that were not discussed by the Board and are not before this court. Most

significantly, the ALJ concluded that Tenneco's withdrawal of Union recognition on December 4, 2006, was lawful. The ALJ predicated his decision on an application of "the *Master Slack* analytical framework [for] determining whether there is [a] causal relationship between the unfair labor practices and the employees' disaffection with the Union." *Id.* (relying on *Master Slack*, 271 N.L.R.B. at 84). In the ALJ's view, such a causal relationship was lacking.

On August 26, 2011, the Board rejected most of the ALJ's proposed findings. The Board agreed with the ALJ that Tenneco's failure to respond to the Union's request for information about the proposed installation of a security camera was an unfair labor practice; however, the Board rejected the ALJ's characterization of that violation as *de minimis* because the request was still relevant at the time it was made. *Tenneco Auto., Inc.*, 2011 WL 4590190, at *2. The Board found that Tenneco's failure to provide the replacement workers' home addresses violated the Act because there was no "clear and present danger" that the Union would misuse the information. *Id.* at *3-4. The Board also found that Tenneco's discipline of Helton for the tee shirt incident violated the Act because "Helton's protected conduct was a motivating factor in the Respondent's decision to issue the discipline, and . . . the evidence fails to show that the Respondent would have disciplined Helton in the absence of his protected activity." *Id.* at *4-6.

The Board also held that Kortz's direction to employees not to say or do anything that could "evoke a response" constituted another violation of the Act. The majority opinion for the Board noted:

> The dissent suggests that the only reasonable interpretation of Kortz's statement is as a directive against threatening conduct not protected by the Act. In so doing, however, it ignores the fact that the statement

> was made in the context of Kortz describing the work force in terms of strike status—those who crossed the picket line, permanent replacements, and reinstated strikers. Given this context, and absent any reference to unprotected employee conduct, it is simply not reasonable to conclude that employees would narrowly interpret the statement to exclude all Section 7 activity.

Id. at *8 (referring to 29 U.S.C. § 157, which protects the right of employees "to engage in other concerted activities for the purpose of collective bargaining"). The Board further held that Kortz's announcement about the posting of signs in the workplace violated the Act because Tenneco's "longstanding practice allowed employees to freely post materials without obtaining prior approval," and thus "Kortz's announcement declared a substantial change to this past practice." *Id.* at *8.

In light of these findings, the Board concluded that Tenneco improperly withdrew recognition of the Union. The Board rejected the ALJ's application of *Master Slack* and concluded "that certain of the[] unfair labor practices [committed by Tenneco] tainted the petition" for decertification. *Id.* at 9. Because the Board found that the employer's illegal conduct was responsible for the employees' disaffection with the Union, it held that the withdrawal was unlawful. *Id.* at 9-10.

Tenneco now petitions this court for review of the Board's decision and the NLRB and the Union have cross-applied for enforcement.

II. Analysis

A. Standard of Review

"As we have noted many times before, our role in reviewing an NLRB decision is limited. We must uphold the judgment of the Board unless, upon reviewing the record as a whole, we conclude that the Board's findings are not supported by substantial evidence, or that the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). We owe "substantial deference" to inferences drawn by the Board from the factual record. *Halle Enters., Inc. v. NLRB*, 247 F.3d 268, 271 (D.C. Cir. 2001). "When the Board concludes that a violation of the [Act] has occurred, we must uphold that finding unless it has no rational basis or is unsupported by substantial evidence. It is not necessary that we agree that the Board reached the best outcome in order to sustain its decisions. The Board's findings of fact are conclusive when supported by substantial evidence on the record considered as a whole." *Bally's Park Place*, 646 F.3d at 935 (citations and quotations omitted).

