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STATEMENT TO THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS
Hearing of 25 July 2012

Chairman Roe and distinguished Representatives:

Thank you for the opportunity to testify today in this hearing to examine proposals to strengthen the National Labor Relations Act. While the NLRA needs to be improved in a wide number of ways, I would like to focus my testimony today on the importance of protecting employees' right to a secret ballot election.

I am a Staff Attorney with the National Right to Work Legal Defense Foundation. Since the Foundation was founded in 1968, it has provided free legal aid to employees who choose to exercise their right to stand apart from unions and their agendas. Foundation attorneys, including myself, have represented numerous employees in cases that involve protecting their right to a secret ballot election or protecting employees from the abuses of top-down union organizing.[1]

Protecting employees' privacy with a secret-ballot election is the very least that should be done to ameliorate the harm the government inflicts on employees through its policies of monopoly representation and compulsory unionism. The NLRA is predicated on forcing individuals to associate with unions. It does so by empowering unions to act as "exclusive representatives" of all employees in a bargaining unit under § 9(a) of the Act, 29 U.S.C. § 159(a), irrespective of whether each employee desires this ostensible representation, and by permitting unions to force employees to support them financially upon pain of losing their jobs. *See* 29 U.S.C. § 158(a)(3).

The federal government forcing individual employees not only to accept union representation against their will, but also to pay for this unwanted representation, is an affront to each individual's right to choose with whom he or she associates. This compulsion is wrong irrespective of whether or not the individual's co-workers

[1] *See, e.g.*, *Lamons Gasket*, 357 NLRB No. 72 (2011); *Dana Corp. (Int'l Union, UAW)*, 356 NLRB No. 49 (2010), on appeal, No. 11-1256 (6th Cir.); *Dana Corp.*, 351 NLRB 434 (2007); *Mulhall v. Unite Here*, 667 F.3d 1211 (11th Cir. 2012); *Adcock v. Freightliner LLC*, 550 F.3d 369 (4th Cir. 2008).

desire to associate with a union. Each citizen's fundamental right to freedom of association should not be subjected to the tyranny of the majority. Thus, Congress should amend the NLRA to repeal monopoly representation or prohibit compulsory unionism with a national Right to Work Act.

However, to the extent that the federal government insists on imposing monopoly representation and compulsory unionism on workers under the NLRA, at a minimum it must ensure that a majority of workers truly support this imposition. The best and most obvious way to guarantee that a majority of employees want union representation is a secret ballot election.

Regrettably, the NLRA currently permits unionization based on private agreements between unions and employers, and without a secret-ballot election. *See* 29 U.S.C. § 159(a). Additionally, the National Labor Relation's Board is actively pursuing policies to deprive employees of their existing statutory right to a secret-ballot election to decertify unions that they no longer support. *See, e.g., Lamons Gasket*, 357 NLRB No. 72 (2011). Congress should thereby amend the NLRA to permit unionization based only on the results of a secret-ballot and to remove all Board-imposed bars on employees' right to a decertification election.

I. Secret-Ballot Elections Must Be Required Under the NLRA Because They Are Superior to Employer Recognition of a Union

That the superiority of secret-ballot elections could require extended argument is itself remarkable. Every American understands instinctively that such elections are the cornerstone of any system that purports to be democratic. Thus, the Supreme Court has long recognized that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969).

Of course, the merit of any procedure must be evaluated in comparison to its alternatives. The alternative to the secret-ballot is "employer recognition" or "voluntary recognition," whereby an employer decrees that a particular union shall be the exclusive representative of its employees. This grant of recognition is generally predicated on an assertion that a majority of employees signed cards authorizing the union to act as their representative.

Secret-ballot elections are superior to employer recognition not only for the most obvious reason—that individuals are more apt to vote their conscience in the privacy of a voting booth than when being pressured by union organizers to sign an authorization card. *See* Section I(C), *infra*. Secret-ballot elections are also superior

to employer recognition because the Board conducts and supervises the elections. By contrast, employer recognition is a private arrangement between a union and employer to which the Board is not privy. The Board has no actual knowledge of whether an employer's recognition of a union reflects the employees' free choice. *See* Sections I(B), *infra.* And there are compelling reasons to suspect that it will not. *See* Section I(C), *infra.* Given that Congress cannot trust the associational rights of employees to the self-interests of union officials and employers, unionization should only be permitted pursuant to a Board-conducted election.