Furthermore, substantial evidence review does not change when the Board disagrees with the ALJ. *Local 702, IBEW v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000). In such situations, the Supreme Court has instructed that an ALJ's findings should not be given "more weight than in reason and in the light of judicial experience they deserve." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951). This means "that evidence supporting a conclusion may be less substantial when an impartial, experienced [ALJ] who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when [the ALJ and the agency have] reached the same conclusion." *Id.* However, an ALJ's findings "are to be considered along with the consistency and inherent probability of testimony," and

the significance of the findings will depend "largely on the importance of credibility in the particular case." *Id.* When the Board and ALJ disagree, the Board's obligation is to "make clear the basis of its disagreement." *Local 702, IBEW*, 215 F.3d at 15. "[S]ince the Board is the agency entrusted by Congress with the responsibility for making findings under the statute, it is not precluded from reaching a result contrary to that of the [ALJ] when there is substantial evidence in support of each result, and is free to substitute its judgment for the [ALJ]'s." *Id.*

The obligation of the reviewing court is to assess the "whole record," meaning that our analysis must consider not only the evidence supporting the Board's decision but also "whatever in the record fairly detracts from its weight." *Universal Camera Corp.*, 340 U.S. at 488; *see also CitiSteel USA, Inc. v. NLRB*, 53 F.3d 350, 354 (D.C. Cir. 1995). A reviewing court must "ask whether a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion." *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999).

B. Insubstantial Challenges Raised by the Company

As noted above, the parties' dispute has narrowed to six contested issues. Those issues are whether the Company committed unfair labor practices when (1) it disciplined employee Joseph Helton because of his pro-Union activities; (2) refused to provide the Union with the home addresses of the striker-replacement employees; (3) refused to provide the Union with information regarding the planned installation of video cameras in the workplace; (4) directed employees not to say or do anything that could "evoke a response" from other employees; (5) unilaterally promulgated a rule requiring supervisory approval prior to the posting of material at the Company's facility; and (6) withdrew recognition of the Union. We grant the Board's cross-petition for enforcement as to the first five charges. The Board's decision on these

matters speaks for itself and needs no amplification by the court. *See W.C. McQuaide, Inc. v. NLRB*, 133 F.3d 47, 49 (D.C. Cir. 1998) (noting that there is no reason for the court to address certain disputed matters when "the company's . . . challenges are met by sufficient evidence in the record to support the Board's findings").

After careful review of the record and the parties' arguments, we uphold the Board's findings that:

> [Tenneco] violated Section 8(a)(1) of the Act by directing employees to refrain from saying anything to each other that might be deemed offensive or evoke a response from another employee. [Tenneco] violated Section 8(a)(3) and (1) of the Act by issuing a written warning to employee Joseph Helton because of his support for and activities on behalf of the Union. [Tenneco] violated Section 8(a)(5) and (1) of the Act by (a) Failing and refusing to furnish the Union with requested information regarding the planned installation of video cameras . . . . (c) Failing and refusing to furnish the Union with requested information concerning the home addresses of the . . . permanent replacement employees. . . . (e) Promulgating a rule requiring supervisory approval prior to the posting of signs, letters, or printed material . . . .

Tenneco Auto., Inc., 2011 WL 4590190, at *11. These findings are supported by substantial evidence and are consistent with established precedent.

We now turn to the Board's finding that Tenneco committed an unfair labor practice when it withdrew recognition of the Union. Because, for the reasons indicated below, we find no substantial evidence to support this charge, we grant the Company's petition for review.

C. Tenneco's Withdrawal of Union Recognition

When an employer has objective evidence that a union has lost majority support, such as "a petition signed by a majority of the employees in the bargaining unit," it may unilaterally withdraw recognition. *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 31 (D.C. Cir. 2007) (quoting *Levitz Furniture Co. of the Pac.*, 333 N.L.R.B. 717, 725 (2001)). But an employer may not rely on an employee petition "when the employer's unfair labor practices significantly contribute to the loss of majority status by undercutting the employees' support of the union." *Williams Enters.*, 956 F.2d at 1234.

The Board has explained that "not every unfair labor practice will taint evidence of a union's subsequent loss of majority support." *Lexus of Concord, Inc.*, 343 N.L.R.B. 851, 852 (2004). Thus, the Board has the burden of adducing substantial evidence to support its finding that an employer's unfair labor practices have "significantly contributed" to the erosion of a union's majority support. *See Quazite Div. of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 496 (D.C. Cir. 1996). In *Master Slack*, the Board set out a four-factor test to determine whether "the unfair labor practices . . . have caused the employee disaffection [with the Union] or at least had a meaningful impact in bringing about that disaffection." 271 N.L.R.B. at 84. The Board's four-factor test, which we have endorsed, includes consideration of:

> (1) The length of time between the unfair labor practices and the employee petition; (2) the nature of the unfair labor practices, including whether they are of a nature that would cause a detrimental or lasting effect on the employees; (3) the tendency of the unfair labor practices to cause employee disaffection with the union; and (4) the effect of the unlawful conduct on the employees' morale, organizational activities, and membership in the union.

Williams Enters., 956 F.2d at 1236 (citing *Master Slack*, 271 N.L.R.B. at 84)).

Both the ALJ and the Board applied the *Master Slack* factors and arrived at opposite conclusions. However, the Board's judgment is infirm because it disregards material evidence that belies any causal relationship between the Company's unfair labor practices and the employees' petition for decertification. Recognizing that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight," *Universal Camera Corp.*, 340 U.S. at 488, we conclude that on the record before us the Board's determination is not supported by substantial evidence.

First, it is highly significant that ten months passed between the last credited unfair labor practice and the submission of the employees' petition for decertification. "The length of time between the unfair labor practices and the withdrawal of recognition" is the first of the four *Master Slack* factors, 271 N.L.R.B. at 84, and it is obviously an important consideration. This temporal factor typically is counted as weighty only when it involves a matter of days or weeks. *See, e.g.*, *Bunting Bearings Corp.*, 349 N.L.R.B. 1070, 1072 (2007) (eight to fifteen days was "close temporal proximity"); *Miller Waste Mills, Inc.*, 334 N.L.R.B. 466, 468 (2001) ("close temporal proximity" when unfair labor practices occurred two to six weeks before petition for withdrawal). However, a lapse of months fails to support, and typically weighs against, a finding of close temporal proximity. *See, e.g.*, *Garden Ridge Mgmt., Inc.*, 347 N.L.R.B. 131, 134 (2006) (five-month delay weighed against finding that unfair labor practices caused employee sentiment against Union); *Lexus of Concord, Inc.*, 343 N.L.R.B. at 852 (no temporal proximity when lapse was three months). Here, even the NLRB admitted in its decision that ten months is "a relatively long period." *Tenneco Automotive, Inc.*, 2011 WL

4590190, at *10. The Board maintained, however, that "the nature of some of the violations would tend to have a lasting detrimental effect on the employees' view of the Union," particularly Tenneco's refusal to provide the addresses of the replacement workers. *Id.* In the Board's view, this and other unfair labor practices "depriv[ed] the Union of opportunities to meaningfully address any lingering feelings of disconnect that would naturally exist in the aftermath of a contentious and divisive strike." *Id.* But for reasons explained below, the cited conduct did not constitute the type of unfair labor practices that the Board has historically characterized as "detrimental or lasting."

The second *Master Slack* factor is "the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees." 271 N.L.R.B. at 84. The third factor is "any possible tendency to cause employee disaffection from the union." *Id.* These factors obviously are related because unfair labor practices that have a lasting effects on employees are likely to be serious enough to cause disaffection with a union. The NLRB relied on four alleged unfair labor practices to show these adverse consequences: Tenneco's refusal to provide the Union with the addresses of replacement employees; Kortz's admonition to employees to avoid having discussions that could "evoke a response"; the requirement that employees obtain supervisor permission before posting materials in the Company facility; and Tenneco's discipline of union advocate Helton. *See Tenneco Auto., Inc.*, 2011 WL 4590190, at *9-10. No violation of the Act is insignificant; but these violations were hardly "hallmark violations that were highly coercive and likely to remain in the memories of employees for a long time." *Goya Foods of Fla.*, 347 N.L.R.B. 1118, 1121 (2006).