A. The Board Does Not Know if an Employer-Recognized Union Has the Support of a Majority of Employees

Secret-ballot elections differ from employer recognition in that the latter is not conducted or supervised by the Board. Employer recognition is simply a *private agreement* in which an employer agrees to recognize a particular union as the exclusive representative of its employees. The Board is not a party to a recognition agreement. It does not review recognition agreements either before or after employers and unions enter into them. The Board has no actual knowledge whether or not an employer-recognized union actually enjoys the true support of a majority of employees.

Unions and employers generally claim in their recognition agreements that the union has the support of a majority of employee based on authorization cards allegedly signed by employees. But the Board has no independent knowledge as to the truth or falsity of this claim. Most importantly, the Board has no knowledge of the conditions under which the cards were procured from employees.[2]

Accordingly, the NLRA's current policy of granting legal validity to employer-recognized unions, *see* 29 U.S.C. § 159(a), is predicated on the blindly trusting that a private agreement between a union and employer accurately reflects what employees actually desire. This is untenable, as the mere "fact that an employer bargains with a union does not tell us whether the employees wish to be

[2] Similarly, third party arbitrators often used by employer and unions to verify card checks have no knowledge of how the union authorization cards were obtained from employees. These third parties are little more than human calculators whose role is merely to count the cards provided by the union against a list of employees provided by the employer. The verification of a card check by an arbitrator says nothing about the conditions under which the union or employer obtained the cards from employees, or the validity of the employer's list.

represented by the union." *Seattle Mariners*, 335 NLRB 563, 567 n.2 (2001) (Member Hurtgen, dissenting).

Of course, in a secret-ballot election, the Board controls the conditions under which votes are cast and counts the ballots itself. In an election, unlike a card check, the Board has independent and actual knowledge as to whether a majority of those voting want union representation. For this reason alone, Board-conducted elections are inherently superior to card check recognition.

B. That an Employer Makes a Union the Representative of its Employees Is Not a Reliable Indicator of Whether Employees Support that Union

Not only does the government not know if employer-recognized unions actually have the uncoerced support of a majority of employees, there are several compelling reasons to believe that employee free choice is not reflected in private recognition agreements. Instead, the agreements reflect little more than the union and employer's perceived self-interests.

First, at their most basic level, recognition agreements are agreements in which two parties agree to take something from a third-party. Specifically, Party A (the employer) and Party B (the union) agree that a third-party (employees) shall surrender rights to Party B. The very construct of this arrangement makes it an inherently unreliable indicator of the desires of the third-party employees, as both parties to the agreement can satiate their self-interests at the expense of employees who are not privy to the agreement.

Second, unions and employers have a number of self-interested reasons to enter into recognition agreements that have nothing to do with effectuating employee free choice. Indeed, there is a long and sordid history of employers recognizing unions that lack the uncoerced support of a majority of employees.[3]

[3] *See e.g., Duane Reade*, 338 NLRB 943 (2003); *Fountain View Care Center*, 317 NLRB 1286 (1995), *enf'd*, 88 F.3d 1278 (D.C. Cir. 1996); *Brooklyn Hospital Center*, 309 NLRB 1163; *Famous Castings Corp*., 301 NLRB 404 (1991); *Systems Mgmt.*, 292 NLRB 1075 (1989), *remanded on other grounds*, 901 F.2d 297 (3rd Cir. 1990); *Anaheim Town & Country Inn*, 282 NLRB 224 (1986); *Meyer's Cafe & Konditorei*, 282 NLRB 1 (1986); *SMI of Worchester*, 271 NLRB 1508 (1984); *Price Crusher Food Warehouse*, 249 NLRB 433 (1980); *Vernitron Electrical Components*, 221 NLRB 464 (1975), *enf'd* 548 F.2d 24 (1st Cir. 1977); *Pittsburgh Metal Lithographing Co.*, 158 NLRB 1126 (1966).

A union's self-interest in being recognized by an employer as its employees' representative is obvious. It is to acquire more members, more compulsory dues payments (in non-Right to Work states), more contributions to underfunded pension and welfare plans, and more power for union officials. Gaining more dues-paying members is a top priority for union officials, as union membership has been in general decline for decades.[4] Unions have an overwhelming self-interest in being recognized as monopoly representatives irrespective of whether or not employees actually support them.