The Board has consistently held that the types of violations that have detrimental and lasting effects are those

involving coercive conduct such as discharge, withholding benefits, and threats to shutdown the company operation. *See, e.g.*, *id.* at 1121-22 (discharging three union adherents and suspending another were "hallmark violations"); *JLL Rest., Inc.*, 347 N.L.R.B. 192, 193 (2006) (threatening employees with closure and job loss); *Beverly Health and Rehab. Serv., Inc.*, 346 N.L.R.B. 1319, 1328-29 (2006) (discharging active union supporter and unilaterally changing hours and vacation); *Overnite Transp. Co.*, 333 N.L.R.B. 1392, 1394 (2001) (hallmark violations included "the granting of an unprecedented wage increase, as well as threats that employees would lose their jobs and that the Employer would close if the employees selected the Union"). The unfair labor practices alleged in this case do not rise to these levels.

This court has agreed with the Board that "the unilateral implementation of changes in working conditions has the tendency to undermine confidence in the employees' chosen collective-bargaining agent." *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000). However, to be considered "hallmark violations," such unilateral changes must normally involve the "issues that lead employees to seek union representation," particularly employee earnings. *Goya Foods*, 347 N.L.R.B. at 1122; *see also M & M Auto. Grp., Inc.*, 342 N.L.R.B. 1244, 1247 (2004) (taint found where the employer's "unilateral changes involved the important, bread-and-butter issues of wage increases and promotions for which employees seek and gain union representation"). Considered against this standard, the unilateral changes in workplace policy cited by the Board – a new rule regarding the posting of materials in the workplace and an admonition to avoid having hostile discussions that could "evoke a response" from other employees – did not risk having a "detrimental or lasting effect on employees." *Master Slack*, 271 N.L.R.B. at 84. Indeed, the record makes it clear that both employees and Union officials continued to post notices on bulletin boards

without first obtaining permission from the Company; and Union officials freely talked with unit employees about work conditions and Union activities without interference from the Company.

Nor did the discipline of Helton rise to the level of "detrimental or lasting." Helton received only a mild reprimand in the form of written counseling. And this was the only disciplinary action recorded prior to the Company's withdrawal of Union recognition. *See Tenneco Auto., Inc.*, 2008 WL 1786082.

Likewise, there is no substantial evidence that Tenneco's failure to supply the replacements' home addresses had detrimental effects of the sort that the Board has described in cases involving "hallmark violations." Union officials worked in the Company facility, the bargaining unit was relatively small, and Union officials had routine and easy access to all unit employees. This access did not excuse the Company's failure to provide the Union with the addresses of the striker replacements, but there is nothing in the record to indicate that the Company's failure resulted in "detrimental or lasting" effects sufficient to cause a large majority of the employees to sign a decertification petition.

The Board also failed to establish by substantial evidence that the alleged unfair labor practices in this case actually prevented communications between the employees and the Union. Thus, the Board fails to satisfy the fourth *Master Slack* factor by articulating what, if any, effect "the unlawful conduct [had] on employees morale, organizational activities, and membership in the union." 271 N.L.R.B. at 84. The Board claims that the alleged unfair labor practices were particularly problematic because they "illustrate[] the [Company's] hostility toward the free expression of employee views about union matters, and show[] a determination to prevent the occurrence of protected prounion speech in its workplace."

Tenneco Auto., Inc., 2011 WL 4590190, at *10. But the evidence does not support this claim. The Union introduced testimony that "the Company's new rules effectively stifled both the Union's and the employees' ability to discuss union related matters." *Tenneco Auto., Inc.*, 2008 WL 1786082. However, the ALJ discredited this testimony and found as a factual matter that between the bulletin board and direct conversations, "the Union had ample opportunity to present to the replacements its side of the strike, the need for union representation, and the progress of the negotiations that were ongoing." *Id.* Indeed, the ALJ found that "the returning strikers could and did speak amicably and about union matters with some of the replacement workers while at work." *Id.* The Board never rejected the ALJ's credibility determinations regarding this testimony.