Employers are apt to recognize unions to satiate perceived business interests, and not to effectuate employee free choice. These business interests include getting a union to cease waging a coercive "corporate campaign" against the employer, which involve a "wide and indefinite range of legal and potentially illegal tactics," such as "litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state and federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors, or the general public." *Smithfield Foods v. UFCW,* 585 F.Supp.2d 789, 795 (E.D. Va. 2008) (quoting *Food Lion, Inc. v. UFCW*, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997)).[5] Employers have also agreed to make unions the representative of their employees to obtain their political assistance;[6] to cut off organizing campaigns of unions less-favored by the employers;[7] to obtain bargaining concessions at the expense of other

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[4] *See* Laura J. Cooper, P*rivatizing Labor Law: Neutrality/Check Agreements and the Role of the Arbitrator*, 83 Ind. L.J. 1589, 1591 (2008).

[5] *See, e.g.,* Cooper, 83 Ind. L.J. 1589, 159-93; Daniel Yager & Joseph LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 Empl. Rel. L.J. 21 (Spring 1999); Herbert R. Northrup, *Union "Corporate Campaigns" as Blackmail: the RICO Battle at Bayou Steel,* 22 Harv. J.L. & Pub. Pol'y 771, 779-93 (1999); *Pichler v. UNITE*, 228 F.R.D. 230, 234-40 (E.D. Pa. 2005) (corporate campaign for organizing agreement), aff'd, 542 F.3d 380 (3d Cir. 2008); *Smithfield Foods v. UFCW*, 585 F. Supp. 2d 789, 795-97 (E.D. Va. 2008) (same).

[6] *See, e.g., Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1289 (11th Cir. 2010).

[7] *See, e.g., Price Crusher Food Warehouse*, 249 NLRB 433 (1980).

employees that the unions represent;[8] and to obtain union concessions at the expense of employees whom the unions organize in the future.[9]

Employers motivated by these and other perceived interests are obviously apt to recognize unions irrespective of employee support for them. Employees are little more than chattel in these arrangements—the consideration the employer is willing to trade to get something from the union. Given that unions and employers can be counted on to pursue their own perceived self-interests, it is irrational for the federal government to defer to their private decisions about whether or not employees want to be unionized.

Third, employer recognition of a union is usually the product of a pre-negotiated "organizing agreement" between the employer and union. In an organizing agreement, an employer agrees in advance to assist a particular union with organizing its employees. This employer assistance generally includes gag-clauses on any employer speech about the union or unionization, granting the union access to employees' workplaces for organizing, the release of private information about nonunion employees to the union, such as their home addresses and contact information, and a ban on secret-ballot elections conducted by the NLRB.[10]

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[8] See, e.g., *Adcock v. Freightliner, LLC*, 550 F.3d 369, 372 (4th Cir. 2008); *Aguinaga v. UFCW*, 993 F.2d 1463, 1471 (10th Cir. 1993); *Kroger Co.*, 219 NLRB 388 (1975).

[9] See ,e.g., Charles I. Cohen et al., *Resisting its Own Obsolescence–How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 533-34 (2006); *Majestic Weaving Co.*, 147 NLRB 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2nd Cir. 1966); *Patterson v. Heartland Indus. Partners*, 428 F. Supp. 2d 714, 716 (N.D. Ohio 2006) (moot on appeal); *Dana Corp. (Int'l Union, UAW)*, 356 NLRB No. 49 (2010), on appeal, Case No. 11-1256 (6th Cir.); *Plastech Eng. Prod., (Int'l Union, UAW)*, 2005 WL 4841723, *1-2 (NLRB Div. of Advice Mem. 2005); *Thomas Built Buses (Int'l Union, UAW),* No. 11-CA-20038 (NLRB Div. of Advice Mem. 2004) see also Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 Lab. Law. 165, 176-77 ("Negotiations over non-Board recognition procedure often spill over to discussing the terms of a future collective bargaining agreement.").

[10] *See* Cohen, 20 Notre Dame J.L. Ethics & Pub. Pol'y at 522-23; A. Eaton & J. Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 47-48 (2001). It is doubtful whether it is lawful for employers to agree to provide this valuable organization assistance to unions. *Compare Mulhall v. Unite Here*, 667 F.3d 1211 (1lth Cir. 2012) with *Adcock v. Freightliner, LLC*, 550 F.3d 369 (4th Cir. 2008).

These private organizing agreements establish conditions inhospitable to employee free choice. For example, to ensure that employees make informed decisions about whether to support or oppose unionization, Congress amended the NLRA to facilitate an "uninhibited, robust, and wide-open debate" between employers and unions. *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008) (citation omitted).[11] Indeed, employees have an implicit "underlying right to receive information opposing unionization" under the NLRA. *Id.* at 68. Yet, organizing agreements generally include gag-clauses on employer speech regarding unionization.[12] Some organizing agreements go even further, requiring that employers speak and conduct captive audience meetings on behalf of the union.[13] The intent and effect is to deprive employees of their "right to receive information opposing unionization," so that employees hear only one side of the story during organizing campaigns—that spun by the union.

Similarly, Congress did not grant unions any right to campaign in employees' workplace, *see Lechmere v. NLRB*, 502 U.S. 527, 532-34 (1992), or any right to personal information about employees prior to petitioning for an election. *See Always Care Home Health Serv.*, 1998 WL 2001253 (NLRB G.C. 1998). Organizing agreements generally provide unions with both forms of employer assistance to allow union organizers to approach and harass employees in both their workplace and at their homes to sign union authorization cards.

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[11] *See also* 29 U.S.C. § 158(c) (speech cannot constitute an unfair labor practice absent threat or promise of benefit); *Southwire Co. v. NLRB*, 383 F.2d 235, 241 (5th Cir. 1967) ("The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available."); *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir. 1986) (employer speech "aids the workers by allowing them to make informed decisions while also permitting them a reasoned critique of their unions' performance"); *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971) ("It is highly desirable that the employees involved in a union campaign should hear all sides of the question in order that they may exercise the informed and reasoned choice that is their right").

[12] *See* Cohen, 20 Notre Dame J.L. Ethics & Pub. Pol'y at 522-23; Eaton & Kriesky, 55 Indus. & Lab. Rel. Rev. at 47-48.

[13] *See, e.g., Dana Corp. (Int'l Union, UAW),* 356 NLRB No. 49 (2010), on appeal, Case No. 11-1256 (6th Cir.); *Thomas Built Buses (Int'l Union, UAW)*, Case No. 11-CA-20038 et seq., at 4-5 (NLRB Div. of Advice Mem. 17 Dec. 2004).

Overall, the procedure prescribed by private organizing agreements—a systematic campaign jointly implemented by a union and employer against employees in their workplace and homes and in an environment devoid of relevant information about the union—are antithetical to employee free choice. These procedures are deliberately designed to ensure that employees sign cards that make the union their monopoly representative. It is unconscionable for Congress to blindly assume that the employer recognitions that are the fruit of this poisonous tree actually reflect the free will of employees.

Finally, the Supreme Court warned decades ago that deferring to even ostensibly "good faith" employer and union beliefs about employee preferences "would place in *permissibly careless* employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives." *International Ladies' Garment Workers v. NLRB*, 366 U.S. 731, 738-39 (1961) (emphasis added); *cf. Auciello Iron Works v. NLRB*, 517 U.S. 781, 790 ("There is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom"). The D.C. Circuit reiterated this warning in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003), when it overruled a Board decision that deferred blindly to a recognition agreement between an employer and union without independently verifying whether employees actually supported the union. "By focusing exclusively on employer and union intent, the Board has neglected its fundamental obligation to protect employee § 7 rights, opening the door to even more egregious violations than the good faith mistakes at issue in *Garment Workers*." *Id.* at 537.

Indeed, an ostensible purpose of the NLRA is to protect employee rights *from* employers and unions. Section 7 of the Act grants "employees" the right to choose or reject union representation. 29 U.S.C. § 157. Sections 8(a) and 8(b) protect employee § 7 rights from the machinations of employers and unions. 29 U.S.C. §§ 158(a-b). To blindly trust employer and union decisions about how employees want to exercise their § 7 rights inverts the structure of the NLRA. It is akin to putting the foxes in charge of the henhouse. Congress must change this irrational policy.

C. Voting in the Privacy of a Voting Booth Effectuates Free Choice Better Than Being Solicited to Sign a Card By a Union Organizer

In addition to the fact that elections are conducted and supervised by the Board, the procedure of a secret-ballot election is also far superior to that of a card check. Casting a ballot in the privacy of a voting booth is far more conducive to free

choice than being solicited to sign an authorization cards in their presence of one or more union organizers. Only in secret-ballot elections are employees given the privacy and space to vote their conscience free from immediate external pressure.