We do not hold that "hallmark violations" are always necessary to satisfy *Master Slack*. Nor do we mean to hold that an employer's interference with communications between a union and unit employees cannot have a detrimental or lasting effect on employees. Rather, we simply hold that, on this record, there is no substantial evidence to support the Board's finding of a causal relationship between the Company's unfair labor practices and the employees' petition for decertification.

In addition, the Board's assessment of the facts leading up to the withdrawal petition is self-contradictory. At one point in its opinion, the Board asserts that the Company's conduct "significantly interfered with protected speech among its employees." *Tenneco Auto., Inc.*, 2011 WL 4590190, at *10. Yet, elsewhere the Board explained that "the record reveals that at least some replacement employees were on friendly terms with the union officials who were reinstated after the strike." *Id.* at 3. Given the small size of the company facility (which facilitated communications between the Union

and unit employees) and the failure of the Board to address the ALJ's finding that the employees had ample opportunity to communicate with and about the Union, the Board has not met its burden under the substantial evidence standard to prove a causal connection.

Finally, it is noteworthy that the ALJ heard and credited testimony from nine of the petition-signing employees that "the Company had done nothing to influence their decision." *Tenneco Auto., Inc.*, 2008 WL 1786082. We understand that such testimony is not necessarily dispositive because it may be nothing more than the product of employer intimidation. Nevertheless, such testimony must be assessed on a case-by-case basis, especially when an ALJ has made credibility findings. *See Universal Camera Corp.*, 340 U.S. at 496 ("The significance of [the ALJ's] report, of course, depends largely on the importance of credibility in the particular case."). The Board is free to reject the ALJ's determinations, but it must "make clear the basis of its disagreement." *Local 702, IBEW*, 215 F.3d at 15. After listening to the employees' testimony, the ALJ found that

> the General Counsel did not establish that the [petition] signers' disaffection with the Union was attributable to the [unfair labor practice] allegations that had been pending for over a year. In point of fact, it would be my finding and conclusion that the [unfair labor practices] in this case had essentially nothing to do with the signers' decision to petition for withdrawal of recognition of the Union. . . . [A]s I observed and heard them, [the employees'] morale as such was elevated based on their decision to disassociate from the Union.

Tenneco Auto., Inc., 2008 WL 1786082. The Board, in turn, simply ignored the signing employees' testimony without any explanation. Because the Board never explained any basis for disagreement with the ALJ's findings, we have taken the

findings into account in assessing whether there is substantial evidence to support the Board's judgment.

The foregoing considerations, in combination, forcefully contradict the Board's errant conclusion – based on a shortsighted assessment of the evidence – that Tenneco violated the Act when it withdrew recognition of the Union. Considering the whole record, we think it apparent that substantial evidence does not support the Board's finding that Tenneco's conduct tainted the decision of the employees' to sign a petition for decertification.

D. The Board's Affirmative Bargaining Order

The Board ordered Tenneco to, *inter alia*, "recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit." *Tenneco Auto., Inc.*, 2011 WL 4590190, at *12. The Board determined "that an affirmative bargaining order is warranted in this case as a remedy for the [Company's] unlawful withdrawal of recognition." *Id.* Before this court, the Board argues that "Tenneco failed to challenge this bargaining order before the Board, and therefore the Court lacks jurisdiction to consider Tenneco's challenge to the remedy now." Br. for NLRB at 58 (citing Section 10(e) of the Act, 29 U.S.C. § 160(e)). We disagree.

Before the Board, Tenneco clearly opposed the unfair labor practice charge based on its alleged withdrawal of recognition. And the Company preserved this challenge in its petition for review in this court. The Board's decision makes it clear that the *sole* basis for the Board's bargaining order is Tenneco's alleged "unlawful withdrawal of recognition." Because we have found that no substantial evidence supports the Board's finding of an unfair labor practice, there is no longer any basis for the bargaining order. Obviously, the

sanction for an unfair labor practice cannot survive once the Board's finding of an unfair labor practice has been reversed.