Moreover, 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 to "vote" against the union by not signing an authorization card does not end the decision-making process for an employee in the maw of a card check drive. Often, it represents only the beginning of the harassment. Union organizers can solicit individuals again and again (and again) until they break down and sign a card.

Employee experience confirms that union organizers frequently harass, mislead, and threaten employees to make them sign union cards. Testimony and statements by employees who have been subjected to card check campaigns can be found in the appendix to this testimony. In the course of counseling employees who have been subjected to card-check campaigns, my colleagues and I at the Foundation are also familiar with the tactics used by union agents to cajole employees into signing cards: incessant home visits; informing employees that signing a card is just for more information, to merely express interest in the union, or to obtain a secret-ballot vote; promising employees unrealistic benefits after unionization; falsely informing employees that the union already has a majority and will soon be in power; and threatening employees with future discrimination when the union does come into power.

Union organizers have a strong incentive under current Board law to use these and other deceitful and unlawful tactics. Under current law, a signed card is presumptively valid. To invalidate a card used to support employer recognition, an unfair labor practice charge must be filed with the Board within six months (which is itself a daunting task for individuals unfamiliar with administrative procedures and labor law). The employee then has the burden of presenting clear and convincing evidence that the card was obtained through a material misrepresentation or coercion.[14] This burden is exceedingly difficult to meet because most union misrepresentations will not invalidate a card, to include union claims that signing a card is necessary to have a meeting, to get more information, or to have an election (unless the employee is expressly told that the card can only be used for this purpose).[15] And usually the only evidence of what a card signer was

[14] *See Photo Drive Up*, 267 NLRB 329, 364 (1983).

[15] *See Montgomery Ward & Co.*, 288 NLRB 126, 128 (1988), rev'd on other grounds, 904 F.2d 1156 (7th Cir. 1990); *Levi Strauss & Co.*, 172 NLRB 732, 733 (1968); *see also Mid-East*

told will be their recollection of a conversion—i.e., "he-said, she-said" testimony—that union agents can easily deny. Even if an employee surmounts all of these burdens, only the particular card at issue will be invalidated and not the union's entire card-check campaign (unless the invalidated card or cards deprives the union of its majority). Given the low probability that pressuring and misleading employees will invalidate a card-check campaign, union organizers have little disincentive to using such unscrupulous to get employees to sign a card.

Perhaps the strongest evidence of the superiority of a secret-ballot election to a card check is that conduct that interferes with employee free choice in elections is *inherent* to any card check. In an election, the Board attempts to ensure that "laboratory" conditions exist in which the uninhibited desires of the employees can be ascertained. *See General Shoe*, 77 NLRB 124, 127 (1948). Conduct by employers and unions that upset these laboratory conditions will result in the election being overturned, even if that conduct does not rise to the level of an unfair labor practice. *Id*. Conduct that will result in the overturn of a Board election includes:

> (1) electioneering activities, or even prolonged conversations with prospective voters, at or near a polling place because, among other things, "[t]he final minutes before an employee casts his vote should be his own, as free from interference as possible," *Milchem*, *Inc*., 170 NLRB 362, 362 (1968);[16]
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> (2) the union or employer keeping a list of employees who vote as they enter or exit the polling place (other than the official eligibility list);[17] and
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> (3) a union official handling cast ballots, even in the absence of proof 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," *Fessler & Bowman, Inc*., 341 NLRB 932, 933 (2004).

This sort of objectionable conduct occurs in *all* card check campaigns. When an employee signs (or refuses to sign) an authorization card, he is in the presence of

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*Consolidation Warehous*e, 247 NLRB 552, 560 (1980) (falsely informing employees that everyone was signing union cards did not invalidate card).

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

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

the union organizer(s) who is attempting to get him to sign that card. In all cases the employee's decision is not secret because the union has the cards and maintains a list of who has signed one and who has not. Union officials handle these cards, as they are the individuals who collect them. Conduct that would not be tolerated in a Board-conducted election occurs in any card-check campaign.

The Board recognized this failing of employee-signed cards and petitions in *Underground Service Alert*, 315 NLRB 958 (1994). There, a majority of employees voted for union representation in a decertification election. However, before the electoral results were known, a majority of employees delivered a signed petition to their employer stating their opposition to the union. The Board held that the petition was a "less-preferred indicator of employee sentiment," particularly as compared to "the more formal and considered majority employee preference for union representation which was demonstrated by the preferred method—the Board-conducted secret-ballot election." *Id*. at 961. This is because an

> election, typically . . . is a more reliable indicator of employee wishes because employees have time to consider their options, to ascertain critical facts, and to hear and discuss their own and competing views. A period of reflection and an opportunity to investigate both sides will not necessarily be available to an employee confronted with a request to sign a petition rejecting the union.

Id. at 960 (citation omitted). Moreover, "[n]o one disputes that a Board-conducted election is much less subject to tampering than are petitions and letters." *Id*.

Thus, even the rare card check drive that does not involve unfair labor practices committed against employees does not approach the laboratory conditions guaranteed in Board-conducted elections. In a card-check, union agents directly solicit employees to sign authorization cards (and thereby cast their "vote"), stand over them as they "vote,' know with certainty how they "voted," and then physically collect and handle these purported "votes." The superiority of Board supervised secret-ballot elections for protecting employee free choice to such a coercive procedure is beyond peradventure. Congress should thereby amend the Act to permit unionization only pursuant to a secret-ballot election.

II. The Right of Employees' to Remove a Union by Secret-Ballot Election Should Be Protected from the Board's Invention of Bars and Other Obstacles to Decertification Elections

Section 9(c)(1)(A)(ii) of the NLRA expressly grants employees the right to petition for a decertification election to remove the union currently acting as their

representative. 29 U.S.C. § 159(c)(1)(A)(ii). Congress saw fit to prohibit the conduct of such elections only when "within . . . the preceding twelve-month period, a valid election shall have been held." 29 U.S.C. § 159(c)(3).

Notwithstanding that the NLRA provides for only one bar to the conduct of elections, the Board has invented numerous new bars to prevent employees from decertifying unions that they no longer support. This includes:

> (1) a "contract bar," which precludes employee petitions for decertification elections during the first *three years* of a collective bargaining agreement, save a 30-day window period near the end of that period, s*ee Waste Management of Maryland*, 338 NLRB 1002 (2003);
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> (2) a "recognition bar," which precludes employee petitions for decertification elections for up to one year after an employer recognizes a union as its employees' representative, *see Lamons Gasket*, 357 NLRB No. 72 (2011); and
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> (3) a "successor bar," which precludes employee petitions for decertification for up to one year after an employer is succeeded by another employer, *see UGL-Unicco Services*, 357 NLRB No. 76, *9 (2011).

The latter two election bars were reinstituted by President Obama's Board appointees to reverse prior decisions that permitted employees to request a secret-ballot election for a certain time period after employer recognition, *see Dana Corp*., 351 NLRB 434 (2007), overruled by *Lamons Gasket*, and after a change in the identity of their employer, *see MV Transportation*, 337 NLRB 770 (2002), overruled by *UGL-Unicco*.

In addition to erecting flat prohibitions on decertification elections, the Board has also instituted policies to make decertification effectively impossible for many employees. This includes, among other things, maintaining a "merger doctrine" under which, if an employer and union agree to merge one or more bargaining units into a single multi-location unit, any employee-filed decertification petition must cover the *entire* merged unit. Decertification petitions filed by employees that cover only the facility at which they are employed will be dismissed, even if that is the unit in which the employees were organized.[18]

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[18] *See, e.g., Westinghouse Elec. Corp.*, 227 NLRB 1932 (1977); *General Elec. Co*., 180 NLRB 1094 (1970); *W. T. Grant Co*., 179 NLRB 670 (1969); *Arrow Unif.*, 300 NLRB 246 (1990).

The result of this doctrine is that unions can organize employees one facility at a time—or even one department at a time under a new Board ruling[19]—and then merge their unit into a much larger one that employees can never hope to decertify because merely requesting a decertification election requires a showing of interest signed by 30% of employees in the unit. Meeting this threshold, much less winning the election, is beyond the capabilities of most employees if their unit consists of thousands employees at multiple facilities.[20]

For example, assume that a grocery store chain has 20 area stores and 100 employees at each store. With the employer's complicity, a union can organize the employees of each store, one-at-a-time, by merely obtaining authorization cards from 51 store employees. The union can then merge each newly-organized store with all other organized stores into one combined unit. If the union organizes all stores, it can create a combined unit of 2,000 employees spread across 20 locations. An employee at a given store who wishes to decertify the union will face the herculean task of obtaining a showing of support for decertification from 667 employees scattered amongst multiple locations.