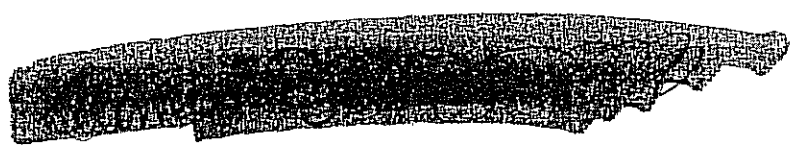
III. Conclusion

With respect to its withdrawal of recognition, we grant Tenneco's petition for review and deny the Board's cross-application for enforcement. The Board's decision regarding the withdrawal of recognition is reversed and the accompanying bargaining order is vacated.

Tenneco does not contest the Board's findings that it violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with requested information concerning Joseph Helton's discipline and work performed by an outside contractor during the strike, and refusing to process Steven Prysianzy's grievance to the third step. We therefore grant the Board's request for summary enforcement of its Order with respect to these violations. With respect to the other unfair labor practice charges at issue in this case, we deny Tenneco's petition for review and grant the Board's cross-application for enforcement.

Exhibit 5

On Wednesday November 21st, I was at work and while my husband was at home a union rep come to our door and rang the door bell. My husband did not answer the door since he did not know who it was and did not want to be bothered at the time. The gentleman at the door left our doorstep and return 5 minutes later and rang the bell again. My husband again did not answer the door and the union rep continued to do this two more times. My husband was about to call the police when the union rep finally left and did not return. We have surveillance video at my house and I do have this occuarnce as well as two others on video tape. On Saturday Noberm 24th my husband and I were in our back yard washing our dogs when a gentleman poked his head over our brick wall and asked if [redacted] was home. I told him that [redacted] was not home, he continued to ask me if [redacted] was at work at Chapman or if I knew where she was. I told her that she was not home and I did not know when she would be returning. I did not reveal myself to him since I did not want to speak with a union rep. I do not wish to be bothered on the weekends at my house, if they wish to speak with me they can speak with me at work. On Monday November 26th, I walked home from work and I got home around 5:40pm. I was in my house when two union representatives, one man and one woman came to my doorstep and rang the door bell. I was unavailable to answer the door to tell them to leave. They continued to stay at our door step and ring the bell two more times. The third and last time they rang the door bell they rang it constantly four rings before they decided to leave. I do not appreciate people coming to my door and lingering while ringing my door bell numerous times. They had my dogs barking which disturb the neighbors. If I do not answer the door then kindly leave. Again, if they wish to speak with me they can approach me on a break at work. I felt very uncomfortable when the union rep looked over our wall. I was taken by surprise that they would do this.



Ex. 5

On Saturday NOV 24th around 6:00pm, a Union member came to my door, young male dark hair. He asked if I was [redacted], I said yes. I saw who he was (Union Rep. & I said I have to go. He tried asking me what my job title was and department I worked in, I told him once again I have to go and closed the door. Him and another person sat in their car in front of my house for 30 mins. I felt harassed and violated that they came to my house.

[redacted]

November 29, 2012

Chapman Medical Center
2601 East Chapman Avenue
Orange, CA 92869

To Whom It May Concern:

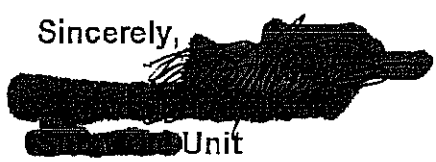
This is to inform you that a SEIU representative came to my house yesterday, November 28, 2012 at 8:00am inquiring about what I voted with regards to saying "Yes" or "No" to the union. They have made negative statements such as "The administration is a liar."

With this event, for me, was offensive and had a feeling of being harassed.

The SEIU representative knows my home address. I am writing this letter to gain protection against any retaliation or negative feedback whether it be a peaceful or violent reaction from them. My goal is also to give Administrative members of Chapman Medical Center knowledge of this event so that anytime there would be an action of union against me and would have caused my safety, you know that it was caused by this organization.

Thank you in advance for addressing my concern.

Sincerely,



Unit