This example actually understates the true breadth and effect of the merger doctrine because some merged units are nationwide in scope. For example, the Teamsters have merged over 1,000 facilities of United Parcel Service (UPS) into a single unit.[21] Even if all employees of a particular facility, or even numerous facilities, wanted absolutely nothing further to do with the Teamsters, they are without any viable recourse to vote the union out of power.

Taken together, the combined effect of the Board's various election bars and merger doctrine is to deny employees their statutory right to choose, by secret-ballot election, whether or not they wish to continue to be represented by a particular union. An employer's recognition of a union will bar an election for up to one year.

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

[20] *Westinghouse*, 227 NLRB 1932, illustrates this application of the merger doctrine. In that case, the Board certified the union as a representative of employees at one particular plant in North Carolina. Slightly over one year later, the employees petitioned to decertify the union. The Board dismissed the petition because the North Carolina plant had been merged into a single nationwide unit consisting of all of the employer's plants. Thus, according to the Board, the only way the North Carolina employees could decertify would be on a nationwide basis.

[21] See *United Parcel Service*, 325 NLRB 37 (1997).

The union's subsequent signing of a collective bargaining agreement will then bar an election for another three years, during which time the union can compel all employees to support it financially (except in Right to Work states). The merger of the employees' bargaining unit into a larger unit will effectively prevent the employees from ever voting on whether they desire union representation. Under this regime, unions and employers can squelch employees' right to reject unwanted union representation.

Congress should not permit the Board to turn union representation into a proverbial "roach motel," where employees can check in, but can never check out. To protect the right of employees to a secret-ballot election to decertify unions that they no longer support, Congress should amend:

> (1) NLRA Section 9(c)(3), 29 U.S.C. § 159(c)(3), to provide that "This limitation is the only limit that may be placed on the conduct of elections;" and
>
> (2) NLRA Section 9(c), 29 U.S.C. § 159(c), to include a new section 6 that provides that "In an election requested under subsection (1)(A)(ii), a bargaining unit that consists of represented employees at a single facility shall always be considered an appropriate unit notwithstanding the merger or inclusion of the employees in a larger, multi-facility, or multi-employer bargaining unit."

Conclusion

For these reasons, Congress should amend the NLRA so that exclusive union representation can be imposed pursuant only to a secret-ballot election, and amend the NLRA to ensure that employees can choose to reject union representation via a secret ballot election at any time other than within one year after a prior election. If employees' freedom to associate with a union is going to be subjected to the tyranny of the majority, at a minimum Congress should ensure that a majority of employees truly want to associate with that union.

APPENDIX OF EMPLOYEE TESIMONY AND STATEMENTS

Congressional Testimony of Mike Ivey (2/8/2007)
http://www.nrtw.org/pdfs/Ivey.pdf

Congressional Testimony of Karen Mayhews (2/8/2007)
http://www.nrtw.org/pdfs/Mayhew.pdf

Statement by Freightliner Employee Katherine Ivey (1/24/2006)
http://www.nrtw.org/pdfs/20060124rico_ivey.pdf

Statement by Freightliner Employee Timothy Cochrane (1/24/2006)
http://www.nrtw.org/pdfs/20060124rico_cochrane.pdf

Declaration by Dana Corp Employee Clarice Atherholt (1/13/2004)
http://www.nrtw.org/neutrality/ClariceAtherholt.pdf

Statement by Dana Corp Employee Donna Stinson (5/12/2004)
http://www.nrtw.org/neutrality/Stinson-Statement.pdf

Statement by Thomas Built Bus Employee Jeff Ward (5/12/2004)
http://www.nrtw.org/neutrality/Ward-Statement.pdf

Statement by Collins & Aikman Employee Edna Dawson (5/12/2004)
http://www.nrtw.org/neutrality/Dawson-Statement.pdf

Declaration by Renaissance Hotel Employee Faith Jetter (11/19/2003)
http://www.nrtw.org/neutrality/FaithJetter.pdf

Declaration by Renaissance Hotel Employee David Harlich (11/19/2003)
http://www.nrtw.org/neutrality/DavidHarlich.pdf